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Criminal Law - Constitutional Law - Those Persons Arrested by Not Convicted of a Crime Have a Constitutional Right to the Return of Their Fingerprints and Photographs

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both men have apparently changed their minds.[38] Dr. Tossi now thinks the spectrograph is "extremely reliable."[39]

The court had before it only the issue of whether or not the voiceprint could be used to show probable cause for an arrest warrant. However, it went further and declared in dictum that

> spectrograms ought to be admissible at least for the purpose of corroborating opinions as to identification by means of ear alone. They ought also to be admissible for the purpose of impeachment.[40]

Thus the Minnesota court has opened the door for the use of voiceprint evidence in criminal trials. New Jersey and California were cautious and did not admit voiceprint evidence. But apparently the trend will be to allow voiceprint evidence. Two more courts have, since *Trimble*, allowed voiceprints to be admitted.[41] Tests conducted since *Cary* and *King* indicate the process is very reliable — the evidence obtained this way should therefore be admissible, and the fact-finder should be allowed to accept or reject that evidence.

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CRIMINAL LAW—CONSTITUTIONAL LAW—THOSE PERSONS ARRESTED BUT NOT CONVICTED OF A CRIME HAVE A CONSTITUTIONAL RIGHT TO THE RETURN OF THEIR FINGERPRINTS AND PHOTOGRAPHS— Petitioner was arrested on a charge of assault and was subsequently fingerprinted and photographed by the Seattle Police Department. After charges were dismissed, petitioner requested

officials when making voice identifications. United States v. Raymond, 337 F. Supp. 641 (1972).

38. Dr. Ladefoged was not convinced of the reliability of the voiceprint process in *Trimble*. However, after reading Dr. Tosi's study, *supra* note 37, Dr. Ladefoged now believes that spectrograms have been established as a reliable method of voice identification, and he testified in favor of spectrograms in United States v. Raymond, 337 F. Supp. 641 (D.D.C. 1972).

39. State *ex rel.* Trimble v. Hedman, 192 N.W.2d 432, 439 (Minn. 1971).

40. *Id.* at 441.

41. United States v. Raymond, 337 F.Supp. 641 (D.D.C. 1972); Worley v. State, 263 So. 2d 613 (Fla. 1972). The circumstances in this case were nearly identical to *Trimble*. Here also a police officer was shot as he responded to an emergency telephone call—this one indicating a policeman in trouble. This call had been recorded, and the defendant was forced to read the statements made by the caller into a tape recorder. Sergeant Ernest Nash of the Michigan State Police Department made spectrograms from these tapes and compared them, identifying the defendant as the person who made the emergency call. Sergeant Nash also made the spectrogram identification in *Trimble*. The court allowed the Government's motion to introduce spectrograms as evidence. In *Worley* voiceprint evidence was allowed to corroborate a policeman's identification of the defendant's voice. The defendant was convicted of telephoning false bomb threats. The court affirmed the conviction.

the chief of police to return her fingerprints and photographs, but the request was refused. The Court of Appeals of Washington, reversing the lower court's decision, *held* that the petitioner had a constitutional right of privacy in her fingerprints and photographs and that she was entitled to their return. The Washington statutes[1] prescribing the method of handling fingerprints and photographs were declared unconstitutional, because they failed to provide for the return of such material upon acquittal when a compelling interest justifying their retention was not shown. *Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971).

Since Louis Brandeis and Samuel Warren authored their historic article on the right of privacy,[2] persons who have been arrested but not convicted have petitioned the courts for the return of their fingerprints and photographs on the grounds that their right of privacy has been violated.[3] In refusing to grant relief, the courts have ruled that the police should be allowed to exercise their discretion in selecting those methods which will most effectively aid them in carrying out their duties of law enforcement.[4] A common theme in these decisions is that the societal interest in public safety far outweighs any individual interest which may be infringed upon.[5]

This general unwillingness on the part of the courts to interfere with police discretion stems not only from the feeling that the police should not be hampered in their functions, but also from the assumption that the confidentiality and secrecy used in the han-

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1. WASH. REV. CODE ANN. §§ 72.50-040 (1959), *as amended*, (Supp. 1971), 72.50.060 (1959), 72.50.100 (1959), 72.50.140 (1969).

2. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

3. *E.g.*, Herschel v. Dyra, 365 F.2d 17 (7th Cir. 1966), *cert. denied*, 385 U.S. 973 (1966); Walker v. Lamb, 254 A.2d 265 (Del. Ch. 1969), *aff'd* 259 A.2d 663 (Del. Supr. 1969); State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); *In re* Molineux, 177 N.Y. 395, 69 N.E. 727 (1904); People *ex rel.* Joyce v. New York, 27 Misc. 658, 59 N.Y.S. 418 (Sup. Ct. 1899); Hodgeman v. Olsen, 86 Wash. 615, 150 P. 1122 (1915).

