Expungement of Mental Health Records in the Civil Commitment Context: A Remedy in Search of a Right

John A. Shannon, Jr.

The rights of mental patients have received considerable attention recently in the courts.[1] In response to a growing recognition of the constitutional infirmity of civil commitment statutes and other mental health laws, the commitment process in some states has undergone recent revision.[2] Affirmation of individual rights in the mental health context has begun to foster statutory protection for the confidentiality of the commitment records.[3] In Arizona, the civil commitment statutes require that an individu-

1. *See, e.g.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir 1974); *In re* Curry, 452 F.2d 1360 (D.C. Cir. 1971); Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E. 2d 908 (1968). These cases are part of an emerging trend toward recognizing that the Constitution guarantees persons civilly committed to state mental institutions a right to a minimum level of care. *See* D. WEXLER, CRIMINAL COMMITMENTS AND DANGEROUS MENTAL PATIENTS 9-10 (1976), *reviewed in* 19 ARIZ. L. REV. 435 (1977). *Cf.* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (state is prohibited from confining, "without more," a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of others). *See generally* Birnbaum, *A Rationale for the Right*, 57 GEO. L.J. 752 (1969); Wexler, Scoville, *et al.*, *Special Project—The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1 (1971) [hereinafter cited as *Special Project*]; *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1191 (1974) [hereinafter cited as *Developments in the Law*].

2. Some revisions have included a more careful definition of mental illness. For instance, in Iowa, separate definitions for "mental illness," "serious mental impairment," and "serious emotional injury" were given which did not exist under previous Iowa mental health laws. *See* Hospitalization of the Mentally Ill, ch. 139, § 1, 1975 Iowa Acts 350 (1975) (codified at IOWA CODE ANN. § 229.1 (1)-(3) (West Supp. 1977)); *see generally* Bezanson, *Involuntary Treatment of the Mentally Ill in Iowa: The 1975 Legislation*, 61 IOWA L. REV. 261, 263 (1975). In Arizona, commitment laws were revised by equalizing release procedures for those found not guilty by reason of insanity and persons civilly committed. *See* ARIZ. R. CRIM. P. 25. In addition, the Arizona legislature changed the standard for retaining a proposed patient for purposes of examination from an allegation that the patient "is mentally ill and in need of supervision, care and treatment" to an allegation that the patient is "a danger to himself or others as a result of a mental disorder." *See* Ch. 185, § 2, [1974] Ariz. Sess. Laws (codified at ARIZ. REV. STAT. ANN. § 36-520(A) (1974)) (original version at Ch. 146, § 71 [1972] Ariz. Sess. Laws 1066); *see generally Special Project, supra* note 1, at 18.

3. The Arizona statutory scheme for civil commitment provides that discrimination in employment and other areas is prohibited, ARIZ. REV. STAT. ANN. § 36-506 (1974), that

al's psychiatric records remain confidential,[4] and that he not suffer discrimination as a result of his involvement in the civil commitment process.[5] In addition, the Arizona law provides for expungement of certain records compiled during the commitment process.[6] Despite the statutory protections provided Arizona residents in both the precommitment and postcommitment stages, the statutory scheme does not yet adequately protect against the adverse consequences of the release of commitment or treatment records. Further, due to the difficulty of proving discrimination,[7] the antidiscrimination provisions[8] of the mental health statutes do not sufficiently protect a former patient from the later detrimental use of his mental health records.[9] Because of the flaws in the present statutory scheme for protecting the individual's statutory interest in preventing discrimination against him on the basis of his previous status, expungement of the records regarding commitment within a certain period of time of the patient's discharge may be necessary. Recognizing this right of expungement would permit "legalized lying," allowing the patient to deny that the civil commitment statutes were invoked against him.[10]

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confidentiality of a patient's records should be maintained, *id.* § 36-509, and that certain records generated by the civil commitment process should be expunged. *Id.* § 36-523(C).

4. *See id.* § 36-509.

5. *See id.* § 36-506(C).

6. *Id.* § 36-523(C). A prepetition screening report, which is required in the first stages of the civil commitment process, must be destroyed if the screening agency finds that there is no basis for filing a petition for court-ordered evaluation.

7. See text & notes 11-36 *infra*.

8. ARIZ. REV. STAT. ANN. § 36-506 (1974) states:

A. Every person undergoing evaluation or treatment pursuant to this chapter shall not be denied any civil right, including but not limited to, the right to dispose of property, sue and be sued, enter into contractual relationships and vote. Court-ordered treatment or evaluation pursuant to this chapter is not a determination of legal incompetency, except to the extent provided in § 36-512.

B. A person who is or has been evaluated or treated in an agency for a mental disorder shall not be discriminated against in any manner, including but not limited to:

1. Seeking employment.

2. Resuming or continuing professional practice or previous occupation.

3. Obtaining or retaining licenses or permits, including but not limited to, motor vehicle licenses, motor vehicle operators and chauffeurs licenses and professional or occupational licenses.

C. Discrimination for purposes of this section means any denial of civil rights on the grounds of hospitalization or outpatient care and treatment unrelated to a person's present capacity to meet the standards applicable to all persons. Applications for positions, licenses and housing shall contain no requests for information which encourage such discrimination.

9. See text & notes 11-36 *infra*.

10. Statutes which allow persons to deny involvement with governmental proceedings have been most prevalent in the area of juvenile law. These statutes generally provide for the sealing or destruction of juvenile records after a child has reached majority, or after termination of the juvenile court's jurisdiction over the child. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-90 (West Supp. 1977); FLA. STAT. ANN. § 39.12(2) (West 1974); IDAHO CODE § 16-1816(A) (Supp. 1976); KY. REV. STAT. § 208.275 (Supp. 1976); DEL. FAMILY CT. R. 420(a). The privilege of "legalized lying," codified in all the above statutes except that of Florida, provides considerable protection against disclosure of the child's involvement with the juvenile courts; it would appear that the child would lose the advantage of anonymity only inadvertently. *See* Chambers, *Chance and Geography Play a Major Role in Setting Bail for Young Offenders*, N.Y. Times, Dec. 27, 1976, § A, at 14, col. 1. *See also* MASS. ANN. LAWS ch. 151B § 4(9) (Michie/Law. Co-op 1976) (protection against perjury for non-disclosure of arrests and convictions for certain crimes extended to adults).

This Note will argue that a statutory right of expungement of psychiatric files is necessary in the civil commitment context,[11] and that once expungement is carried out only physicians requiring the records for treatment purposes may gain access to information linking the patient to the process. Present protections against possible abuses of mental health records will be examined in order to demonstrate the present inability of the judiciary to provide protection equivalent to expungement. In addition, it will be argued that the constitutional right to privacy will justify the right of the former patient to compel destruction or expungement of the records. It will next be considered whether the present Arizona statutes violate equal protection because the laws provide for destruction of some, but not other mental health records. Next, the retention of mental health records will be addressed in regard to procedural due process protections. Finally, the form and scope of the recommended statutory remedy will be set forth.

THE ARIZONA MENTAL HEALTH CIVIL RIGHTS STATUTES

The Arizona mental health statutes provide that persons subjected to the civil commitment process should not suffer discrimination as a result of their involvement with that process.[12] Specifically, the law provides that "every person undergoing evaluation or treatment . . . shall not be denied any civil right, including but not limited to, the right to dispose of property, sue and be sued, enter into contractual relationships and vote."[13] In addition, the statute explicitly prohibits discrimination in employment, housing, and the granting of various state licenses.[14] Although this Arizona mental health "civil rights" law on its face clearly prohibits discrimination against former mental patients, in operation the statute will afford little protection. One factor limiting the effectiveness of the statute is the administrative interpretation it has received in Arizona.

Regulations adopted pursuant to the Arizona mental health legislation have narrowly construed the intent of the drafters, stating that discrimination based *solely* on hospitalization or outpatient mental health care is prohibited.[15] Arguably, however, the legislature did not intend such a limited

11. The primary objective of the expungement remedy is not necessarily the physical destruction of civil commitment records, but the right of the former mental patient to deny involvement with the civil commitment process. The objective of confidentiality can be achieved not only by the physical destruction of the records, but also by the removal of patient-identifiers from the file. It will be argued that the permanent removal of patient-identifiers after a designated period of time will accomplish the proper balance between the competing interests of health care professionals and the patients.

12. ARIZ. REV. STAT. ANN. § 36-506 (1974).

13. *Id.* § 36-506(A).

14. *Id.* § 36-506(B).

