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DISCRIMINATORY HIRING PRACTICES DUE TO ARREST RECORDS — PRIVATE REMEDIES

I. INTRODUCTION

The Federal Bureau of Investigation has estimated that in 1969 there were 7½ million arrests made in the United States, exclusive of traffic violations. In a substantial number of cases, the charges against the individual were either dropped or the subsequent trial resulted in an acquittal. Theoretically, such a disposition should resolve the matter as far as the individual is concerned. Indeed, in the Anglo-American legal tradition, we cannot even say that the individual has been vindicated, since in theory he was presumed innocent from the outset. Unfortunately, the realities of life in our society often have little in common with the high ideals of our forefathers and legal theorists. The limited purpose of this Comment is an attempt to bring reality a slight step closer to theory in one important area of daily life.

Present day communications and “modern” police investigatory procedures have combined to produce a situation wherein the arrested individual has a “record” on file in at least one, and probably several law enforcement data centers. In some instances, this record may only indicate that the person was arrested. In other cases, the final disposition may be noted. However, in the latter case, even an exoneration has little, if any, favorable influence on the attitude of the police, the government or the private sector of the community toward this individual. This attitude, which we as a nation take toward anyone who has had...
"police contact," places the individual with a mere arrest record at a tremendous societal disadvantage.

Perhaps the greatest inequity caused by arrest records is discrimination in employment practices. In no other private area are such records used so extensively and with such devastating results. Recent surveys have demonstrated more than amply the widespread use of arrest records in the making of employment decisions. It is interesting to note that while there have been several recent commentaries in this area, none have been directed at potential private remedies which would enable the individual to vindicate his rights in the courts. The theories presented in this Comment are not intended to be exhaustive. Notably, expungement of the record will not be treated because of its general ineffectiveness. Instead, several of the more promising theories have been dealt with in order to provide a practical guide in an effort to bring about the much needed changes in the law.

As a result of the widespread use of arrest records in making employment decisions, it will be presumed, for purposes of this Comment, that there has been such usage and discrimination on that basis. The proof of discrimination will vary in each case, but the arguments advanced in an effort to provide the courts with the necessary tools to void that discrimination will vary only to take into account the nature of the employer.

II. GOVERNMENTAL DISCRIMINATION

As an employer, the federal government has strived to eradicate the more common forms of discrimination. By so doing, it has become


9. See, e.g., Comment, Criminal Records of Arrest and Conviction: Expungement from the General Public Access, 3 Calif. W.L. Rev. 121 (1967); Comment, Guilt by Record, 1 Calif. W.L. Rev. 126 (1965); Note, supra note 8.

It seems to be generally accepted that the problem of discrimination in employment based on arrest records should be the subject of legislative and not judicial action. However, it is this writer's opinion that the problem is far too pressing to await legislative initiative. Legislative action is sorely needed and, if it comes, would be welcomed. However, it is submitted that in the interim those who bear the brunt of this discrimination should not be forced to accept the consequences of legislative abstention.

10. Expungement of an arrest record entails an action brought by the individual to have the record destroyed. Expungement is a statutory remedy provided only in a minority of states. Rubin, The Law of Criminal Correction 637–38 (1963). Generally, these statutes provide for expungement of conviction records, id. at 638, and therefore are not applicable to the type of record discussed in this Comment. Further, this remedy while potentially useful has not proved effective in actual practice. See Booth, The Expungement Myth, 38 Los Angeles B. Bull. 161 (1963). For further discussion of expungement, see Comment, Criminal Records of Arrest and Conviction: Expungement from the General Public Access, 3 Calif. W.L. Rev. 121 (1967).


a leader in creating employment opportunities for minority segments of the society. However, its position on the use of arrest records is unclear. The Civil Service Commission, while only inquiring into past convictions, does ask the job applicant whether charges are pending against him at the time of his application. Furthermore, the Commission’s questionnaire warns the applicant not to give false information upon penalty of job denial or forfeiture, and possible criminal prosecution. Viewing this questionnaire as a whole, it would appear that an arrest record is not a serious impediment to federal employment. However, this may not be the case.

Notwithstanding the foregoing questionnaire, federal employment is conditioned upon an investigation of the applicant for “security” reasons. At the very least, this investigation must consist of a fingerprint check with the F.B.I. and appropriate local law enforcement agencies. Therefore, while the Civil Service Commission’s questionnaire may not reveal an applicant’s arrest record, the subsequent investigation most assuredly would. The use made of this information, ostensibly to determine whether the applicant presents a threat to the national security, is largely within the discretion of the hiring agency. However, under the guidance of Mr. Justice Douglas, recent cases have begun to limit the powers of the government qua employer. These cases and their impact will be discussed in a later section.

