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Privacy at Your Fingertips — The Right of an Acquitted To Retrieve Fingerprint and Photograph Records

The petitioner was arrested and charged with the crime of assault and battery. She was photographed and fingerprinted by the Seattle Police Department, and those photographs and fingerprints were placed in the department files. Following the dismissal of charges against her at trial, she requested the return of the photographs, their negatives, and the fingerprints. The acting chief of police refused to return these items. After this refusal the petitioner sought a writ of mandate directing the acting chief of police to return all the photographs, negatives, and fingerprints. Although no basis was given for either the taking or the retention of the fingerprints and photographs, the trial court refused to issue the writ and held that she had no right to their return even though she had been acquitted. *Held, reversed*: When one is acquitted of a criminal charge, he has a fundamental right to the return of the fingerprints and photographs taken incident to investigation of the crime, and this right cannot be curtailed absent the showing of a compelling interest in the retention of such fingerprints and photographs. *Eddy v. Moore*, 487 P.2d 211 (Wash. Ct. App. 1971).

I. THE RETENTION OF IDENTIFICATION RECORDS

Although the right of arresting authorities to fingerprint and photograph an arrestee has been well established, whether the law enforcement agencies may thereafter retain fingerprint records has not been clearly resolved.¹ In those cases in which the arrestee has been tried and convicted, retention of

¹ A large body of statutory and case law has developed regarding both the fingerprinting and the photographing of arrestees. For example, in all but three states some reference to fingerprints or fingerprinting may be found in statutes. These three states are Colorado, South Carolina, and Tennessee. A. MOENSSENS, *FINGERPRINTS AND THE LAW* 39 (1969). As for case law, it has become well established that the police have the right to take fingerprints and photographs of an accused before trial. *See, e.g.*, *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932); *Shaffer v. United States*, 24 App. D.C. 417, *cert. denied*, 196 U.S. 639 (1904); *Downs v. Swann*, 111 Md. 53, 73 A. 653 (1909); *Howard v. State*, 453 S.W.2d 150 (Tex. Crim. App. 1970).

In *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932), which dealt with the so-called common-law right of arresting authorities to fingerprint an arrestee, a federal district court directed a United States attorney to return a defendant's fingerprint records. The court so ordered, stating that neither state nor federal statutes authorized the taking of fingerprints and that such action subjected the arrestee to unnecessary indignity. The circuit court's opinion, reversing the lower court decision, stated that "as a physical invasion it [fingerprinting] amounts to almost nothing and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit." *Id.* at 70. *Kelly* is persuasive authority for the proposition that the right to gather such information may be extended to cover misdemeanants unless a statute expressly provides to the contrary. A. MOENSSENS, *supra*, at 43.

The New Jersey and Texas courts have specifically held that such authority exists. *Bartletta v. McFeeley*, 107 N.J. Eq. 141, 152 A. 17, 18 (Ch. 1930), *aff'd per curiam*, 109 N.J. Eq. 241, 156 A. 658 (Ct. Err. & App. 1931): "In the performance of this duty [of preventing crime, apprehending criminals, and gathering evidence], they [the police] may use any apt and reasonable means which do not invade the rights of the accused" *Owensby v. Morris*, 79 S.W.2d 934, 935 (Tex. Civ. App.—Fort Worth 1935): "[W]e hold that a peace officer who has good cause to believe and does believe, that a person is then compounding a crime, for which the officer will be under a duty to procure his arrest, may detain him, take his fingerprints, have him photographed and otherwise detain him, for the protection of society"

fingerprint records has invariably been found to be within the state's authority.² But when the arrestee has been tried and acquitted this issue has not been settled since the arrestee may claim that fingerprinting is an unlawful invasion of privacy.

With the decision in *Griswold v. Connecticut*,³ the right to be free from governmental intrusion was under some circumstances recognized by the United States Supreme Court as a constitutional guarantee. The right was said to emanate from the first amendment's protection of freedom of association, the third amendment's prohibition against the quartering of soldiers, the fourth amendment's guarantee against unreasonable searches and seizures, the fifth amendment's protection of the privilege against self-incrimination, and the ninth amendment's reservation of additional, unspecified rights to the people.⁴ Thus, this "zone of privacy" stems in part from fundamental constitutional guarantees.⁵

