F.B.I. ARREST RECORDS: THE NEED TO CONTROL DISSEMINATION

Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970)

Plaintiff Menard was held for two days by the Los Angeles police and released without being formally charged. A California statute provides that such a procedure is justified when the police are satisfied that there are no grounds for making a criminal complaint against the person arrested.[1] The statute further provides that the incident shall subsequently be deemed only a detention, not an arrest.[2] After plaintiff's release, his fingerprints and the record of his detention were sent to the FBI.[3] Plaintiff instituted this suit in the United States District Court for the District of Columbia for the removal of this information from the FBI's criminal file. Both sides moved for summary judgment, and the court granted the defendant's motion. On appeal, Menard argued that the material should be removed from the files because, in light of the California statute, it should not be referred to as a "criminal" record. The FBI argued that, once the plaintiff was arrested, it was entitled to maintain a record of the information sent it.[4] The court of appeals,

1. CAL. PEN. CODE § 849(b)(1) (Deering, 1961).

2. *Id.*

3. The FBI's files contained the following notation under a column headed "disposition": "Released—Unable to connect with any felony or misdemeanor at this time". After the initial complaint was filed, it was changed to read: "Unable to connect with any felony or misdemeanor—in accordance with 849(b)(1)—not deemed an arrest but a detention only". Menard v. Mitchell, 430 F.2d 486, 488 n. 1 (D.C. Cir. 1970).

4. The FBI derives its authority to maintain criminal records and fingerprint files from the Attorney General of the United States. 28 C.F.R. § 0.85(b) (1970). He in turn is authorized by federal statute. 28 U.S.C. § 534 (1968) provides:

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

The United States Marshall's Manual requires fingerprinting of all persons taken in and charged with the violation of a federal statute. UNITED STATES MARSHALL'S MANUAL § 702.01, *cited* in United States v. Krapf, 285 F.2d 647, 650 (3d Cir. 1961). There is no statute authorizing the return of such material. United States v. Kalish, 271 F. Supp. 968, 969 (D. P.R. 1970).

finding the question more complex than presented by the parties, remanded for further factual development.[5]

The court's finding that the facts established in the lower court were inadequate for proper resolution, and its subsequent discussion of the potential harms and abuses of the disputed practice indicate the seriousness of the problem and the need for a sufficient remedy.[6] The court first mentioned potential economic losses resulting from the restriction—or total deprivation—of opportunities for schooling, employment, or professional licenses.[7] The FBI does not disseminate its records directly to employers; nevertheless, many employers do have ready access to them.[8] The court also discussed the manner in which

5. An important consideration of the court was the allegation by the plaintiff that there was no probable cause for his arrest, and that the crime with which he was supposed to be linked did not, in fact, occur. Menard v. Mitchell, 430 F.2d 486, 491-92 (D.C. Cir. 1970).

6. It should be noted that there is much confusion existing with regard to the distinct meaning of the words "arrest" and "conviction". The word "arrest" often connotes guilt to the general public. *See* Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CR. & DEL. 494, 495-96 (1967); *In re* Smith, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (N.Y. City Fam. Ct. 1970). It has been suggested that law enforcement officials contribute to the confusion, by often using words which strongly imply guilt. "In 1946, the FBI referred to all persons in its files as a *criminal army* of 6,000,000 individuals who have been arrested and fingerprinted—one out of every twenty-three inhabitants in the United States." Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CR. & DEL. 494, 496-97 (1967) *citing*, M. LOWENTHAL, THE FEDERAL BUREAU OF INVESTIGATION 376 (1950).

A recent occurrence, which received national attention, illustrates how such misleading statements can unwittingly be made. "In the midst of a statement to the press on the role of the news media in helping maintain respect for law and the system of justice, the President [Richard M. Nixon] declared that Manson 'was guilty, directly or indirectly, of seven murders without reason'. Mr Nixon is a lawyer, and as he spoke, Attorney General John N. Mitchell stood by his side." [The statement referred to was made while Charles Manson was on trial in Calfironia for the murder of eight persons]. N.Y. Times, Aug. 4, 1970, at 1, col. 1.

7 One survey, noted by the court, indicates that 75% of New York employment agencies would not accept, for referral, an applicant with an arrest record, and another showed that 66 of 75 employers would not consider employing a person who had been arrested for assault although subsequently acquitted. 430 F.2d at 490 n. 17. *See also In re* Smith, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (N.Y. City Fam. Ct. 1970); Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CR. & DEL. 494 (1967).