While the federal government’s employment practices are open to question, those of the various state and local governments appear to be little better than abusive. Disregarding the various discretionary licensing statutes in the several states, a recent study revealed that approximately fifty per cent of the states and seventy-five per cent of the local governments surveyed began their questioning with respect to the appli-

14. Id.
15. The President has promulgated regulations which provide that federal employment is conditioned upon investigation of the applicant. The investigation must include a check with the F.B.I. and other appropriate agencies. If any information develops indicating that employment may not be “clearly consistent with national security,” a full field investigation must be conducted. Exec. Order No. 10,450, 3 C.F.R. 936 (1953). But see Cole v. Young, 351 U.S. 536 (1956), wherein the Court ruled that the Government must demonstrate a connection between the acts of the employee and the “national security” in order to dismiss an employee.
17. See Scott v. Macy, 349 F.2d 182, 183 (D.C. Cir. 1965), wherein the court found that the subsequent investigation revealed the appellant’s arrest record.
18. However, restrictions have been imposed on such agencies. See Cole v. Young, 351 U.S. 536 (1956); notes 105 to 130 and accompanying text infra.
19. See notes 105 to 110 and accompanying text infra.
20. Such statutes provide for fingerprint checks of applicants and generally concern licensing of physicians, pharmacists, and others, but may also include: public service vehicle operators, CONN. GEN. STAT. REV. § 14-44 (1970); employees of check cashing agencies, N.J. STAT. ANN. § 17:15A-3 (1970); employees of alcoholic beverage manufacturers and wholesalers, N.Y. ALCO. BEV. CONTROL LAW §§ 103(6), 104(9) (McKinney 1970); and private detectives, PA. STAT. ANN. tit. 22, § 14 (Supp. 1971).
cants' "criminal records," and inquired into previous arrests. Several states do not provide for any explanation of the arrests by the applicant; others request additional information. Questions concerning prior arrests would not be asked if the employer did not think them pertinent in evaluating applicants' moral character and job qualifications. Unless it is used to discriminate among applicants, this type of question is without purpose. Accordingly, the mere fact that a particular applicant has an arrest record places him at a disadvantage when compared with an applicant, equal in other respects, but without a record.

With this in mind, it may be appropriate first to discuss an argument that can be advanced against the retention of arrest records by law enforcement agencies. The acceptance of this argument by the courts would prevent both governmental and private discrimination at the same time.

A. The Right of Privacy

It is submitted that a cogent argument may be advanced which would indirectly prevent the type of discrimination with which we are concerned herein, before it has an opportunity to occur. Using the often-discussed right of privacy, the maintenance of an arrest record of an individual who has never been convicted can be prevented or severely curtailed. As with many other legal problems, there are several levels at which the right of privacy argument may be applied. At one level, the actual maintenance and possession of the file by law enforcement agencies may be challenged. On a different level is an attack aimed at the divulgence of the file's contents to prospective employers, governmental or private. Both of these potential avenues of attack will be examined below in order to determine their feasibility. It should be noted, however, that neither of these arguments strike at the problem of job discrimination per se; rather, they operate indirectly to alleviate discrimination by removing the basis for it.

1. The Maintenance of Arrest Records

The maintenance of an arrest record concerning an individual operates to deprive that individual of numerous societal benefits. From a law enforcement point of view, several reasons may be advanced to support
the retention and use of such records. However, when an arrest does not result in a conviction, these reasons become questionable. Basically, the maintenance of arrest records constitutes a situation wherein the benefit to be gained by society — aid to law enforcement officials in their attempt to control crime — must be examined in light of the damage done to the individual. In the situation under consideration, a substantial part of the damage is the serious impediment faced by a large segment of the society in obtaining employment. It may be appropriate, therefore, to attempt to prevent the maintenance of these files completely.

It is clear that certain amendments to the United States Constitution were drafted to protect definitive aspects of what may generally be termed the individual's right of privacy. For example, the third amendment limits the quartering of troops in private homes; the fourth amendment limits the government's search and seizure power; and the fifth amendment grants the privilege not to be forced to incriminate oneself. It is also clear that the ninth amendment recognizes rights, not enumerated in the first eight amendments, which are retained by the people. What is not clear is the extent to which the ninth amendment will be used as a basis for protecting and enlarging the right of privacy. The ninth amendment,

27. Among these reasons are the following: (1) arrest records facilitate ease of apprehension and detection in future crimes; (2) the records are needed by police authorities so that they can keep track of persons who have had police contact; and (3) many of those acquitted are actually guilty, but were released on technicalities, and therefore, are criminals and must be watched. See also Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970).

28. Not only is the individual with an arrest record excluded from a large segment of employment, he is usually one of the first persons brought under suspicion when a crime is committed in his area. Normally, the police carry a book containing names and addresses of persons in their area with arrest and conviction records. Also, in the event of a later conviction, an individual's arrest record is often used in the "presentencing report" submitted to the judge. See N.Y. Code Crim. Proc. § 942-a (McKinney 1958); Administrative Office of the United States Courts, The Presentence Report 11 (1965). See also Menard v. Mitchell, 430 F.2d 486, 490-91 (D.C. Cir. 1970); Note, supra note 8.

29. In 1969, based upon a population of 133,028,000, a total of 5,576,705 arrests were reported. Crime Reports, supra note 1, at 118. It is estimated that for the entire country in 1969 there were 7½ million arrests. Id. at 31. One commentator estimated that there is one new offender in every eight arrests. See Hess & LePoole, supra note 5, at 494. Extrapolating these figures, it becomes apparent that in 1969, approximately 937,500 of the 7½ million had never been arrested previously. In other words, about 937,500 new arrest records are being added to police files each year and accordingly, that number will be added each year to those who will be burdened by the discrimination discussed herein.

