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Recent Trends

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F.B.I. RECORDS

The seemingly impervious computer banks, wherein the Federal Bureau of Investigation maintains its secret files on private American citizens, suffered two minor cracks in recent months. In *Jabara v. Kelly*, __ F. Supp. __ (E.D. Mich. 1974), the court refused to take at face value a government assertion of executive privilege regarding the secrecy of investigative records. Rather, the court chose to examine the questioned records *in camera*. By balancing the competing interests, the court determined whether information contained therein sought by a private litigant should be disclosed.

Jabara was a pro-Arab, activist attorney who had apparently been the subject of an ongoing F.B.I. investigation. In a § 1983[1] civil rights suit against the F.B.I. he alleged that the investigators had violated his first, fourth, fifth and ninth amendment rights through overt and covert surveillance. The plaintiff filed a discovery motion seeking information from the F.B.I. as to whether wiretaps had been performed, and when, where and what conversations had been recorded. The government claimed that the manifest public interest in preserving secrecy would support a holding that the information was subject to executive privilege, arguing that such disclosure might jeopardize government informers, compromise continuing investigations and expose tactical intelligence.

Citing as its main authority an unreported opinion by District Judge Vanartsdalen,[2] the Sixth Circuit found it necessary and proper to "determine the primacy of the interests of the Government versus those of the individual, balancing the necessity of the individual in obtaining the information against the Governmental need in maintaining the secrecy of the information."[3] The court allowed the plaintiff's discovery. This blow to the defendant was softened by the court's assurance that only that information essential to plaintiff's case would be disclosed, regardless of the outcome of any balancing.

The decision in *Menard v. Saxbe*, __ F.2d __ (D.C. Cir. 1974), also pierced the shroud of secrecy surrounding F.B.I. records. The D.C. Circuit held that the F.B.I. had no statutory right to retain the record of an individual's arrest for an offense for which that individual had not been prosecuted. The court recognized the detrimental effect of an arrest record upon an individual's opportunities for employment, upon his treatment by police and upon his ability to testify in courts of law. Despite the unrebutted presumption of innocence, the record wrongly damaged Menard's reputation.[4] Consequently, the Bureau was held to have a duty to expunge the record of this particular non-convicted arrest from its files.[5]

Although petitioner Menard argued that retention and dissemination of the F.B.I. record violated his constitutional rights,[6] the court's decision rested upon a statutory basis. Judge Leventhall, speaking for the court, said that the federal statute[7]

[1] 42 U.S.C. § 1983 (1970).

[2] Philadelphia Resistance v. John N. Mitchell, (E.D. Pa. No. 71-1738, Aug. 3, 1972).

[3] __ F.2d at __ (Judge Freeman quoting Judge Vanartsdalen in *Philadelphia Resistance*). *See also* Black v. Sheraton Corp. of America, 371 F. Supp. 97 (D.D.C. 1974) (Judge Rickey); Frankenhauser v. Risso, 17 FED. RULES SERV. 2d 16 (E.D. Pa. 1973). *Contra*, Black v. Sheraton Corp. of America, 50 F.R.D. 130 (D.D.C. 1970) (Judge Sirica); Capitol Vending Co. Inc. v. Baker, 35 F.R.D. 511 (D.D.C. 1964).

[4] For discussions on the detrimental impact of an arrest record see Comment, *Branded: Arrest Records of the Unconvicted*, 44 MISS. L.J. 928 (1973); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971).

[5] *See* United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (duty to expunge is inherent in the right to collect data). For general discusssions on the expungement of criminal records see Kogan, *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L.C. & P.S. 378 (1970); Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850 (1971); Comment, *Arrest Record Expungement—A Function of the Criminal Court*, 1971 UTAH L. REV. 381 (1971); Note, 35 U. PITT. L. REV. 205 (1973) (case note on Davidson v. Dill, 503 P.2d 152).

[6] For further comments see Comment, *F.B.I. Rap Sheets—An Invasion of Constitutional Rights?*, 20 CATH. U.L. REV. 511 (1971); Note, *Arrest and Credit Records: Can the Right to Privacy Survive?*, 25 U. FLA. L. REV. 681 (1972).