The social impact of poor dissemination practices is equally as important. "Discrimination based on previous arrests hits hardest at the lowest socio-economic level, where the largest numbers of persons with arrest records are to be found. Since the few existing employment opportunities are still further reduced for persons with arrest records, many who have no chance to break out of the vicious cycle of poverty become criminals." Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CR. & DEL. 494, 498 (1967).

8 Employers have access to the records in several ways. First, prohibition of access may not be enforced by local authorities. Second, information may be released to civil and government agencies, all of whom can then pass the information on to the inquiring party. Third, employers often require waivers of confidentiality which, when signed, give the employer the authority he needs

arrest records are used by law enforcement agencies: arrest records are used by police officers in determining whether to make formal charges against an individual,[9] by lawyers in determining whether to allow a defendant to present his story without impeachment by prior convictions,[10] and by judges in determining whether to deny release prior to trial[11] and the sentence to be given a convicted offender.[12] When an individual has been lawfully arrested and exonerated, there seems little justification for subjecting him to continuing punishment by adverse use of his "criminal" record.[13] As to persons arrested without probable cause,[14] there is a serious question of the constitutionality of any adverse use of their records.[15]

Although not discussed by the court, *Menard* raises an invasion of privacy question. Generally, courts have followed *United States v. Kelly*,[16] which held that one does not have a constitutional right of privacy that outweighs the necessity of keeping arrest records for the prevention of crime and protection of society.[17] Nevertheless, the

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to obtain a copy of the record from the local authorities. Fourth, some employers require a copy of the record from the individual. *In re* Smith, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (N.Y. City Fam. Ct. 1970).

In addition, in small cities an employer may know a law enforcement officer who can obtain the information for him, and in larger cities an employer may have his own security force which has, or can acquire, access to the information. *See* Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CR. & DEL. 494 (1967).

9. AMERICAN BAR FOUNDATION, LAW ENFORCEMENT IN THE METROPOLIS, 145 (McIntyre ed. 1967); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 287 (1965).

10. Menard v. Mitchell, 430 F.2d 486, 491 (D.C. Cir. 1970).

11. "The allegation of prior offenses certainly is a factor to take into consideration in determining whether to allow bail, although charges against one are not entitled to the same weight as prior convictions." Rhodes v. United States, 275 F.2d 78, 81-82 (4th Cir. 1960). *See also* Russell v. United States, 402 F.2d 185, 186 (D.C. Cir. 1968).

12. Sentencing transcript in United States v. Isaac, 299 F. Supp. 380 (D. D.C. 1969), *cited* in Menard v. Mitchell, 430 F.2d 486, 491 n. 22 (D.C. Cir. 1970); *see also* R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 21-22 (1969).

13. Menard v. Mitchell, 430 F.2d 486, 494 (D.C. Cir. 1970).

14. Persons are frequently subject to arrest by police who are not concerned with obtaining a conviction but with some other motive. The motive may be to inflict a punitive sanction (*e.g.*, gambling), to control certain crimes (*e.g.*, prostitution), or to recover contraband. *See* W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 146-50, 471-82 (1965); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 246-50 (1969). Persons subjected to such extra-legal sanctions then possess a criminal record based on this "arrest".

15. Menard v. Mitchell, 430 F.2d 486, 492 (D.C. Cir. 1970).

16. 55 F.2d 67 (2d Cir. 1932).

17. *E.g.*, United States v. Krapf, 285 F.2d 647 (3d Cir. 1961); Thom v. New York Stock Exchange, 306 F. Supp. 1002 (S.D.N.Y. 1969); United States v. Laub Baking Co., 283 F. Supp. 217 (N.D. Ohio 1968); Voekler v. Tyndall, 226 Ind. 43, 75 N.E.2d 548 (1947); McGovern v. Van Riper, 140 N.J. Eq. 341, 54 A.2d 469 (1947).

continuing applicability of *Kelly* is questionable.[18] A determining factor in that case was that U.S. Marshalls were instructed to return such material to persons discharged without a conviction. This, however, is no longer the practice: in fact, U.S. Marshalls are now instructed not to return any such records, and U.S. Attorneys are instructed to "oppose vigorously" attempts to secure return.[19] In addition, *Kelly* involved an arrest with probable cause[20] and, therefore, can be distinguished from situations involving an arrest without probablee cause. Notwithstanding *Kelly*, there is recent authority for Menard's point of view. *United States v. Kalish*[21] concedes that, when arrested, an individual's right of privacy does not outweigh the necessity of protecting society and accumulating data for the prevention of crime no matter how mistaken the arrest may have been. Despite this concession, however, the court stated that when an individual is acquitted or discharged without conviction "no public good is accomplished by the retention of the material while a great imposition is placed upon the citizen . . . . His privacy and personal dignity is invaded as long as the Justice Department retains 'criminal' identification records, 'criminal' arrest, fingerprints and a rogue's gallery photograph."[22]