15. ARIZ. ADMIN. R. & REG. tit. 9, § 9-15-305 (1975) provides: "No person undergoing evaluation or treatment in a mental health agency shall be denied any civil right or discriminated against in any manner solely upon the grounds of hospitalization or outpatient care and treatment." The technical wording of the statute, however, forbids "any denial of civil rights on the grounds of hospitalization or outpatient care and treatment unrelated to a person's

protection for former mental patients. The first problem a former mental patient will face in attempting to show discrimination under the Arizona statute, therefore, will be the practical problem of proof. If the regulation is applied, it is clear that the patient will have the burden of proving the facts constituting discrimination in his particular case. To show the seriousness of this problem, a contrast with title VII of the Civil Rights Act of 1964[16] will be useful.

An analogy with title VII cases will demonstrate that discrimination will be very difficult to prove under the Arizona civil commitment laws primarily because statistical inferences which can give rise to a presumption of discrimination under title VII cannot be applied under the Arizona civil commitment laws. There are two reasons for this result. First, even though title VII allows a presumption of discrimination arising from statistical discrepancies between the work force and the number of minorities employed by a particular defendant, such inferences will probably not be allowed under the Arizona civil commitment laws, as a matter of statutory construction. Second, even if statistical inferences were allowed, the practical problems of proof will prove to be extremely difficult for the plaintiff to surmount.

To prove discrimination under the Civil Rights Act, a plaintiff need not demonstrate actual discrimination directed against him in particular; the courts have interpreted the statute to mean that if he can show that an employment practice has had a discriminatory impact, he has established a prima facie case.[17] The plaintiff in title VII cases can introduce statistical evidence to establish discrepancies between the estimated representation of a particular minority in the relevant group and its representation in the general population.[18] The plaintiff can establish, through the use of statistics, that a seemingly neutral hiring policy, such as the utilization of

present capacity to meet the standards applicable to all persons." ARIZ. REV. STAT. ANN. § 36-506(C) (1974). Although the statute does not explicitly prohibit discrimination solely on this ground, it is unclear whether Arizona courts would ignore the regulations and excuse proof of discrimination based solely upon commitment.

16. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253, (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (Supp. V 1975)). The utility of borrowing analysis from preexisting case law on similar antidiscrimination statutes is apparent because there has been no litigation to date on the Arizona statute.

17. Dorsaneo, *Statistical Evidence in Employment Discrimination Litigation: Selection of the Available Population, Problems, and Proposals*, 29 SW. L.J. 859, 860 n.3 (1975); *see* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974). *See generally* Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975) [hereinafter cited as Note, *Beyond the Prima Facie Case*]; Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463 (1973) [hereinafter cited as Note, *Employment Discrimination*]. *But cf.* International Brotherhood of Teamsters v. United States, 45 U.S.L.W. 4506 (U.S. May 31, 1977) (seniority system which perpetuates pre-title VII discrimination held permissible).

18. E.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); United States v. Hayes Int'l Corp., 456 F.2d 112, 120 (5th Cir. 1972); United States v. Bethlehem Steel Corp., 312 F. Supp. 977, 992 (W.D.N.Y. 1970); Penn v. Stumpf, 308 F. Supp. 1238, 1243 n.7 (N.D. Cal. 1970).

intelligence tests or degree requirements, can also have a discriminatory effect.[19] The use of statistics does not necessarily foreclose inquiry into the reasonableness of a hiring practice; should the plaintiff establish a prima facie case by the use of statistics, the defendant can bring in evidence to rebut the inference of discrimination.[20] The solicitude of allowing plaintiffs in title VII cases to establish a prima facie case by the use of statistics apparently manifests the congressional policy of balancing competing interests of prohibiting discrimination and maintaining employer freedom.[21]

Because of the construction given the Arizona statute by the administrative regulations, however, establishing a prima facie case by a method of proof similar to that employed by title VII plaintiffs will be foreclosed, leaving little protection to an aggrieved mental patient.[22] If a former mental patient is required to prove actual discrimination by subjective standards, the purposes of the antidiscrimination provision will be frustrated to a large extent.

An illustration of the limited protection the Arizona regulation provides can be discerned in *Glassman v. New York Medical College*.[23] In *Glassman*, the court interpreted a New York statute which prohibited discrimination against former mental patients solely by reason of admission to a mental health facility.[24] The plaintiff had applied for admission to the New York Medical School, which required her to disclose that she had been a mental patient.[25] Upon being denied admission to the school, the applicant filed suit

19. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 428-31 (1971); Equal Employment Opportunity Comm'n v. Detroit Edison Co. 515 F.2d 301, 313 (6th Cir. 1975); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351, 1352 (N.D. Cal. 1972). *See generally* Note, *Employment Discrimination, supra* note 17.

In *Griggs*, a power company in North Carolina required transferees to skilled positions to attain national median scores on the Wonderlic Personnel Test (an alleged measure of general intelligence) and the Bennet Mechanical Comprehension Test. The Court noted the inadequacy of broad general testing devices as measures of ability. *See* Griggs v. Duke Power Co., 401 U.S. 424, 428-31 (1971). *Accord*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 427-36 (1975).

20. Congress has recognized the need for allowing an employer some discretion in hiring and has allowed employment tests provided they do not have a discriminatory effect. *See* United States v. Georgia Power Co., 474 F.2d 906, 912 (5th Cir. 1973); 42 U.S.C. § 2000e-2(h) (1970); 29 C.F.R. §§ 1607.4-.5 (1976).

21. Note, *Employment Discrimination, supra* note 17, at 466. Although some courts have required the plaintiff to prove a specific instance of discrimination in title VII cases, *see* Watkins v. Scott Paper Co., 530 F.2d 1159, 1171 & n.15 (5th Cir. 1976), this doctrine is apparently in fast retreat. Note, *Employment Discrimination, supra* note 17, at 472 & n.37.

22. See text & notes 25-36 *infra*.

23. 64 Misc. 2d 466, 315 N.Y.S.2d 1 (Sup. Ct. 1970).

24. N.Y. Laws ch. 738, § 3 [1964] (current version at N.Y. MENTAL HYG. LAW § 15.01 (McKinney 1976)) provides:

> Notwithstanding any other provision of law to the contrary no person admitted to a hospital by voluntary or informal admission shall be deprived of any civil right solely by reason of such admission nor shall such admission modify or vary any civil right of any such person, including but not limited to civil service ranking and appointment or rights relating to, the granting, forfeiture or denial of a license, permit, privilege or benefit pursuant to any law.

25. *See* 64 Misc. 2d at 467, 315 N.Y.S.2d at 2. Apparently, there is nothing in the Arizona statutes to prohibit a similar inquiry, provided the defendant can prove that such a request for information does not encourage discrimination. *See* ARIZ. REV. STAT. ANN. § 36-506(C) (1974).

under the New York Mental Hygiene Law and demanded to be admitted to medical school.[26] The court rejected her claim on the ground that the statute only prohibited discrimination predicated solely upon former commitment to a mental institution.[27] Because some applicants having qualifications similar to those of the plaintiff were accepted while others equally qualified were rejected, the plaintiff had not shown discrimination solely by reason of her previous commitment.[28] Furthermore, evidence indicated that while some applicants who had received psychiatric care were rejected, others were accepted.[29] The court noted that the admissions committee customarily considered previous suicide attempts and other interruptions in a person's academic career,[30] and that the committee reasoned that students who have interrupted their academic careers, for whatever reason, have a higher attrition rate than students who have not interrupted their careers.[31]

The *Glassman* court thus concluded that the record did not indicate discrimination based solely on previous admission to a mental health facility, and therefore that no violation of the New York statute had been proven. The plaintiff was not permitted to use the approach of the title VII cases that by establishing a prima facie case of discrimination through the use of statistical evidence, the burden of proof is shifted to the defendant. Instead, the plaintiff was required to isolate the factor of admission to a mental health facility and show that this variable was the sole reason for her rejection from medical school. Because there were many factors that came into play in the admissions process,[32] the plaintiff's burden of proof was insurmountable.[33] Interpreting the statute in a manner that forced the plaintiff to isolate the

26. 64 Misc. 2d at 467, 315 N.Y.S.2d at 2.
27. *Id.* at 468, 315 N.Y.S.2d at 3; *see* text of statute quoted at note 24 *supra*.
28. 64 Misc. 2d at 468-69, 315 N.Y.S.2d at 3-4.
29. *Id.*
30. *Id.*
31. *Id.*
32. Some of the factors were grades, a personal interview, admission tests, and letters of recommendation. *Id.* at 468, 315 N.Y.S. 2d at 4.
33. The *Glassman* court's analysis of the available statistics is troubling. The court indicated that some applicants with the plaintiff's qualifications were rejected and others accepted, but did not specifically analyze the statistical discrepancy between applicants having psychiatric histories and those who did not have such histories. Under title VII analysis, so long as the plaintiff establishes that there is some substantial statistical discrepancy between the number of persons against whom discrimination is prohibited and the applicant pool, the defendant would have been forced to rebut the inference of discrimination. See text & note 17 *supra*. The *Glassman* court seemed to sidestep the issue of allowing proof of prima facie discrimination on the basis of statistical evidence:

> Likewise, the argument that by considering her past mental history, the defendant reduced and hence modified or varied her ranking, and thus modified or varied her civil right, is without merit. The defendant did not modify or vary her civil right, which was to apply for admission. She did not have a right to automatic admission.
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> To accept plaintiff's interpretation of Section 70(5) of the Mental Hygiene Law, would result in discrimination against all applicants who had not been patients in a mental hospital. A high academic rating and prior admission to a mental hospital would mandate automatic admission to the medical college.