[7] 28 U.S.C. § 534 (1970) provides:

(a) The Attorney General shall—
  (1) acquire, collect, classify, and preserve identification, criminal identification, crime and other records; and
  (2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.
(b) the exchange of records authorized by subsection (a)(2) of this section is subject to cancellation if

authorizing data collection by the F.B.I. implicitly requires the Bureau to distinguish and separate files of convicted criminals and those of so called neutral (innocent) persons. All records of non-convicted persons should be maintained in the latter file, the retention of which, the court felt, would yield none of the detrimental effects of a record in the "criminal" file. Although not basing its decision on constitutional grounds, the court did express concern with the constitutional issue as well.[8]

Finally the court concluded that although the F.B.I., upon proper request, has a duty to expunge a record of non-conviction, the proceedings must be initiated by private individuals at the local level. This procedure is reasonable in light of the fact that the Bureau's records are derivative, i.e., they come from those local jurisdictions, and because imposing this positive duty upon the Bureau would create an unwieldy burden.

Jury Selections

Although the constitutional right to a fair and representative jury is applicable to the states through the due process clause of the fourteenth amendment, the Supreme Court has provided only vague directives as to what procedures will uphold this constitutional right. Any method which arbitrarily excludes any identifiable, but otherwise qualified group to serve as jurors, will be found unconstitutional.[9] The primary test has been whether the selection procedure was designed to produce a representative cross-section of the community, not whether it actually was successful.[10] Despite voluminous litigation over whether specific schemes meet this broad standard, the Supreme Court has failed to delineate a more specific test. Several recent cases have brought this issue back into the limelight, and the often conflicting results have shed little new light on the application of this constitutional right.

In *Reed v. State*, 292 So. 2d 7 (Fla. 1974), the Florida supreme court upheld a statutory scheme[11] for jury selection which excluded all persons under age 21 and which classified eligible jurors as: professional persons, government employees and persons over 65. The court decided that the twenty-sixth amendment which had enfranchised 18 to 21 year olds, had not reduced the broad discretion of the states in establishing qualifications for jurors. Although the Florida plan excluded a group of persons deemed qualified to vote, the court believed that the state retained the authority to determine that these same persons were not qualified to be jurors.[12] The majority noted the Supreme Court's failure to establish more specific standards for a "fair" jury selection procedure and found the Florida scheme within the proper scope of discretion left to the states.[13]

Justices Erwin and Boyd argued vigorously in dissent that the spirit, if not the letter, of the Supreme Court decisions on this issue requires that a jury selection procedure be as random as possible in selecting jurors from all qualified persons. They asserted that the twenty-sixth amendment demonstrates that persons aged 18 to 21 are qualified for the responsibilities of citizenship, hence they should also be qualified for jury service, and their exclusion is arbitrary and unconstitutional. The justices further argued that the statute's classification system is also unconstitutional because it provides for a process that is manipulated so as to insure representation from certain social, economic and age

dissemination is made outside the receiving departments or related agencies.

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

[8] "We think sound principles of justice and judicial administration dictate that in general actions to vindicate constitutional rights, by expungement of arrest records [are mandatory]." ___ F.2d at ___.

[9] *See, e.g.*, Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Whitus v. Georgia, 385 U.S. 545 (1967); Hernandez v. Texas, 347 U.S. 475 (1954).

[10] An early succinct definition of the cross section principle was:

> [T]here is a constitutional right to a jury drawn from a group which represents a cross section of the community. And a cross section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of People.

Fay v. New York, 332 U.S. 261, 299 (1947) (Murphy, J., dissenting).

[11] Fla. Stat. § 40.01 (1970).

[12] For a discussion of jury selection procedures which discriminate against young adults see Comment, *Constitutionality of Excluding Young People From Jury Service*, 29 Wash. & Lee L. Rev. 731 (1973). On jury selection systems in general see Beiser, *Are Juries Representative?*, 57 Judicature 194 (1973); Note, *Jury Selection and the Equal Protection Clause*, 2 U.C.L.A.—Alaska L. Rev. 141 (1973).

