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Computerized Criminal Records: The Duty of the FBI to Maintain and Disseminate Accurate Files

Barbara Pugliese Gorman
University of Dayton

COMPUTERIZED CRIMINAL RECORDS: THE DUTY OF THE FBI TO MAINTAIN AND DISSEMINATE ACCURATE FILES— *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974).

The use and dissemination of criminal records[1] for routine suspect checks, sentencing and parole hearing has been the subject of much recent discussion.[2] Much of the controversy revolves around the increased access to criminal history files through the FBI's National Crime Information Center (NCIC) which serves as a clearing house for law enforcement agencies throughout the nation.[3] Due to conflicting court decisions and varying state statutes,[4] the rights, requirements and limitations for expunging these records are presently in a state of confusion.[5]

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1. Criminal records include both "police blotters" and criminal history records. "Police blotters" or "arrest books" are chronological reports of all persons incarcerated by law enforcement personnel. According to state or federal statutes they are usually public records and are, therefore, open to the public or the press and outside the scope of this note. "Criminal history records" include arrest and conviction records on a specific individual and are not available to the public at large. The term "arrest record" includes records of all full-custody arrests and temporary detentions. It refers to centrally maintained records which list an arrestee's identity, the date and place of the arrest, the offense(s) and the status or disposition of the charge(s). The term "conviction record" refers to any record which indicates that a person has been convicted of any crime. Often conviction records are the same as updated arrest records, but they also include conviction data on persons summoned to appear to answer criminal charges and never subject to arrest. *See generally* COLLEGE OF LAW, ARIZONA STATE UNIVERSITY AND POLICE FOUNDATION, MODEL RULES: RELEASE OF ARREST AND CONVICTION RECORDS (1974).

2. Cohen, *"Criminal Records"—A Comparative Approach*, 4 GA. J. OF INT'L L. & COMP. L. 116 (1974); Hemphill, *Protection of Privacy of Computerized Records in the National Crime Information Center*, 7 J. OF L. REF. 594 (1974); Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society*, 67 MICH. L. REV. 1089 (1969); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974); Comment, *Arrest Records—Protecting the Innocent*, 48 TUL. L. REV. 629 (1974); Comment, *Branded: Arrest Records of the Unconvicted*, 44 MISS. L.J. 928 (1973); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971); Comment, *Police Records of Arrest: A Brief for the Right to Remove Them From Police Files*, 17 ST. LOUIS U.L.J. 263 (1972).

3. It was noted in Menard v. Mitchell, 328 F. Supp. 718, 721 (D.D.C. 1971) that there are over 19 million fingerprint cards relating to criminal activity on file at the NCIC.

4. For examples of state statutes dealing with criminal history files in contrasting fashion, see ILL. REV. STAT. ch. 38, § 206-3 (1973); ORE. REV. STAT. § 181.540 (1973); CONN. GEN. STAT. ANN. § 54-90 (1972).

5. There is a growing realization on the part of the judiciary that some semblance of order must be made out of the chaos surrounding criminal records and their dissemination. At present, however, decisions are contradictory. Some courts deny expungement relief, weighting heavily the need for public safety and effective law enforcement. Hershel v. Dyra, 365 F.2d 17 (7th Cir. 1966), *cert. denied*, 385 U.S. 973 (1966); Walker v. Lamb, ___ Del. Ch. ___, 254 A.2d 265 (1969); Kolb v. O'Connor, 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957). Some cases deny expungement relief, but place certain restrictions on the dissemination of arrest records and their content. Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971); Spock v. District of Columbia, 283 A.2d 14 (D.C. App. 1971). A third group of decisions would permit

The District of Columbia Court of Appeals has previously considered the broad issue of dissemination of arrest records in *Menard v. Mitchell*.[6] The court noted four types of arrest for which expungement might be proper: (1) those not based on probable cause and not made in good faith; (2) those not based on probable cause but with good faith intentions; (3) those made with probable cause, but where officials may have knowledge that further investigation would probably exonerate the individual; (4) those made with probable cause but where judicial procedures were not utilized. In a subsequent proceeding,[7] the court further interpreted the statute pertaining to the collection of arrest records[8] as imposing a duty on the FBI to expunge information from its criminal file when the local agency which first reported that information to the FBI later reports information which puts in doubt the accuracy of the relevant FBI record. The subsequent litigation in *Tarlton v. Saxbe*[9] involved the issue of whether the FBI has a further affirmative duty to assure the accuracy of its files with respect to both arrest and conviction records.

