

# "CRIMINAL RECORDS"—A COMPARATIVE APPROACH

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## I. American Practice

The United States prides itself that under its judicial system no one is considered guilty until he has been convicted of a criminal act. As far as the infliction of punishment in the technical sense (fine, imprisonment, capital punishment, loss of certain civil rights) is concerned it is true that conviction in a judicial proceeding is a prerequisite, but this is not the whole picture.

On principle, criminal proceedings in this country begin with an arrest,<sup>1</sup> generally supplemented by fingerprinting and photographing. The fact that in many cases actual physical restriction or confinement is soon lifted by some type of bail does not alter the fact that the person has been arrested.

It is not our purpose here to determine why criminal proceedings still as a rule start with the harsh, and in itself degrading, measure of physical arrest, even when only a minor violation of law is involved. Possibly an important reason is the lack of reliable records of changes in a person's residence which would make it easier to locate him for the further steps in the criminal proceeding. The American people would not readily submit to a system used frequently in Europe under which every change of residence is to be reported to the police of both the old and the new residence, indicating both places of residence so that it becomes fairly easy to follow the movements of every person.<sup>2</sup>

Be this as it may, the fact that arrest is such a universal occurrence

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<sup>1</sup>In recent times some mitigation of this principle can be observed. N.C. GEN. STAT. § 15-20 reads in part: "In all cases of misdemeanor any officer authorized by law to issue warrants in criminal actions may issue a summons instead of a warrant of arrest when he has reasonable ground to believe that the person accused will appear in response to the same." Still, a warrant will have to be issued before the trial. ROY G. HALL, JR., *THE LAW OF ARREST*, 13 (2d ed., 1961). A citation that may be issued under Georgia law for vehicle violations is still defined as arrest in the headline of that section. GA. CODE ANN. § 27-222 (1972).

<sup>2</sup>This does not mean that in the United States there do not exist other methods which can have, at least to a certain degree, the same effect. The evergrowing use of the Social Security account number in matters of federal or state taxation, in Medicare or private health insurance, on drivers' licenses, on identification cards of universities, libraries, etc. can be an important clue for tracing a person's whereabouts. The technicalities connected with the European system mentioned in the text are quite simple, so that their fulfillment does not amount to any considerable burden.

in criminal proceedings results in an enormous number of arrests<sup>3</sup> with an inordinately low ratio between arrests and convictions.<sup>4</sup> One would expect that these two aspects of arrests in the United States should have the effect that little, if any, importance is attributed to the mere fact of having been arrested. Actually, the opposite is true. This is demonstrated by a rather recent but not atypical Georgia statute that obliges law enforcement agencies to place all arrest information on appropriate records which shall be open for public inspection.<sup>5</sup> The statute does not provide for the disposition of the case to be added to the record.

Even where no such broad statutes regarding public availability of every arrest record exist the situation is not very different. Ever since 1939 the Attorney General of the United States has been under the statutory duty to "(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."<sup>6</sup> To carry out this duty the Attorney General has issued the following regulation:

Subject to the supervision and direction of the Attorney General, the director of the Federal Bureau of Investigation shall: . . . (b) Conduct the acquisition, collection, exchange, classification and preservation of identification records, including personal fingerprints voluntarily sub-

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<sup>3</sup>In 1968 the FBI had in its criminal files more than 54 million arrest records. FBI, COOPERATION, THE BACKBONE OF EFFECTIVE LAW ENFORCEMENT 12 (1968); the number of arrests made in 1965 alone as listed by the FBI was over 5,030,000. 1965 FBI UNIFORM CRIME REPORTS table 21 at 112 (1966). It was believed in 1967 that "about 40 per cent of the male children living in the United States today will be arrested for non-traffic offense some time in their lives" and that "the proportion is even higher for boys living in a city." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 247 (1967).

<sup>4</sup>One has only to think of dragnet arrests, of mass arrests in connection with control of riots or of the many unjustified arrests for disorderly conduct. In 1958, some high ranking police officers expressed their conviction that more than 75% of all arrests were made illegally. M. HOUTS, FROM ARREST TO RELEASE 24 (1958).

<sup>5</sup>GA. CODE ANN. § 27-220 (1972), based on this statute, reads:

It shall be the duty of all sheriffs, chiefs of police, and the heads of any other State law enforcement agencies to obtain or cause to be obtained, the name, address and age of all persons arrested by law enforcement officers under the supervision of such sheriffs, chiefs of police or other State law enforcement agencies, when any such person is charged with an offense against the laws of Georgia or any other state of the United States. Such information shall be placed on appropriate records which each of such law enforcement agencies shall maintain, and such records shall be open for public inspection unless otherwise provided by law.

The only exception from the duty to maintain arrest records open to the public appears to be the provision in GA. CODE ANN. § 24A-3502 (1972), referring to the arrest of juveniles.

<sup>6</sup>28 U.C.C. § 534(a) (1970).

mitted, on a mutual beneficial basis, from law enforcement and other governmental agencies, insurance companies, railroad police, national banks, member banks of the Federal Reserve System, FDIC-Reserve-Insured Banks, and banking institutions insured by the Federal Savings and Loan Insurance Corporation; provide expert testimony in Federal or local courts as to fingerprint examinations; and provide identification assistance in disasters and in missing persons type cases including those from insurance companies.<sup>7</sup>

The full impact of this system can be understood only if Executive Order No. 10450<sup>8</sup> is also considered. The gist of this lengthy order is to be found in its section 3(a) which reads in part:

The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation . . .

In the recent case of *Menard v. Mitchell*<sup>9</sup> the workings of the system in practice were ably described by the United States District Court for the District of Columbia.<sup>10</sup> The case involved a suit to compel the Attor-

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<sup>7</sup>28 C.F.R. § 0.85 (1971).

<sup>8</sup>Exec. Order No. 10,450, 3 C.F.R. 72 (Supp. 1953), 5 U.S.C. § 7311 (1970).

<sup>9</sup>*Menard v. Mitchell*, 328 F. Supp. 718 (D.D.C. 1971).

<sup>10</sup>*Id.* at 721-23:

The FBI Identification Division has some two hundred million sets of fingerprints on file. These records are maintained in separate criminal and applicant files. Fingerprints are submitted to the Bureau by federal, state, and local agencies on a reciprocal basis. Law enforcement agencies, primarily local police and sheriff's offices submit prints of arrested persons in order to receive information on the person's prior criminal involvement. The Bureau reports its findings and maintains the fingerprint card so submitted, along with the accompanying arrest data, in its criminal file. Information on the subsequent disposition of each arrest is posted if received from the submitting agency. The information so recorded is cryptic and formal, without explanation or elaboration. Juvenile arrests and convictions, when submitted by local agencies, are treated the same as similar adult data. The criminal file currently contains information on some sixty million arrests of approximately nineteen million people.

Fingerprint cards are also received from agencies of the state and federal governments and others who seek information on an individual's record of criminal involvement in connection with permits, licenses and employment clearance. After check [sic] against the criminal file, cards are maintained in the applicants file for future reference. The

ney General and the Director of the FBI to remove from Bureau identification files plaintiff's fingerprints and accompanying notations regarding his arrest and detention which were not followed by further prosecu-

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Division also receives hundreds of "name check" requests from contributing and non-contributing sources, including an occasional Congressman, asking for the criminal record of an individual by name without submitting any fingerprints for comparison. . . .

The volume of work of the Division is enormous, requiring about 3,300 employees. The Division receives an average of 29,000 fingerprints a day for processing, of which about 13,000 are received from law enforcing agencies in connection with arrests.

The Division, broadly speaking, considers any state, city or county official to be authorized to receive information if the agency has something to do with law enforcement or if it is authorized by statute, ordinance, or rule to fingerprint applicants for employment or for a permit or license. . . . The Division maintains a current list of contributing or participating state and federal agencies which now numbers between 7,000 and 8,000. Of these, approximately 3,750 are local police departments and sheriff offices. Criminal record data is not sent directly to private employers, except in a few instances such as 390 banks insured by the F.D.I.C. and certain hospitals. . . .

Given the very general nature of its purported authority the Bureau has proceeded cautiously. It investigates the authority of local agencies to require fingerprints and insists that detailed forms be filled out by contributors showing the purpose for which fingerprints are to be submitted. The Attorney General advises in doubtful situations. The Division has carried out its work in a responsible, meticulous manner. Nonetheless, the end result is most unsatisfactory. While the Division has vigorously sought to develop complete records and particularly to learn of dispositions resulting from each arrest, this effort has not been successful due to the failure of arresting agencies to send in follow-up data on forms provided. Some police departments do much better than others in this regard, but the Division has no sanctions and must be satisfied with what it can get by persuasion since the whole system functions on a voluntary basis. Even more troublesome is the fact that the Division has little opportunity to supervise what is actually done with the arrest records it disseminates. It requires that a proper purpose be stated by the agency requesting information but what is in fact done with the information as a practical matter cannot be constantly checked. It is apparent that local agencies may on occasion pass on arrest information to private employers. The Division makes no regular inspection to prevent this, for it has neither funds nor sanctions, and accordingly responds only to complaints. In a few instances police departments have been restricted, and in other instances when complaints were received personnel or administrative changes were demanded by the FBI and put into effect.

Any agency that forward [sic] fingerprint arrest data to the Division may request the Bureau to remove the data from the file and return it. This the Bureau does automatically, retaining no copies and without inquiring as to the reasons underlying the request. Thus control of what arrest or criminal data remain in the files rests in every case (except where an arrest on Federal charges is involved) with the local arresting authority. In 1970 over 8,000 arrest records were returned by the FBI to local authorities. Some thirteen states, including California, have laws or procedures for authorizing this form of expungement in various circumstances. In addition some states have laws limiting the type of arrest data that can be forwarded routinely to the Bureau.

Regarding some later development in the crime reporting system see text accompanying note 56, *infra*.

tion by California police. On defendants' motion summary judgment had been granted by the District Court; on appeal it was reversed<sup>11</sup> and the case remanded to the District Court which then rendered the quoted decision.

In its opinion the Court of Appeals ably described the consequences of an arrest record:

Information denominated a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved. An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned or whether to exercise their discretion to bring formal charges against an individual already arrested. Arrest records have been used in deciding whether to allow a defendant to present his story without impeachment by prior convictions, and as a basis for denying release prior to trial or an appeal; or they may be considered by a judge in determining the sentence to be given a convicted offender.<sup>12</sup>

The logical sequence of the whole problem was summed up by the court in these words:

Adverse action taken against an individual because of his arrest record is premised upon certain assumptions regarding the meaning of an arrest. Insofar as these assumptions differ from reality, the adverse actions will have an erroneous basis.<sup>13</sup>

On remand the District Court found that the arrest was made with probable cause, regardless of subsequent failure to establish plaintiff's involvement in any crime, and refused to order the record expunged.

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<sup>11</sup>Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970).

<sup>12</sup>*Id.* at 490 n.17. The court gave these details about the economic disadvantages resulting from an arrest record: "A survey by the New York Civil Liberties Union indicated that 75% of New York area employment agencies would not accept for referral an applicant with an arrest record. SPARER, EMPLOYABILITY AND THE JUVENILE ARREST RECORD 5 (Center for Study of Unemployed Youth, New York University) (pamphlet). Another survey of 75 employers indicated that 66 of them would not consider employing a man who had been arrested for assault and acquitted. Schwartz and Skolnik, *Two Studies of Legal Stigma*, 10 SOC. PROB. 133 (1962). At the very least, an arrest record is likely to lead to further investigation; and if it is convenient to fill the job before the investigation is complete, the applicant is effectively denied employment because of his record. See Hess and Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME & DELINQUENCY 494, 496 (1967)."

<sup>13</sup>430 F.2d at 491.