30. While the Supreme Court has held that the government cannot use information or evidence obtained from or as the result of an illegal arrest, see, e.g., Davis v. Mississippi, 394 U.S. 721 (1969), some courts have been reluctant in their approach to expungement of records of illegal arrests, even when the arrest was without probable cause, or was used to harass or punish or for other illegal objectives. Cf. Wheeler v. Goodman, 306 F. Supp. 38 (W.D.N.C. 1969), vacated, 401 U.S. 987 (1971).

31. U.S. Const. amend. IX, provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

therefore, becomes an indispensible aspect of any attempt to espouse a privacy doctrine.

Prior to *Griswold v. Connecticut*, the Supreme Court had been given few opportunities to elucidate the meaning of the ninth amendment. In *Griswold*, the Court was faced with a challenge to a Connecticut statute prohibiting the use of contraceptives. After the aiding and abetting convictions of the director and medical director of a birth control clinic were upheld by the Connecticut courts, the Supreme Court granted certiorari, allowing the defendants to assert the rights of their clients. The Court, in an opinion by Mr. Justice Douglas, struck down the statute as violative of the right of marital privacy. Mr. Justice Douglas found this right of privacy to be implicit in the "penumbra" of the first, third, fourth, fifth and ninth amendments. However, he failed to give a detailed and certain interpretation to the ninth amendment at that time.

On the other hand, Mr. Justice Goldberg made a detailed analysis of the ninth amendment in his concurring opinion in *Griswold*. Justice Goldberg read the ninth amendment as signifying that the Bill of Rights was not to be read restrictively. Rather, other rights exist which are "so rooted [in the traditions and conscience of our people] as to be ranked as fundamental." These fundamental rights are preserved by the ninth amendment, and then applied as constitutional principles through the due process clauses of the fifth and fourteenth amendments. Finally, Justice Goldberg concluded that the right of privacy was a fundamental right, and could be invoked in *Griswold*.

With the exception of the two dissents, the various interpretations given the ninth amendment by the Justices in *Griswold* all seemed to recognize the ability to distill a general right of privacy from the Constitution or, at least, to espouse a doctrine which, through the first, third, fourth, fifth and ninth amendments, would have extensive constitutional underpinnings. However, the general right of privacy, presaged in

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33. 381 U.S. 479 (1965).


35. 381 U.S. at 485-86.

36. Id. at 484.

37. While Mr. Justice Douglas did not extensively analyze the ninth amendment in *Griswold*, he did so in the later case of *Osborn v. United States*, 385 U.S. 323 (1966). In *Osborn*, Mr. Justice Douglas construed the ninth amendment as being a rule of construction which allows the derivation of unenumerated rights from the implicit bases of the enumerated rights. 385 U.S. at 352-53. See Kutner, supra note 32.

38. 381 U.S. at 488-93.

39. Id. at 493.

40. Id.

41. Dissenting in *Griswold* were Justices Black and Stewart. 381 U.S. at 507.

42. See Kutner, supra note 32; 15 Catholic U.L. Rev. 126 (1966).
Griswold and viewed by many as the beginning of a much needed constitutional doctrine, was short-lived.

Only two years subsequent to Griswold, the Court, through Mr. Justice Stewart, handed down the decision in Katz v. United States. In Katz, the Court held that the use of electronic eavesdropping devices to intercept the defendants’ telephone conversations in a public telephone booth violated the search and seizure provisions of the fourth amendment. To arrive at this holding, the Court chose to abandon the trespass doctrine in search and seizure cases, and to implement in its stead a determination of whether or not the Government had violated the defendants’ reasonable expectation of privacy. In the words of the Court, “the fourth amendment protects people not places.”

However, in Katz, Mr. Justice Stewart took the opportunity to restate his position on a general right of privacy. He stated for the Court that:

The Fourth Amendment cannot be translated into a general constitutional “right to privacy.” That Amendment protects individual privacy against certain kinds of governmental intrusion. ... But the protection of a person’s general right to privacy ... is ... left largely to the law of the individual States.

As in many areas of constitutional law, it appears as though the first steps taken in espousing the privacy and ninth amendment doctrines have been but erratic gestures. Faced, on the one hand with a need for a new privacy doctrine in Griswold, and, on the other, with the fear of that doctrine swallowing up provisions of the Bill of Rights, the Court chose to back away from the initial probe it had made in Griswold. However, even under Katz, it may remain possible to establish a strong argument against the maintenance of arrest records.