I. TARLTON'S COMPLAINT

Petitioner John Tarlton brought an action against the Attorney General and the Director of the FBI to have certain information expunged from his criminal file. The information contained in the NCIC included several entries of arrests for which there was no ultimate disposition indicated and additional arrests and convictions which he alleged were perpetrated in violation of his constitutional rights. He alleged that the incomplete and inaccurate information supplied from the FBI's NCIC records had influenced a court in imposing sentence on him and had influenced the parole board's decision to deny him parole. The district court dismissed Tarlton's complaint for failure to state a cause of action.[10] The court

expungement relief in "extreme circumstances": Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973), United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (police misconduct); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969) (arrests based on unconstitutionally vague statutes); United States v. Mackey, 387 F. Supp. 1121 (D.C. Nev. 1975) (arrests based on inaccurate FBI information). Still other courts have held that there is a fundamental right to have arrest records returned upon acquittal implicit in the concept of ordered liberty without regard to legislative action or to the presence of special circumstances justifying relief. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971).

6. 430 F.2d 486 (D.C. Cir. 1970).
7. Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974).
8. 28 U.S.C. § 534 (1970).
9. 507 F.2d 1116 (D.C. Cir. 1974).
10. Tarlton v. Mitchell, Civil No. 1862-71 (D.D.C. Dec. 1, 1971).

of appeals reversed and remanded by a 2-1 majority.[11]

Before reaching the merits, the court noted that it was not deciding the issues of whether the FBI must guarantee the accuracy of information in its files; whether the FBI must resolve conflicting allegations as to the accuracy of its records; or, whether the FBI may properly retain records of arrests if the accused is later acquitted or the charge dropped. The court pointed out that in the present case the first two questions would be resolved against Tarlton. The issue was framed as follows:

> [T]o what extent, if any, does the FBI have a duty to take reasonable measures to safeguard the accuracy of information in its criminal files which is subject to dissemination.[12]

The majority's holding was limited to the finding that Tarlton had stated a cause of action, relating to the nature and extent, if any, of the duty of inquiry to be placed on the FBI with respect to the accuracy of their NCIC files. According to the court's reasoning, the FBI is more than a mere passive repository of records received from others since the FBI "energizes"[13] those records by maintaining a system of criminal files and by disseminating the records on a nation-wide basis. The FBI cannot avoid all responsibility for inaccuracies which might injure innocent individuals by a printed disclaimer; neither is it the guarantor of the accuracy of information in its criminal files. Therefore, it would be the task of the district court on remand to determine standards of reasonable care within the FBI's capacity to insure the accuracy of the information. Since it has previously been held that the FBI has a duty to take notice of reliable information furnished by local law enforcement agencies,[14] the district court might inquire whether persuasive reasons exist for not extending this duty to a more general duty of care.[15]

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11. 507 F.2d 1116.
12. *Id.* at 1121.
13. *Id.* at 1126.
14. Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974).
15. The majority's reasoning for a more general duty of care is supported by 42 U.S.C. § 3771(b)(1973)—applicable to all "criminal history information" maintained by "state and local government" with LEAA funds—which states:

> All criminal history information collected, stored, or disseminated through support under this chapter shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Administration shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incom-

Judge Wilkey dissented. First, he argued, the majority placed a primarily legislative task on a district court judge—that of overseeing the operation of the FBI. If additional legislation was deemed essential, the judge was directed to write an appropriate judicial amendment to 28 U.S.C. § 534.[16] Second, in addressing the FBI's duty and responsibility, the majority had all but ignored Tarlton and impliedly ruled against him on his main contentions. Third, the "duty" referred to would inevitably compel the FBI to judge the "constitutional accuracy"[17] of the criminal information contained in its criminal history records.

II. The Court's Statutory Interpretation of Section 534

In determining that a cause of action existed, the majority held that the FBI had "some duty" to prevent the dissemination of inaccurate arrest and conviction records—the extent of which was to be determined by the district court. This duty was based on a statutory interpretation of 28 U.S.C. § 534.