Nevertheless, it did order restrictions on its use: "His arrest record may not be revealed to prospective employers except in the case of any agency of the Federal Government if the plaintiff seeks employment with such agency; but the record may be disseminated to law enforcement agencies for law enforcement purposes."<sup>14</sup> In reaching its decision the District Court emphasized that "[u]nder our system of criminal justice, only a conviction carries legal significance as to a person's criminal behavior,"<sup>15</sup> and elaborated on this point by quoting from an opinion of the U.S. Supreme Court:

The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated.<sup>16</sup>

Plaintiff argued that maintenance and use of an arrest record without an ensuing conviction violated the constitutional guarantees of presumption of innocence, of due process, of the right to privacy and freedom from unreasonable search under the Fourth Amendment. Of these arguments the District Court singled out the right to privacy as inherent in the American constitutional form of government, warning, "[i]f information available to Government is misused to publicize past incidents in the lives of its citizens the pressures for conformity will be irresistible. Initiative and individuality can be suffocated and a resulting dullness of mind and conduct will become the norm."<sup>17</sup>

The court discussed the 1930 statute,<sup>18</sup> expressing the belief that it must be narrowly interpreted, especially in view of the defects in the reporting system. As its principle faults the court enumerates: 1) The complete lack of uniformity, as state and local agencies receive criminal record data for employment purposes whenever authorized by local enactment. A partial list of such enactments shows as one extreme example a local enactment of Provincetown, Massachusetts, under which a fingerprint is to be taken of all non-residents seeking employment. 2) Lack of control by the Federal Bureau of Investigation over improper dissemination by any of the hundreds of local agencies to which information is supplied against which no criminal or civil sanc-

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<sup>14</sup>328 F. Supp. at 725-28.

<sup>15</sup>*Id.* at 724.

<sup>16</sup>*Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957).

<sup>17</sup>328 F. Supp. at 726.

<sup>18</sup>28 U.S.C. § 534(a) (1970). See text accompanying note 6, *supra*.

tions are provided. 3) The frequent lack of completeness and accuracy of the arrest record material which is not counterbalanced by any procedure through which individuals could obtain, correct or supplant record information used against them and of any assurance that an individual even knows that his employment application is affected by a fingerprint record of the FBI. 4) The incapacity of the Division for employment data to cope with the ever increasing demand of additional applicants who fall within its own vague standards of eligibility of obtaining information.<sup>19</sup>

Assessing these findings the court concluded that the system was out of effective control and that legislative guidance creating adequate sanctions and administrative safeguards was necessary. In the meantime, the court found that "[the] Bureau is without authority to disseminate arrest records outside the Federal Government for employment, licensing or related purposes whether or not the record reflects a later conviction,"<sup>20</sup> contrasting the use for these purposes with that for law enforcement purposes only.

There is a compelling necessity to furnish arrest data to other law enforcement agencies for strictly law enforcing purposes. Arrest records are available in uncovering criminal conduct, they play a significant role in the prosecutor's exercise of discretion, they greatly aid in setting bond, determining sentences and facilitating the work of penal or other institutions of correction. When arrest records are used for such purposes, they are subject to due process limitations within the criminal process, and misuse may be checked by judicial action.<sup>21</sup>

From this it concluded that plaintiff's arrest record "will not be expunged where its dissemination outside the Federal Government is limited to law enforcement purposes."<sup>22</sup>

In reality (though in form of dictum) touching the very essence of the problem of records of arrests not followed by conviction, the Court of Appeals said:

Realistically, the FBI cannot be expected to investigate the facts underlying every arrest or retention reported to it; the most it can do is examine the report on its face and, perhaps, investigate further if a complaint is received from the individual concerned. For most of those

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<sup>19</sup>328 F. Supp. 718, at 726-27.

<sup>20</sup>328 F. Supp. at 726-27.

<sup>21</sup>*Id.* at 727. It may be doubtful whether due process is a sufficient protection against the use of records of arrest not followed by conviction, as the discretion of the prosecutor or that of the judge in setting bail rarely reveals the underlying reasons.

<sup>22</sup>*Id.*

arrested—too poor, too ignorant, and often too disheartened to complain—the only adequate remedy may lie either in severely curtailing any use of records of arrest or in *eliminating altogether their maintenance in a file associated with the individual's name* (emphasis supplied).<sup>23</sup>

The *Menard* decisions have been quoted extensively here because their wording sheds so much light upon the working of the arrest records system. They have been used as a starting point in *Eddy v. Moore*.<sup>24</sup> Harriet Eddy was arrested, fingerprinted, photographed and charged with assault by the Seattle Police Department. At trial the charges were dismissed, but the Chief of Police, Moore, denied her request to return her fingerprints and photographs, and her petition for a writ of mandate ordering him to show cause why they should not be returned was refused by the trial court on the ground that she had no legal right to their return. The Court of Appeals reversed, tracing the development of the right to privacy. While it did not go so far as to conclude that that right following an acquittal creates an absolute bar to the retention of such records, it continued:

The value of fingerprints and photographs of an arrested person depends upon two factors: An assumption the individual arrested did in fact commit the crime for which he is accused and that his commission of this crime indicates a likelihood that other crimes will be committed. An acquittal seems to negate both premises. Where the only reason for the presence of an individual's fingerprints and photographs in the police file is based upon an arrest which has subsequently been voided by an acquittal and no further justification is made for the retention of these fingerprints and photographs, no rational basis for their retention remains.<sup>25</sup>

From this the court concluded that it would require a compelling showing on the part of the state to justify the retention of the fingerprints and photographs; that to require this did not put an undue burden upon law enforcement agencies; and that the Washington statutes governing what is done with fingerprints and photographs upon acquittal were too limited in scope and therefore constitutionally defective by omission. As the Seattle Police Department had made no compelling showing, the court directed it to return the fingerprints and photographs to Mrs. Eddy. The decision seems to go beyond the *Menard* case.

The problem of how to handle records of arrests which were not

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<sup>23</sup>430 F.2d at 495 n.51.

<sup>24</sup>5 Wash. App. 334, 487 P.2d 211 (1971).

<sup>25</sup>5 Wash. App. at 344, 487 P.2d at 217.



followed by conviction has in recent times been handled in some further cases and with varying results. Special treatment was given to juveniles. In *T.N.G. v. Superior Court of San Francisco*<sup>26</sup> the court denied a petition for mandamus seeking an order to seal records of the short detention of several juveniles. The court thought that a juvenile temporarily detained by juvenile court authorities and subsequently released without further proceedings does not become subject to a record which should be described as an "arrest" or "detention" record and therefore in completing application forms for educational or occupational opportunities, such juvenile need not state that he had been "arrested" or "detained." This, together with the fact that the juvenile court need not disclose that any juvenile had been detained if he has never been brought before the court<sup>27</sup> made formal sealing of the record superfluous. Also regarding the request for immediate sealing, the court denied any unconstitutionality under either the equal protection or the due process clause, of two other California laws, attacked on grounds that they discriminated between youths of different ages; one provides that a juvenile record including information as to arrest, detention and wardship may be sealed when the juvenile reaches majority or on expiration of five years from the date on which jurisdiction of the juvenile court terminates;<sup>28</sup> the second allows any minor not a juvenile who has been arrested for a misdemeanor and treated as an adult but not convicted of the offense to petition the court at any time for an order to have the record sealed.<sup>29</sup>

Two recent New York cases concerning juveniles move toward protecting the juveniles from the disadvantages of a genuine arrest record. In the case of *John Harry v. Loney*,<sup>30</sup> a juvenile, age 15, was arrested and charged with attempted burglary; he had knocked at the rear door of the house of a friend with whom he expected to go boating and peered through the windows; seeing no one, he raced back to the boat on which he had come, to join another companion. The court ruled that he was not entitled to a declaration that the arrest was null and void since at the time of the arrest there may have been probable cause, but that he was entitled to have his and his parents' surname obliterated from all records and other documents in the possession of the police that reflected on the arrest, and to have all records of the court proceeding

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<sup>26</sup>4 Cal. 3d 767, 484 P.2d 981, 94 Cal. Rptr. 813 (1971).

<sup>27</sup>CAL. WELF. & INST. CODE § 827 (West 1971).

<sup>28</sup>*Id.* § 781.

<sup>29</sup>CAL. PENAL CODE § 851.7 (West 1971).

<sup>30</sup>65 Misc. 2d 759, 317 N.Y.S.2d 848 (Sup. Ct. 1971).

sealed, subject to inspection only at the arrestee's request or upon an order of the court. Recognizing a duty of the arrestee to answer affirmatively the question, "Have you ever been arrested?" the court declined to grant total expunction, yet did grant the lesser relief described even in the absence of special legislation, lack of which the court deprecated strongly, because it perceived no benefit in maintaining the arrest record open. It distinguished this case from those of failure of convictions for reasons other than innocence, such as suppression of evidence, withdrawal of charges, or refusal of the victim of a crime to testify. In all such cases the court would see a public interest in the retention of the arrest records as a means of identification in the apprehension of criminals and fugitives.

A very similar result was reached in another juvenile case, *In re Smith*.<sup>31</sup> Here the police had taken into custody two boys, 14 and 15 years old, during a demonstration in front of a public school, alleging acts that could amount to unlawful assembly and riot; the court allowed counsel for the police department to withdraw its petition on the grounds of failure to establish a prima facie case. The court emphasized that prohibiting inspection of the record by future employers would be ineffective for the reason that they often require the job-seeking juvenile to obtain from the clerk of the juvenile court a certificate about his record. Also, the Armed Forces require the juvenile to waive confidentiality of his record, and police regulations themselves allow information to be given to various agencies; the court noted in addition that private investigators can secure police records. Owing to the tendency of the economic world to presume guilt from an arrest record, and to the complete lack of evidence against the juveniles as distinguished from mere procedural snags, while not granting total expungement, the court ordered obliteration of the surnames of the juveniles and their parents from all records of the clerk of the court and of the Police Department, and the sealing of the petitions, to be kept separate from the regular petition files. Complete protection, the court said, would be possible only by a statute forbidding employers' inquiries<sup>32</sup> or by a statutory procedure nullifying abortive arrests. Absent such statutes, the preservation of the petition is advisable so that a prospective employer willing to make a further inquiry can obtain the complete history of this proceeding.

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<sup>31</sup>63 Misc. 2d 198, 310 N.Y.S.2d 617 (Family Ct. 1970).

<sup>32</sup>Such a statute was passed in 1965 and in 1966 by the New York Assembly but was defeated both times in the New York Senate. Hess and Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME AND DELINQUENCY 494, 499 (1967).

With regard to adults, various degrees of relief have been granted against the use of records of arrests which did not lead to convictions. In some cases the application of civil rights statutes led to complete expunction of the records. In *Wheeler v. Goodman*<sup>33</sup> the court declared unconstitutional for vagueness a North Carolina vagrancy statute under which persons had been arrested as hippies and had been driven away from their rented house in what the court described as a bizarre story of police harassment. The court, citing 42 U.S.C. § 1983,<sup>34</sup> granted the requested relief of expunction of the arrest record. It was considered a question of semantics whether an unlawful arrest had ever occurred, so that a person thus arrested could deny that he had ever been arrested. Arrest records exist, the court said, to facilitate criminal investigation, but cannot perform any such function in this case where the arrestees have committed no crime, and retention of the arrest record cannot be justified as criminal identification. Though expunction may not be appropriate every time an arrestee is acquitted or is released without prosecution, here the youth of the arrestees, their innocence of any crime, the extreme misbehavior of the police in making arrests without probable cause and the absence of any benefit to society in the maintenance of the records justified the expunction.