Katz appears to indicate that in order to have an invasion of privacy which rises to a constitutional plane, there must be a breach of an enumerated constitutional provision. Further, Katz teaches that the fourth amendment’s search and seizure provisions are breached only by governmental intrusion upon an individual’s reasonable expectation of privacy. Admittedly, when an individual is arrested there can be no reasonable expectation of privacy since the individual’s rights must yield to public interests. Hence, the original compilation of arrest data does not amount to a constitutional violation. However, it cannot seriously be doubted that the government compiles data when an arrest is made that it could not otherwise obtain: upon arrest, the suspect is compelled to dis-

43. See note 32 supra.
44. See note 41 supra.
46. Id. at 350-53.
47. Id. at 353.
48. Id. at 351, 353.
49. Id. at 351.
50. Id. (emphasis added and footnotes omitted).
51. Id. at 350 nn.4 & 5.
close much information which we may assume would not ordinarily be volunteered by an individual to the government. It is submitted that after the charges have been dropped or the individual acquitted, there is a reasonable expectation of a return to normalcy, and from that point on governmental maintenance of an arrest record constitutes a continuing violation of the individual's privacy. In this way, the maintenance of the record becomes violative of the individual's right to privacy under the fourth and ninth amendments.

This approach seems to have been taken by the United States District Court for the District of Puerto Rico in the case of Kalish v. United States. In Kalish, the defendant had been fingerprinted and photographed following an arrest for violation of a Selective Service regulation. Later, he entered the military service and the charges were dropped. On a motion to order expungement of the arrest records, the court ordered the record expunged, noting the severe detriment to the individual and the lack of public good derived from the maintenance of such records. The court held that the continued maintenance of the record constituted "an unwarranted attack upon his character and reputation and violates his right of privacy: it violates his dignity as a human being."

The Kalish case and other recent decisions have recognized the tremendous impact that criminal arrest records may have upon the individual. Several early cases, intimating that such records lead to no adverse effects, have not been followed. This new awareness of a future detriment to the individual, combined with the slowly evolving concept of privacy and including perhaps the search and seizure requirements of the fourth amendment, has given the individual a strong weapon for halting discriminatory hiring practices before they can begin.

2. Disclosure of Arrest Records — Breach of Confidentiality

Perhaps less drastic than the preceding remedy, at least from a law enforcement point of view, is an individual's remedy for breach of the confidentiality of arrest records. Most statutes authorizing the maintenance of arrest records fall within one of several general categories. At one extreme are the statutes providing for the confidentiality of the record with civil remedies for breach of that confidentiality; while at the other extreme, there are statutes that make arrest records public. Somewhere in-between are the statutes which provide for confidentiality without civil

53. 271 F. Supp. at 969.
54. Id. at 970 (emphasis added).
56. See, e.g., United States v. Kelly, 55 F.2d 67, 70 (2d Cir. 1932).
58. See, e.g., D.C. CODE ENCYCL. ANN. §§ 4-134, 4-135 (1966).
remedy; those which make no statutory provision whatsoever as to arrest records, but do as to conviction records, and those states without any statutory provision at all. None of these statutes have provided the individual with adequate protection, and in general, the "confidential" files have been easily accessible to prospective employers, governmental or private. Because of the widespread abuse of these records, the availability of a private action in the event of their disclosure to unauthorized persons would provide a powerful deterrent compatible with the needs of both law enforcement agencies and the individual.

An examination of the various statutes makes it apparent that they fall within one of two classes: (1) those providing for confidentiality; and (2) those making no provision with respect to confidentiality. For the time being, discussion of the former category will be postponed, and the statutes falling within the latter will be examined more closely.

Typical of a non-confidential statute is the federal enactment which provides for disclosure of conviction and arrest records to certain agencies and "other institutions." At the very least, this statute authorizes the divulgence of any records to other governmental agencies — including potential employer agencies. Such a practice, however, may cause this type of statute to be constitutionally infirm.

Initially, when a suspect is arrested, his rights must be subordinated to those of society, and he must allow the compilation of the material which then becomes his arrest record. However, when the charges are dropped or the individual is acquitted, the law enforcement agencies must have a valid reason for retaining the records. That is, in order to comport with equal protection standards, the statute or practice authorizing the maintenance and retention of arrest records must have a purpose which is at least reasonably related to the differentiation of those with and those without records. Furthermore, while a practice such as this

61. Most states fall within this latter category in that they have no statutory provisions as to confidentiality. See Note, supra note 8.
62. See Hess & LePoole, supra note 5; Comment, Guilt by Record, 1 Calif. W.L. Rev. 126 (1965); Note, supra note 8; 49 Texas L. Rev. 141 (1970).
63. The argument that these records are confidential and are not released to other than authorized officials is sometimes advanced to forestall such a remedy. This, however, does not comport with the facts. See Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970); Comment, Criminal Records of Arrest and Conviction: Expungement from the General Public Access, 3 Calif. W.L. Rev. 121 (1967).
64. This latter group includes those states having no statutory provision since the same arguments would apply to their agency policies.
65. 28 U.S.C. § 534(a)(2) (1970) authorizes dissemination of F.B.I. records to "authorized officials of the Federal Government, the States, cities, and penal and other institutions." (Emphasis added.) The Attorney General has taken the position that release of the records to government officials, government agencies in general, most banks, insurance companies, and railroad police is authorized. 28 C.F.R. § 0.85(b) (1971).
66. 28 C.F.R. § 0.85(b) (1971).
67. See text accompanying notes 51 & 52 supra.
68. See, e.g., Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Yick Wo v. Hopkins, 118 U.S. 356 (1886). While the fifth amendment
may be supported by several reasonable purposes, in actual operation it can not be predicted upon one which is otherwise impermissible. A purpose which conflicts with another constitutional mandate would necessarily be impermissible. In the present context, the use of arrest records by governmental agencies for employment purposes is, as will be shown later, a denial of due process. Therefore, while the retention and use of the records for crime control may be upheld as consonant with the equal protection clause, if in actual operation the data is disclosed to outsiders for use in employment decisions, such use could not be upheld since the objective would be a denial of due process and hence impermissible. Accordingly, the statutes providing for the maintenance of records can withstand an equal protection attack only if they are limited to use in crime control. It becomes incumbent upon a court, therefore, in construing such a statute, to make a determination that the records must be kept confidential and disclosed only for crime control purposes. Thus, those statutes which do not provide for confidentiality must be construed as so providing. Since all of these statutes must be construed as providing for confidentiality or, expressly make such a provision, there is now only one type of statute, as far as the present situation is concerned, while previously there were two. In this single group, each statute, either expressly or by necessary judicial gloss, provides that arrest records must be kept confidential.