4. *E.g.*, Herschel v. Dyra, 365 F.2d 17 (7th Cir. 1966), *cert. denied*, 385 U.S. 973 (1966); Walker v. Lamb, 254 A.2d 265 (Del. Ch. 1969), *aff'd* 259 A.2d 663 (Del. Supr. 1969); State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); *In re* Molineux, 177 N.Y. 395, 69 N.E. 727 (1904); People *ex rel.* Joyce v. New York, 27 Misc. 658, 59 N.Y.S. 418 (Sup. Ct. 1899); Hodgeman v. Olsen, 86 Wash. 615, 150 P. 1122 (1915).

5. *E.g.*, McGovern v. Van Riper, 140 N.J. Eq. 341, 54 A.2d 469 (1947). In discussing the state's right to infringe on the privacy of the individual, the court quotes Blackstone:

> Every man when he enters into society, give up part of his natural liberty as the price of so valuable a boon and obliges himself to conform to those laws which the community has thought proper to establish. Otherwise there would be no security to individuals in any of the enjoyments of life.

Id. at 471, *quoting* BLACKSTONE COMMENTARIES 125-26 (9th ed).

> Though most courts which have allowed retention have used Blackstone's reasoning, very few have been specific as to the particular purposes which retention serves. One court, however, has posited two purposes:
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> The responsible superior police officials are thereby furnished with definite and authoritative data of the activities of the department . . . The other is the preservation, for future reference and use, of the data so secured.

Miller v. Gillespie, 196 Mich. 423, 163 N.W. 22 (1917).

dling of these records insures against any misuse.[6] Indeed, where the courts have determined that this confidentiality may be violated, they have been quick to act.[7] In *Itzkovitch v. Whitaker*,[8] the court disallowed the public display of photographs of innocent persons in a "rogue's gallery."[9] Ruling that such a practice is a clear invasion of privacy, the court declared that "[e]veryone who does not violate the law can insist upon being let alone."[10]

Until recently, the courts have had little reason to go beyond *Itzkovitch* in limiting police discretion as to the use of arrest record.[11] But, as abuses within the criminal justice identification system have become widespread,[12] the courts have begun to re-examine their position with respect to the retention of photographs and fingerprints of acquitted individuals. In *United States v. Kalish*,[13] the District Court of Puerto Rico ordered the Attorney General of the United States to destroy the plaintiff's arrest record.[14] The court declared that the plaintiff's right to privacy had been violated by the mere placement of his fingerprints and photographs in a file marked "criminal" in the Department of Justice.[15] In *Menard v. Mitchell*,[16] the District of Columbia Court of Appeals made reference to "serious difficulties" which a person may be subjected to if his arrest record becomes known.[17] When that case was remanded

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6. *E.g.*, State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1964); Miller v. Gillespie, 196 Mich. 423, 163 N.W. 22 (1917); Hodgeman v. Olsen, 86 Wash. 615, 150 P. 1122 (1915).

7. Schulman v. Whitaker, 117 La. 704, 42 So. 227 (1906); Itzkovitch v. Whitaker 115 La. 479, 39 So. 499 (1905); Roesch v. Ferber, 48 N.J. Super. 231, 137 A.2d 61 (1957); Hansson v. Harris, 252 S.W.2d 600 (Tex. Civ. App. 1952).

8. Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905).

9. *Id.* "Rogues galleries" are collections of photographs of persons who the police believe to have participated in criminal activity. These photographs are shown to members of the general public when they are attempting to identify the culprit of a crime.

10. *Id.* at 500.

11. The term "arrest record" as used herein is intended to mean only those records indicating arrests that were not followed by convictions.

12. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY, 75 (1967); W. LAFAVE, ARREST (1965).

13. United States v. Kalish, 271 F. Supp. 968 (D.C.P.R. 1967).

14. In United States v. Kalish, 271 F. Supp. 968 (D.C.P.R. 1967), the plaintiff was arrested when he refused to be sworn into the United States Army. At trial, the plaintiff testified that he had no intention of breaking the laws of the United States and that his actions were based on the advice of his attorney who had been making efforts to have him reclassified.

In arriving at its decision, the court flatly rejected the traditional justification that arrest records must be retained for the common good. The court stated that "[w]hen an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed on the citizen." *Id.* at 970.

15. United States v. Kalish, 271 F. Supp. 968, 970 (D.C.P.R. 1967).

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

17. *Id.* at 490-491.