Another case where the expunction resulted from the application of civil rights legislation is *United States v. McLeod*.<sup>35</sup> The court found that arrests and prosecution of various persons for violation of local laws were to intimidate Negro citizens of the county, interfering with their right to vote by discouraging an attempt to register. On the basis of the Civil Rights Act of 1964<sup>36</sup> the Court of Appeals reversed the decision below, holding that the District Court should enter an order requiring the appropriate county officials to return all fines and to expunge from the record all arrests and convictions resulting from the prosecution which formed the basis of these suits. The District Court was also to order reimbursement by the county of all costs, including reasonable attorneys' fees, incurred in the defense of the state criminal prosecutions and it was to take whatever additional action might be necessary to return the individuals to their status quo ante.

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<sup>33</sup>306 F. Supp. 58 (W.D.N.C. 1969).

<sup>34</sup>This section is concerned with rights of redress in citizens who have been deprived under color of state law of rights guaranteed under the Constitution and laws of the United States.

<sup>35</sup>385 F.2d 734 (5th Cir. 1967).

<sup>36</sup>42 U.S.C. § 1971(b) provides that no person shall interfere or attempt to interfere with the right of another person to vote in an election for federal office; (c) provides authority for the Attorney General to bring a proper action for preventive relief in the case of such actual or attempted interference.

The protection of civil rights was again the basis for an expungement order in *Hughs v. Rizzo*.<sup>37</sup> Here, on various occasions hippies and persons associating with them had been arrested for the obvious purpose of harassing them away from Rittenhouse Square in Philadelphia; there was no probable cause for the arrests and all were released soon afterward. On the basis of 42 U.S.C. § 1983 the court ordered:

The defendants shall forthwith cause to be physically expunged from all police department records, and from the records of any law enforcement agencies to which the same may have been forwarded or referred, all references to the plaintiffs and other persons arrested in Rittenhouse Square in connection with the plaintiffs on the evenings of June 17 and July 5, 1967; and shall return to those arrested, or destroy, all photographs (including the negatives and all copies, prints and reproductions of said photographs) taken by or at the direction of the police, of said persons arrested. Certification of compliance with this order shall be filed in this Court within thirty (30) days.<sup>38</sup>

A much broader basis for an expungement order was used by the court in *United States v. Kalish*.<sup>39</sup> The somewhat involved facts show that Kalish was ordered by his local draft board to report for induction in the United States Army on May 1, 1967. Prior to the reporting date he had received notice of his acceptance into the Law School of the University of Puerto Rico. He alleged that he notified the draft board of that fact and that under the then-existing regulations he was entitled to have his status reopened and reclassified or, in case of denial, to a hearing before the Local Board. He also alleged that the Board refused to reopen or reclassify his status and did not afford him a hearing. Kalish reported for induction on May 1; on the same day his counsel filed a petition for habeas corpus; the court issued an order directing the Acting State Director of the U.S. Selective Service System for Puerto Rico to show cause on May 3 why Kalish should not be released from custody and his classification opened. The order was served on May 1; when Kalish, on advice of counsel, refused to step forward and be sworn in he was released from custody. On May 3, the return day of the show-cause order, the Assistant U.S. Attorney informed the court that there had been an agreement with Kalish's counsel to allow the latter to reopen the selective service proceedings. This agreement notwithstanding, an information was lodged against Kalish for failure to submit to induction. Kalish and his attorney first heard of the arrest

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<sup>37</sup>282 F. Supp. 881 (E.D. Pa. 1968).

<sup>38</sup>*Id.* at 885.

<sup>39</sup>271 F. Supp. 968 (D.P.R. 1967).

order when they were present in court on the return of the show-cause order. Kalish took the stand and under oath testified that he had no intention of violating the laws of the United States, that his refusal to step forward and be sworn into the U.S. Army was based upon the advice of counsel, that his purpose in filing the habeas corpus petition was to secure due process of law, and that he voluntarily surrendered himself to the jurisdiction of the court and was willing to be inducted into the U.S. Army then and there. In spite of this the U.S. Attorney insisted that Kalish be processed, arrested, fingerprinted and photographed.

The Government, in answering Kalish's motion for an order to expunge and destroy photographs and fingerprints, claimed that there is no Congressional statute authorizing the return or destruction of the criminal identification of persons eventually found innocent or those discharged without conviction. The court believed that when arrested, an accused does not have a constitutional right of privacy that outweighs the necessity of protecting society by the accumulation of this data, no matter how mistaken the arrest may have been. But, when an accused is acquitted or when he is discharged without conviction, the court held that no public good is accomplished by the retention of criminal identification records, that great imposition is placed upon a citizen and that his privacy and personal dignity is invaded as long as the Justice Department retains "criminal" identification records, "criminal" arrest records, fingerprints, etc. On this broad basis the court ordered that the Attorney General of the United States should forthwith destroy the arrest records and identification records involved including the fingerprints and photographs and all copies thereof, then in the custody of or maintained by the Identification Division of the Federal Bureau of Investigation, that said records or identification data should not be transmitted to any other governmental agency or any person and that the Attorney General should promptly notify the court of the time, place and manner in which said records have been destroyed.<sup>40</sup>

Other cases have denied interference with records of arrest not leading to conviction, or have granted only limited relief. In *Hershel v. Dyra*,<sup>41</sup> Hershel was arrested for violating a Chicago anti-litter ordinance; at the hearing the case was non-suited on the city's motion.

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<sup>40</sup>In *Kowall v. United States* the court took the sweeping position that a federal district court in vacating a sentence according to 28 U.S.C. § 2255 may totally expunge arrest records where it is found "that the public interest in retaining records of a specific arrest is clearly outweighed by the dangers of unwarranted adverse consequences to the individual." 53 F.R.D. 211, 214 (W.D. Mich. 1971).

<sup>41</sup>365 F.2d 17 (7th Cir. 1966), *cert. denied* 385 U.S. 973 (1966).

Hershel brought suit in the Federal District Court asking for damages for false arrest on the basis of 28 U.S.C. § 1983<sup>42</sup> and petitioning for an order directing the Superintendent of Police to expunge and annul all records under his care, custody and control in the Chicago Police Department pertaining to his arrest. The District Court granted defendants' motion to strike the complaint and dismiss the cause of action. The appellate court reversed and remanded as to the damage claim, but affirmed as to the motion for expunction of the records. The court referred to decisions by Illinois courts saying that absent express legislative authority to the contrary the Superintendent of Police may retain all arrest records regardless of whether the accused has been acquitted, discharged, or otherwise released from the charges brought against him, relying on cases cited by defendants holding that the retention of fingerprints and other arrest records by the police, even after discharge, does not violate any constitutional right of the accused. It concluded that under the obligation of the Chicago Police Department to maintain public safety and welfare in Chicago the Superintendent of Police is justified and duty bound to compile and retain arrest records of all persons arrested, and that the execution of this policy does not violate the arrested person's right of privacy.

In *Weisberg v. Police Department*<sup>43</sup> Weisberg, a diabetic, was arrested after he entered a grocery store and tried to take something sweet to eat to stave off insulin shock. When these facts were made known in court the charge was withdrawn, and he then petitioned for removal and destruction of his arrest record from the arrest records of the Police Department of the Village of Lynbrook and the Nassau County Police Department. The court admitted that petitioner's fear that the arrest record might hurt him both professionally and in his efforts to obtain government employment might not be groundless, based on the introduction of a bill in the New York Senate making it a misdemeanor for any employer "to inquire or ask any person whether or not he has ever been arrested, as a condition of employment or continuing employment."<sup>44</sup> But the court rejected the petition for lack of power in the courts to interfere with the police records. This lack of power the court deduced from the existence of state statutes that regulate the matter by giving such powers to interfere to other agencies, but not to the courts, and from the absence of any inherent power of the courts over police department records as contrasted with their own records; the court felt

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<sup>42</sup>See note 34 *supra*.

<sup>43</sup>46 Misc.2d 846, 260 N.Y.S.2d 554 (Sup. Ct. 1965).

<sup>44</sup>46 Misc. 2d at 846, 260 N.Y.S.2d at 555; see note 30 *supra*.

this viewpoint was supported by a special provision of the state code of criminal procedure that upon acquittal or dismissal fingerprints taken as a condition to admission to bail are, on demand, to be returned to defendant or destroyed in his presence.<sup>45</sup> The court suggested legislation steps toward limiting access to an arrest record when no information or indictment is returned.

An elaborate ruling about the question of expungement of a record of arrest not followed by conviction can be found in *Morrow v. District of Columbia*.<sup>46</sup> Morrow was arrested and charged with disorderly conduct for swearing at a police officer. When the Corporation Counsel of the District of Columbia brought him to trial in the District of Columbia Court of General Sessions the court ordered the case dismissed because prosecution for that offense could be brought only by the United States Attorney. Morrow immediately moved for expungement of the record of this arrest from Police Department files. The judge of General Sessions Court, Judge Alexander, issued an order instructing the Corporation Counsel not to disseminate the information pertaining to Morrow's arrest. The District did not appeal this order but later the Corporation Counsel requested Judge Alexander to reduce his order to writing. This the judge did, issuing the following detailed order:

The District of Columbia and all of its agencies and officials, including the Commissioners of the District of Columbia and their agents including the Chief of Police of the Metropolitan Police Department and all his agents, and including every member of the Metropolitan Police Department of the District of Columbia and their agents are prohibited, effective September 25, 1967, the date on which this order was first directed to such persons in the presence of their attorney, the Assistant Corporation Counsel of the District of Columbia, from distributing, communicating, transmitting, or otherwise making available or providing information regarding the record or information of the arrest on August 30, 1967 of Mr. Don Morrow, defendant in these proceedings, to any other governmental or private agency or person, including other law enforcement agencies or officials until further order of this Court.<sup>47</sup>

Shortly afterwards the so-called Duncan Report<sup>48</sup> about the use of arrest records was published, and on October 31, 1967 the Commission-

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<sup>45</sup>N.Y. CODE CRIM. PROC. § 552-a (McKinney 1971).

<sup>46</sup>417 F.2d 728 (D.C. Cir. 1969).

<sup>47</sup>*Id.* at 730 n.3.

<sup>48</sup>ARREST RECORDS COMMITTEE, D.C. BOARD OF COMM'RS., REPORT OF THE COMMITTEE TO INVESTIGATE THE EFFECT OF POLICE ARREST RECORDS ON EMPLOYMENT OPPORTUNITIES IN THE DISTRICT OF COLUMBIA (1967).

ers adopted virtually all its recommendations which became law 90 days later.<sup>49</sup> Upon the adoption of this report the Corporation Counsel moved for Judge Alexander to limit his original order in scope in accordance with the Duncan Report, the main change being that the Morrow arrest record in this case could be disseminated to other law enforcement agencies. Morrow opposed this motion, asked for an order of physical expunction of the arrest record and for a subpoena *duces tecum* to produce certain records to determine whether the Police Department was complying with Judge Alexander's order. Judge Alexander denied the motion to amend the order, issued the subpoena and started hearings on compliance. At this point the Corporation Counsel obtained from the District of Columbia Court of Appeals a decision holding that it had the power to issue extraordinary writs and that mandamus and prohibition were appropriate because the Court of General Sessions did not have any ancillary jurisdiction in a criminal case to issue orders prohibiting dissemination of arrest records.<sup>50</sup>

Judge Alexander and Morrow then were allowed by the Circuit Court of Appeals for the District of Columbia to appeal from the District of Columbia Court of Appeals. The Circuit Court of Appeals<sup>51</sup> held that the District Court of Appeals did have the power to issue extraordinary writs in supervision of the Court of General Sessions, and that it was also appropriate for the District Court of Appeals to act upon the petition for mandamus and writ of prohibition. However, contrary to the District Court of Appeals' holding, the Court of General Sessions did have ancillary jurisdiction in a criminal case to issue protective orders regarding dissemination of arrest records. The court saw as rele-

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<sup>49</sup>The recommendations result from minutes of the October 31, 1967 meeting of the Board of Commissioners which form an appendix to the opinion of the Circuit Court of Appeals, 417 F.2d 745, 746. Their main provisions as to adult arrest records are that such records are to be released upon request, without cost and without the authorization by the person to whom they relate, to law enforcement agents (*i.e.*, persons having cognizance of criminal investigation directly involving the individuals to whom the requested records relate, including judges, prosecutors, defense attorneys with respect to the records of their client defendants, police officers, etc., but excluding private detectives and investigators, etc.) if such agents represent that such records are to be used for law enforcement purposes. Subject to this, adult arrest records shall be released in a form which reveals only entries relating to offenses which have resulted in convictions or forfeitures of collateral. Subject to this, copies or extracts of adult arrest records or statements as to nonexistence of such records shall be released upon formal application and payment of a fee to persons not qualifying as law enforcement agents, provided that applicants who are not the person to whom such records relate must present releases by the persons to whom the records may relate. Punishment by a fine up to \$50.00 is established for any person to require as a condition of employment the production of any arrest record or copy, extract or statement thereof at the expense of any employee or applicant for employment to whom such record may relate.