The Court of Appeals for the District of Columbia previously interpreted this statute to include certain limitations: (1) the FBI could not make available to prospective employers for licensing or for related purposes any arrest records which did not result in prosecution;[18] (2) the FBI had to expunge records of reported "arrests" when the contributing police agencies corrected the report and established that the incident involved nothing more than an en-

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plete or maintained in violation of this chapter, shall, upon satisfactory verification of his identify, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

Further, the NCIC Advisory Policy Board issued a statement in late 1973 outlining privacy and confidentiality policy with particular emphasis on the computerized criminal history file (CCH). For a summary of that statement see Memorandum to the Legislature of Nebraska on L.B. 524 (1975).

16. 28 U.S.C. § 534 (1970) provides:

(a) The Attorney General shall—

(1) acquire, collect, classify and preserve identification, criminal identification, crime and other records; and

(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records authorized by subsection (a)(2) of this section is subject to cancellation of dissemination if made outside the recognized departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions of this section.

17. As the dissent points out, the majority makes numerous references to "accuracy and constitutional accuracy" of FBI files. "Accuracy" seems to refer to the factual accuracy and completeness of the information contained in the file, while "constitutional accuracy" refers to "records of arrest which are constitutionally invulnerable to challenge." 507 F.2d at 1137.

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

counter with the police.[19] This interpretation could be justified by the argument that 28 U.S.C. § 534 must be narrowly interpreted to avoid violation of an individual's constitutional rights. The court, in *Tarlton,* again interpreted the statute to require such reasonable care as the FBI is able to afford to avoid injury to innocent citizens through dissemination of inaccurate information. Absent clear language, Congress cannot be imputed to intend to authorize the FBI to damage the reputation of innocent individuals contrary to settled common law principles (in this case, libel, slander, and the right of privacy)[20] and federal courts should interpret statutes as consistent with existing law unless contrary legislative intent appears. Thus, the statute must be interpreted in a manner designed to prevent government dissemination of inaccurate criminal information without reasonable precautions to insure accuracy.

This reasoning is sound. However, from this origin, the court delved far beyond mere interpretation and, in effect, suggested a major rewriting of the statute. After hastily determining that at this stage of the proceeding petitioner had stated a cause of action, the majority went on to posit what appeared to be more in the order of a general treatise on a complicated area of the law, rather than an opinion bearing on the facts and petitioner at hand.

First, the majority appears to have forgotten, at least tacitly, about Tarlton's substantive allegations. Tarlton's complaint involved several arrests for which no ultimate disposition was indicated and arrests and convictions which he alleged had been perpetrated in violation of his constitutional rights. He did not challenge the FBI's right to disseminate records of complete and constitutionally accurate arrests and convictions, nor did he allege that any information had been disseminated to unauthorized persons. Tarlton impliedly argued that the FBI had to either verify or eliminate each and every arrest and conviction on his record. The majority rejected this as neither legally required nor factually possible. The FBI could not be expected to investigate the facts underlying each arrest or detention and is not authorized to make judgments concerning questions of constitutional interpretation. The district court could not be expected to review the constitutionality and relitigate the merits of all arrests and convictions on file at the NCIC. Furthermore, considerations of federal-state comity require that local courts should make initial determinations as to the validity of arrests and convictions. What then remains of Tarlton's cause of ac-

19. Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974).
20. *See* PROSSER, TORTS, §§ 112 and 117 (4th ed. 1971).

tion? It would seem that his arguments are effectively denied and that his case is doomed to fail on the merits.

Yet, the majority finds a cause of action and suggests that the duty established in *Menard v. Saxbe,*[21] to take notice of information supplied by local law enforcement agencies, might be extended to require a more affirmative duty of care, *e.g.*, to request local law enforcement agencies to comment on and document adequately the factual basis of allegations submitted to the FBI challenging the accuracy of prior information submitted by local agencies, to be responsible for keeping their files reasonably current, or to revise forms so as to require the addition of subsequent information on the crime reported.[22]

III. Legislative History of Section 534

As appropriate as these procedures might be, they are not yet part of the law as drafted by Congress. For a court to require them is to amend rather than to interpret the statute in question. This is especially true since Congress has considered amendments to § 534 and has yet to pass anything comprehensive, thus indicating a legislative intent contrary to the one held by the court.