For the individual, such a determination without more would be meaningless since these statutes have been constantly abused even when they specifically provide for confidentiality. Accordingly, it is necessary to fashion a remedy whereby the individual's rights may be vindicated. One potential remedy is an action in tort for invasion of privacy. At the outset, it should be noted that such a remedy would not directly prevent disclosure or discrimination. Rather, the threat of a civil action for damages against the disclosing individual would have the effect of deterring disclosure and, thereby, preventing discrimination indirectly.

has no equal protection clause, the Court nonetheless has held that the federal government must comply with equal protection. See Bolling v. Sharpe, 347 U.S. 497 (1954). See Menard v. Mitchell, 430 F.2d 480, 489 n.7 (D.C. Cir. 1970); DEL. CODE ANN. tit. 11, § 8522 (1953) (indicating that the particular chapter should be construed liberally to effectuate prompt identification and apprehension of criminal offenders).


72. See notes 105 to 130 and accompanying text infra.

73. This is not to say that such a purpose is necessarily valid.

74. See note 71 supra.

75. See notes 3 to 8 and accompanying text supra.

76. One added benefit of this type action is that it would inhibit disclosure to both governmental and private employers, since the action is against the official divulging the file and would deter all divulgencies by him. As will be seen later (text accompanying notes 143 to 159 infra), the remedies for private discrimination are, at this time, practically nonexistent.

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The development of the law of privacy as a tort has its historical origins in a famous article written in 1890 by Samuel D. Warren and Louis D. Brandeis. There, the authors reviewed several earlier cases and concluded that the results reached in those cases were premised upon the principle of individual privacy — the right to be left alone. Thereafter, this privacy rationale was slowly adopted by the courts until there evolved four distinct subclassifications of the tort of invasion of privacy. One of these subclassifications is the public disclosure of private facts.

Generally, a tort action for public disclosure of private facts must meet two requirements. First, the disclosure must concern “private” facts. The type of facts that are considered private, however, is not entirely clear. For instance, it is generally agreed that facts which constitute public record are not “private” facts. Conversely, it has been held that medical records, medical facts, indebtedness and facts of this nature are “private.” Arrest records, as examined previously, must be kept confidential. As such, it is submitted that they fall within the class of protectable “private” facts.

The second general requirement of the action is that the disclosure itself must be public in nature. Thus, it has been held that there is no invasion of privacy where the defendant informs the plaintiff’s employer that the plaintiff is delinquent in a debt, or where a bank privately discloses the plaintiff’s financial status. Presumably, the basis for the public disclosure requirement is that the tort protects the plaintiff’s privacy and there is no invasion of that privacy without general publicity. However, any rigid doctrinaire formula mechanically applied breeds only con-
tempt for the legal system. The true basis for this tort, as for any tort, is the damage done to the individual. In the present context, the damage done is real and substantial. Disclosure of arrest records to prospective employers can and does result in the loss of employment opportunities for the individual. 90 Basically, it becomes a matter of degree, and while the extent of the disclosure may be relevant in determining damages, it should not preclude recovery entirely. 91 In fact, several cases have recognized that the amount of publicity is not the important question; rather, the potential for harm involved in the disclosure is considered to be the yardstick.

These cases have not upheld the distinction between general public disclosure of private facts and disclosure to only a few persons. For instance, in Simonsen v. Swenson, 92 the court noted that disclosure by a physician to a hotel owner that a guest at the hotel had a "highly contagious disease" constituted an invasion of privacy unless the doctor could show sufficient legal justification. 93 In a case more closely analogous to the problem presently under discussion, the court held that divulgance to an employer that one of his employee's owed the defendant a debt and would not pay constituted an invasion of privacy. 94 In that case, the court implicitly rejected the public disclosure requirement and the rationale behind it, noting that the plaintiff had been damaged irrespective of the lack of general publicity. 95 In Munzer v. Blaisdell, 96 the defendant, a hospital superintendent, disclosed the plaintiff's medical records. In that case, as in the present situation, a state statute provided for the confidentiality of such records, but did not provide for a private remedy. 97 The court found that the plaintiff had stated a cause of action, holding:

[W]here a . . . duty is imposed by statute, a breach of that duty will give rise to a cause of action for damages . . . and . . . if the statute itself does not provide a remedy, the common law will furnish it. 98