<sup>50</sup>*In re Alexander*, 243 A.2d 901 (D.C. Ct. App., 1968).

<sup>51</sup>417 F.2d 728, 732 (D.C. Cir. 1969).



vant points of the Duncan Report recommendations as adopted by the Commissioners, that arrest records cannot be furnished to employers unless the record is recopied to include only those arrests resulting in convictions or forfeitures of collateral, although complete and unexpurgated arrest records can be disseminated to other law enforcement agencies.<sup>52</sup> Reversing the District Court of Appeals insofar as it denied the ancillary jurisdiction of the Court of General Sessions, the Circuit Court of Appeals remanded the case for the decision of the substantive issue as to the proper scope of the order to control dissemination. The main evil of dissemination lying in its adverse effect on job opportunities, the Circuit Court of Appeals concluded that the Duncan Report rules would be a good rule of thumb as to the appropriate scope of a court order prohibiting dissemination; however, other evils such as unjustified invasion of privacy, particularly where innocent persons are arrested, could result from such dissemination in particular cases. On remand, the District Court of Appeals<sup>53</sup> concluded that the Duncan Report rules then in force furnished reasonable and adequate protection against the misuse of arrest records and that no further order was required for that purpose, except in rare cases presenting such unusual facts as to justify the expungement of a particular arrest record; it felt that the *Morrow* case presented no such unusual facts, and that therefore the order of the trial court was to be vacated. The practical result of this decision is that, contrary to the original order, the Morrow arrest record could be disseminated to other law enforcement agencies for law enforcement purposes.

In *Irani v. District of Columbia*<sup>54</sup> Irani, a graduate student with a security clearance for federal employment, was arrested for parading without a permit. The District of Columbia determined not to prosecute because of lack of evidence, and Irani then requested that the trial court order the record of the arrest expunged. Factually, Irani established without contradiction that he was arrested in connection with a civil disturbance at which he was innocently and unavoidably present, having just left a cancelled class at a local university where the disturbance was in progress. The trial court denied expunction following the rulings of the decision in *In re Alexander* (in the *Morrow* complex);<sup>55</sup> it found that the facts did not qualify as "unusual facts" under the *Alexander* ruling, there being no ruling by the District Court of Appeals that a dismissal

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<sup>52</sup>*Id.* at 742 and note 49 *supra*.

<sup>53</sup>*In re Alexander*, 259 A.2d 592 (D.C. Ct. App. 1969).

<sup>54</sup>272 A.2d 849 (D.C. Ct. App. 1971).

<sup>55</sup>259 A.2d 592 (D.C. Ct. App. 1969).

for lack of evidence is of itself a proper ground to order expungement of an arrest record. On appeal the District Court of Appeals reversed and remanded for an exercise of judgment by the trial court as to the form of relief which it might deem appropriate. It interpreted the facts to be that Irani had affirmatively established that he was innocently present for legitimate reasons and that his arrest was a mistake. It concluded that such circumstances reveal a "rare case presenting such unusual facts as to justify" some relief in the meaning of the *Alexander* case and held that where one arrested for an offense successfully makes an affirmative demonstration negating actual guilt, it is error to deny relief outright.

In a concurring opinion<sup>56</sup> Associate Judge Nebeker suggested guidelines for what the trial court could do upon remand. He detailed the contents of Irani's request for expunction, *i.e.*, the physical destruction of all records along with photographs and fingerprints; he had also requested that he be supplied with the names of other officials who might know of the event, presumably in order that he might seek similar relief against them. Judge Nebeker doubted that complete relief could be obtained even through expunction as long as the arrestee, or for that matter the arresting officer, would violate legal provisions regarding case statements, perjury, etc., if he denied the arrest. He also questioned whether fingerprints taken at such an arrest must never be used, even for identification in the event of an untimely death or for other non-criminal purposes. The judge thought there were many legitimate and practical reasons consistent with the public interest why the trial court might not wish to erase the historical fact of the arrest, or even give the appearance of doing so. He felt that the trial court might consider whether an order directing complete or limited expunction was appropriate; as an alternative, the court could consider an order requiring the Metropolitan Police Department to amend its records to reflect the determination that Irani had established his complete lack of culpability and had affirmatively shown factual innocence regarding the incident. Such information would then be forwarded to any other agency possessing a record of the arrest, such as the Federal Bureau of Investigation.

In another decision based on the civil rights legislation some relief has been worked out, aiming not at the dissemination of criminal records but rather at the use by a third party of a record of arrests not followed by convictions. In *Gregory v. Litton Systems Inc.*,<sup>57</sup> the plaintiff, a Negro, sued under Title VII of the Civil Rights Act of 1964<sup>58</sup> for mone-

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<sup>56</sup>272 A.2d at 851-853.

<sup>57</sup>316 F. Supp. 401 (C.D. Cal. 1970).

<sup>58</sup>42 U.S.C. § 2000e *et seq.*; the Equal Opportunity Employment Provisions.

tary and injunctive relief, alleging that defendant had in 1968 refused to employ him for the sole reason that he had previously been arrested on fourteen different occasions, thirteen of them before 1959, though he had never been convicted of any criminal offense. He also alleged that defendant had a "standard policy" of not hiring applicants who had been arrested on a "number of occasions" for reasons other than minor traffic offenses, and that in effectuating this policy defendant required all applicants to fill out a form asking for a listing of all arrests other than those involving minor traffic offenses. The court held that this policy had the foreseeable effect of denying black applicants an equal opportunity for employment and was unlawful under the Civil Rights Act of 1964 even if it appeared on its face to be racially neutral and had not been applied discriminatorily as between applicants of different races. It reached this conclusion on the finding first, that there was no evidence that persons never convicted but arrested a number of times would perform less efficiently or less honestly than others, the evidence being overwhelmingly to the contrary; therefore information about arrests not followed by conviction was irrelevant to the suitability for employment. Secondly, it was noted that Negroes are arrested far more frequently than whites in proportion to their numbers; though comprising some 11% of the population, blacks account for 27% of reported arrests and for 45% of arrests reported as "suspicion arrests." In consequence, the court granted the plaintiff stipulated compensatory damages as well as attorney's fees, and for the protection of plaintiff as well as other applicants similarly situated because of their race, enjoined defendant in the following way:

A. From continued discrimination against plaintiff and other persons similarly situated because of their race, arising out of prior arrests involving no conviction.

B. From seeking from applicants for employment, by questionnaires, forms, or verbally, information concerning their prior arrests which did not result in conviction.

C. From utilizing as a factor in determining any condition of employment, including hiring, promotion and termination, any record of arrest which did not result in conviction.

D. In view of the fact that arrest information, which is not a matter of public record, can apparently be obtained cheaply and easily from sources other than the applicant, defendant will be restrained from seeking, obtaining, or considering, in connection with employment of applicants, information concerning arrests of such applicants which did not result in conviction, provided, however, that this shall not prohibit defendant from seeking and obtaining information on the

public record, but provided further that public record information concerning arrests alone may not be utilized, as provided in C above as a factor in determining any condition of employment.<sup>59</sup>

In connection with its statement about the irrelevance of a series of arrests not followed by conviction to efficient and honest performance on the job the court mentioned that "[i]n recognition of this irrelevance the County of Los Angeles, a large scale employer, has ceased to ask for arrest information for employment."<sup>60</sup> Even more significant is the fact that in 1966 the standard U.S. Government employment application form (Form 57) was changed to require information concerning only those arrests followed by conviction, rather than all arrests.<sup>61</sup> However, as long as the Civil Service Commission works under Executive Order No. 10450<sup>62</sup> and includes in its investigation a check of the fingerprint files of the FBI no real change can be expected from the modernization of Form 57.

The *Gregory* decision, progressive though it is, still raises questions. Based solely upon the Civil Rights Act of 1964, it gives relief only to members of minority groups, while relief against using records of arrest as such appears desirable for everyone. Also, as long as access to information from public records is allowed under paragraph D, it may not be utilized if it concerns records of arrests alone. Yet there is still the danger that, subconsciously at least, such information will influence the decision whether or not to employ the person concerned.<sup>63</sup>

Considering the cases discussed one realizes that they run the gamut from denying any relief concerning the availability of records of arrests which did not lead to conviction, through the granting of limited relief, to complete expunction, another example of lack of uniformity as existing with regard to so many legal issues. It has also been seen that federal, state and local statutes or regulations differ widely and, on occasions, were declared to be insufficient or even incompatible with the United States Constitution.<sup>64</sup> It also appeared that at times courts have

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<sup>59</sup>316 F. Supp. at 404.

<sup>60</sup>*Id.* at 403.

<sup>61</sup>PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 75 (1967).

<sup>62</sup>Exec. Order No. 10,450, 3 C.F.R. 72 (Supp. 1953), 5 U.S.C. § 7311 (1970); the relevant section is quoted in the text accompanying note 8 *supra*.

<sup>63</sup>The court distinguishes "records of arrests which do not result in formal prosecution or trial," declaring them not to be matters of public record, from "information which is on the public records concerning the prosecution and trial of any prospective employee, even if the proceeding eventually resulted in an acquittal." *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403.

<sup>64</sup>See, text accompanying notes 5,6,7,8,23,24,27,28,29,43,49 *supra*. Examples of statutes not mentioned before include CONN. GEN. STAT. ANN. §§ 54-90 and 90(a) (Supp. 1972-73). This statute

deprecated the absence of any statutory rules and called for their enactment, possibly in a uniform fashion.<sup>65</sup>

A small step in the direction of uniform legislation regarding criminal justice data was taken in the Omnibus Crime Control Act of 1970.<sup>66</sup> It inserted into § 519 of the Omnibus Crime Control and Safe Streets Act of 1968<sup>67</sup> a new paragraph reading: "Not later than May 1, 1971, the Administration<sup>68</sup> shall submit to the President and the Congress recommendations for legislation to assist in the purpose of this title with respect to promoting the integrity and accuracy of criminal justice data collection, processing, and dissemination systems founded in whole or in part by the Federal Government, and protecting the constitutional rights of all persons covered or afflicted by such systems." The Law Enforcement Assistance Administration, on the basis of recommendations by the President's Commission on Law Enforcement and Administration of Justice,<sup>69</sup> started a program called SEARCH—System for Electronic Analysis and Retrieval of Criminal Histories—"a prototype, computerized system for the exchange of criminal history information among the States."<sup>70</sup> In December 1970, this program was turned over to the FBI for further development,<sup>71</sup> and at the same time Congress

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orders the automatic eradication of all police and court records and of those of the prosecuting attorney, in case of a final judgment of acquittal or in case of dismissal of the charge. In certain other cases, for example in case of an absolute pardon, the person involved or his heir may petition for erasure. In any case of eradication the person arrested shall be deemed not to have been arrested *ab initio*. The statute appears insufficient as far as the status of information submitted to the FBI is concerned; it is also unclear whether it gives the arrestee the legal right after erasure to deny any such arrest later on. In Maine, ME. REV. STAT. ANN. tit. 25, § 1631 (1964) simply declares confidential all criminal and administrative records of the State Police and the Bureau of Identification with certain exceptions, among them information made available in open court and information on pending cases which would not jeopardize their investigation or prosecution. Oregon has a provision about confidentiality of fingerprints, photograph records and reports in criminal matters, and requires both law enforcement agencies and courts to report case dispositions to the central bureau of criminal identification. ORE. REV. STAT. §§ 181.510, .520, .540 (1970). Neither statute covers the handling of the information given to the FBI. N.Y. CIVIL RIGHTS LAW § 79-e (McKinney 1971) provides for the return of photographs, fingerprints, etc. taken in a criminal action determined in favor of the accused, but only on condition that no other criminal action is pending against him and that he has not previously been convicted of a crime or of loitering either within or without the state of New York.