[13] For discussions on the burden of challenging a questionable jury selection scheme see Comment, *Constitutional Law—Burden of Proof in Juror Discrimination Cases in Missouri*, 38 Mo. L. Rev. 99 (1973); Note, *Challenging The Jury Selection System in New York*, 36 Albany L. Rev. 305 (1972).

groups. Since no rational state interest is served by this classification, the dissenters concluded that a selection process based upon voter registration lists and without the classification system was necessary to produce a random cross-section of the community.[14]

In Louisiana, the state supreme court upheld a jury selection procedure which possessed provisions which resulted in sex discrimination. The procedure challenged in *State v. Stevenson*, 292 So. 2d 488 (La. 1974), excludes women from the selection process unless they file a written declaration of willingness to serve. No such affirmative duty is imposed upon the male population. Intuitively, this system would seem to arbitrarily exclude many women from jury service, or at best work to discourage women from participating on juries. However, the right to a representative jury belongs to the defendant. Viewing the Louisiana procedure from this perspective, the system forces men to serve while allowing women to opt out. This results in an arbitrary and distinctively non-random jury character. The Louisiana supreme court, nonetheless, held that the system was not unconstitutional.

In *Bradley v. Judge of Superior Court*, __ F. Supp. __ (C.D. Cal. 1974), the court allowed a jury selection system to stand which provided that jurors for a particular district be selected from the entire county of which that district was but a small part. In spite of evidence that this scheme reduced the percentages of black jurors in the district from 32 per cent to 8 per cent, and of Mexican-American jurors from 18 per cent to 7 per cent, the district court did not believe that the challengers had shown that the plan fell short of the constitutional demands for a jury selection procedure designed to produce a fair cross-section of the community.[15]

Juvenile Justice

The juvenile justice system remains in a state of flux. Efforts to establish separate systems for processing juvenile and adult offenders have struggled between the twin goals of eliminating the harshness of adult criminal procedures and simultaneously satisfying constitutional and statutory demands. When it became obvious in the last decade that the de-institutionalization of juvenile justice had vested immense discretion in the juvenile courts, the United States Supreme Court hastened to warn that some,[16] but not all,[17] constitutional guarantees of due process extend to juvenile adjudications. Today, courts continue to wrestle with the ambiguous dictates of the Supreme Court in the determination of which constitutional standards are required for juvenile justice.

The Maryland Court of Special Appeals remains uncertain as to whether the fifth amendment's double jeopardy clause applies to juvenile proceedings. In *In re Anderson*, 321 A.2d 516 (Md. Ct. Spec. App. 1974), the defendant had been referred by the juvenile court to a hearing before a master. In spite of the master's report that the evidence was insufficient to sustain the charge, the juvenile court chose to conduct its own hearing *de novo*. The appellate court held that even assuming that the double jeopardy clause did apply, this particular procedure, unique to the juvenile court, was not unconstitutional. The master, it was found, was only an aid to the juvenile court, and his decision was held to not be a separate adjudication.

In *People v. Ellis*, 57 Ill. 2d 627, 311 N.E.2d 98 (1974), the Illinois supreme court found a statutory procedure which discriminated between male and female juveniles, in violation of the equal rights amendment of the state constitution. The Illinois Juvenile Court Act placed males under 18 years of age and females under 19 years of age within the jurisdiction of the juvenile court. The court could see no rational state interest in this classification. Although the court found it unnecessary to reach the federal constitutional issue, the fourteenth amendment's equal protection clause could be an alternative basis for the same result.[18]

[14] For a serious challenge to this conclusion see Comment, *Voter Registration Lists; Do They Yield a Jury Representative of the Community?*, 5 U. Mich. J.L. Ref. 385 (1972).

[15] Two other recent cases further illustrate the heavy burden which a challenge to a jury selection procedure must overcome. Thompson v. Sheppard, 490 F.2d 830 (5th Cir. 1974) (disproportionate racial and sexual characteristics of resultant jurors does not show the system itself is invalid); Partida v. State, 506 S.W.2d 209 (Tex. Crim. App. 1974) (fact that grand jurors were only 39% Mexican-American in a community where same constituted 79% of the population does not show system designed improperly).

[16] *See* Kent v. United States, 383 U.S. 541 (1966) (due process guarantors of 1) notice, 2) right to counsel, 3) privilege against self-incrimination, and 4) right of confrontation and cross-examination of witnesses apply to juvenile adjudicatory hearings); *See also In re* Gault, 387 U.S. 1 (1967) (affirming that the basis of *Kent* was that constitutional rights are not for adults alone); *cf. In re* Winship, 397 U.S. 358 (1970) (adjudication of delinquency requires proof beyond a reasonable doubt).