One proposed bill[23] dealt with a number of the problems considered by the court in the present case. It would have limited dissemination of criminal arrest records to officers or employees of law enforcement agencies and would have prohibited dissemination of arrest records in the following situations: (1) where the record was more than two years old if no prosecution was pending; (2) when the prosecuting attorney agreed that no prosecution was warranted; or, (3) if the record was expunged under the laws of the state in which the arrest occurred by order of a court of competent jurisdiction. The bill would also have allowed the individual the right to inspect his own record and to obtain the names of all persons who had copied it. He could have petitioned any United States court to correct the record or enjoin such maintenance or dissemination. The bill did not become law.[24]

After the district court decision in *Menard v. Mitchell,* a decision which could have been viewed as a restriction on the FBI's ability to disseminate arrest and conviction records, a law was en-

21. 498 F.2d 1017 (D.C. Cir. 1974).

22. 507 F 2d at 1129.

23. H.R. 13315, 92d Cong., 2d Sess. (1972).

24. Neither has subsequent legislation of the same nature succeeded in becoming law. *See* Proposed Bills S. 1427 and H.R. 62, 94th Cong., 1st Sess. (1975), for the current versions of the above noted proposed bill.

acted to provide funds for the dissemination of arrest and conviction records, not only to courts and law enforcement agencies, but also

> [F]or the exchange of identification records with officials of federally chartered or insured banking institutions to promote or maintain the security of those institutions, and, if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing, any such exchange to be made only for the official use of any such official and subject to the same restrictions with respect to dissemination as that provided for under the aforementioned Act.[25]

This law represents a partial Congressional overruling of *Menard v. Mitchell* and indicates that the Congressional position on the FBI's role in the collection and dissemination of arrest and conviction records is a less restrictive one than the present court's view of what that role should be.

In 1974, subsequent to the *Tarlton* decision, Congress amended Title 5 U.S.C. by adding § 552a.[26] This Act requires federal agencies to give detailed notice of the nature and uses of their personal data banks and information system; establishes certain minimum standards for handling and processing personal information maintained in the data banks and systems of the executive branch; gives the individual the right, with certain exceptions, to be told upon request whether or not there is a government record concerning that individual to have access to it and to challenge it with a hearing on request, and with judicial review in federal court; and establishes a Privacy Protection Commission to make a study of the major data banks and other computerized information systems.[27] Sections of this law are applicable to criminal history files, *e.g.*, the right to access. However, the bill allows for certain exceptions regarding law enforcement agencies[28] and the committee report notes that:

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25. Pub. L. No. 92-184, 85 Stat. 627, 642 (1971). *See also, e.g.*, Pub. L. No. 92-544, 86 Stat. 1109, 1115 (1972).

26. Privacy Act of 1974.

27. S. Rep. No. 93-1183, 93d Cong., 2d Sess. (1974).

28. 5 U.S.C. § 552a (1974), *amending* 5 U.S.C. § 552, provides, in part:

(j) General Exemptions.—The head of any agency may promulgate rules in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c) and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (3), (4) (A) through (F), (e) (6), (7), (9), (10), and (i) if the system of records is . . . (2) maintained by an agency or component thereof which performs as its principle function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional probation, pardon or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged

> S. 3418 permits each agency to promulgate its own regulations implementing the Act and this should provide sufficient flexibility so that the Attorney General will not undermine good law enforcement practice in promulgating regulations.[29]

The Committee further emphasized the need for added legislation in the area of criminal justice.[30]

There are some valid reasons for Congressional hesitancy. Even the majority takes notice of the "difficult and sensitive questions involved in reconciling policies of federalism and administrative efficiency with the duty suggested by [this] discussion."[31]

In any case, the legislative history of 28 U.S.C. § 534 is contrary to the court's interpretation of the statute. As the dissent points out, although the court's framing of the issue to be decided is innocuous enough, the thrust of the opinion goes to the determination of "accuracy or constitutional accuracy" which necessarily implies that the FBI has to judge whether information is "accurate or constitutionally accurate" before it can be disseminated. This duty is not created in the statute and would ultimately lead to an amendment assigning the FBI a function that is traditionally judicial.[32]

Unfortunately, the majority "scrupulously avoids" constitutional issues. Again, the dissent appears to reach the heart of the matter:

> If there is a constitutional requirement affecting the FBI's operations, this court has a right to say so. If there is no constitutional requirement but only a statutory one, neither this court nor the district court has the right to make a legislative oversight inquiry to determine the need for additional legislation.[33]

Since the statutory interpretation reads far too much into the statute, it would seem more appropriate to discuss the constitutional issues.