Pre-*Griswold* cases had held that the retention of the fingerprints of an acquitted person was not a violation of the right of privacy, and had stated that the right is limited in such cases by the reasonable demands of society for the collective health, safety, and welfare of the entire citizenry.⁶ Thus, these cases appear to have turned on a balancing of the citizen's freedom from governmental intrusion with the police powers of the state. But such a balancing test would appear to be inapplicable today since the term "balancing" would normally indicate a simple weighing of the individual's right against society's. Instead, when a "fundamental right" is involved, the individual interest is presumptively of greater weight than the societal interest.⁷ It is clear that in order to justify the regulation by the state of such a fundamental right, the state must show a compelling need.⁸

On the federal level the question of whether an acquitted person's right of privacy compels the return of identification records taken after his arrest seems to have been resolved on the grounds of reasonableness. That is, the federal

² See, e.g., *Hodgeman v. Olsen*, 83 Wash. 615, 150 P. 1122 (1915). See also A. MOENSSENS, *supra* note 1, at 89.

³ 381 U.S. 479 (1965). "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance." *Id.* at 484. Justice Douglas referred to a "zone of privacy created by several constitutional guarantees." *Id.* The Douglas formulation of a "right to privacy" suggests a potentially wide field for application of the concept of "emanations and penumbras." This was the first time that a "constitutional right of privacy" had been given explicit recognition as an independent doctrine. M. SLOUGH, *PRIVACY, FREEDOM, AND RESPONSIBILITY* 59 (1969).

⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁵ *Id.* at 485. The term "fundamental" implies that such rights are applicable to the states by way of the due process clause of the fourteenth amendment. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). Furthermore, the term suggests that the traditional test of compliance with the due process clause, a test of reasonableness, is inapplicable to such rights. "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 relationships to the effectuation of a proper state purpose." 381 U.S. at 497, citing *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (Goldberg, J., concurring). Does the fact that the right of privacy is based upon emanations from fundamental rights dictate that the right of privacy also be considered fundamental? The opinion in *Griswold* seems to treat the right of privacy as fundamental without considering this question.

⁶ See, e.g., *Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946).

⁷ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (concurring opinion); *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942).

⁸ *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

courts appear to have applied a balancing test in those cases in which the acquitted's right of privacy has been vindicated.⁹ In one recent federal case¹⁰ the court posed the question of whether "a citizen with a *criminal* identification file [should] be haunted by fingerprints labelled 'criminal' when he has no charges pending against him."¹¹ The court determined that the retention of an acquitted's records was a violation of his right to privacy. This decision employed the reasoning that when an accused is acquitted of the crime, or when he is discharged without conviction, the retention of criminal identification records serves no public interest, although it imposes a burden upon the citizen. Even more recently, a federal court has held that the mere fact that the plaintiff had been arrested did not justify the retention of his fingerprints and record of his detention in criminal identification files.¹² Thus, while the federal courts have determined that an acquitted is entitled to the return of his identification records, they have not reached that conclusion through the explicit application of a compelling interest test.

On the state level, two well-defined lines of cases have developed. One adopts the principle that the individual interest in privacy, whether a right or not, is limited by the reasonable interest of society in the retention of such records.¹³ The other holds that the preservation of these records constitutes an unwarranted attack upon character and reputation and violates the citizen's right of privacy, as well as his dignity as a human being.¹⁴ The New Jersey courts¹⁵ have adopted the first approach. Their reasoning has been that, because of the state's concern for the safety of its people, private life ceases to be private when one has been indicted.¹⁶ The rationale for the retention of an acquitted's identification records is that, should the acquitted ever be subsequently arrested, he would then be more conveniently identified. Although both federal and some state authorities seem to apply a similar test (one which demands the demonstration of a rational basis), contravening results have been reached by these two bodies.¹⁷ It should also be noted that the weight of

⁹ Judge Augustus Hand noted that United States attorneys and marshals are instructed by the United States Attorney not to make public photographs or fingerprints prior to trial and are required to destroy all such records after acquittal or when a prisoner is discharged without conviction. See *United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932). But see *Stevenson v. United States*, 380 F.2d 590, 594 (D.C. Cir. 1967), in which it is noted that under the *United States Marshal's Manual*, fingerprints are not to be returned to a defendant, whether or not he is acquitted of a charge.

¹⁰ *United States v. Kalish*, 271 F. Supp. 968 (D.P.R. 1967).

¹¹ *Id.* at 970.

¹² *Menard v. Mitchell*, 430 F.2d 486 (D.C. Cir. 1970).

¹³ See Annot., 14 A.L.R.2d 750, 770 (1950).