90. See note 8 supra.
91. In a somewhat related subclass of invasion of privacy — intrusion upon seclusion or into private affairs — the extent of publicity is of no consequence. Thus, the defendant was found liable for prying into the status of plaintiff's bank account in Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936). In MacDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939), the defendant was found to have committed this tort by listening to the plaintiff's conversations via a hidden microphone. See also LaCrone v. Ohio Bell Tel. Co., 114 Ohio App. 299, 182 N.E.2d 15 (1961); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Frey v. Dixon, 141 N.J. Eq. 481, 58 A.2d 86 (1948). These cases amply illustrate that the plaintiff's privacy may be invaded despite the lack of widespread publicity.
92. 104 Neb. 224, 177 N.W. 831 (1920).
93. In Simonsen, the physician was able to show sufficient legal reason to invade the patient's privacy.
95. 155 So. 2d at 914.
97. Id. at 774, 49 N.Y.S.2d at 916.
98. Id. at 775, 49 N.Y.S.2d at 917 (emphasis added). It should be noted that it is not unusual to find courts taking a position similar to the one taken in the Munzer case. For instance, many negligence cases are proved by showing the breach of a
In *State ex rel. Mavity v. Tyndall*, the court was asked to expunge the arrest records of an individual who had been acquitted. Pursuant to statutory authorization, the records were maintained to facilitate crime control and suspect identification. While the court upheld the constitutionality of the statute, it stated that any use of the record not consonant with the statute—specifically, posting of photographs in a "rogues' gallery"—would constitute an actionable invasion of privacy.

Lastly, in *McGovern v. Van Riper*, the court held that the right of privacy is a natural law concept protected by the state constitution. The court concluded that at least prior to any conviction, arrest records could not be disseminated or disclosed unless the individual became a fugitive from justice. Such dissemination was held to serve no useful public need, and to constitute an invasion of privacy which could be redressed by the court.

These cases make it clear that the wrong to be redressed is the invasion of the plaintiff's privacy. Such a wrong cannot be premised upon the inflexible application of legal dogma. The true basis for the relief should be the unauthorized disclosure, taking into account the potential for damage created by that disclosure. In this way, if the extent of the disclosure is pertinent to the damage sustained, it may be considered in assessing the amount of damages recoverable. However, a plaintiff should not be denied all recovery solely because the disclosure was not sufficiently public.

In the instant situation, disclosure of arrest records by law enforcement agencies in contravention of either an express or a necessarily implied confidentiality provision constitutes an invasion of privacy which is an actionable tort. In this setting, such a formulation is a logical expansion of the privacy doctrine, and is necessary for the vindication of substantial individual rights. This cause of action would present a valuable deterrent to disclosure and thereby aid in halting discrimination based upon arrest records.

**B. Due Process**

Very early in this country's legal history, a distinction was made between the relationship of the Constitution to the government *qua* government and the government *qua* employer. It was this distinction which

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led to the often quoted statement by Mr. Justice Holmes that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."105 This distinction between the government in its governmental interests and the government in its proprietary interests gave rise to the so-called "right-privilege" distinction in public employment.106 This distinction has had an effect on public employment that is difficult to imagine. Repeatedly, courts have dismissed complaints by public employees who had been summarily dismissed for any number of reasons.107

It was only recently that the tide turned, hastening the demise in importance and consequence of the "right-privilege" concept.108 This downfall, due in large part to Mr. Justice Douglas' incessant attacks,109 had led Mr. Justice Jackson to conclude that:

The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally.110

Consonant with this trend has been the courts' growing realization that the government is bound by the Constitution whether it acts in a governmental or proprietary capacity.111 One constitutional mandate which the courts have been expanding is the due process clause of the fifth and fourteenth amendments.

In its early stages, the notion that the government must conform to due process requirements in its capacity as an employer was rarely given

106. See, e.g., Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951). Basically, the phrase "right-privilege distinction" summarizes the proposition that the government is not bound by the Constitution when it acts in proprietary matters. Rather, it is free of all constitutional restraints and may act as any other private entity. To the employee, this has meant that he may be hired and fired at the whim and will of the government, without any constitutional protection.
111. See cases cited in notes 113 to 120 infra.
However, the more recent cases have not been reluctant to do so, and have indicated that certain aspects of procedural due process must be met before the government may discharge an employee. At present, these requirements include at least: (1) notice of the discharge and the reasons therefore; (2) provision for some means by which the employee may answer the charges (not necessarily a full scale hearing in every case); (3) ample time within which to answer; and, (4) a reasonable relation between the nature of the charges and the ability of the employee to perform his duties. Finally, while most of these cases have involved the discharge of employees, there are cases which have applied these principles to prospective employees as well.

In the case of *Scott v. Macy*, the court allowed an appeal by a petitioner who had been denied employment by the United States Civil Service Commission because of unspecified "immoral" conduct. The court stated that even though the appellant was a mere applicant, "he is not without constitutional protection." It was held that without more specificity, the charge of "immoral" conduct was not sufficient to justify exclusion in light of the due process clause. Furthermore, the court pointed out that specificity alone would not necessarily rectify the constitutional infirmity of the practice since due process required that the Commission show a reasonable relation between the petitioner's conduct and his occupational competence.