64 Misc. 2d at 469, 315 N.Y.S.2d at 4.

variable of her admission to a mental health facility, and to prove that this fact was the sole cause of her rejection, was tantamount to requiring that the plaintiff prove a specific instance of discrimination without the aid of rebuttable inferences such as those resorted to in title VII cases.

Although the defects inherent in the New York statute and the *Glassman* interpretation could be avoided under the Arizona statute by allowing potential plaintiffs to establish an inference of discrimination on the basis of prior commitment through statistical evidence, it would still not appear that the Arizona law could afford adequate protection. Courts have recognized that allowing statistical inferences can be effective devices in eliminating discriminatory practices, but there are limitations on the utility of statistics, particularly in regard to discrimination against former mental patients. If a particular minority group represents a minute portion of the general population, the absence of any members of that minority in the group under scrutiny may not be significant statistically.[34] For example, in Pima County, Arizona, there are approximately thirty-four involuntary admissions to mental health facilities per year,[35] while the county's labor pool consists of approximately 156,000 persons.[36] Unless the employer employed a very large labor force, he legitimately may have failed to hire any former involuntary mental patients. Since the numerical discrepancy between the number of former mental patients and the general population is so great, the Arizona antidiscrimination statute will not lend itself readily to proof by statistical evidence. The problem is compounded by the fact that the statute has been interpreted to deny the plaintiff the benefit of inferences.

It is apparent that the Arizona civil rights statute cannot afford the former patient adequate protection from discrimination, but it may be argued that the patient may be protected by the confidentiality statute.[37]

34. Note, *Beyond the Prima Facie Case, supra* note 17, at 416. *See also* 29 C.F.R. § 1607.5 (1976) (providing guildelines for mathematical formulas for use in discrimination cases).

35. Letter from Stuart Ghertner, Assistant to the Director, Southern Arizona Mental Health Center, to John Shannon (Feb. 24, 1977).

36. ARIZONA DEP'T OF ECONOMIC SECURITY, TUCSON AREA MANPOWER REVIEW 22 (Dec. 1975); *id.* at 21 (Nov. 1974).

37. ARIZ. REV. STAT. ANN. § 36-509 (1974) provides:

> All information and records obtained in the course of evaluation, examination or treatment shall be kept confidential and not as public records, except as the requirements of a hearing pursuant to this chapter may necessitate a different procedure. Information and records may only be disclosed, pursuant to rules established by the department, to:
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> 1. Physicians and providers of health, mental health or social and welfare services involved in caring, treating or rehabilitating the patient.
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> 2. Individuals to whom the patient has given consent to have information disclosed.
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> 3. Persons legally representing the patient, and in such case, the department's rules shall not delay complete disclosure.
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> 4. Persons authorized by a court order.
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> 5. Persons doing research or maintaining health statistics, provided that the department establishes rules for the conduct of such research, as will insure the anonymity of the patient.

Under this provision, mental health records may not be disclosed unless they are needed for treatment, for research purposes, to aid correctional officers and law enforcement agencies, or if they are obtained by court order or consent of the patient. Although the statute is designed to protect privacy, it cannot, practically speaking, ensure that the records will be kept confidential.[38] It is therefore argued that the only way to ensure confidentiality is to allow for expungement of patient-identifiers from mental health records after a designated period of time.

The confidentiality statute prohibits public disclosure of the contents of commitment records,[39] but is interpreted not to prohibit government officials, such as police officers, from learning about the existence of the mental health records.[40] In addition, one statutory exemption to the rule of confidentiality presents a significant problem. By the explicit language of the statute, records may be released to virtually anyone with the patient's consent.[41] Thus, despite the obvious protective purpose of the confidentiality statute, employers could defeat its objective by simply requiring complete disclosure of mental health records as a condition of employment.[42] Under the Arizona statute, it would be possible for an employer to ask a former patient about psychiatric treatment so long as the employer could prove that his inquiry did not encourage discrimination against former mental patients.[43] In many governmental forms and applications, questions regarding former psychiatric treatment are also common, and involve penalties for not answering fully and truthfully.[44] In addition, if an applicant answers such

6. The department of corrections in cases where prisoners confined to the state prison are patients in the state hospital on authorized transfers either by voluntary admission or by order of the court.

7. Governmental or law enforcement agencies when necessary to secure the return of a patient who is on unauthorized absence from any agency where the patient was undergoing evaluation and treatment.

38. See text & notes 39-46 *infra*.

39. ARIZ. REV. STAT. ANN. § 36-509 (1974).

40. Opinion No. 75-5, 1975 OP. ARIZ. ATT'Y GEN. 36, 40.

41. ARIZ. REV. STAT. ANN. § 36-509(2) (1974).

42. *Cf. In re* Smith, 63 Misc. 2d 198, 200, 310 N.Y.S.2d 617, 619 (Fam. Ct. 1970). In *Smith*, the court recognized this problem in the context of juvenile arrest records. Two boys, aged 14 and 15, were arrested and juvenile delinquency petitions were filed against them alleging unlawful assembly and riot during a demonstration in front of a public school. The juveniles were released and the charges were dropped. The court held that it had inherent power over juvenile records and ruled that the surnames of the boys should be deleted from the juvenile records. The analogy between juvenile records and mental health files is apropos considering the potential for harm arising from both types of files and that both types of records can be obtained by the same form of coercion. *Id.* at 200-01, 310 N.Y.S.2d at 619-20. Furthermore, even if mental health files were not available, and employers are informed that the former patient was released and no longer suffering from a mental handicap, the mere knowledge of former treatment is nevertheless stigmatizing. *Cf. id.* at 201, 310 N.Y.S.2d at 620 (employer may in fact presume guilt from arrest record even when certificate exonerating juvenile is included in the file).

43. *Compare* ARIZ. REV. STAT. ANN. § 36-506(c) (1974) *with id.* § 36-509(2).

44. *See* Application for Admission to the State Bar of Arizona, 1976-77 (on file in the *Arizona Law Review* office); *cf.* Greene v. Committee of Bar Examiners, 4 Cal. 3d 189, 480

questions truthfully, and the administrative agency refuses to hire or grant a benefit to a former patient, such administrative decisions are usually upheld unless there is a clear abuse of discretion.[45]

Under the statutory scheme of protection, the former mental patient is thus left with a Hobson's choice. He can comply with questions that require disclosure of his background and run the risk that his records will be disclosed, relying on a civil rights statute which has been shown to be ineffective. In the alternative, the patient can refuse to answer the inquiry and run the risk that his application will be summarily denied because of failure to answer questions fully and truthfully.[46] Although the intent of both the confidentiality and antidiscrimination statutes[47] is to ensure the patient's privacy, the ineffectiveness of these statutes indicates that they need to be supplemented by an additional provision requiring the removal of "patient-identifiers." If mental health records did not contain information directly identifying the patient, and if the patient were given the legal right to disavow any connection with the civil commitment process, the patient would avoid the problems inherent in the current statutes, and thus would be afforded greater protection. In addition, strong constitutional arguments can be made to support the enactment of a statute mandating the expungement of patient-identifiers.

P.2d 976, 93 Cal. Rptr. 24 (1971) (applicant failed to fully disclose litigation and arrest warrant); Spears v. State Bar, 211 Cal. 183, 294 P.697 (1930) (applicant failed to disclose crimes involving moral turpitude); *cf. Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st. Cong., 1st & 2d Sess. 285 (1969-70) (prepared statement of Bruce J. Ennis) (alleged denial of hack licenses and civil service employment) [hereinafter cited as *Hearings*].