¹⁴ See, e.g., *Reed v. Harris*, 348 Mo. 426, 153 S.W.2d 834 (1941); *Itzkovitch v. Whitaker*, 115 La. 628, 39 So. 499 (1905), *aff'd*, 117 La. 708, 42 So. 228 (1906).

¹⁵ See, e.g., *McGovern v. Van Riper*, 140 N.J. Eq. 341, 54 A.2d 469 (Ch. 1947). The court said: "[C]hanging conditions necessarily impose a greater demand upon that reserve element of sovereignty called the police power, for such *reasonable* supervision and regulation as may be essential for the common welfare." *Id.* at 471 (emphasis added).

¹⁶ It should be pointed out that perhaps a distinction exists between merely being arrested and being both arrested *and* indicted when referring to the return of fingerprint records.

¹⁷ Texas appellate courts take the position that identification records of an individual, against whom no complaint was filed, do not have to be destroyed or expunged, and that failure to do so does not constitute an invasion of privacy. Justification for such a conclusion has been grounded on the idea that this is an administrative procedure of the police to which an individual must at times be subjected for the sake of the common good. *Hansson*

state authority appears to favor the public interest over the private when the retention of an acquitted's identification records is at issue.¹⁸

The contrary line of state authority is exemplified by a surprisingly early Louisiana case.¹⁹ In that case the court granted a request for the return of identification records on the ground that no public good could be served by exhibiting the picture of an honest man. The case is perhaps too early to have dealt with the question in terms of any test other than reasonability. Nevertheless, it illustrates that the problem has not traditionally been approached as one involving a fundamental constitutional right. Despite the variation in results, all the cases appear to deal uniformly with the problem by employing the balancing of the private and public interests in light of the circumstances of each particular situation.

II. EDDY V. MOORE

In *Eddy v. Moore*²⁰ the Washington Court of Appeals recognized that an acquitted has a fundamental right of privacy which includes the right to the return of his fingerprints and photographs following acquittal. In so holding the court adopted a course in distinct contrast to the dominant state authority which has evolved regarding the subject. Furthermore, the court has apparently gone beyond the reasoning of the federal cases which have dealt with the question, as well as the reasoning of the minority view among the states.

The court traced the historical development of the general rule allowing identification records of arrested persons to be retained by the police in their discretion for the protection of society. However, the court frequently mentioned exceptions to the general rule as enunciated by both writers²¹ and legal precedent.²² In dicta the court expounded at length on the right of privacy, and in closing, that discussion led to a formulation of the issue of the case: whether an acquitted, absent a showing of compelling interest by the state, has the right to the return of fingerprint records on the basis of the fundamental right of privacy.

The court pointed out the direct correlation between the loss of individual privacy and the retention of arrest records by stating that one who has been arrested and then acquitted has an "undeniably greater visibility to the police than other persons."²³ However, the court dispelled any implication that the

v. Harris, 252 S.W.2d 600 (Tex. Civ. App.—Austin 1952), *error ref. n.r.e.*; Owensby v. Morris, 79 S.W.2d 934 (Tex. Civ. App.—Fort Worth 1935).

¹⁸ Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962); Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); McGovern v. Van Riper, 140 N.J. Eq. 341, 54 A.2d 469 (Ch. 1947); Bartletta v. McFeeley, 107 N.J. Eq. 141, 152 A. 17 (Ch. 1930); Hansson v. Harris, 252 S.W.2d 600 (Tex. Civ. App.—Austin 1952), *error ref. n.r.e.*

¹⁹ Itzkovitch v. Whitaker, 115 La. 628, 39 So. 499 (1905), *aff'd*, 117 La. 708, 42 So. 228 (1906). *See also* Annot., 138 A.L.R. 22, 66 (1942); Annot., 83 A.L.R. 130 (1933).

²⁰ 487 P.2d 211 (Wash. Ct. App. 1971).

²¹ Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²² Itzkovitch v. Whitaker, 115 La. 628, 39 So. 499 (1905), *aff'd*, 117 La. 708, 42 So. 228 (1906); Hodgeman v. Olsen, 83 Wash. 615, 150 P. 1122 (1915).

²³ 487 P.2d at 216. Not only will the arrestee be subject to greater visibility to the police, but also to a private sector of life (*i.e.*, potential employers). Reports indicate that there is evidence that many employers make improper use of arrest records, thus making

decision was an absolute bar to any retention by emphatically stating that the principle enunciated in the case applied only when there was no compelling interest for retaining such records. Thus, the departure of *Eddy* from all of the earlier authority on this question lies in the fact that an acquitted person's interest in the return of his identification records is characterized as a fundamental right, and that interest cannot be subordinated to the interest of the state in retaining the records merely by showing some rational basis for their retention.