The *Scott* case is not alone in extending the due process requirements to applicants for employment. In *McConnell v. Anderson*, the court held that the fourteenth amendment due process clause prohibits a state university from refusing to hire an otherwise qualified librarian solely on the basis of the applicant's homosexuality.
not find, and the university could not show, that homosexuality adversely affected the applicant's occupational ability. In McConnell, as in Scott, the court again required the government to show a reasonable relationship between the job and the reason for disqualification in order to meet the due process requirements.

These cases extend constitutional protection to persons denied governmental employment, as well as to those wrongfully dismissed from employment. In so doing, they are in line with the recent trend of expanding the constitutional restraints on the government qua employer, and can be expected to be followed. All that remains is to apply these principles to an individual who is excluded from public employment because of an arrest record.

Assuming that the other procedural safeguards have been complied with, the key determination turns upon the applicant's occupational ability and an arrest record's relation thereto. In the great majority of cases, it would not be reasonable to infer that a mere arrest is indicative of the applicant's capabilities, since in the Anglo-American tradition we presume a man innocent of a crime until proved guilty. It might be said that the presumption of innocence applies only in criminal cases because of the gravity of the proceedings. However, it is difficult to demonstrate why in a criminal proceeding a presumption as to guilt cannot arise simply because of an arrest, yet in an agency proceeding such an inference would be permissible. In fact, it may be that any inference drawn from an arrest record violates due process. Therefore, any inference with respect to the applicant's competence which is derived from an arrest record and used as the basis for the denial of governmental employment would violate the due process clause of either the fifth or fourteenth amendment.

It is submitted that a case by case analysis, rather than a strictly doctrinal approach, should be adopted by the courts in this delicate area. In each case, the court must decide, on the basis of all the facts presented, whether the agency acted reasonably and without arbitrariness in reaching its conclusion to deny employment.

C. Civil Rights Act of 1871

The Civil Rights Act of 1871 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to

128. Id. at 814.
the person injured in an action at law, suit in equity, or other proper proceeding for redress.\textsuperscript{131}

Remedies arising under this Act are limited to deprivations by states or territories or their agents of rights, privileges, or immunities secured by the United States Constitution and federal laws. As such, this section would not be pertinent to discrimination on the federal level.

Although they are phrased broadly, in many instances, the Civil Rights Acts have been limited by the doctrine of immunity. Legislators have been held immune from suit under the Act,\textsuperscript{132} as have judges.\textsuperscript{133} However, at the administrative level the defense of immunity has not been so successful.

In cases where the defense of immunity was asserted by administrative officials, the courts have distinguished two situations. When the administrative official has been following a judicial or legislative mandate, valid on its face, he apparently is clothed with judicial immunity.\textsuperscript{134} However, when the official is acting pursuant to an unconstitutional statute or custom, the defense of immunity does not apply.\textsuperscript{135} In the present context, a suit against an administrative official for his implementation of a state practice or custom of discrimination in employment based upon arrest records, would appear to have little trouble with the immunity defense; such practice is unconstitutional as violative of the due process clause of the fourteenth amendment.

Recent court decisions have increased the utility of section 1983. In \textit{Monroe v. Pape},\textsuperscript{136} the Supreme Court held that actions by police officers clearly in violation of state law were within the purview of that section, notwithstanding the “under color of” state law requirement.\textsuperscript{137} Subsequently, other cases have indicated that failure to exhaust state remedies does not bar a federal action pursuant to section 1983.\textsuperscript{138} An action under this section is made out when the plaintiff shows that the defendant acted “under color of” state law to deprive him of “any rights, privileges or immunities secured by the Constitution and laws.”\textsuperscript{139}

In the present context, an action would lie against an administrative official applying discriminatory policy.\textsuperscript{140} Since government employment

\begin{thebibliography}{10}
\bibitem{133} See, e.g., Francis \textit{v. Crafts}, 203 F.2d 809 (1st Cir. 1953).
\bibitem{134} See, e.g., Dunn \textit{v. Gazzola}, 216 F.2d 709 (1st Cir. 1954); Francis \textit{v. Lyman}, 216 F.2d 583 (1st Cir. 1954).
\bibitem{136} 365 U.S. 167 (1961).
\bibitem{137} Id. at 183-87.
\end{thebibliography}
is involved, and the official is a government employee, he would be acting “under color of” state law in refusing to hire an individual with an arrest record. Such a refusal is in violation of due process, and the practice of releasing arrest records to employers may violate equal protection. Therefore, the individual denied employment would be deprived of rights secured by the Constitution. Furthermore, it should be noted that this potential action against the responsible officials may very well have the effect of deterring future abuses by punishing the person implementing the discriminatory practice.