<sup>65</sup>See text accompanying notes 30, 32, 41, 43 *supra*.

<sup>66</sup>42 U.S.C. § 3767b (1972).

<sup>67</sup>42 U.S.C. § 3767 (1970).

<sup>68</sup>The Law Enforcement Assistance Administration, created by the Omnibus Crime Control and Safe Streets Act of 1968 § 519, 42 U.S.C. 3711 (1970).

<sup>69</sup>PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION, THE CHALLENGE OF CRIME IN A FREE SOCIETY 261-66 (1967).

<sup>70</sup>117 CONG. REC. 14,563 (daily ed. Sept. 20, 1971); introduction to S. 2546, 92d Cong., 2d Sess. (1971) by Sen. Hruska.

<sup>71</sup>*Id.*

passed the above quoted amendment to the 1968 Act. Senator Hruska admitted that the hearings, early in 1971, by the Senate Subcommittee on Civil Rights had amply demonstrated how much more critical the issue of the individual's right to privacy has become in the computer age.<sup>72</sup>

On September 20, 1971, more than four months after the expiration of the above mentioned deadline, the United States Attorney General submitted to the Vice President, as President of the Senate, the requested legislative recommendations which then were introduced by Senator Hruska under the title of The Criminal Justice Information System Security and Privacy Act of 1971.<sup>73</sup> The bill contained few if any substantive innovations of any protective character. Though it includes case disposition within the meaning of "criminal offender record information" as well as summaries of arrests and identification data, (§ 2(2)), it takes no specific steps at all toward securing the completeness of the record in this regard; it merely presents a vague and rather complicated procedure through which an individual can obtain information about or a copy of his record for the purpose of challenge or corrections (§ 3(c)). It provides for both criminal and civil liability of those who willfully violate the Act, but good faith reliance upon the provisions of the Act or any other applicable law, rules, regulations or procedures prescribed thereunder would constitute a complete defense to civil or criminal action brought under this Act (§ 6). The bill is applicable only to information systems funded, at least in part, by the Law Enforcement Assistance Administration, which automatically excludes those maintained by the FBI or other federal law enforcement agencies such as the Secret Service or the Customs Bureau (§ 2(1)). Though the included information systems (*i.e.*, those of states, or of local agencies if financially aided by the Law Enforcement Assistance Administration) shall on principle be available only to law enforcement agencies and be used only for law enforcement purposes, "qualified individuals" may have access to them for research purposes under regulations to be established by the Attorney General (§ 3(a), (b)). An omnibus provision equates to "law enforcement purposes" such additional purposes necessary to the proper enforcement or administration of other provisions of the law as the Attorney General may prescribe by regulations issued under § 6 (§ 3(a)). The broad authorization given the Attorney General in § 6 reads: "The Attorney General is authorized, after

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<sup>72</sup>*Id.*

<sup>73</sup>S.2546, 92d Cong., 2d Sess. (1971). The bill was referred to the Senate Committee on the Judiciary.

appropriate consultation with representatives of State and local law enforcement agencies participating in information systems covered by this Act, to establish such rules, regulations and procedures as he may deem necessary to effectuate the provisions of this Act."

In the section-by-section analysis which the Attorney General attached to his letter of transmission of the draft bill to the Vice President, he significantly interpreted § 6 with reference to the "additional" dissemination purposes mentioned in § 3(a) in the following manner: "It is intended that agencies that use criminal justice information for valid non-law enforcement purposes as, for example, counterintelligence, *personal suitability*, or security, may continue to do so, but must obtain the information through a law enforcement agency." (Emphasis supplied). This changes little, if anything, from the present situation. No differentiation at all is made anywhere in the bill about "criminal offender record information" between arrests that have led to conviction and those that have not.

Another legislative initiative was taken by Congressman Don Edwards of California.<sup>71</sup> His bill provides for inspection by the arrestee of his criminal arrest record and for disclosure to him, upon his request, of all persons to whom, in the six months previous to such request, his arrest record had been disclosed. It would allow for a suit in the United States District Court to enjoin maintenance or dissemination of a record that is in violation of the Act and would permit orders for correction of an incorrect record; it also would provide civil and criminal sanctions for maintaining, disseminating or using a criminal record in violation of the act, such sanctions extending to the FBI and other federal officers and employees, and for the first time would take a modest step in the direction of distinguishing records of arrests that did not lead to conviction. Section 3102, subsection (a) of the Bill reads:

No officer or employee of the United States or of a federally assisted law enforcement agency, and with respect to a criminal arrest record received from an officer or employee of the United States or of a federally assisted law enforcement agency, no officer or employee of any law enforcement agency, may disseminate to any person a criminal arrest record—

- (1) relating to an arrest which occurred more than two years before the date of such dissemination and concerning which there is no prosecution pending in a court;
- (2) relating to an arrest concerning which the prosecuting attorney responsible for conducting any prosecution arising out of such arrest

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<sup>71</sup>117 CONG. REC. 14,564-65 (daily ed. Sept. 21, 1971).

agrees no prosecution is warranted and that no criminal record should be kept; or

(3) which is expunged, or prohibited from being maintained under a provision of the law of the State in which the arrest which is the subject of such record occurred, or by order of a court having jurisdiction with respect to such arrest.

According to subsection (c), clause (1) of subsection (a) is not applicable to an arrest record concerning a person who has ever been convicted of a felony under any federal or state law.

Exceptions from these prohibitions may be obtained only through an order of a federal court having jurisdiction upon application by the Attorney General or any officer of a law enforcement agency, indicating in writing and under oath or affirmation all facts relied upon by the applicant to justify his petition (§§ 3102(e), 3105). Finally, the bill would give the arrestee some help against interrogations about his arrests by providing: "In responding to any question concerning any arrest the respondent may consider such question to apply only to an arrest the record of which may be lawfully disseminated, maintained or used by the Attorney General. No person shall be required to waive the right granted to him by this section nor shall any person be penalized in any manner for exercising such right." (§ 3106)

Neither of the two bills discussed has become law.

The conclusion to be drawn from the preceding examination is that at present the American handling of records of arrests not followed by conviction is unsatisfactory. The defects hinge on two points: first, that on principle, every criminal proceeding starts with arrest, a fact that has brought about in the minds of many a distortion of the maxim that a man is presumed innocent until convicted, and second, that because of the presence of an arrest as an element of most criminal proceedings, criminal records in this country center around arrest rather than around convictions. It should be of interest to learn how some of the civil law countries handle these two problems.

## II. CIVIL LAW PRACTICE

### A. *Switzerland*

In Switzerland the Federal Act on Federal Criminal Procedure provides:

The person accused can be the object of an order of arrest only if there exists against him a grave suspicion of being guilty and if, besides, one of the following conditions is fulfilled:

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<sup>75</sup>118 CONG. REC. 1467 (daily ed. Feb. 24, 1972); introduction to H.R. 13,315, 92d Cong. 2d Sess. (1972) by Cong. Edwards. The bill was to introduce a new ch. 177, tit. 28 U.S.C.—Dissemination of Arrest Records—with sections numbered 3101 through 3110. It was referred to the House Committee on the Judiciary.



- (1) that there is a strong suspicion of flight; such suspicion may be assumed to exist especially if the accused person is under suspicion of a violation punishable with hard labor or if he is not able to establish his identity or has no domicile in Switzerland;
- (2) if definite circumstances lead to the suspicion that he wants to destroy traces of the violation or to induce witnesses or persons co-accused to make false statements or in some other way to interfere with the result of the inquiry.<sup>76</sup>

It is important that the presumption of suspicion of flight under § (1) is not conclusive. Hard labor is described in Article 35 of the Swiss Penal Code<sup>77</sup> as the strictest of the penalties restricting liberty; its duration is at least one year and at the most twenty years of life. A detention based upon § (2) can be maintained beyond two weeks only upon special authorization by the court bench that handles the indictment.<sup>78</sup> Hard labor being the strictest punishment available (no death penalty is provided for), it is clear that there are numerous kinds of violations that are punishable with a lesser degree of restraint of freedom or with fines.<sup>79</sup> Consequently, probably in a vast majority of cases no arrest order will be issued if there are no special circumstances that indicate the danger of flight or of attempts to obstruct the inquiry.

Thus, criminal proceedings and arrest are a far cry from being identical and the temptation of handling them identically in the field of reporting hardly exists. This is reflected in the statutory handling of criminal records. The basic rules on criminal records are established in the Penal Code itself.<sup>80</sup> According to the code and to the federal regulations in this field a Criminal Register is kept by the Swiss Central Police Office with entries concerning every person sentenced within the federal territory

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<sup>76</sup>Swiss Federal Act on Federal Criminal Procedure of June 15, 1934 art. 44 AMTLICHE SAMMLUNG DER BUNDESGESETZE UND VERORDNUNGEN [AS] (1934). The Act is applicable only to proceedings before Swiss Federal Courts whose jurisdiction is established either by federal legislation or through delegation to them by Cantonal legislation approved by the Federal Congress ("Assembly"). *Id.* arts. 7, 8. Cantonal criminal proceedings are regulated by Cantonal laws on criminal procedure which differ considerably from one another. *See* Clerc, *La Détention Préventive*, 84 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 149 (1968). Substantive criminal law, on the other hand, is ruled by the Swiss Federal Penal Code, SCHWEIZERISCHES STRAFGESETZBUCH [StGB] of December 21, 1937, as amended, AMTLICHE SAMMLUNG DER BUNDESGESETZE UND VERORDNUNGEN 757 (1938). Arts. 400, 401 provide for abrogation of Cantonal penal laws on January 1, 1942, the effective date of the Federal Penal Code.

<sup>77</sup>AS 764 (1938).

<sup>78</sup>Swiss Federal Act on Federal Criminal Procedure art. 51, para. 2 AS 696 (1934).

<sup>79</sup>It is to be admitted though, that the penalty for theft is hard labor up to five years or simple imprisonment. StGB Art. 137.