The court did not believe that the imposition of the "compelling showing of necessity" standard imposed any undue burden on the state. As analagous authority for the application of this standard, the court compared the present situation with the stringent requirements which a law enforcement official must meet to justify the intrusion into a man's home.²⁴ In both situations the interest in the individual right of privacy is presumptively greater.²⁵ In light of the state's failure to rebut such a presumption, it followed that Mrs. Eddy should be allowed to retrieve her identification records.

III. CONCLUSION

The state's interest in the public safety justifies the retention of a criminal's identification records. Such reasoning, however, cannot justify the retention of the acquitted person's identification records.²⁶ Any argument which finds some justification for the retention of an acquitted's records operates on the fallacious assumption that one who has been arrested but acquitted is more likely than the person who has never been arrested to commit a crime in the future. Even more puzzling is the idea that such retention would have a deterrent effect on future criminal conduct. It is doubtful that many would-be criminals stop before committing a crime to think about whether their identification records

the search for employment more discouraging. In trying to explain the circumstances of the arrest to the would-be employer, the arrestee-applicant hopes the employer will be satisfied with the explanation given, but many times the potential employee's arrest record will cast a shadow of uncertainty as to his character and as a consequence the arrestee will not be given the job sought. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE—THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967).

²⁴ *Aguilar v. Texas*, 378 U.S. 108 (1964).

²⁵ The analogy used by the court seems strange because the fourth amendment is couched in terms of reasonableness. However, the standards for permitting a search are more than reasonableness (*i.e.* probable cause).

²⁶ By retaining an arrestee's records in a "criminal identification file," the arrestee is being placed in a category along with those convicted of crimes. The arrestee should not have to suffer the personal indignity of having his records retained by law enforcement officials when records of other non-acquitted citizens are not present in such a file. What reason does the state have to retain non-criminal records in a criminal file? "The only time arrest records can be a useful tool for determining which persons have engaged in criminal activity is when police consistently arrest those who commit crime." Comment, *Arrest Records as a Racially Discriminatory Employment Criterion*, 6 HARV. CIV. R.—CIV. LIB. L. REV. 165, 172 (1970). Moreover, the late Director of the F.B.I., J. Edgar Hoover, stated that "it must be understood that the overwhelming majority of F.B.I. reports do not tell a complete story." Hoover, *The Confidential Nature of F.B.I. Reports*, 8 SYRACUSE L. REV. 1, 4 (1956). The stigma of a criminal record handicaps the arrestee for the remainder of his life, for he will have to admit he has arrest records and perhaps try to explain the circumstances. See Comment, *Guilt by Record*, 1 CALIF. W.L. REV. 126, 127 (1965). See also 46 NOTRE DAME LAW. 825, 830 (1971). However, the "expungement" concept, a method to combat extrajudicial penalization, may be an alternative. By utilizing this concept, the record of an individual's past is kept from hampering his future endeavors. See Pertler & Hilmer, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CALIF. W.L. REV. 121, 125 (1967).

are on file. Even if they did, the probability is great that they would not refrain from committing the crime merely because their fingerprints have been previously recorded. Thus, the retention of an acquitted's identification records does not appear to be defensible on grounds of reasonableness. Why, then, did the Washington court choose to apply the compelling interest test? Because the right to privacy is fundamental, the more stringent standard is applicable. However, the conclusion that the right of privacy is fundamental must rest on the assumption that the penumbral rights which emanate from fundamental constitutional guarantees necessarily take on the quality of fundamentality themselves. The majority opinion in *Griswold* points out that the zone of privacy is created by such fundamental guarantees.²⁷ But whether the right of privacy is itself fundamental is not apparent.²⁸ With the exception of *Eddy*, no case seems to have reached this conclusion. The failure of the Washington court to give more attention to this position is the only significant flaw in its otherwise well-reasoned analysis.

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²⁷ 381 U.S. at 485.

²⁸ *Id.* at 491. Mr. Justice Goldberg's concurrence, however, did not reach this question. His conclusion, in which Justice Brennan and the Chief Justice joined, is in keeping with the assumption in *Eddy*—that the right of privacy is fundamental in the sense that only a compelling interest can justify its dilution.