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offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status . . . .

See also, "(k) Specific Exemptions" of the same bill.

29. Legislative History of Pub. L. 93-579, *U.S. Cong. & Adm. News* 6936, 6937 (1974); the subsequent Department of Justice Rules and Regulations on the Criminal Justice Information System (1975) seem to be in direct response to this comment. 40 Fed. Reg. 22114 *et seq.* (May 20, 1975), 28 C.F.R. § 20.1 *et seq.*

30. Legislative History of Pub. L. 93-579, *U.S. Cong. & Adm. News* 6936, 6938 (1974).

31. 507 F.2d at 1126.

32. As the dissent notes, this would put the FBI in the position of judging the constitutional accuracy of every record it disseminates. 507 F.2d at 1137.

33. *Id.* at 1132.

IV. THE PRIVACY ISSUE

The court points to the value of individual privacy which serves to "insulate individuals from unjustifiable government interference."[34] Reference is made to the expression of this right of privacy in the fourth and fifth amendments and certain aspects of the first amendment. However, this right has been employed in areas far removed in application from the dissemination of criminal records, and the use of analogous reasoning might be inappropriate. It would be more efficient to directly attack the problem by specifying the various rights, limitations and exceptions involved in the dissemination-privacy controversy.[35]

A judicially approved definition of the right of privacy is that it is the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private activities, in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.[36] Prosser considers the invasion of the right of privacy not as one tort but four distinct torts: (1) intrusion upon one's seclusion or solitude, or into his private affairs; (2) public disclosure of embrassing private facts about the plaintiff; (3) publicity which places one in a false light in the public eye; and, (4) appropriation for the defendant's advantage of the plaintiff's name or likeness.[37]

These definitions, however, do not really encompass the specific circumstances involved in a criminal history record system. First and basically, an invasion of privacy normally involves some sort of publicity—sometimes defined as publicity by the mass media or publication to the general public. The court in *Tarlton* points out that the present complaint "does [not] allege that the information, whether accurate and complete or not, has been disseminated to unauthorized persons."[38] Here the allegation is that the incomplete or inaccurate information has influenced the court

34. *Id.* at 1124; the majority also makes reference to the Supreme Court's discussion of privacy in Griswold v. Connecticut, 381 U.S. 479 (1965) and Roe v. Wade, 410 U.S. 113 (1973).

35. Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975) is an example of a more exact analysis in dealing with a dissemination problem. In *Utz*, appellants challenged the District of Columbia Metropolitan Police Department's policy of routinely transmitting to the FBI the fingerprint cards and accompanying identification data of individuals arrested in the District of Columbia. The court held that the District of Columbia's "Duncan Ordinaire" prohibited such a routine practice, either before conviction or after exoneration or both, as long as the FBI continued to redisseminate that data for other than law enforcement purposes, and particularly for purposes of employment and licensing, 520 F.2d at 483-91.

36. 62 AM. JUR. 2d, *Privacy* § 1 (1972).

37. PROSSER, TORTS, § 117 at 802 (4th ed. 1971).

38. 507 F.2d at 1121.

in imposing sentence on the petitioner and in denying parole. Both the court and the parole board are not classified as the general public, and their access to accurate and complete records is not being challenged. Thus, public disclosure under Prosser's subcategories is not the issue.