<sup>80</sup>StGB tit. 5 arts. 359-364, 62, 80. Under the authority established in art. 364 the Federal Council has issued regulations; *see* Decree Concerning the Criminal Register of November 14, 1941 AS 1297 (1941).

and every Swiss citizen sentenced abroad; each Canton maintains such a register for every person sentenced by the authorities of that Canton and for every person sentenced who is a citizen of it. The only entries to be registered are judgments of conviction within one month after they have become final, paroles, and facts that cause a change of an entry. The law provides for cancellation of entries in the record *ex officio* after the expiration of nearer defined periods of time, and allows the judge to order a cancellation of entries on request of the person sentenced if certain conditions as to his behavior have been fulfilled and certain minimum periods of time have expired. In cases of an especially meritorious behavior of the person sentenced the judge may order the cancellation even before the expiration of the minimum time periods.<sup>81</sup> Information about the contents of the Register can, upon request, be given to the judicial and other authorities of the Federation, the cantons or the communities. No information may be given to private persons, except that each individual can request information as to what is recorded about himself. Information about cancelled entries may be given only to administrative agencies that issue or revoke drivers' licenses and to judicial authorities with regard to proceedings in which the person concerned is the accused, or is subject to the execution of a punishment, to rehabilitation, or cancellation. In these cases the fact of the former cancellation is to be mentioned.<sup>82</sup>

## B. *France*

In French law "provisional detention" is regulated by provisions in force since January 1, 1971.<sup>83</sup> It is the rule in cases of a crime,<sup>84</sup> "crime" being defined as a violation of the law punishable by death, hard labor for life, criminal imprisonment for life, hard labor for a limited time, or criminal imprisonment for a limited time.<sup>85</sup> In cases of a less serious violation, "délit," provisional detention, may be ordered or maintained if lighter measures of judicial supervision are insufficient and if the possible punishment is at least two years of prison under these conditions: (1) that provisional detention is the only means to preserve evidence or to avoid either pressure upon witnesses or fraudulent conspir-

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<sup>81</sup>StGB art. 80 as amended by Swiss Federal Act of March 18, 1971 AS 777,790 (1971).

<sup>82</sup>StGB art. 363 as amended by the Act of October 5, 1950 AS 1, 14 (1951) and the Act of March 18, 1971 AS 777,802 (1971).

<sup>83</sup>C. PRO. PÉN. arts. 114 through 148-3 as amended by law No. 70-643 of July 17, 1970 (13e ed. Petits Codes Dalloz 1971).

<sup>84</sup>*Id.* art. 146.

<sup>85</sup>C. PÉN. arts. 1, 7 (69e ed. Petits Codes Dalloz 1971).

acy between the accused and his accomplices; or (2) that the provisional detention is necessary in order to protect the public order from interference caused by the violation or to protect the accused, to put an end to the violation or to prevent its repetition, or to guarantee that the accused is available for the proceedings.<sup>86</sup> "Délit" is defined as a violation of the law punishable with imprisonment of more than two months and up to five years without considering special augmentations due to recidivism or other factors or for other reasons, or with a fine of 2,000 francs.<sup>87</sup> Again the result is that criminal proceedings and arrest do not coincide at all.

The subject of criminal and related records is dealt within title VIII of the Code of Criminal Procedure, entitled "Judicial Register."<sup>88</sup> The clerk of each tribunal, a rank corresponding roughly to the state superior courts in America, handles the criminal records of all persons born within the territorial jurisdiction of the tribunal. To him are reported in the criminal field all *convictions* of a crime or délit, as well as those of mere contraventions, if the punishment provided by law is more than ten days of imprisonment or a fine of more than 400 francs. He also handles pronouncements of juvenile courts even if they do not amount to a penalty in the strict sense.<sup>89</sup> A similar register of criminal records is maintained by the Minister of Justice for persons born outside France, those whose birth certificates cannot be found, and those whose identities are in doubt.<sup>90</sup> Title VIII gives detailed directions as to the treatment of later changes of the recorded judgments through pardon, grace, commutation, reduction, parole amnesty, etc.<sup>91</sup>

There are three types of criminal register which can be distinguished by virtue of how much information is to be given about the contents of each. Register No. 1 comprehends the full record and can be disseminated only to judicial authorities.<sup>92</sup> Register No. 2 does not include the pronouncements of juvenile courts which do not amount to a penalty, condemnations of persons between the ages of eighteen and twenty-one years if the court in pronouncing them has expressly excluded them from being mentioned in Register No. 2, and condemnations for police contraventions.<sup>93</sup> The contents of this register can be disseminated to

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<sup>86</sup>C. PRO. PÉN. art. 144 (13e ed. Petits Codes Dalloz 1971).

<sup>87</sup>C. PÉN. arts. 1, 40; C. PRO PÉN art. 381.

<sup>88</sup>In French "Casier Judiciaire." C. PRO. PÉN arts. 768-81.

<sup>89</sup>*Id.* art. 768.

<sup>90</sup>*Id.* art 771.

<sup>91</sup>*Id.* art 769.

<sup>92</sup>*Id.* art. 774.

<sup>93</sup>*Id.* art. 775.

provincial governors (préfets) and to public state administrations which deal with requests for public employment, proposals of honorable distinctions, the allotment of work or of public markets, disciplinary matters, and with the establishment of public schools; information may also be given to certain military and electoral authorities and to those private administrations or juridical persons listed in a special regulation for the execution of title VIII.<sup>94</sup> Register No. 3 records only sentences of imprisonment for a crime or délit, and indicates expressly that this is its object. Its contents may be communicated only to the person to whom it refers, never to a third person.<sup>95</sup>

The point of greatest importance for the topic under consideration is the fact that nothing but judgments of conviction and no event preceding a judgment, such as an arrest, ever enters the criminal record. Special decrees regulate the recordings of judgments or administrative decisions in the fields of alcoholism<sup>96</sup> and those of traffic violations.<sup>97</sup>

### C. Italy

The Italian Code of Criminal Procedure goes into great detail in describing the prerequisites for, and modes of, interference with the personal liberty of an individual involved in criminal activity.<sup>98</sup> The substance of these provisions can be summarized as follows. Arrest *in flagrante* is obligatory for the police forces if the penalty for the act committed is imprisonment for more than three years; this requirement extends to those who have been declared habitual or professional criminals or have been subjected to security measures, to those who have been sentenced to imprisonment before and are caught *in flagrante* while committing a crime punishable with detention of not less than one year, and finally to those who have no residence within the State.<sup>99</sup> In these cases a private citizen may also arrest a person caught *in flagrante*.<sup>100</sup> The police *may* arrest *in flagrante* if the crime committed is subject to imprisonment for a maximum of not less than two years, if the malefactor has been declared an habitual or professional criminal or has been sentenced more than twice to imprisonment for an unintentional act or

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<sup>94</sup>*Id.* arts. 776, 779.

<sup>95</sup>*Id.* art. 777.

<sup>96</sup>Decree of January 9, 1960, (13e ed. Petits Codes Dalloz 371, 1971).

<sup>97</sup>*Id.* at 369.

<sup>98</sup>C. PRO. PÉN. arts. 235-94 (Hoepli 1971).

<sup>99</sup>*Id.* art. 235 paras. 1, 2. Some special violations of the Code of Public Security are also subject to obligatory arrest by the police if the wrongdoer is caught *in flagrante*; TESTO UNICO DI SICUREZZA PUBBLICA art. 220 (Hoepli 1971).

<sup>100</sup>C. PRO. PÉN. art. 242 para. 1.

once in the last ten years for a violation of the same type as the one in which he is caught, or if he has no residence within the State and is caught committing an unintentional crime the penalty for which is not less than six months; finally arrest *in flagrante* is allowed, not commanded, for certain defined contraventions.<sup>101</sup>

In cases other than *in flagrante* situations the police may make an arrest without a warrant if two conditions are satisfied; the crime must be strongly suspected and be one for which an arrest warrant would otherwise be obligatory, and there must be a well-founded suspicion of flight.<sup>102</sup> An arrest warrant is obligatory where there is confirmed suspicion of any of the following: (1) a crime against the State as such for which the penalty is imprisonment for not less than five years or for a maximum of ten years or for life; (2) a crime the penalty for which is imprisonment for not less than five years or for a maximum of fifteen years or for life; (3) the crime of transferring or acquiring a person who is reduced to the status of slavery or of maintaining him in such a status; (4) the crime of clandestine or fraudulent traffic in stupefying drugs; and (5) the crime of counterfeiting Italian or foreign money being legal tender in Italy or elsewhere or importing counterfeit money into Italy or dealing with it.<sup>103</sup> Arrest warrants are optional where the crime attributed to a person is (1) an unintentional crime the penalty for which is imprisonment for a maximum of not less than three years; (2) an unintentional crime the penalty for which is imprisonment of a maximum of not less than two years, if the accused had been convicted before of an unintentional crime more than twice or had been convicted once before for a crime of the same type, or if he has no residence within the State or if it appears that he has fled or is about to flee; (3) an intentional crime the penalty for which is imprisonment for at least two years or not more than five years.<sup>104</sup> In reaching a decision regarding such optional arrest warrants the judge shall consider the moral qualities of the accused and the circumstances of the case.<sup>105</sup>

The result of these detailed provisions is again that the field of optional arrests is wide and that criminal proceeding and arrest are by no means notions which are likely to coincide. Again, the provisions regarding criminal records reflect this difference. A chapter consisting of eight articles within the fourth book of the Code of Criminal Procedure

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<sup>101</sup>*Id.* art. 236.

<sup>102</sup>*Id.* art. 238.

<sup>103</sup>*Id.* art. 253.

<sup>104</sup>*Id.* art. 254.

<sup>105</sup>*Id.*

dealing with the execution of judgments takes care of the topic under the headline of "Judicial Register."<sup>106</sup> As in the French system, the tribunals, again courts comparable in their rank to state superior courts in America, collect and preserve extracts of certain documents referring to persons born within their respective territorial jurisdictions; those as to foreigners, stateless persons, citizens born abroad or those whose birthplace is within the state but cannot be ascertained are to be preserved at the tribunal of Rome.<sup>107</sup> As far as criminal records are concerned the register contains (a) judgments of conviction as soon as they have become irrevocable, and decrees that have become executable; (b) judgments that have been rendered at the inquisitorial stage of the proceedings<sup>108</sup> declaring that no further prosecution is to take place if they are no longer subject to appeal, and judgments upon trial of acquittal or those blocking further prosecution, as soon as they have become irrevocable; (c) decisions that declare a convicted person a habitual or professional wrongdoer, and those ordering, changing or revoking security measures.<sup>109</sup>

Paragraph (b) of these provisions needs to be clarified. Italian criminal procedure provides, both at the inquisitorial and trial stages, for judgments of acquittal that can become final and unappealable. At the inquisitorial stage such judgments mean that no further prosecution is to take place; they are issued either by the district judge if the proceeding is pending before him, or by the inquiry judge if an inquisitorial proceeding has been initiated before him.<sup>110</sup> After trial the acquittal judgment on principle effects the acquittal although in certain cases here a pronouncement to proceed no further is also provided for.<sup>111</sup> The law enumerates the reasons for which judgments of acquittal or pronouncements to proceed no further may be rendered and requires that the reason be expressed in the dispositive part of the sentence.<sup>112</sup> Among the more important reasons enumerated are that the crime forming the basis of the proceeding has not occurred or has not been committed by the defendant (and in this case the judgment may specify either that there is proof that the crime has not occurred or has not been committed by the defendant, or that there is a complete lack of proof that the crime has occurred or has been committed by the defendant); that the defen-

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<sup>106</sup>In Italian, "Casellario Giudiziale." *Id.* arts. 603-610.

<sup>107</sup>*Id.* art. 603.

<sup>108</sup>In Italian: "istruzione."

<sup>109</sup>C. PRO. PÉN. art. 604 § 1a-c.

<sup>110</sup>*Id.* arts. 398 para. 3, 395, 378.

<sup>111</sup>*Id.* arts. 478, 479.

<sup>112</sup>*Id.* arts. 378, 395, 398, 478, 479.

dant is mentally incompetent or cannot be punished because the act committed is not a crime; that there is insufficient proof for a judgment of conviction (in which case the sentence specifies that it was rendered for "insufficient proof"); that the crime is extinguished or that the criminal proceeding should not have been started or should not have been continued, or that in the case of a juvenile a judicial pardon is granted. In these last two cases the sentence is always to proceed no further.<sup>113</sup>

Thus, in Italian law there appear provisions that call in criminal matters for the recording of judgments other than those convicting the defendant. Some of these record entries can only improve the status of the defendant, such as those stipulating that the crime did not occur or has not been committed by the defendant. Others carry with them a stigma, especially those pronouncing an acquittal because of "insufficient proof." Yet the prerequisite for any entry is always a judicial decision either by judgment or by decree that has become final or executable; arrests as such are not recorded.