45. *See* Spears v. State Bar, 211 Cal. 183, 294 P.697 (1930); Dening v. Cooke, 162 Misc. 723, 295 N.Y.S. 724 (Sup. Ct. 1937); *cf. In re* Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976) (bar committee's determination that law student's irrational behavior rendered him mentally unfit to practice law upheld). *But see In re* Courtney, 83 Ariz. 231, 319 P.2d 991 (1957) (applicant admitted to bar despite committee's lack of recommendation).

46. *See* Anonymous v. Kissinger, 499 F.2d 1097 (D.C. Cir. 1974). Although regulations promulgated pursuant to ARIZ. REV. STAT. ANN. § 36-107 (1974) suggest that divulgence of information contained in any medical record is prohibited, *see* ARIZ. ADMIN. R. & REG. tit. 9, § 9-1-314(5) (1975), the regulations would not inhibit prohibited disclosure as a practical matter. A records clerk confronted with an appropriate consent form would not be in a position to determine whether the intent of the confidentiality statute was being thwarted in a particular case.

The mental health statutes insure against disclosure by imposing penalties on those who violate a patient's rights, *see* ARIZ. REV. STAT. ANN. § 36-516(B) (1974), but the same statute also allows violations for good cause. *Id.* § 36-516(A). In addition, it is possible that disclosure of records may be authorized, such as when a patient consents to disclosure, *see, id.* § 36-509(2), and yet, be in contravention of the law's purpose in providing privacy because a patient was coerced into disclosure of his mental health file. *See generally* Opinion No. 75-5, 1975 OP. ARIZ. ATT'Y GEN. 36, 39.

47. *See* ARIZ. REV. STAT. ANN. §§ 36-506,-509 (1974); ARIZ. ADMIN. R. & REG. tit. 9, §§ 9-15-305,-313 (1975).

CONSTITUTIONAL BASES FOR EXPUNGEMENT

The Right to Privacy

In *Griswold v. Connecticut*,[48] the Supreme Court first recognized privacy as an independent constitutional right.[49] Although this right is never mentioned explicitly in the Constitution, the Court has expanded its scope as a fundamental constitutional liberty.[50] The Court has recently indicated that the right to privacy entails two different concepts.[51] Privacy may include an interest in avoiding disclosure of personal matters[52] and an interest in making certain kinds of important decisions.[53] In order to establish that expungement of involuntary commitment records falls under the constitutional right to privacy, the first aspect of the right will be relevant. It can be argued that expungement is within the individual's interest in avoiding disclosure of personal matters.[54] Certainly, the individual has a legitimate expectation of privacy, arising from statute, which historically gives rise to recognition of the applicability of constitutional privacy protection.[55] The substantial risk of breach of the state's duty to ensure confidentiality of mental health records, and the serious consequences for the individual whose records are disclosed, seem to require such constitutional recognition.

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48. 381 U.S. 479 (1965).

49. In *Griswold*, appellants included the executive director, the medical director of the Planned Parenthood League and a licensed physician accused of giving married persons information on contraceptives, in violation of a Connecticut statute making it a crime for any person to use any drug or article to prevent conception. The Court held that the statute violated the right of privacy which was within the penumbra of the first, third, fourth, fifth and ninth amendments. *Id.* at 484.

50. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Mancusi v. DeForte, 392 U.S. 364 (1968); Katz v. United States, 389 U.S. 347 (1967).

51. Whalen v. Roe, 429 U.S. 589 (1977). In *Whalen*, the Court held that a New York statutory scheme which required disclosure of a patient's prescription for certain dangerous drugs and storage of such information in a centralized computer bank was not violative of the right to privacy.

52. *Id.* at 599 n.25.

53. *Id.* at 600 n.26. The Court mentioned that this aspect of privacy is restricted to decisions in regard to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.*; *see* Paul v. Davis, 424 U.S. 693, 713 (1976). *See generally* Gross, *The Concept of Privacy*, 42 N.Y.U.L. REV. 34 (1967); Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670, 673-86 (1973).

54. *See* Stanley v. Georgia, 394 U.S. 557 (1969), where the Court held that a Georgia statute prohibiting private possession of obscene materials violated the first amendment. Arguably, the case supports the notion that the state may not infringe a person's control over personal matters. The Court stated: "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id.* at 564; *accord*, Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See also* Whalen v. Roe, 429 U.S. 589, 606 (1977) (Brennan, J., concurring) (constitutional right of privacy may prohibit unauthorized disclosure of personal information). *But cf. id.* at 609 (Stewart, J., concurring) (broad dissemination of personal information does not entail privacy interests).

55. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969) (possession of pornographic material within privacy of home); Mancusi v. DeForte, 392 U.S. 364 (1968) (individual can object to search and seizure of personal papers kept at his place of work); Katz v. United States, 389 U.S. 347 (1967) (legitimate expectation of privacy when using public telephone).

A recent United States Supreme Court case, however, dealt with a similar issue, but apparently reached a contrary conclusion. In *Whalen v. Roe*,[56] the Court upheld a New York statutory scheme which required computerized retention of distribution records for certain dangerous drugs for a period of five years.[57] The statute also required destruction of all the records at the end of the five year period.[58] The New York statute required that a doctor who prepares a prescription for certain dangerous drugs fill the prescription in triplicate on an official form. The completed form must identify the prescribing physician, the dispensing pharmacy, the drug and dosage, and the patient.[59] One copy is retained by the physician, the second by the pharmacist, and the third forwarded to the New York State Department of Health in Albany. The physicians and pharmacists are required to retain their copies for five years, but unlike the Health Department, are not required to destroy the records.[60]

The *Whalen* Court listed the many precautions required by statute or regulation to be taken by the Department of Health to insure confidentiality. The receiving room where the prescriptions are received is surrounded by a locked wire fence and protected by an alarm system.[61] The computer tapes containing the prescription data are kept in a locked cabinet. Furthermore, when the tapes are used, the computer is operated so that no other terminal outside the computer room can read or record the information. In addition, public disclosure of the identity of patients is expressly prohibited by statute and by a Department of Health regulation.[62] The Court held that in light of these safeguards, New York's statutory system for temporarily storing information regarding dangerous drug prescriptions did not violate the constitutional right to personal privacy.[63] However, the *Whalen* decision does not mandate the conclusion that no privacy right is invaded by the Arizona commitment statutes.

Unlike the statute upheld in *Whalen*, the statutory scheme for civil commitment in Arizona allows the state to retain mental health records for an indefinite period of time.[64] The Court held that the New York law requiring five year retention of prescriptions in state data banks was not, on

56. 429 U.S. 589 (1977).
57. *Id.* at 593. The New York statute classified drugs into five categories. Schedule I drugs included heroin and other drugs which are highly abused and subject to no recognized medical use. Schedule II through V included drugs of progressively lower dangerousness. The Court in *Whalen* dealt with Schedule II drugs, the most dangerous of the legitimate drugs. *Id.* The identification of patients was designed to aid in the enforcement of laws intended to minimize the misuse of dangerous drugs. *Id.* at 597.
58. *Id.* at 593.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 601-02.
64. ARIZ. REV. STAT. ANN. §§ 36-529, -540 (1974).

its face, a violation of the right to privacy, because the appellees had not shown that the security provisions in the statutory scheme supported an assumption that the program would be administered improperly.[65] The Court relied in part on the assertion that the statutory scheme did not provide for unwarranted public disclosure of the data because the New York statute provided for destruction of records after 5 years.[66]

The Court took a similar position in *Planned Parenthood v. Danforth*.[67] One provision of the Missouri statute challenged in this case required records of abortions to be kept for seven years.[68] Because of the governmental need to keep accurate and complete statistical information, and in light of the provision in the statute requiring confidentiality of those records, the Court upheld the law on the grounds that it did not infringe on the mother's right of privacy.[69] Furthermore, the Court held that retention of records for a limited time was not an unreasonable way in which to effectuate the state's purpose in compiling the records.[70]

The state interest in maintaining mental health records for an indefinite period of time to compile statistics and to aid research is no more compelling than keeping other types of records for the same purposes. Once researchers and statisticians have extracted the necessary material from the record, the record serves no further statistical or research purpose. Because there is no more compelling reason for retaining mental health files for statistical and research purposes than other types of records, those who keep mental health records should be required, after a reasonable period of time, to remove patient-identifiers.[71]

A major factor in the *Whalen* Court's holding that the New York statute permitting computerized storage of prescriptions for dangerous drugs violated no right of privacy was the presence of numerous procedural safeguards built into the statutory scheme assuring that no unwarranted

65. 429 U.S. at 601.
66. *Id.* at 601 n.27.
67. 428 U.S. 52 (1976). The Court held in *Planned Parenthood* that a Missouri statute which required spousal or parental consent to an abortion was violative of the right to privacy. *Id.* at 65-67.
68. *Id.* at 79.
69. *Id.* at 81.
70. *Id.* The Court expressed its holding in rather narrow terms:
> Recordkeeping of this kind, if not abused or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment. The added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits.