Congress found that the privacy of an individual is directly affected by the collection, maintenance, use and dissemination of personal information by federal agencies.[39] The Privacy Act of 1974 speaks of the collection of such personal data and the need to prevent such information collected for one purpose from being used for another.[40] This right of privacy involves "the individual's ability to control the flow of information which concerns or describes him."[41]

Criminal records have been expunged on the basis of a violation of the right of privacy.[42] However, such litigation usually involves arrests resulting in acquittal or dismissal, where the right of the individual to have fingerprints and photographs returned, absent a compelling showing of necessity by the government, is found to be a fundamental right of privacy "implicit in the concept of ordered liberty."[43] Expungement is allowed in such cases on the premise that since one is innocent until proven guilty, one not convicted of a crime should not be subjected to the prejudice that confronts one who possesses an arrest record.[44] Thus, a right of privacy is involved where records disseminated are either personal and misused, or which—when public—might lead one reading them to conclusions unfounded or prejudicial to the individual.[45]

The above considerations are clearly not involved in the present case. Here, "appellant does not deny that he was in fact arrested

39. 5 U.S.C. § 552a (1974), *amending* 5 U.S.C. § 552. See § 2(a)(1).

40. 5 U.S.C. § 552a (1974), *amending* 5 U.S.C. § 552. See § 2(b)(2).

41. Miller at 1107. *See* note 1, *supra*.

42. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971).

43. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157, 161 (1972). It is interesting to note that Judge Cardozo, in Palko v. Connecticut, 302 U.S. 319, 325 (1937), used this phrase as an indication of a due process right.

44. For hardship confronting the individual due to prejudice surrounding the mere fact of having an arrest record see Miller, The Closed Door: The Effect of a Criminal Record on Employment with State and Local Public Agencies, introduced as testimony and reproduced in Hearings on H.R. 13315 Before Subcommittee Four of the Committee of the Judiciary, 92d Cong., 2d Sess. (1972) beginning at 259; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY, 75 (1967); Karabian, *Record of Arrest: The Indelible Stain*, 3 PACIFIC L.J. 20 (1972); *see also* note 2, *supra*.

45. These situations would involve Prosser's classifications of intrusion and false light in the public eye. *See* note 36, *supra*.

and convicted as shown by his FBI record."[46] Instead he alleges that a large number of arrests and convictions in his file were invalid and that his apparently long history of crime is not a true reflection of the facts.[47] Since petitioner's major contention does not deal with private information, records reported inaccurately, mistaken reports, dissemination to unauthorized people or reports of arrests resulting in dismissal or acquittal, a right of privacy as conventionally defined does not seem to be directly involved. On the whole, then, analysis in terms of "privacy" considerations is most unsatisfactory.

V. Due Process Considerations

However, there is a constitutional right that Tarlton could possibly have been denied. While it may be stretching logic to assert that in the particular case at hand, appellant's privacy was invaded, he might have a valid reason for redress: a denial of due process. If, as alleged, some of Tarlton's convictions were based on charges under unconstitutionally vague statutes and others were obtained without affording appellant the use of an attorney, his record might clearly be "constitutionally inaccurate." Furthermore, there are procedural rights guaranteed at sentencing and parole hearings since such authorities are required to sentence on an accurate and constitutional criminal record. Therefore, this can be identified as a due process problem.

If Tarlton has been denied his due process before the law, what remedy is available to him? Tarlton is asking for a "retroactive duty of affirmative inquiry" to be placed on the FBI.[48] While the majority does not point to a duty so great as this, it does hold that there is a duty to maintain reasonably accurate or constitutionally accurate files. To place the full burden of this duty on the FBI and the District Court for the District of Columbia is inefficient, impractical and unreasonable.

With means already available to the individual to seek vacation of convictions due to violations of his constitutional rights, it is more expedient and logical for petitioner to follow established procedures in the courts having jurisidiction over the alleged infraction. Since evidence seized in violation of one's constitutional rights can be

46. Brief for Appellant at 19, Tarlton v. Saxbe, 507 F.2d 1116.

47. There were five entries of arrest which petitioner contends did not result in prosecution. However, the court primarily looks to the 12 arrest and conviction entries which Tarlton alleged were obtained in violation of his constitutional rights.

48. 507 F.2d at 1135.

suppressed from use at trial as the fruit of an illegal seizure,[49] the record of an arrest or conviction—obtained unconstitutionally—could be treated similarly and ordered expunged.

