

1975

Expungement of Arrest Records

Adrienne Volenik

University of Richmond, avolenik@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>

 Part of the [Criminal Law Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Adrienne Volenik, *Expungement of Arrest Records*, 9 Clearinghouse Rev. 23 (1975).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

The National Paralegal Institute is preparing a guide for Legal Services projects on unauthorized practice of law and ethics opinions relating to the use of paralegals in Legal Services settings. The Institute needs information (preferably copies of pleadings) about any complaints relating to the use of paralegals. We are most interested in complaints dealing with unauthorized practice lodged with courts, bar associations, or administrative agencies. Also send information about any charges brought against any attorney relating to the attorney's use of paralegals.

The American Bar Foundation published a general *Unauthorized Practice Handbook* in 1972. It is a compilation of all state statutes dealing with the practice of law as well as synopses of cases and comments on unauthorized practice. Anyone interested in obtaining a xerox copy of this out-of-print publication can order it from: Xerox University Microfilms, 300 North Zeeb Road, Ann Arbor, Michigan 48106, order number OP2002790. A check or money order for \$20 plus the purchaser's state sales tax on \$20 should be included with the order.

NATIONAL JUVENILE LAW CENTER

3642 Lindell Blvd., St. Louis, Mo. 63108, (314) 533-8868

Expungement of Arrest Records

Contrary to the philosophy of the juvenile court, it is undoubtedly a rare occasion when a child benefits from his exposure to the juvenile court system. Even when a child is actually rehabilitated by the process, the invidious effects that flow from being labeled a "juvenile delinquent" may serve to negate any benefit that he may have received. Perhaps the most unjustifiable of all side effects is the stigma that attaches to a child who has been arrested and subsequently either released without prosecution or acquitted. In a society that espouses the idea that an individual is innocent until proven guilty, he will be treated as though his arrest were synonymous with guilt. On applications for future employment and for admission into educational institutions, he may be asked for information about past arrests without regard to the disposition of those arrests. Clearly this information could only be viewed in an unfavorable light.

In order to limit the harmful effects of an arrest record, many jurisdictions require that juvenile arrest records be kept separate from those of adult offenders. (See *e.g.*, Section 55 of the Uniform Juvenile Court Act, drafted by the National Conference of Commissioners on Uniform State Laws in 1968, which provides in part that "[l]aw enforcement records and files concerning a child shall be kept separate from the records and files of arrests of adults.") In addition, many jurisdictions have also placed limitations on who may inspect arrest records. (See *e.g.*, Section 55 of the Uniform Juvenile Court Act, *supra*, which limits access to these records by the public unless: (1) the child is transferred to criminal court for prosecution; (2) the interest of national security so requires, or; (3) the court orders it for the best interest of the child.)

While these provisions theoretically provide considerable protection for a child, the expungement or sealing of his arrest record is the best method of protecting him from the

harmful effects that normally result from it. Section 57 of the Uniform Juvenile Court Act also empowers the juvenile court to seal law enforcement records. Unfortunately, even these provisions are no panacea since most state statutes permit the expungement or sealing of records only after certain conditions have been met. These conditions may be so strict as to require a waiting period free of further offenses and a showing that the child has been rehabilitated.

The limitations of such provisions are obvious. If a child must wait for two years to expunge the record of his arrest in a case where he was never brought to trial, he must suffer the consequences of that arrest for the entire period. During that time he must answer "yes" to any inquiry as to whether he has ever been arrested. Should he be involved in any further trouble, that arrest may be considered by the judge at disposition, and that contact with the police may be the reasons for closer surveillance of all his activities by law enforcement authorities as well as serving as the basis for his consideration as a suspect whenever a crime is committed. In order to avoid these handicaps, counsel for the juvenile should petition the court for immediate expungement of arrest records where charges are either dismissed without prosecution or where the child is acquitted at his adjudicatory hearing.

Counsel's challenge to the retention of these records may be based upon a violation of the child's right to privacy. In the last century this concept has become an established principle of American civil jurisprudence recognized as basic to the Bill of Rights. (In *Griswold v. Connecticut*, 381 U.S. 479 (1965) the intimacies of the marriage relationship were held to be protected by this right. In *Stanley v. Georgia*, 394 U.S. 557 (1969) the right to possession of obscene materials in one's own home was established. *Eisstadt v. Baird*, 405 U.S. 438 (1972) extended the *Griswold* rule to unmarried individuals, and *Roe v. Wade*, 410 U.S. 113 (1973) the Supreme Court found the right of a woman to terminate an unwanted pregnancy covered by her right to privacy.) Based on this right, several courts have decided that a court should order the expungement of an arrest record when the harm to the individual's right of privacy, because of adverse unwarranted consequences, outweighs the public interest in retaining these records. In *U.S. v. Kalish*, 271 F.Supp. 968 (D.P.R. 1967), the court recognized that:

[N]o public good is accomplished by retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is invaded as long as the Justice Department retains 'criminal' identification records, 'criminal' arrest records, fingerprints and a rogue's gallery photographs. . . . The preservation of these records constitutes an unwarranted attack upon his character and reputation and violates his right of privacy; it violates his dignity as a human being. (271 F. Supp. at 970.)