Id. at 81 (footnote omitted).
71. The state interest in treatment may justify retention for a longer period of time. However, even in this context, patient confidentiality may be preserved by requiring patient-identifiers to be removed after treatment has ended, with the state keeping a closely guarded code linking patient to file, and allowing patients to be identified with their files only if treatment is needed at a subsequent time.

disclosures would occur.[72] The New York statutes,[73] unlike the civil commitment laws in Arizona,[74] do not contain a provision whereby a patient may consent to the disclosure of his records. As previously discussed, the Arizona consent provision need not be violated for unwarranted disclosure to occur.[75] The state or a private party may coerce disclosure of the records by withholding certain benefits unless the patient discloses the record.[76]

Clearly, disclosure under such circumstances would stigmatize the former patient, and may result in the loss of some valuable benefit. When courts have been confronted by possible stigmatization in the context of arrest records, they have allowed expungement of those records where the individual was unconstitutionally detained.[77] These courts have allowed expungement on the theory that they possess inherent power to protect a person's privacy once it has been shown that the police do not have an interest in the records.[78] The same theory which justifies destruction of arrest records arguably supports the expungement of mental health re-

72. 429 U.S. at 600-01.

73. N.Y. PUB. HEALTH LAW §§ 3300-3371 (McKinney Supp. 1975-76).

74. *See* ARIZ. REV. STAT. ANN. § 36-509(2) (1974).

75. See text & notes 45-47 *supra*.

76. A major area of concern is that the patient may be forced to waive confidentiality of mental health files in order to receive benefits from third-party payors, such as insurers of group health plans where coverage is provided for civil commitment. *See* Connecticut Gen. Life Ins. Co., Arizona Health Plan, § A (on file in the *Arizona Law Review* office); Aetna Life Ins. Co. Group Plan 5460186 (Group Policy No. 6P-363764, Jan. 4, 1977) (on file in the *Arizona Law Review* office). If a patient is unfortunate enough to sign a blanket consent form in return for insurance coverage, the patient may discover that he would be unable to stop wide-scale dissemination of his mental health file. For instance, the insurer may notify the patient's employer of the employee's condition, on the theory that the employer is entitled to this information since the employer is paying the premiums. *See* U.S. DEP'T OF COMMERCE, NAT'L BUREAU OF STANDARDS, COMPUTERS, HEALTH RECORDS, AND CITIZENS RIGHTS 48 (N.B.S. Monograph 157 Dec. 1976) [hereinafter cited as CITIZENS RIGHTS].

In addition, mental health records could be disclosed by insurance companies to credit reporting agencies. Although credit reporting agencies are required to discuss the contents of their records with persons adversely affected by a report, medical information need not be disclosed. *See* 15 U.S.C. §§ 1681, 1681g (1970). The dangerous possibilities discussed here are mitigated to some degree because some mental health treatment facilities require specific consent forms before information can be released. Interview with Dr. Stuart J. Ghertner, Special Assistant to the Director, Southern Arizona Mental Health Center, in Tucson, Arizona (Oct. 30, 1975 & Nov. 4, 1975).

77. *See, e.g.*, Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974); Kowall v. United States, 53 F.R.D. 211 (W.D. Mich. 1971); United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967); Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971).

In *Menard*, the court held that the FBI could not retain a card containing fingerprints of an individual who was detained but not arrested. The court used its inherent power to order expungement, after it gave an extremely narrow interpretation to statutory authority which allowed the F.B.I. to retain arrest records of local law enforcement agencies. 498 F.2d at 1029-30. In *Kowall*, the court held that where a defendant was improperly arrested for failure to report for military induction, it had inherent power to order expungement. 53 F.R.D. at 216. Similarly, in *Kalish*, the court held that it had inherent power to order expungement of arrest records when an inductee failed to be sworn into military service because he relied on the advice of counsel. 271 F. Supp. at 970. In *Eddy* and *Davidson*, the courts held that the right to privacy required the return or expungement of arrest records to defendants against whom charges had been dismissed or who had been acquitted, absent a compelling showing by the police department justifying retention of the records. 180 Colo. at 132, 503 P.2d at 162; 5 Wash. App. at 345, 487 P.2d at 217.

78. *See* discussion & cases note 77 *supra*.

cords.[79] When courts have ordered expungement of arrest records, they have recognized the great potential for harm from retaining those records. Because the state had an insufficient interest in retaining the records,[80] the threat of disclosure has led several courts to recognize that indefinite retention of these records violates an individual's right to control information about himself and thus violates his constitutional right to privacy.[81] The potential for discrimination resulting from the retention of mental health records is similar to that suffered from the retention of arrest records.[82] A

79. See text & notes 80-84 *infra*. *But see* Wolfe v. Beale, 23 Pa. Commw. Ct. 475, 353 A.2d 481 (1976), where the court held that a statute requiring records to be kept for an indefinite period of time after a mental patient was released deprived the court of authority to expunge the records. *Id.* at 477, 353 A.2d at 482. The dissent properly called attention to the majority's error in not recognizing the right of privacy established by the Pennsylvania Constitution, PA. CONST. art. I, § 1, which arguably gave the court authority to order expungement. 23 Pa. Commw. Ct. at 478, 353 A.2d at 483 (Kramer, J., dissenting). The dissent limited its analysis by arguing that if Ms. Beale was unconstitutionally confined, the state had no interest in the records. As previously stated, however, a constitutional right to privacy may prohibit indefinite retention of records even if commitment procedures were constitutionally valid. See text & notes 52-76 *supra*. *But cf.* Volkman v. Miller, 52 App. Div. 2d 146, 383 N.Y.S.2d 95 (1976) (law requiring computerization of mental health files declared to be constitutionally permissible; plaintiffs' allegations were merely conclusory and without factual support).

80. The state interest in monitoring criminal activity is not compelling when an arrestee was detained and later released, or when an arrestee has been acquitted. *See In re* Smith, 63 Misc. 2d 198, 202, 310 N.Y.S.2d 617, 621 (Fam. Ct. 1970); Eddy v. Moore, 5 Wash. App. 334, 344, 487 P.2d 211, 217 (1971).

81. Davidson v. Dill, 180 Colo. 123, 130, 503 P.2d 157, 161 (1972); Eddy v. Moore, 5 Wash. App. 334, 345, 487 P.2d 211, 217 (1971).

A person with an arrest record is much more apt to be subject to police scrutiny: He often will be the first to be questioned and the last eliminated as a suspect. *See* Menard v. Mitchell, 430 F.2d 486, 490-91 (D.C. Cir. 1971). In addition, arrest records are used by judges in making sentencing decisions, and in deciding whether to grant bail or release without bond. *See, e.g.*, Russell v. United States, 402 F.2d 185, 186 (D.C. Cir. 1968); United States v. Cifarelli, 401 F.2d 512, 514 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968); Jones v. United States, 307 F.2d 190, 192 (D.C. Cir. 1962). Finally, an arrest record may adversely affect employment opportunities. Menard v. Mitchell, 430 F.2d 486, 490 n.17 (D.C. Cir. 1971). Some statutes require the submission of fingerprints with an application for a license, *see* Menard v. Saxbe, 498 F.2d 1017, 1021 (D.C. Cir. 1974), and sometimes specify arrest records as grounds for denial of a license or merely invest administrative officials with broad power to determine fitness or moral character. *See, e.g.*, CONN. GEN. STAT. ANN. § 14-44 (West Supp. 1977); DEL. CODE tit. 24, § 1303 (1974); FLA. STAT. ANN. § 561.15(1) (West Supp. 1977); N.J. STAT. ANN. § 17:15A-7 (West 1970); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470, 475 & n.24 (1971). Since it is possible for administrative agencies to acquire arrest records, or at least to confirm that the applicant has been arrested, the record may serve as a potential barrier to employment or approval for a state license. Furthermore, because administrative determinations ordinarily are not overturned absent a clear showing of arbitrariness, caprice, or fraud, McDonough v. Goodell, 13 Cal. 2d 741, 91 P.2d 1035 (1939); Epstein v. California Horse Racing Bd., 222 Cal. App. 2d 831, 35 Cal. Rptr. 642, 648 (Ct. App. 1963); State *ex rel.* Bluemond Amusement Park, Inc. v. Mayor of Milwaukee, 207 Wis. 199, 240 N.W. 847 (1932), it is possible for former arrestees to be summarily denied employment.