Upon presentation of proper proof, the FBI would then have the duty to update its records, expunge what was illegally obtained, and yet not have to judicially interpret the record. If *Tarlton* is an extension of *Menard v. Saxbe,* the logical inference is that in addition to the duty of correcting records on notice of local law enforcement agencies, there would be an additional duty on the FBI to correct constitutionally inaccurate arrest and conviction records on notice from the courts.

An affirmative duty could be placed on the petitioner to go forward in a judicial determination asserting violation of his constitutional rights. Thus, the petitioner would have a remedy to redress his injury while the FBI's duty would be limited simply to the correction of what has been shown to be factually inaccurate.

Of course, to begin this process petitioner must have access to his file. As noted, the Privacy Act of 1974 grants the individual access to his file with certain exceptions.[50]

Other more affirmative duties to be imposed on the FBI might also be needed to guarantee the ordinary citizen's due process of law regarding criminal history files. The following could be established to facilitate the FBI's role as more than a "mere repository" of records but less than a "guarantor" of this accuracy. (1) The FBI might be required to implement computer software to periodically output incomplete reports, with the subsequent task of requesting the disposition of the case from the local law enforcement agencies involved.[51] This would place some affirmative duty on the FBI com-

49. Wong Sun v. United States, 371 U.S. 471 (1963).

50. 5 U.S.C. § 552a (1974), *amending* 5 U.S.C.§ 552. *See* § (d). This is an essential first step since in addition to the possible hardship to the individual, it seems unthinkable that the "right to life, liberty and property" would not encompass a right to see the facts of one's own life that are available for other designated people to see. Furthermore, recent Department of Justice rules and regulations concerning criminal history records require that an individual upon whom information has been collected, be permitted to review any criminal history information maintained about him for the purpose of challenge or correction. 40 Fed. Reg. 22114 *et seq.* (May 20, 1975), 28 C.F.R. § 20.1 *et seq.*, especially § 20.34.

51. Although the new Justice Department regulations place some additional duties on the FBI, correction, accuracy and completeness of information held in the NCIC/CCH will continue to be the responsibility of the contributing agency. Furthermore, although agencies will be required to institute data collection, entry, storage, and systematic audit procedures to minimize the possibility of recording and storing inaccurate information, an FBI spokesman said that the rules do not affect the current practice of disseminating outdated arrest records without disposition for law enforcement purposes. Computerworld, July 11, 1975 at ——. Previously, former Attorney General Katzenbach testified before Subcommittee Four of the Committee on the Judiciary considering H.R. 13315, 92d Cong., 2d Sess. (1972), that

puter center but is justified since the effect of criminal records on the individual is excerbated by the fact that they are available on a nation-wide basis. Furthermore, regular updating and correction of records would not only be beneficial to the individual but would also aid law enforcement agencies since they would then be receiving on request a more accurate and updated report on the subject of their inquiry. (2) Another duty would be to correct and expunge records on the demonstration of court action vacating the conviction or dismissing the arrest because of constitutional irregularities. (3) To implement the above policies, a review board might be set up to process requests for expungement when the individual seeking redress can demonstrate to some degree of certainty the inaccuracy or mistake.[52]

Such a proposed arrangement would initially require additional funds and result in some inconvenience to the administrative workings of the FBI. However, such a procedure could remove unnecessary litigation from the courts by establishing workable guidelines, and aid the FBI's NCIC in running more smoothly and efficiently. Aside from economic and administrative considerations, the fact that there is such a huge and widely disseminated record system in itself would seem to imply a duty to make such a file as accurate as possible.

Such a proposal obviously goes far beyond an interpretation of 28 U.S.C. § 534. However, it is not inconsistent with judicial responsibility or authority to note that in addition to a right of privacy concerning proper dissemination of criminal history files, there is also a due process right of accuracy in the maintenance of such files.

Barbara Pugliese Gorman

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it would be technically possible to achieve the objective of monitoring arrest records with an automatic cancellation or purging program. As to the information already in the FBI computer, he said, "You can put it in and you can take it out, you can add to the disposition of it, you can do a great deal with it." Subcommittee Report at p. 7, *supra*.

52. Presently, the right of challenge is not supported by an arbitration procedure for determining whether the individual or the agency decides to amend or otherwise change the record.