> Information denominated a record of arrest, if it become known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to the 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 a mere fact of an arrest, even if followed

for trial,[18] the District of Columbia District Court discovered such glaring deficiencies in the Federal Bureau of Investigation identification system[19] that it warned that "[t]hese developments emphasize a pressing need to preserve and to redefine aspects of the right of privacy to insure the basic freedoms guaranteed by this democracy."[20] Though *Kalish* and *Menard* differed as to remedy,[21] both recognized the dangers of allowing unrestricted retention of arrest records.

In the instant case, the court was faced with a series of statutes which specifically allowed police to retain arrest records.[22] To strike down these statutes as an unconstitutional invasion of the right of privacy in one's fingerprints and photographs, the court used the substantive due process argument employed by Mr. Justice Goldberg in his concurring opinion in *Griswold v. Connecticut*.[23] In *Griswold*, the United States Supreme Court declared that a Connecticut statute banning the use of contraceptives was an unconstitutional invasion of the privacy of the marital relationship.[24] Mr. Justice Goldberg pointed out that this right of privacy was fundamental and protected by the due process clause of the Fourteenth Amendment.[25] For the state to infringe upon this funda-

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> 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.

Id.

18. Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971). The District of Columbia Court of Appeals remanded the case for trial to the District of Columbia District Court because the facts presented were inadequate for the Court of Appeals to make a ruling on the cross-motions for summary judgment.

19. *Id.* at 726-27.

20. *Id.* at 727.

21. In Kalish v. United States, 271 F. Supp. 968 (D.C.P.R. 1967), the court ordered that plaintiff's identification record be destroyed. In Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971), the court denied plaintiff's request for expungement but ordered that arrest records not be disseminated to prospective employers. They did, however, allow dissemination to other law enforcement agencies for law enforcement purposes.

22. WASH. REV. CODE ANN. §§ 72.50-040 (1959), *as amended*, (Supp. 1971), 72.50.060 (1959), 72.50.100 (1959), 72.50.140 (1969).

§ 72.50.140 provides:

> In the event that (1) the person is not convicted of any of the charges for which he was arrested for the reason that such charges are not brought against him; or (2) such charges are brought and have been dismissed or the person acquitted; all such records of identification shall be confidential to extent provided for in RCW 72.50.100 except that such facts may be released on order of court where such facts are material to issues in any litigation.

23. Griswold v. Conn., 381 U.S. 479 (1965).

24. *Id.*

25. The right of privacy was first introduced in 1890 by Samuel Warren and Louis Brandeis in an essay in the *Harvard Law Review*. *See* Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). Through a rigorous critical analysis, the authors showed that the doctrines of trespass, nuisance, and property were inadequate to protect against the more refined forms of intrusion by one private person on the solitude

mental right, he argued, it must show a "compelling" justification for its action.[26] Because Connecticut had failed to make such a showing, Mr. Justice Goldberg ruled that the statute could not stand.[27]

In declaring the right of marital privacy to be fundamental, Mr. Justice Goldberg enunciated three tests which judges must use to determine whether or not a right is fundamental:

1. [T]hey must look to the "traditions and [collective] conscience of our people" to determine whether a principle is so rooted [there] . . . as to be ranked as fundamental.
2. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'
3. "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society."[28]

To satisfy the first requirement, the court in the instant case asserted that "the presumption of innocence until proof of guilt beyond a reasonable doubt"[29] is one of our most basic legal canons, and that "[u]nder our system of criminal justice, only a conviction carries legal significance as to a person's involvement in criminal behavior."[30] Secondly, the court pointed out that in both

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of another. They suggested that a new concept of protectible privacy could and should be evolved.

In 1960, Dean Prosser noted that the concept of privacy has developed into four torts:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity which places the plaintiff in a false light in the public eye;
4. Appropriation for the defendant's advantage, of the plaintiff's name or likeness.

The right of privacy which a citizen retains against his government underlies the specific guarantees of the third, fourth and fifth amendments in regard to quartering troops, search and seizure, and self-incrimination. For a discussion of the development of privacy in public law, see Dixon, *The Griswold Penumbra,* 64 MICH. L. REV. 197 (1965).

In elevating the right of privacy to a constitutional level, the United States Supreme Court in Griswold v. Conn., 381 U.S. 479 (1965), used two basic approaches. Mr. Justice Douglas found the right of privacy to be within the "penumbras" of the first eight amendments. Though he concurred with Mr. Justice Douglas' opinion, Mr. Justice Goldberg declared that the right of privacy was a fundamental right "implicit in the concept of ordered liberty," and hence protected under the due process clause of the Fourteenth Amendment. The Court did not attempt to determine the precise source of the right of privacy. This, however, is unimportant in light of the fact that six Justices found such a right to exist, and thereby established it for the first time as an independent constitutional right.