[17] *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (due process does not require a jury trial in juvenile proceedings).

[18] For discussions on sex-based discrimination in juvenile justice see *Equal Protection For Juveniles: The*

A Kentucky sentencing provision which, it was claimed, discriminates between adults and juveniles, did survive an equal protection attack. In *Fryrear v. Commonwealth*, 507 S.W.2d 144 (Ky. Ct. App. 1974), the court held that a prior decision, holding that a life sentence amounted to cruel and unusual punishment for a juvenile rapist, was not determinative of the same issue for an adult rapist. The distinction between adults and juveniles for sentencing purposes was found to be rational and not violative of the equal protection clause.

Several courts have struggled with the due process problems inherent in schemes for deferring a juvenile defendant to the adult criminal courts. In *People v. Fields*, 391 Mich. 206, 216 N.W.2d 51 (1974), the Michigan supreme court affirmed the view that guidelines for such deferral must be statutorily established rather than left to the discretion of the judge. But in *State v. Grayer*, 191 Neb. 523, 215 N.W.2d 859 (1974), the Nebraska supreme court reached a contrary position by upholding prosecutorial discretion in the decision whether to proceed against a juvenile in juvenile or adult court.[19]

Besides the constitutional dimension to juvenile proceedings, the courts have been troubled over the implementation of statutory provisions. An outstanding example is the conflicting interpretations by federal courts with regards to the Youth Corrections Act.[20] In *United States v. Kaylor*, 491 F.2d 1127 (2d Cir. 1974), the Second Circuit upheld the presumption that the sentencing of juveniles was to be imposed according to YCA (as opposed to the statutory penalty for the substantive offense). Kaylor had been sentenced according to the statutory penalty rather than under the YCA apparently because the judge had found that there would be "no benefit" from YCA sentencing. The court of appeals held that the "no benefit" exception to YCA sentencing requires a judge to make an express finding of "no benefit," stating his reasons therefor. Only an extraordinary finding would justify divergence from Chogress' intent to make YCA sentencing the presumptive standard for juveniles.

In *United States v. Hartford*, 489 F.2d 652 (5th Cir. 1974), the Fifth Circuit, in reviewing sentences in three different cases, also addressed itself to the proper scope of discretion under the YCA. In the first case the juvenile defendant had been sentenced for the maximum four years under the YCA. He could have received a maximum of one year for the substantive offense, but the judge, indicating on the record that he did not believe one year to be sufficient, utilized the YCA provisions to impose a greater sentence. The Fifth Circuit reversed, finding this decision contrary to Congressional intent and an improper exercise of discretion under the Act. In the second case, a juvenile defendant received a five year maximum sentence for the substantive offense. The judge had given no consideration to YCA sentencing because he believed the substantive offense involved required the maximum punishment available. Again the court of appeals

Present Status of Sex-Based Discrimination in Juvenile Court Law, 7 GA. L. REV. 494 (1973); 1 FORDHAM URBAN L.J. 286 (1972).

[19] For discussions on the waiver issue in juvenile proceedings, see Comment, *Due Process and Waiver of Juvenile Court Jurisdiction*, 30 WASH. & LEE L. REV. 591 (1973); Comment, *Prosecutorial Discretion and the Decision to Waive Juvenile Court Jurisdiction*, 1973 WASH. U.L.Q. 436 (1973); Note, *Constitutional Law—Juvenile Waiver Statute—Delegation of Legislative Power to Judiciary*, 1973 WIS. L. REV. 259 (1973).

[20] 18 U.S.C. § 5010 (1970) provides:

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense of which he stands convicted or until discharged by the Division so provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

The Supreme Court has granted certiorari on this issue in Dorszyinski v. United States, 484 F.2d 849 (9th Cir.), *cert. granted*, 414 U.S. 1091 (1973).

held this to be an improper exercise of discretion under the YCA, saying that a judge must consider YCA sentencing for every juvenile. In the third case, however, the appellate court upheld the sentencing of a juvenile of the maximum allowed for the substantive offense. There had been no indication of prejudice from the record, and the judge had taken evidence on rehabilitative possibilities under the YCA. A lone dissenter from the Fifth Circuit took the stricter view of the Second Circuit, believing that the absence of an express finding of "no benefit" constituted reversible error.