The potential for misuse of arrest records is greatly magnified when computerization of records allows for widespread dissemination. *See* Davidson v. Dill, 180 Colo. 123, 125-26, 503 P.2d 157, 158-59 (1972). Because arrest records are often cryptic, they are frequently susceptible to misinterpretation by someone untrained in the use of the terminology employed. Menard v. Mitchell, 430 F.2d 486, 493 (D.C. Cir. 1970). Thus, even though an arrestee was eventually exonerated, the inference of guilt might nevertheless attach. Alexander & Waltz, *Arrest Record Expungement in California: The Polishing of Sterling*, 9 U.S.F.L. REV. 299, 302 (1974); *see* Note, *Guilt by Record*, 1 CAL. W.L. REV. 126 (1965).

82. Psychiatric evaluation inherently involves probes into the innermost thoughts of an individual. If the information thus obtained is allowed to become public, it can be extremely damaging. Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952)); Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55, 64

former mental patient may be denied employment as a result of his medical history,[83] experiencing the same frustration a former arrestee often feels because of his involvement with the police.[84] Additionally, mental health records are highly susceptible to misinterpretation by untrained individuals.[85] The sensitive nature of mental health files and their susceptibility to

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(1973). One of the tools utilized in psychiatric examinations is a wide-ranging discussion designed to elicit information about past crimes, antisocial conduct, personality molding experiences, and subconscious ideas and values. *Id.* at 58. The patient is subjected to a battery of tests, such as the Minnesota Multiphasic Personality Inventory, which includes the following questions which must be answered "true" or "false":

> 1) I think of things too bad to talk about; 2) I dream frequently about things that are best kept to myself; 3) I believe there is a God; 4) I believe in the second coming of Christ; 5) Christ performed miracles such as changing water into wine; 6) I believe there is a Devil and Hell in afterlife; 7) I am worried about sex matters; 8) I wish I were not bothered by thoughts about sex; 9) When a man is with a woman he is usually thinking about things related to her sex; 10) there is something wrong with my sex organs.

Id. at 64 n.52. It would appear that these questions would not be ordinary topics of conversation, and answers would only be elicited if a person was under some obligation to respond.

Even at the early stages of the civil commitment process, before a patient actually is evaluated by psychiatrists, the potential for gathering private information exists. In Arizona, for example, a prepetition screening report is required after the initial application is filed alleging that a proposed involuntary patient is, as a result of a mental disorder, a danger to himself and others. ARIZ. REV. STAT. ANN. § 36-521(c)(1974). The prepetition screening report is prepared essentially from an interview with the alleged dangerous individual and involves compiling an "intake" of the individual. The "intake" includes a social history which often involves disclosure of private matters, such as marital and family problems of the patient. Interview with Dr. Stuart J. Ghertner, *supra* note 76.

83. *See* Olshansky, Grob, & Malamud, *Employers' Attitudes and Practices in the Hiring of Ex-Mental Patients*, 42 MENTAL HYGIENE 391 (1958). *See generally Hearings, supra* note 44, at 284; Farina & Ring, *The Influence of Perceived Mental Illness on Interpersonal Relations*, 70 J. ABNORMAL PSYCH. 47 (1965); Sarbin & Mancuso, *Failure of a Moral Enterprise: Attitudes of the Public Toward Mental Illness*, 35 J. CONSULTING & CLINICAL PSYCH. 159 (1970).

84. *See* MENTAL HEALTH LAW PROJECT, PROPOSED MENTAL HEALTH LEGISLATIVE GUIDE § M, at 1 (1975) [hereinafter cited as LEGISLATIVE GUIDE]. The retention of mental health records might result in other disabilities as well. Rights which may be impaired include the right to serve on federal juries, *see* 29 U.S.C. § 1865(b) (1970), the right to obtain a firearm license, D.C. CODE §§ 3207-3210(3)(a) (1973), or a driver's license, VA. CODE § 46.1-360 (Supp. 1976). *See generally Hearings, supra* note 44, at 285. Other disabilities include loss of insurance coverage and benefits, and the avoidance of necessary treatment out of fear of disclosure. *See* CITIZEN RIGHTS, *supra* note 76, at 48-69.

85. *See* Gotkin v. Miller, 514 F.2d 125, 127 n.2 (2d Cir. 1975). Mental health records can sometimes be misleading because judgments and opinions concerning unconventional behavior often depend on the biases and predisposition of doctors. *See In re* Sealy, 218 So. 2d 765 (Fla. App. 1969) (two doctors testified that a self-proclaimed hippie, who believed in free love and nonviolence, was mentally ill, while another psychologist disagreed). In addition, diagnosis and labeling of a patient's disorder may to some degree depend upon the psychiatrist's educational background and abilities, which may create certain biases in diagnosticians causing them to recognize certain forms of psychopathology in their patients more so than other forms. *See* G. FRANK, PSYCHIATRIC DIAGNOSIS: A REVIEW OF THE RESEARCH 67-68 (1975); Pasamanick, Dinitz, & Lefton, *Psychiatric Orientation and its Relation to Diagnosis and Treatment in a Mental Hospital*, 116 AM. J. PSYCH. 127 (1959); Pikorny, *Problems in Psychiatric Classification*, 1 INT'L J. NEUROPSYCH. 161 (1965); Strupp & Williams, *Some Determinants of Clinical Evaluations of Different Psychiatrists*, 2 ARCHIVES GENERAL PSYCH. 434 (1960).

The dangers of psychological labeling are compounded by the imperfection of psychiatric diagnosis. *See, e.g.*, Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 697 (1974); Raines & Johrer, *The Operational Matrix of Psychiatric Practice: Consistency and Variability in Interview Impressions of Different Psychiatrists* (pt. 1), 111 AM. J. PSYCH. 721 (1955); Schmidt & Fonda, *The Reliability of Psychiatric Diagnosis: A New Look*, J. ABNORMAL SOC. PSYCH. 262 (1956); Strupp & Williams, *supra* at 434. Another danger resulting from the presence of mental health records is that some patients who are labeled "dangerous" are later found not to be dangerous. *See* Rubin, *The Psychiatric Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCHIVES GENERAL PSYCH. 397, 407 (1972) (bibliography of statistical studies); *Special Project, supra* note 1, at 99.

misinterpretation are problems which are exacerbated by the widespread dissemination possible now that such records are being computerized.[86]

In addition to the problem of disclosure of personal information in mental health records, disclosure of such records could inhibit patients from seeking psychiatric care. In *Whalen v. Roe*,[87] the Court found no evidence showing that a statutory scheme requiring centralized recordation of prescriptions for dangerous drugs inhibited patients from consulting their doctors.[88] For this reason, the Court held that the statute did not, on its face, violate the constitutional right to privacy.[89] However, in the context of mental health records, the threat of possible disclosure may demonstrably inhibit patients from voluntarily seeking psychiatric care.[90] In such a case,

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Finally, psychologists and psychiatrists can fall prey to the dangers of "reification," the labeling of behavior as an attribute of a person. An example of this tendency occurs when a man who steals is labeled "a thief." Labeling a man who steals a thief is to reify the action into an attribute, implying that a man will continue to steal regardless of external circumstances. This same process occurs when a person who is a danger to himself or others is labeled "dangerous" under civil commitment laws. Once a person acts violently, he is labeled dangerous, and the dangerousness is no longer used to describe behavior, but the qualities of the individual. Thus, it is possible that psychological labeling can be transformed into a self-fulfilling prophecy. *See* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 449 (1974).

86. Computers are increasingly being used to store information about mental patients. By 1974, the Multistate Information System [MSIS] was receiving automated data on psychiatric patients in six states and the District of Columbia, and has helped establish compatible computer systems in several other states. Gobert, *Accomodating Patient Rights and Computerized Mental Health Systems*, 54 N.C.L. REV. 153, 155 & n.7 (1976) [hereinafter cited as *Gobert*]; *see* LEGISLATIVE GUIDE, *supra* note 84, § L, at 11. *See generally* Murnaghan, *Health-Services Information Systems in the United States Today* 1974, NEW ENG. J. MED. 693 (1974); Ultett, *Automation in a State Mental Health System*, 25 HOSPITAL & COMMUNITY PSYCH. 77 (1974). Computerized data banks are particularly susceptible to misuse because of the speed with which information can be obtained and the volume of such material. LEGISLATIVE GUIDE, *supra*, at 17.

87. 429 U.S. 589 (1977).

88. *Id.* at 602.

89. *Id.* The Court noted that although the appellees claimed that possible disclosure would inhibit them from using schedule II drugs, about 100,000 prescriptions for such drugs were filled each month prior to the district court's injunction. From this data the Court concluded that the New York statute, did not on its face inhibit patients from using schedule II drugs.