26. In a long series of cases this court has held that where fundamental personal liberties are involved, they may not be abridged by the states simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. Griswold v. Conn., 381 U.S. 479, 497 (1965).
27. *Id.* at 497-98.
28. *Id.* at 493.
29. Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211, 217 (1971).
30. *Id.*

Kalish and *Menard*, this right of privacy in one's fingerprints and photographs was recognized as fundamental.[31] The court met the final test by stating that:

> We have now reached the point where our experience with the requirements of a free society demands the existence of a right of privacy in the fingerprints and photographs of an accused who has been acquitted, to be at least placed in the balance, against the claim of the state for a need for their retention.[32]

Once the court established the fundamental nature of this particular right, it applied the compelling interest test and found the state unable to make such a showing.[33] Thus, the court ruled that the plaintiff was entitled to the return of her fingerprints and photographs.[34]

Furthermore, the court declared that the Washington statutes were unconstitutional because they failed to include a provision calling for the return of fingerprints and photographs upon acquittal when the state failed to show a compelling interest for their retention.[35]

The judicial approach used in the instant case is, of course, as vulnerable to attack as *Griswold* itself. But it is not important here to resurrect these criticisms; it is enough to say that given the long history of transgressions in this area and the concomitant dangers which they have created, this court felt that stern measures were necessary to remedy a problem which had been ignored for too long.

More importantly, one must look to the actual protection afforded by such a ruling. It appears that arrest records, once automatically retained, will now be returned to the victims unless challenged by the state. Undoubtedly, this is a substantial safeguard. But in those cases where the state chooses to make such a challenge, who is to determine whether the state's interest is a "compelling" one? To leave the question solely to the courts would be inequitable for two reasons. First, the courts have no way of determining when the state has asserted a "compelling" interest for retention, because the usefulness of these records in preventing crime

31. *Id.*
32. *Id.*
33. *Id.* at 218. It appears that the state relied solely on the Washington statutes as authority for its power to retain arrest records. In ordering the return of petitioner's fingerprints and photographs because the state failed to show a "compelling" interest for retention, the court failed to specify any criteria for meeting the "compelling" interest test. As is pointed out in the text, there is very little information available which courts can use to make such a determination.
34. *Id.*
35. *Id.*

has never been documented.[36] Second, those most affected by arrest records are often those least likely to pursue costly litigation.[37] In order to protect this area of privacy from further governmental encroachment, legislative action must be taken. Only the legislature, through the use of legislative hearings, can effectively probe into the closed system of criminal identification, and determine the usefulness of arrest records in light of the critical threat to individual privacy which they present. Furthermore, only the legislature can establish a statutory requirement enforceable in all cases.[38] Though the ruling in the instant case is undoubtedly an important step in protecting this sphere of privacy, perhaps its greater significance is that it may serve as a warning light to the legislature indicating that the time for action is at hand.

THOMAS HAMLIN

CONSTITUTIONAL LAW—SCHOOLS AND SCHOOL DISTRICTS—PROHIBITION OF LONG HAIR ABSENT SHOWING OF ACTUAL DISRUPTION VIOLATES UNSPECIFIED NINTH AMENDMENT RIGHTS TO GOVERN ONE'S PERSONAL APPEARANCE.

School authorities suspended the fifteen-year-old petitioner from school attendance based upon his violation of the school dress code.[1] An action was brought by the petitioner and his parents in

36. "It should be noted that usefulness of arrest records remains unproven since the closed system maintained by police impairs the ability to document usefulness." Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. Chi. L. Rev. 850, 855 n.23 (1971).

37. "For most of those 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 arrests, or in eliminating altogether their maintenance in a file associated with the individual's name." Menard v. Mitchell, 430 F.2d 486, 495 n.51 (1971).

38. The statute should include two basic provisions. First, it should require that arrest records be returned to any person arrested for either a misdemeanor or a felony when the proceedings against that person have been dismissed, or when that person has been acquitted, unless the state can show a "compelling" interest for their retention. Second, the statute should list those particular crimes where, based on a legislative investigation of the usefulness of arrest records in preventing crimes, the state is thought to have a "compelling" interest justifying retention of arrest records.

Devising the second provision to such a statute will be an arduous task. But it is precisely because the legislature has the necessary resources to make a comprehensive analysis of this problem, that the decision-making should be left to that body and not to the courts. It is within the special competence of the legislature to study this question, and to make reasoned judgments based on its findings.

1. Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).
The pertinent regulations in effect at the time of Stephen's expulsion provided as follows:

> a. all hair is to be worn clean, neatly trimmed around the ears and back of neck, and no longer than the top of the collar on a regular dress or sport shirt while standing erect. The eyebrows must be visible and no part of the ear can be covered. The hair can be in a block cut.
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> b. The maximum length for side burns shall be the bottom of the ear lobes.

Id. at 1070-71.