III. THE PRIVATE SECTOR

As has been previously discussed, the impact of an arrest record on an individual’s chances for public employment is great. However, in many ways the practices of private employers are more blatantly discriminatory. Often, the mere presence of an arrest record completely excludes an individual from employment. One survey of New York employment agencies indicated that seventy-five per cent refuse to refer an individual with an arrest record, regardless of the disposition of the case. In effect, an arrest record is treated as a conviction record by private employers. The overwhelming indication is that it is almost impossible for a person with an arrest record to obtain a position for which he is qualified, and not much easier for him to find employment requiring a lower level of skill. This problem is greatly compounded by an almost total lack of private remedies available to the individual. In fact, except for an action against the law enforcement official for disclosure (and the resultant deterrence of future disclosures), there does not appear to be any single general remedy. There is, however, a remedy which may be useful to a large segment of the population with arrest records — an action brought under the Civil Rights Act of 1964.

141. See text accompanying notes 105 to 130 supra.
142. See text accompanying notes 68 to 74 supra.
143. See notes 11 to 24 and accompanying text supra.
145. See Schwartz & Skolnick, supra note 8.
146. See notes 144 & 145 supra. See also American Management Ass’n Book of Employment Forms 167-274 (1967); California Assembly Interim Comm. on Criminal Procedure, 1959-61 Report 57 (1961); Report of the Comm. to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia (1967); Hess & LePoole, supra note 5.
147. See notes 57 to 104 and accompanying text supra.
148. Blacks make up approximately eleven per cent of the total United States population. U.S. Bureau of the Census, Statistical Abstract of the United States: 1970, at 23 (91st ed.). In an area encompassing 133,028,000 persons, a total of 5,576,705 arrests were reported in 1969. Of that total, blacks accounted for 1,558,740, or 28 per cent, while whites constituted 3,842,895, or 68.9 per cent. Reduced further, blacks accounted for 55.7 per cent of violent crime arrests and 33.5 per cent of the property crime arrests. Crime Reports, supra note 1, at 118 (1969).
(a) It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compen-
In *Gregory v. Litton Systems, Inc.*, the United States District Court for the Central District of California held that an objectively neutral employment practice which discriminated against blacks, and which was not supported by a showing of "business necessity," violated Title VII of the Civil Rights Act of 1964, irrespective of the presence or absence of an intent to discriminate. The case is interesting and pertinent here because the neutral practice was the disqualification from employment of anyone who had been arrested on a "number of occasions." The court noted that while Negroes comprise only eleven per cent of the population, they account for twenty-seven per cent of reported arrests with forty-five per cent of those arrests characterized as "suspicious." In enjoining Litton Systems, the court found the defendant's policy violative of Title VII because it has the foreseeable effect of denying black applicants an equal opportunity for employment. It is unlawful even if it appears, on its face, to be racially neutral, ... [G]ood faith in the ... application of the policy is not a defense.

While decided in the midst of a conflict among the circuit courts as to the legality of so-called "neutral" practices, the *Gregory* case stands for the position that irrespective of the practice's neutrality, it is illegal if it does in fact discriminate. This position is similar to that taken by the United States Supreme Court in *Gaston County v. United States*, striking down the use of voter literacy tests as constituting a subtle form of discrimination against blacks. Ostensibly "neutral," the policy was in fact discriminatory since blacks had traditionally been denied educational opportunity and, therefore, proportionally fewer were able to pass the literacy test.

The dispute as to "neutral" policies in racial discrimination cases has finally been put to rest by the Supreme Court in *Griggs v. Duke Power*
Co. In *Griggs*, the Court held that the neutral practice of requiring a high school education or the passing of a general intelligence test as a condition to employment in or transfer to jobs was invalid under Title VII of the Civil Rights Act of 1964. The practice was held invalid because: (1) while it was applied uniformly to whites and blacks alike, it operated to exclude blacks at a higher rate than whites; (2) the practice was not shown to be significantly related to job performance; and (3) the practice substantially carried on the previous policy of giving preference to whites. This last reason, however, was not relied upon heavily since the Court accepted the lower court's determination that there was, in fact, no motive or intent to discriminate. The Court stated that "Congress directed . . . the Act to the consequences of employment practices, not simply the motivation." As *Griggs* amply illustrates, the district court in *Gregory* was correct in invalidating the company's policy of excluding persons with multiple arrest records, since the policy acted to exclude blacks at a higher rate than whites, and there was no showing, by the company, that the practice was significantly related to job performance. With the backing of the *Griggs* case, *Gregory* becomes an invaluable precedent in invalidating the neutral practice of private job disqualification because of arrest records.

IV. Conclusion

The imposition placed upon many members of society by the maintenance and retention of arrest records is overwhelming. While the rights of the individual must yield to the interests of society at the time of arrest, it is difficult to justify his continued hardship on the same basis. In their peculiarly characteristic lethargy, the legislatures, both state and federal, either have taken no action, or have given insufficient protection to the privacy and dignity of their citizens. It is, therefore, the position of this Comment that it must become a task for the courts to rectify the problem. Furthermore, a substantial benefit is derived from allowing private remedies in areas such as this because of their deterrent value. Surely, an administrative official would be more hesitant to discriminate knowing that any resultant damages will come out of his own pocket. With this in mind, several of the more attractive available alternatives have been presented; it is hoped for the benefit of the courts as well as for the benefit of the individual litigant.

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156. Id. at 436.
157. Id. at 426.
158. Id. at 432.
159. Id.
160. See notes 57 to 62 supra.