The chapter on the judicial register also provides for certain items of the criminal record to be removed after the running of various periods of time,<sup>114</sup> and sets out elaborate rules as to who can obtain information about the contents of the register. Every authority having criminal jurisdiction may obtain for purposes of criminal justice information about all entries in the criminal register concerning an individual. All other public authorities and agencies that are entrusted with public services have the same right if the information is needed for an act related to the person to whom the information refers, with the exception of judgments of acquittal of an exempted minor.<sup>115</sup> As to requests by private persons for information from the criminal register, the law distinguishes between the person to whom the record refers and others; the subject of the record is entitled to the information under any circumstances. All other private persons may seek information only for the purpose of presenting it in court, for purposes of the electoral process, or in hiring for services or labor. In the request the purpose must be specified and the legitimate interest of the petitioner must be demonstrated.<sup>116</sup> The information given for electoral purposes shall not comprise any conviction or other pronouncements that have no influence upon electoral rights.<sup>117</sup> Among other restrictions on information to be given to private

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<sup>113</sup>*Id.*

<sup>114</sup>*Id.* art. 605.

<sup>115</sup>*Id.* art. 606.

<sup>116</sup>*Id.* art. 607.

<sup>117</sup>*Id.* art. 609.

persons, two deserve some mention: certain first convictions carrying minor penalties against persons who were less than eighteen years old at the time of the violation; and those pronouncing somewhat higher penalties against anyone, but as to which the sentencing judge has forbidden inclusion in information from the criminal register.<sup>118</sup> Finally, the law establishes a review as to both inscriptions in the register and information from it. Controversies on either point are decided by the public prosecutor, the interested party having the right to recourse through judicial review.<sup>119</sup> The very detailed provisions as to the judicial register appear to be of special interest if compared with Senator Hruska's and Representative Edwards' legislative proposals.<sup>120</sup>

#### D. *West Germany*

The law of the Federal Republic of Germany (West Germany) as to arrest is found in its Code of Criminal Procedure.<sup>121</sup> Less casuistic than the Italian law, German law uses a broad and systematic approach which is found in many of its large codifications. Provisional detention ("Untersuchungshaft") is allowed but not obligatory against a person charged with a criminal act who is under strong suspicion of such act if there exists a "just reason for provisional detention" ("Haftgrund"); even then, provisional detention may not be decreed if it is out of proportion with the importance of the matter and the punishment or measure of security to be expected.<sup>122</sup> A "Haftgrund" exists if upon the basis of definite facts (1) it is established that the person charged is fugitive or is in hiding,<sup>123</sup> or (2) after evaluating the circumstances of the individual case there is danger that the person charged will attempt to evade the criminal proceeding ("Fluchtgefahr"),<sup>124</sup> or (3) his behavior arouses a strong suspicion that he will (a) destroy alter, remove, suppress or falsify means of proof or (b) influences unfairly co-defendants, witnesses or experts, or (c) induce others toward such acts, thereby rendering more difficult the ascertainment of the truth. ("Verdunkelungsgefahr").<sup>125</sup> If the penalty for the violation is no more than imprisonment for up to six months or a fine, provisional detention cannot be decreed on the basis of "Verdunkelungsgefahr," and on the basis of

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<sup>118</sup>*Id.* art 608.

<sup>119</sup>*Id.* at 610.

<sup>120</sup>See text accompanying notes 70-75 *supra*.

<sup>121</sup>STRAFPROZESSORDNUNG [StPO] §§ 112-31 (Schönfelder, *Deutsche Gesetze* 1971).

<sup>122</sup>StPO § 112 para. 1.

<sup>123</sup>*Id.* § 112 para. 2(1).

<sup>124</sup>*Id.* § 112 para. 2(2).

<sup>125</sup>*Id.* § 112 para. 2(3).



"Fluchtgefahr" only if the person charged has already evaded the proceeding in question or has made preparations to flee, or if he has no residence or domicile within the territory in which the Code of Criminal Procedure is applicable, or he cannot identify himself.<sup>126</sup> Only a few individual crimes are singled out for special treatment. Against a person charged with incest with a person related to him in the direct line of kinship<sup>127</sup> or with a lewd act toward a minor under his supervision or toward a person otherwise depending on him,<sup>128</sup> or with a homosexual act toward a dependant minor or with mercenary homosexual behavior,<sup>129</sup> or with aggravated lewd acts (including statutory rape)<sup>130</sup> or with rape,<sup>131</sup> and who is under strong suspicion of such act, or against a person under strong suspicion of the repetitious or continuous commission of criminal acts interfering gravely with law and order, or violence, aggravated theft, robbery or extortion, aggravated receiving of stolen goods, arson or certain violations of the drug laws, there also exists a "Haftgrund"; this is also true if definite facts establish a danger that he will commit, before final judgment is rendered, another criminal act of the type indicated and the provisional detention is necessary to prevent the existing danger.<sup>132</sup> Finally, provisional detention may be decreed also without the presence of a "Haftgrund" in the sense of § 112, par. 2 against a person charged with murder<sup>133</sup> or with voluntary manslaughter<sup>134</sup> or with genocidal manslaughter,<sup>135</sup> if he is under strong suspicion of such act.<sup>136</sup>

Without a decree of provisional detention a preliminary arrest is allowed in these cases: 1) anyone may effect the preliminary arrest of a person found *in flagrante* or pursued if there is suspicion of flight, or the arrestee's identity cannot be established immediately;<sup>137</sup> 2) the office of the public prosecutor or police officers may also, in the case of imminent danger, make a preliminary arrest if the prerequisites for a decree of preliminary detention are given.<sup>138</sup> In both cases the person

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<sup>126</sup>*Id.*

<sup>127</sup>*Id.* § 112 para. 2; Strafgesetzbuch [StGB] § 173 para. 1 (Schönfelder, *Deutsche Gesetze* 1973).

<sup>128</sup>StGB § 174.

<sup>129</sup>*Id.* § 175 para. 1 (2, 3).

<sup>130</sup>*Id.* § 176.

<sup>131</sup>*Id.* § 177.

<sup>132</sup>StPO § 112(a) para. 1 (1-2).

<sup>133</sup>StGB § 211.

<sup>134</sup>*Id.* § 212.

<sup>135</sup>*Id.* § 220(a) para. 1(1).

<sup>136</sup>StPO § 112 para. 3.

<sup>137</sup>*Id.* § 127 para. 1.

<sup>138</sup>*Id.* § 127 para. 2.

arrested must be brought without delay, at the latest on the day after the arrest, before the local judge of the district within which he was arrested; the judge decides at a hearing whether the arrestee is to be freed or a decree of provisional detention is to be issued.<sup>139</sup> Elaborate provisions regulate the proceedings in the case of provisional detention based upon a decree, including the possibility of bail or of other measures less restrictive than actual detention, and establish the necessity of periodic judicial re-examination of the question of maintaining the provisional detention and the possibilities of an appeal by the person detained from decrees ordering or maintaining the provisional detention.<sup>140</sup>

On the basis of a decree of provisional detention the office of the prosecutor or the judge having jurisdiction may issue an arrest warrant if the accused is fugitive or absconds. Without a decree of provisional detention an arrest warrant can be issued only if a person apprehended escapes or otherwise evades his custody. Then also the police may issue the arrest warrant.<sup>141</sup>

The result is that in West German law arrest is the exception rather than the rule and that there is little danger of identifying it with a criminal conviction. The result is reflected in the German regulations concerning criminal records. German law in this field is, at present, in a stage of transition; the whole law of recording has recently been codified in the Law Concerning the Federal Central Register.<sup>142</sup> This codification embraces criminal convictions; judicial decisions that order or terminate guardianships for the mentally ill or retarded, for spendthrifts, and for alcoholics; decisions of administrative agencies regarding the expulsion of foreigners, the denial or prohibition of practicing certain professions or trades, the denial, withdrawal or restrictions of a passport, and the prohibition against possession of firearms and ammunition; decisions in criminal proceedings dealing with the question of mental competence of the accused; judicial decisions ordering the detention of a person because of mental illness or retardation, drug addiction or alcoholism; follow-up decisions in these fields, all to be entered in the so-called Central Register; and finally, certain decisions of courts and other authorities in matters of juvenile delinquency, to be entered into the so-called Education Register.<sup>143</sup>

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<sup>139</sup>*Id.* § 128.

<sup>140</sup>*Id.* §§ 114-26.

<sup>141</sup>*Id.* § 131.

<sup>142</sup>Law Concerning the Central Register and the Education Register (*Bundeszentralregistergesetz*) (BZRG) of March 18, 1971 (Schonfelder, *Deutsche Gesetze* 1973).

<sup>143</sup>BZRG §§ 3, 11, 12, 13, 14-19, 55, 56.

The codification came into force on January 1, 1972<sup>144</sup> supplanting<sup>145</sup> the Law Concerning Limited Information about the Criminal Register and the Expungement of Criminal Entries<sup>146</sup> and the Decree Concerning the Criminal Register.<sup>147</sup> As to persons born in West Germany the functions of the Central Register and the Education Register, and the special tasks allotted by the codification to the Federal Attorney General and the Federal Minister of Justice continue to be carried out until, at the latest, December 31, 1976 by the authorities handling them under the old law; however, the Federal Minister of Justice with the consent of the Bundesrat may order that these functions or special tasks pass to the Federal Central Register, the Federal Attorney General and the Federal Minister of Justice at an earlier date.<sup>148</sup> Because of the transitional character of the old Law and Decree the treatment of the subject here will be limited to the law of the codification which, because of its elaboration, shall be dealt with in some detail.

The Federal Central Register is maintained in Berlin, administered by the Federal Attorney General who is attached to the Federal Supreme Court. As far as records in criminal matters are concerned there is no provision for recording arrests (provisional detention). A search notice or a notice about an arrest warrant<sup>149</sup> may be deposited by a duly qualified authority at the Register;<sup>150</sup> if the Register carries any entry or receives any communication regarding the person involved, the depositing authority is notified of the date and identification number of each entry and of the authority from which the communication originated.<sup>151</sup> In the case of arrest warrant inquiries coming from several authorities each one is notified by the Register of the inquiry of the other inquiring authority or authorities,<sup>152</sup> and each inquiring authority is also informed about any incoming request for a Certificate of Conduct or for information about the entries in the Register.<sup>153</sup> It should be emphasized that in spite of the provisions just mentioned the search or arrest warrant notice is not a regular entry in the Register. As a matter of procedure this result from the fact that the subject of these notices is

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<sup>144</sup>*Id.* § 71 para. 1.

<sup>145</sup>*Id.* § 71 para. 2.

<sup>146</sup>Law of April 9, 1920] RGBI 507.

<sup>147</sup>Decree of June 12, 1920 [1920] Central Bulletin for the German Empire 909.

<sup>148</sup>BZRG § 71 para. 3.

<sup>149</sup>See text accompanying note 141 *supra*.

<sup>150</sup>BZRG § 25.

<sup>151</sup>*Id.* § 26 para. 1 cl. 1.

<sup>152</sup>*Id.* § 26 para. 2.

<sup>153</sup>*Id.* § 26 para. 1 cl. 2.

dealt with in a special title of the Bundeszentralregistergesetz, apart from the one whose headline is "Contents and Keeping of the Register."<sup>154</sup> As to the substantive aspect the Register authority is to be notified should the inquiry become moot, perhaps through finding the person looked for, or through withdrawal of the order of arrest; in any case, the notice about the inquiry is to be eliminated from the Register at the latest upon expiration of three years following its inclusion.<sup>155</sup> This indicates clearly that this type of notice reflects in no way upon the character of the person involved but rather serves for a limited time only the sole purpose of aiding the authorities to locate him.