90. Dr. Maurice Grossman, a clinical professor of psychiatry and Chairman of the American Psychiatric Association's Task Force on Confidentiality compiled case histories which underscore the conclusion that threat of disclosure of mental health files adversely affects the psychiatrist-patient relationship:

> 1. A patient, the wife of an employee covered by a group contract required intensive treatment because of extreme emotional decompensation . . . .When her husband filed a claim for the cost of treatment, he was told that the employer would be informed of the claim and would be required to increase premium payments on all employees . . . . The physician was dissuaded from following up on the case by both the husband and the wife for fear that the husband would lose his job. The patient became worse.
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> 2. A schizophrenic patient received electric shock treatment in a hospital and was able to return to work. The patient was not told the actual diagnosis because she was still in a fragile state . . . . The hospital sent a report of the hospitalization, including the diagnosis of schizophrenia and an account of a suicide attempt to the insurance company . . . which [in turn sent it] to the employer under a group contract coverage. Back at work, the patient found . . . that her fellow employees knew all about her illness. [She] became paranoid toward her physician and terminated treatment.
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> 3. A . . . psychiatric patient inquired from the insurance company whether information would reach the employer and was assured it would not. The entire therapy was damaged and the patient became worse when the employer disclosed knowledge of the treatment and other factors. The Medical Director of the National

the patient would be able to assert that the state is unduly infringing upon privacy by disturbing the physician-patient relationship.

In *Roe v. Wade*,[91] the Supreme Court held that a Texas criminal statute prohibiting abortions violated a woman's constitutional right to privacy.[92] In addition, the Court held that in the first trimester of pregnancy, the abortion decision must be left to the medical judgment of the pregnant woman's attending physician.[93] The Court indicated that where the patient exercises her right to an abortion, the state may not impinge upon the doctor-patient relationship.[94] In a concurring opinion to *Doe v. Bolton*, Mr. Justice Douglas suggested that the doctor-patient relationship deserves constitutional protection.[95] The Court in *Whalen v. Roe*[96] has recently interpreted such language as giving a doctor a derivative claim to the patient's right of privacy.[97] Where the patient has no constitutional claim, the doctor has no

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[insurance] company involved . . . wrote: "We are obligated to tell the employer because he pays the premiums."

See CITIZEN RIGHTS, *supra* note 76, at 48-49.

91. 410 U.S. 113 (1973).

92. *Id.* at 163.

93. The Court also held that after the "compelling point" (the point in time recognized by the Court where the instance of mortality in abortion may be less than mortality in normal childbirth), the state could regulate the abortion decision to the extent that such regulation is reasonably related to the preservation and protection of the mother's health. *Id.* Finally, the Court held that after viability (the point at which a fetus is capable of meaningful life outside the mother's womb), the state may proscribe abortion to carry out its interest in potential life. *Id.*

94. With respect to the state's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. . . .

This means . . . that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Id.

95. The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship.

It is one thing for a patient to agree that her physician may consult with another physician about her case. It is quite a different matter for the State compulsorily to impose on that physician-patient relationship another layer or, as in this case, still a third layer of physicians. The right of privacy—the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment—becomes only a matter of theory, not a reality, when a multiple-physician-approval system is mandated by the State. . . .

The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values. We deal with fundamental rights and liberties, which, as already noted, can be contained or controlled only by discretely drawn legislation that preserves the "liberty" and regulates only those phases of the problem of compelling legislative concern. The imposition by the State of group controls over the physician-patient relationship is not made on any medical procedure apart from abortion, no matter how dangerous the medical step may be. The oversight imposed on the physician and patient in abortion cases denies them their "liberty," *viz.*, their right of privacy, without any compelling, discernible state interest.

Georgia has constitutional warrant in treating abortion as a medical problem. To protect the woman's right of privacy, however, the control must be through the physician of her choice and the standards set for his performance.

Doe v. Bolton, 410 U.S. 179, 219-20 (1972) (Douglas, J., concurring).

96. 429 U.S. 589 (1977).

97. *Id.* at 604 n.33.

greater right than that of the patient.[98] As discussed previously, the patient arguably has a right to privacy in permitting removal of patient-identifiers where health records are retained by the state for an indefinite period of time.[99] In such a case, the physician would be permitted to assert the right to have patient-identifiers removed. However, the state may assert its own interests in order to overcome this right.

State Interests in Defense of Retention of Records

The state's interests in retaining arrest records are the prevention of future criminal activity and the compilation of statistics.[100] However, when an arrestee is released or acquitted, most courts have recognized that the state interest is no longer compelling, and have ordered expungement.[101] This rationale can be applied to the state's interests in the maintenance of mental health records. Several interests could potentially justify the state's retention of mental health records. First, the state could argue that records are needed to assist treatment should a patient be recommitted. Second, mental health records arguably should be retained for statistical purposes.[102] Finally, the state could argue that records are needed for research purposes.

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98. *Id.* In *Whalen* the Court did not reject the argument that inhibition of the doctor-patient relationship may be an unconstitutional invasion of privacy, but only held that there was insufficient evidence in that case to raise the presumption that the statute on its face could cause such an inhibition. *Id.* The Court also indicated that the doctor's right was derivative of the patient's—a doctor could complain of an unconstitutional law only to the extent such a law inhibited the patient's protected activity. *Id.* The Court specifically left open the question whether a statutory scheme which inhibited the doctor-patient relationship by unwarranted disclosures might violate the right to privacy. *Id.* at 605-06.

99. See text & notes 79-98 *supra*.

100. *See In re* Smith, 63 Misc. 2d 198, 202, 310 N.Y.S.2d 617, 621-22 (Fam. Ct. 1970); Eddy v. Moore, 5 Wash. App. 334, 344, 487 P.2d 211, 217 (1971).

101. *See In re* Smith, 63 Misc. 2d 198, 202, 310 N.Y.S.2d 617, 621-22 (Fam. Ct. 1970); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971). However, another line of cases has held that, absent legislative direction as to disposition of arrest records, courts do not have power to order expungement. *See, e.g.*, Herschel v. Dyra, 365 F.2d 17, 20 (7th Cir. 1966); Sterling v. City of Oakland, 208 Cal. App. 2d 1, 6, 24 Cal. Rptr. 696, 699 (Ct. App. 1962); Spock v. District of Columbia, 283 A.2d 14, 17 (D.C. App. 1971).

102. The interest in retaining records for statistical purposes can be dealt with summarily. The individual interest in privacy proposed here deals with permanent removal of patient-identifiers from the files and the right to deny psychiatric history without fear of perjury or other adverse consequences. Thus statistical material need not be destroyed, provided it is not traceable to a particular former patient. *See generally* Gobert, *supra* note 86, at 183. It is interesting to note that one organization which supplies the life insurance industry with medical data completely expunges information in its computer file every seven years, so that reports made in the distant past are no longer available for underwriting purposes. *See* CITIZEN RIGHTS, *supra* note 76, at 61.

Potential third-party payors may complain that a lack of information on the background of an insured or an applicant prevents accurate assessment of risk for underwriting and claims purposes. For this reason, the underwriting process should be distinguished from the claims process. As to the claims process, it is clearly necessary for the insurer to have access to the patient-insured's background, in order to prevent fraud and to provide a factual basis on which to determine whether coverage exists. However, after a certain period of time is allowed for the insurance companies to gather such information, patient-identifiers can be removed. On the other hand, underwriting presents a less compelling need for specific information. *Id.* The damage that a lack of information concerning involuntary civil commitment may cause in assessing insurance risks can be compensated by socializing those risks. If insurance companies miscalculate their premiums and coverage, such costs will be passed on to other customers.

The state's interest in treatment will not justify indefinite retention of commitment files, in view of a viable, less restrictive alternative. To fully serve the treatment interest, records may be retained for a designated period of time after release of a patient from commitment, at the expiration of which patient-identifiers should be removed from the files, and only those persons involved with treating the patient should be allowed access to the identifiers.[103] Mental health care professionals could also use such records in subsequent commitment proceedings.[104] The state's interest in carrying on research, although it is clearly a valid one,[105] can also be met by less restrictive means. This state purpose can be accomplished if mental health records and their patient-identifiers are kept for a designated period of time, giving researchers access to the files to conduct necessary studies.[106]

In addition to these conventional interests, the state may argue that retention of records for treatment purposes is predicated on the parens patriae power, meaning that a lesser showing of governmental interest would justify retention of records, on the theory that this power is invoked to protect the welfare of an incompetent individual.[107] However, this power is

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Such relatively minor costs borne by a large number of people should be balanced against the possible damage caused by disclosure of mental health records. When the great potential for harm from disclosure is weighed against increased insurance premiums, it would appear that social policy should favor the privacy interest. *Id.* at 279.