As possible solutions to the problem, two remedies—the sealing of records[23] and expungement[24]—are available. Generally, these remedies have been utilized only in "unusual circumstances" or upon a showing of actual or imminent harm.[25] Nevertheless, these limitations were not

18. *Accord*, Sterling v. City of Oakland, 208 Cal. App. 2d 1, ___ P.2d ___, 24 Cal. Rptr. 696 (Dist. Ct. App., 1st Div., Div. 3 1962).

19. UNITED STATES ATTORNEY'S MANUAL tit. 8, § 83 (Feb. 1, 1966).

20. 55 F.2d 67 (2d Cir. 1932).

21. 271 F. Supp. 968 (D. P.R. 1970).

22. *Id.* at 970. *See also* Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969).

23. Sealing means that a record is "merely" sealed—not destroyed. Kogon & Loughery, *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L.C. & P.S. 378, 379 (1970).

24. Expungement means that the record is physically destroyed, as if it never happened. *Id.* Although sealing and expungement are two distinct remedies, their advantages and limitations are essentially the same. Therefore, the following discussion will be limited to expungement, the remedy which Menard sought.

Many expungement and sealing of record statutes are directed to the records of persons who have been *convicted* of a crime and who have subsequently served a period of good behavior. Although many of the same problems, and, indeed, many more, exist for the person who has been convicted, this discussion is limited to persons arrested but not convicted. For a discussion of expungement and sealing of records of convictions, *see* Gough, *Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147.

25. *See, e.g.*, Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969) (holding that a judge did have ancillary jurisdiction to order expungement in unusual circumstances); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (ordering plaintiffs returned to "status quo ante" which

applied in the recent case of *In re Smith.*[26] In that case, the New York Juvenile Court concluded that potential harm was sufficient to warrant relief, and that there was no public interest to be served in maintaining records of charges which are dismissed. Although *Smith* was decided in a juvenile court, the same policies should be applied to *Menard.*

If the court does grant expungement in *Menard,* valuable precedent will be established. Nevertheless, relief will be afforded others only after successful litigation. Such relief does not help those too poor, too ignorant, or too disheartened to complain,[27] and the persons relieved, relative to the number harmed, will constitute but a small percentage.[28]

One author suggests that the only solution to this problem is automatic expungement of the record of any arrest not resulting in conviction.[29] He further suggests that, in order to accomplish the purpose of complete redemption effectively, the remedies should probably be extended to all governmental and law enforcement agencies.[30] There is, however, authority that no matter how far expungement is extended, it still would be an ineffective and impractical remedy.[31] No record can ever be entirely erased because, even after expungement, copies of the record may remain in the hands of various public agencies.[32] Also, the expungement order may not be concealed.[33]

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included expungement); Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968) (expungement ordered with certification to the court); Wheeler v. Goodman, 306 F. Supp. 58 (W.D. N.C. 1969) (sealing of records ordered where records could not be justified as "criminal"); Pales De Mendez v. Aponte, 294 F. Supp. 311 (D. P.R. 1969) (ordering expungement of arrest and conviction records where the defendant was unconstitutionally convicted). Although these remedies were obtained in federal court, the expungement orders were directed against local authorities. Such an order will not apply to the FBI, however, if they have already obtained the record of fingerprints. Nor do state statutes which provide for expungement or sealing apply to the FBI. Kogon & Loughery, *Sealing and Expungement of Criminal Records—The Big Lie,* 61 J. CRIM. L.C. & P.S. 378 (1970).

26. 63 Misc. 2d 198, 310 N.Y.S.2d 617 (N.Y. City Fam. Ct. 1970).

27. Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970).

28. One recent survey shows that, in contrast to the United States where a mere arrest constitutes a criminal record, criminal records in other countries are limited almost exclusively to convictions. The survey also shows that the dissemination of conviction records in other countries is not as widespread as in this country, and that the dissemination of arrest records is practically non-existent. Hess & Le Poole, *Abuse of the Record of Arrest not Leading to Conviction,* 13 CR. & DEL. 494, 499 (1967).