The substantive entries in the Register have been outlined above.<sup>156</sup> In the field of criminal records final judgments that are no longer subject to ordinary appeals are to be entered if they contain a conviction and pronounce a penalty, or if they indicate any measure of security or reformation or the sentence of a juvenile or young adult under postponement of the infliction of a juvenile penalty in accordance with the law on juvenile jurisdiction. Convictions for a contravention punishable only through a fine are not to be entered.<sup>157</sup> The entry includes principal and subsidiary penalties,<sup>158</sup> such as the revocation of a drivers' permit and the period of time for which it is revoked,<sup>159</sup> as well as any probation, and parole, pardon or amnesty affecting the penalty, and follow-up decisions concerning penalties or their mitigation; the expiration date of a sentence involving imprisonment or any restriction of liberty is also to be recorded.<sup>160</sup>

The duty of notification is reciprocal. The courts notify the Register of all decisions, statements or facts that are subject to entry in the Register.<sup>161</sup> If the Register contains any entries about any type of mitigation of a penalty still subject to revocation, then the Register has to inform the source of such entries of any new penalties recorded, of the granting of mitigation in another case, or of the receipt of an inquiry for search or arrest. In case a mitigation is revoked and the Register contains an entry of mitigation in another case, it informs the source of the other mitigation of that revocation.<sup>162</sup> In this way a high degree of

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<sup>154</sup>BZRG Part I ("The Central Register") tit. 3 ("Notices about Warrants of Arrest and Search Notices") as compared with Part I tit. 2 ("Contents and Keeping of the Register").

<sup>155</sup>BZRG § 27, paras. 1, 2.

<sup>156</sup>See text accompanying note 143 *supra*.

<sup>157</sup>BZRG § 4, paras. 1, 2.

<sup>158</sup>*Id.* § 5 para. 1(5).

<sup>159</sup>*Id.* § 9.

<sup>160</sup>*Id.* at 17.

<sup>161</sup>*Id.* § 20.

<sup>162</sup>*Id.* § 21 paras. 1-3.

certainty is established that every authority concerned with criminal records is constantly kept abreast of any of actual change and even possible changes, the first sign of which could be an inquiry for a search or an arrest warrant.

Other titles deal with the expunction of entries from the Register<sup>163</sup> and with the general rules regulating information about the contents of the Register.<sup>164</sup> Entries of convictions are with few exceptions<sup>165</sup> to be expunged after the expiration of terms which run, according to the type and length of the penalty meted out, from five to fifteen years.<sup>166</sup> In exceptional cases, the Federal Attorney General may, either upon a petition or ex officio, order the record expunged, contrary to the general provisions, of certain entries if the penalty has been fully paid or served and no public interest would be violated by such order. The individual concerned may appeal a denial of such petition within two weeks to the Federal Minister of Justice.<sup>167</sup> The Register itself expunges entries concerning persons whose death has been reliably reported or those who are more than ninety years old.<sup>168</sup> If the entry concerning conviction has been expunged or is to be expunged, neither the underlying facts nor the conviction itself can be raised in legal matters regarding the individual concerned nor can they be used against him, although the rights of third persons are not interfered with.<sup>169</sup>

In disseminating information about the contents of the Register a distinction is drawn between a so-called Certificate of Conduct,<sup>170</sup> and Unrestricted Information about the Register.<sup>171</sup> Anyone over fourteen years of age may himself or through his legal representative apply for a certificate about the contents of the Register as to his person (Certificate of Conduct). The application is to be made at the local police office where the residence of the applicant is registered,<sup>172</sup> which office must verify his identity. The Certificate of Conduct cannot be sent to any

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<sup>163</sup>*Id.* tit. 5.

<sup>164</sup>*Id.* tit. 4.

<sup>165</sup>The exceptions are imprisonment for life, security confinement, confinement in a mental institution and judgments permanently barring an individual from being issued a driver's license. *Id.* § 43 para. 3.

<sup>166</sup>*Id.* § 43 paras. 1, 2.

<sup>167</sup>*Id.* § 47.

<sup>168</sup>*Id.* § 22.

<sup>169</sup>*Id.* § 49 paras. 1, 2. As an exception, the crime may be taken into consideration if the security of the Federal Republic of Germany or Länder absolutely requires such an exception, Länder knowingly imposes such an exception, as well as in a few other circumstances. *Id.* § 50.

<sup>170</sup>*Id.* §§ 28-38.

<sup>171</sup>*Id.* §§ 39-41.

<sup>172</sup>*Id.* § 28 paras. 1, 2.

person other than the applicant.<sup>173</sup> If he applies for it with the purpose of presenting it to some public authority it is to be sent to this authority which must allow the applicant to see it if he so desires. However, the applicant may ask the Register to send the certificate, if it contains any entries, to a local court of the applicant's choice rather than directly to the public authority. After inspection by him the local court forwards the certificate to the public authority or, if the applicant objects to this, destroys the certificate.<sup>174</sup> In exceptional cases, a public authority may obtain a Certificate of Conduct directly if it is needed for conducting its official functions and a request directed to the person concerned is either inappropriate or unavailing; again, the person concerned must be allowed to see it first if he so desires.<sup>175</sup> These provisions secure a high degree of privacy and permit the applicant to detect any mistake in an entry without, on the other hand, being able to alter the certificate before it reaches the public authority in question. The Certificate of Conduct does not include notices of search or orders of arrest deposited with the Register, nor does it list certain minor convictions; most major convictions are no longer listed after the expiration of a term between three to five years. However, in most cases, as long as one conviction is still to be mentioned in the Certificate of Conduct all listed convictions are to be mentioned.<sup>176</sup> In exceptional cases the Federal Attorney General may allow further exclusions from the Certificate of Conduct under rules similar to those described above as to expunction of an entry.<sup>177</sup>

Entries not to be listed in the Certificate of Conduct, as well as notices of search or an order of arrest deposited with the Register, are included in the so-called Unrestricted Information about the Register, to be given only to the courts and offices of the public prosecutor for judicial purposes, to the central offices of the Federal Government and to the Government Länder, to the police offices concerned with criminal matters for the purposes of prevention and prosecution of crimes, and to several other authorities for the purpose of their special services. The Unrestricted Information is to be issued only upon express request and if it contains entries not to be listed in a Certificate of Conduct this must be indicated.<sup>178</sup> Such entries can be forwarded by the central authorities to their subordinate authorities only in special cases of an urgent public

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<sup>173</sup>*Id.* § 28 para. 4.

<sup>174</sup>*Id.* § 28 para. 5.

<sup>175</sup>*Id.* § 29.

<sup>176</sup>*Id.* §§ 30-36.

<sup>177</sup>*Id.* § 37.

<sup>178</sup>*Id.* § 39.

interest.<sup>179</sup> Generally, any type of information about the Register can be given only to the public servants entrusted with the receipt and handling of the matter in question.<sup>180</sup>

In two cases the Federal Attorney General can allow information to be given beyond those entries that go into the Certificate of Conduct. A person older than fourteen years or his legal representative may be allowed information about whether the Register contains such entries if he demonstrates a justified interest in this. Further, the Federal Attorney General may allow that Unrestricted Information about the contents of the Register may be given for scientific studies if the importance of the study justifies this and if there is assurance that no abuse is to be feared. Even then the names of the persons concerned can be revealed only if the study cannot be carried out without this.<sup>181</sup>

Finally, the law endeavors to clear up the dilemma that exists in American law of how far the person convicted has to reveal his past. The German law provides as follows:

Duty of Disclosure of a Person Convicted.

1) A person convicted is allowed to denote himself not convicted and he need not disclose the facts underlying a conviction if the conviction is either

- 1) not to be entered into the Register, or
- 2) not to be listed in the Certificate of Conduct or
- 3) to be expunged.

2) In so far as courts or other authorities are entitled to Unrestricted Information the person convicted cannot avail himself, with regard to such courts or authorities, of the privilege based upon paragraph 1) No. 2 if he has been advised of this.<sup>182</sup>

The law does not deal expressly with the question of whether a private stipulation or renunciation can do away with the rights just described. However, the nature of the provisions as part of public law and their elaborateness both as to the general extent of the privilege and as to its one important restriction make it sufficiently clear that they cannot be changed through private stipulation or renunciation.

### Conclusion

There is in the United States a need to balance the interest of the public in the apprehension and conviction of criminals with that of

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<sup>179</sup>*Id.* § 41.

<sup>180</sup>*Id.* § 42.

<sup>181</sup>*Id.* § 40 paras. 1, 2.

<sup>182</sup>*Id.* § 51.

individuals arrested but not convicted of any wrongdoing. As has been shown, some of the leading civil law countries have approached this goal in two ways: first, by not requiring an arrest in a great number of criminal cases and thus not furthering in the mind of the public the idea that arrest and criminal wrongdoing are identical, and second, by confining entries in criminal records, at least on principle, to final convictions of criminal violations. The recent West German codification of the law of criminal records appears to be striving for the greatest perfection both through concentration of criminal records and limitation of their availability only to those public authorities in serious need of them as well as to the person to whom the record refers; this protects at the same time his right to privacy as to his criminal record and also his right to its accuracy.

It is not suggested here that a complete and immediate shift to the systems described is the adequate solution of the dilemma in American law, but some moves in the right direction may be advisable. The lack of any reliable information in America about the change of residence is possibly an obstacle against making a formal arrest a rare exception rather than the general rule. Yet more and more a summons to the police station for interrogation should be substituted for an arrest in the frequent cases either where the expected penalty is small or where family or employment circumstances make it improbable that the accused would become unavailable in the further proceedings.<sup>183</sup>

To use an arrest in itself as an item suitable for a criminal record is an anachronism that shifts to the accused the burden of proving his innocence; this ought to be changed to the more civilized method of recording convictions rather than arrests. For purposes of finding or identifying a living or deceased person one could consider making fin-

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<sup>183</sup>See n.1 *supra*. In England this trend is clearly visible. Under § 1(1) of the Magistrates' Court Act of 1952, 15 & 16 Geo. 6 & Eliz. 2 c.55, the justice of the peace may, upon an information laid before him, issue either a summons requiring that the accused person appear before a magistrates' court to answer the information or a warrant to arrest that person and bring him before a magistrates' court. However, according to § 24 of the Criminal Justice Act of 1967, c. 80, a warrant for arrest of any person seventeen years or older shall not be issued under § 1 of the Magistrates' Court Act unless the offense is an indictable offense, *i.e.*, an offense which if committed by an adult, is triable on indictment (§ 125 Magistrates' Court Act) or is punishable by imprisonment, or unless the address of the defendant is not sufficiently established for a summons to be served on him. Arrest without warrant is regulated in § 2(1) of the Criminal Law Act of 1967, c. 58, which introduces the term of arrestable offense and provides: "The powers of summary arrest conferred by the following subsections shall apply to offenses for which the sentence is fixed by law or for which a person (not previously convicted) may under or by virtue of any enactment be sentenced to imprisonment for a term of five years, and to attempts to commit any such offence; and in this Act, including any amendment made by this Act in any other enactment, 'arrestable offence' means any such offence or attempt."



gerprinting compulsory for everyone reaching an age at which fingerlines are sufficiently developed. This would hardly be a greater intrusion into privacy than the present widespread use of fingerprints or of Social Security numbers. A central archive of fingerprints for the whole population, combined with one of modernized criminal records and notices of search or of arrest warrants would be both more effective and more humane than the present system.



# GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW

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VOLUME 4

1974

ISSUE 1

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1973-1974

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