The Supreme Court of Colorado recognized that retention of arrest records might constitute an invasion of a person's right to privacy in *Davidson v. Dill*, 503 P.2d 157 (Colo. 1972). The court further outlined factors to be considered by trial courts to determine whether an invasion would be likely in future cases. Those factors include: (1) who has access to the records; (2) to what extent the information can be disseminated; (3) what justification exists for their

retention and; (4) exactly what information is contained in the records. (See also *Eddy v. Moore*, 487 P.2d 211 (Wash. App. 1971) and *Menard v. Mitchell*, 328 F.Supp. 718 (D. D.C. 1971).)

While the trend of these recent adult cases supports the expungement of arrest records where an arrest has not led to a conviction, juvenile decisions show no such clear pattern. Instead, the "benevolent" philosophy of the juvenile court is being used as the basis for decisions to maintain these files. Recently, in Washington, four juveniles sought expungement of both their court and arrest records. A unanimous court decided that the philosophy of the juvenile court required the maintenance of court records in order to assist the court in formulating plans for best aiding and correcting juveniles brought before it. (*Monroe v. Tielsch*, 525 P.2d 250 (Wash. 1970).) The majority of the court concluded that law enforcement agencies have a legitimate interest in the maintenance of juvenile arrest records in order that they can monitor any developing patterns of behavior of the juvenile.

A strong dissent challenged the majority opinion. Although concurring that the court should be in possession of any and all pertinent information, the minority disagreed that law enforcement agencies should maintain files of arrests that did not lead to convictions. It reviewed the disabilities that could flow from an arrest record and noted that arrest, in and of itself, is probative of nothing, stating that:

[T]here seems to be something drastically wrong with a societal attitude which imposes or precipitates social and economic sanctions upon an individual as the cost of social penitence and forgiveness when the subject is innocent of any conclusively ascertained and established social misconduct. (525 P.2d at 256.)

The dissent further articulated the argument for expungement of an arrest record because it violated a child's fundamental right to privacy.

The paucity of case law concerning the expungement and sealing of the arrest records of juveniles makes it a difficult issue for counsel to prepare. On the other hand, the importance of the issue and lack of readily ascertainable standards makes it one which is ripe for review. Therefore, it is urged that Legal Services attorneys confront the problem and, additionally, be selective in their choice of forum and presentation in order to minimize the expansion of existing bad case law.

The National Juvenile Law Center is currently preparing materials on juvenile records that may be helpful to the attorney dealing with a problem of this nature.

Adrienne Volenik, Staff Attorney

NATIONAL CONSUMER LAW CENTER, INC.

One Court St., Boston, Mass. 02108, (617) 523-8010

Issues in Public Utilities Cases

What follows is a short checklist of issues of concern to poor people which may be raised in public utilities cases before state regulatory commissions. The checklist is limited to telephone cases, but similar issues can be raised in gas,

electric, water, sewer, bus, subway, rail, taxicab and community antenna television cases. The checklist is further limited to issues which usually do not require a great deal of time. Often a lawyer need appear only for the presentation of his client's or experts' testimony and for crucial cross-examination of opposing witnesses. During the balance of the hearings, a student, either paid or volunteer, can follow the proceedings. Students (or professors) who would be interested can be found in law, business administration, economics, engineering and accounting. Depending on the laws of the individual state, the student may be a legal representative.

Before starting on a public utility case, a Legal Services lawyer obviously must have an interested client. Very often the client may have a specific complaint (e.g., termination of telephone service), but if you inquire in depth, you will find that they just cannot afford the service, but may still have a great need for it (e.g., the client has a heart condition and must be able to call the doctor). Or the client may have heard about a proposed rate increase and may say: "I can't afford the bill now." You have three choices: to try to make a deal which the client may not be able to honor in the future; to have the client use a pay telephone (the rate for which may be going from \$.10 to \$.20); or to try to get fair rates for all your clients. If you have enough clients, or a community group which wants to get involved, you may be able to intervene.

Depending on the laws in your state, intervention may mean filing a written petition or merely appearing at a hearing. In any case, you should ask for the right to raise your issues, the right to present testimony, and the right to cross-examine adverse witnesses. In addition, if you intend a court appeal, you may have to show that your clients are "aggrieved." (Generally, a rate payer has been held to be aggrieved by a rate increase.)

In telephone rate cases, as in most other regulatory rate setting matters, you will find that the commission is most concerned with the "rate base" and the "rate of return." Generally, the rate base is the property "used or usable in providing service." It is expressed in the dollar value of this property. The rate of return is the percentage return which the company is allowed on the rate base. This is not the same thing as a return on equity ("profit"), nor is the company guaranteed this amount. Generally the regulatory commission finds that the company has *A* dollars of rate base and allows *B* percentage rate of return on this rate base. For further elucidation on these concepts see Mello, *Public Utility Rate Increases, A Practice Manual for Administrative Litigation*, 8 CLEARINGHOUSE REV. 411 (October 1974).

In telephone cases, there are the additional terms of "cost of service" and "value of service." Although regulatory commissions differ on which of these concepts is most important in setting rates, historically telephone rates were set on the value of service to the customer. The idea was that when telephone service was expanded, it was unfair to charge different customers different amounts based only on where they were located geographically. Rather, customers were charged what the service was worth to them. More recently cost of service has become more important, and the differential rates between customers are now more commonly based on the cost of serving that customer. This will be noted in the issues checklist.

The final, fundamental concepts in telephone cases are "basic services," "supplemental services" and "optional services."