29. Schiave, *Condemned by the Record,* 55 A.B.A. 540, 542 (1970).

30. *Id.* 543.

31. Kagon & Loughery, *Sealing and Expungement of Criminal Records—The Big Lie,* 61 J. CRIM. L.C. & P.S. 378 (1970).

32. *Id.* 383-84.

33. *Id.* 384.

In short, current remedies do not eliminate the potential publication of illegitimate arrest records.[34]

The best solution to this problem is the imposition of strict and definite standards upon dissemination of police records.[35] The Duncan Report[36] proposed several recommendations for effectively accomplishing this goal in the District of Columbia. The more significant recommendations were: first, adult arrest records should be released to law enforcement agencies upon request, provided that such law enforcement agencies represent that such records would be used only for law enforcement purposes;[37] second, adult arrest records released for any other purpose[38] should include only those arrests which resulted in convictions;[39] third, any record released in the foregoing manner should be accompanied by an instructional manual which would set forth the permissable uses of the record.[40] In addition, all arrest records should be required to set forth the disposition of the arrest.[41] If the record does not

34. 28 U.S.C. § 534 (b) authorizes the Attorney General to cancel the exchange of its records if dissemination is made outside the receiving departments or related agencies. There is, however, no indication that his power is ever invoked.

35. The control of dissemination is made difficult by the innovation, in many states, of computerized records which are connected with the FBI. "Pennsylvania has contracted for a statewide real-time computer system that will give 90% of the state's police departments an instant source of information on stolen vehicles, wanted persons, and *other crime data.*" (Emphasis added) Being directly connected to the FBI's National Crime Information Center, similar information will be available from all sources tied into the FBI system. *Penn. Police to Utilize State-Wide Computer System*, 7 Cr. L. 2478 (1970).

36. DISTRICT OF COLUMBIA BOARD OF COMMISSIONERS, THE REPORT OF THE COMMITTEE TO INVESTIGATE THE EFFECT OF POLICE ARREST RECORDS ON EMPLOYMENT OPPORTUNITIES IN THE DISTRICT OF COLUMBIA (OCTOBER 25, 1967) (THE DUNCAN REPORT). *In re* Alexander, 243 A.2d 901 (D.C. App. 1969), held that the Duncan Report rules, as adopted by the District of Columbia, furnish reasonable and adequate protection to citizens against misuse of arrest records and thus an order to expunge was not issued. For a thorough discussion of the report, *see* Murrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969).

37 DISTRICT OF COLUMBIA BOARD OF COMMISSIONERS, THE REPORT OF THE COMMITTEE TO INVESTIGATE THE EFFECT OF POLICE ARREST RECORDS ON EMPLOYMENT OPPORTUNITIES IN THE DISTRICT OF COLUMBIA 24 (1967). The term "law enforcement agent" as used in this context is limited to persons conducting criminal investigations or proceedings which directly involve the individual to whom the records relate. It specifically excludes private detectives, personnel investigators, private security agents, or others who do not ordinarily participate in the criminal process.

38. *See, e.g.*, 28 C.F.R. § 50.2 (1970) (relating to the release of information to the news media of persons arrested or charged with a criminal offense).

39. *Id.* 25.

40. *Id* 28.

41. The *Menard* Court pointed out that, although the FBI is vested with considerable discretion in how it maintains its criminal files, there is a limit beyond which it may not go. 430 F.2d 486. By failing to include the disposition of cases, it comes dangerously close to this limit by devising a

show the disposition, it should not be released for any purpose, including law enforcement.

On remand, the district court will be called upon to undertake a thorough study of the FBI's practices in handling arrest records. The problem is of such magnitude that it may be necessary for the district court to prohibit *any* dissemination by the FBI until effective legislative standards are established.

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classification which lumps the innocent with the guilty. Id. at 492, *citing*, Boorda v. Subversive Activities Control Board, 137 U.S. App. D.C. 653, 421 F.2d 1142 (D.C. Cir. 1968), *cert. denied*, 397 U.S. 1042 (1970). If one has been subjected to an unlawful arrest, as Menard alleges he has, he should be protected at least to the extent that the record carries the correct disposition of the case. *See* note 3 *supra*.

It should be noted that law enforcement agencies often maintain records of persons who have been neither arrested nor formally charged with a crime. For a discussion of these practices and their legal implications, *see* Anderson v. Wills, 56 N.J. 210, 265 A.2d 678 (1970); Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970).