103. *See generally* CITIZEN RIGHTS, *supra* note 76, at 278-80. Such records would normally be used in a continuing treatment program after commitment has terminated. For instance many patients who are committed in Arizona opt for voluntary aftercare. Interview with Dr. Stuart J. Ghertner, *supra* note 76. Requiring removal of patient-identifiers is hardly a novel suggestion, since treatment facilities such as the Southern Arizona Mental Health Center in Tucson, Arizona require patient-identifiers be removed six months after termination of treatment. *Id.* However, because such requirements may not be uniformly applied, a statute requiring such a procedure is necessary to ensure patient confidentiality. *See generally* CITIZENS RIGHTS, *supra* note 76, at 281.

104. Another possible use of mental health records would be in predicting a particular patient's predilection for violent and dangerous behavior. Although it is generally recognized that mental health care professionals are not very successful in predicting dangerousness, the psychiatric literature suggests that prediction might be less successful without a history of the patient. *See generally* Diamond, *supra* note 79, at 444-47; Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 AM. J. PSYCH. 304 (1972); *Special Project*, *supra* note 1, at 96-99; *Developments in the Law, supra* note 1, at 1242. Commenting on the study completed on the Baxstrom patients, one writer observed: "One can only conclude that psychiatrists who make [*sic*] such judgments tended to overpredict dangerousness greatly, by a factor somewhere between ten and a hundred times the actual incidence of dangerous behavior." Diamond, *supra* at 447. Several Baxstrom patients successfully challenged a New York law that allowed prisoners believed to be mentally ill and dangerous who had completed their maximum sentences to be retained indefinitely in maximum security hospitals for the criminally insane. *See* Baxstrom v. Herold, 383 U.S. 107 (1966).

105. There is little question that the need for research in psychiatry is pressing. For example, followup studies are necessary to test effectiveness in predicting dangerousness as well as testing diagnostic categories. *See* G. FRANK, *supra* note 85.

106. For example, the Southern Arizona Mental Health Center, through informal fiat, requires patient-identifiers to be removed from files after records are closed—six months after treatment is terminated. Interview with Dr. Stuart J. Ghertner, *supra* note 76.

107. The parens patriae power developed as part of the English constitutional system, under which the King became the guardian of all infants, idiots, and lunatics, and has been the basis of involuntary commitment of the mentally ill. Under such power the state acts in a beneficient, rather than punitive role in promoting the interests of certain persons deemed incompetent. *In re* Ballay, 482 F.2d 648, 658-59 (D.C. Cir. 1973) (dictum); W. BLACKSTONE, COMMENTARIES *47-48. *See generally Developments in the Law, supra* note 1, at 1210.

limited by constitutional safeguards, and in balancing the hardship which the patient must bear against the hardship on the state, the retention of mental health records for an indefinite period of time is unjustified. Although it is uncertain whether the parens patriae power or the police power justifies involuntary institutionalization,[108] even if the civil commitment laws are construed as an exercise of the parens patriae power, it can be argued that this power would trigger the same constitutional protections as the police power.

Where claims that the state is acting in the best interests of the individual are said to justify reduced procedural and substantive safeguards, the state actions must be "candidly appraised."[109] If they are to be sustained, they must be reasonably calculated to produce the beneficial results that motivate them. Furthermore, courts have recognized that exercising the parens patriae power in the context of involuntary civil commitment can be justified only if the state provides treatment;[110] once treatment ends, confinement of patients must be justified on some other ground. Since the parens patriae power is exercised for the benefit of the patient, the termination of treatment seems to determine the point at which the state can no longer constitutionally exercise such power.[111] Therefore, it would seem that the parens patriae power cannot justify the state's keeping such records indefinitely upon termination of treatment. Clearly, removal of patient-identifiers from the former patient's file after a reasonable time following release will not interfere with the exercise of the parens patriae power. This

108. By statute in Arizona, persons can be committed if they are a danger to themselves or others. ARIZ. REV. STAT. ANN. §§ 36-520(A), -529, -533(A)(1) (1974). Trying to distinguish between a power exercised for the welfare of the state—the police power—and a power invoked for the good of the individual—the parens patriae power—is further, complicated by judicial rulings that describe the latter power as a subspecies of the police power, rather than as a conceptually distinct theory. Higgins v. United States, 205 F.2d 650, 651-52 (9th Cir. 1953); Wells v. Attorney General, 201 F.2d 556, 559 (10th Cir. 1953). Since the invocation of the parens patriae power is predicated on the notion that a person is unable to care for himself, it has been suggested that the application of this power should be restricted to those judged mentally incompetent. *See Developments in the Law, supra* note 1, at 1212. Even though a person is judged insane, he may nevertheless retain rational decisionmaking capacity. *See Hearings, supra* note 44, at 273. *See also* ARIZ. REV. STAT. ANN. § 36-506 (A) (1974).

Concurring in O'Connor v. Donaldson, 422 U.S. 563 (1975), Chief Justice Burger indicated that the parens patriae power must be construed in a restrictive manner: "[D]ue process requires that [state power] not be invoked indiscriminately . . . . [A] particular scheme for protection of the mentally ill must rest upon a legislative determination that it is compatible with the best interests of the affected class, and its members are unable to act for themselves." *Id.* at 583. In *O'Connor*, the Court held that a state cannot constitutionally confine, "without more," a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of family or friends. *Id.* at 576.

109. O'Connor v. Donaldson, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring) (quoting *In re* Gault, 387 U.S. 1, 21, 27-29 (1967)). Mr. Chief Justice Burger was responding to the majority's opinion which looked disparagingly upon the custodial treatment Mr. Donaldson had received. Mr. Burger concluded that in some cases, custodial care which can only be justified under the parens patriae power could pass constitutional muster. *Id.* at 583-84.

110. *See In re* Ballay, 482 F.2d 648, 659 (D.C. Cir. 1973) (dictum); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *See generally Developments in the Law, supra* note 1, at 1324-27.

111. *See* O'Connor v. Donaldson, 422 U.S. 563, 578 (1975) (Burger, C.J., concurring).

alternative will also assure that the patient's constitutional right to privacy can be protected fully. In the event the right to privacy is held not to mandate the expungement of involuntary commitment records, a second constitutional argument can be made.

Equal Protection

The Arizona civil commitment laws provide for judicial review of certain documents[112] and a later hearing to establish whether the proposed patient is a danger to himself or others.[113] The court first reviews a petition for evaluation which is filed by the screening agency. The statutes provide for expungement of records after a prepetition screening report has been filed, but only when the medical director concludes that a petition for evaluation should not be filed.[114] In effect, the expungement remedy applies only when there is no "probable cause" to carry on further commitment procedures. This statutory scheme creates classifications which may violate equal protection. First, expungement is allowed only when the finding of nondangerousness is made at the first stage of the civil commitment process.[115] Second, the statutory right of expungement applies only to those who are never committed, and not to those committed and then released.[116] These classifications will now be examined under the equal protection doctrine.

The fourteenth amendment prohibits a state from denying "any person within its jurisdiction the equal protection of the laws."[117] The traditional two-tiered formula of equal protection analysis has undergone considerable modification recently, making it difficult to determine the appropriate level of scrutiny applicable in a particular case.[118] The traditional approach to

112. *See* ARIZ. REV. STAT. ANN. § 36-523 (1974) (such documents would include a prepetition screening report and statements by the person applying for the petition).

113. *Id.* §§ 36-539 to -540. The entire commitment procedure is governed by statute. First, an application for court-ordered evaluation is submitted by any responsible person. *Id.* § 36-520(A). The person alleged to be dangerous must then undergo a screening by a prepetition screening agency. *Id.* § 36-521(B). The screening agency files a report with the court. *Id.* § 36-521(C). If the person refuses to undergo the screening, the prepetition screening agency may also file a report giving reasons why the screening was not possible. The screening agency may then file a petition for court-ordered evaluation. *Id.* § 36-521(D). If from the review of the petition, the court determines there is reasonable cause to believe the person is a danger to himself or others, the court may order a professional evaluation, and at that time must inform the person of his right to a hearing and legal counsel. *Id.* § 36-529. If it is determined as a result of the court-ordered evaluation that the patient is a danger to himself or others, the medical director in charge of the agency which provided the evaluation must file a petition for court-ordered treatment. *Id.* § 36-531(B). Finally, if the court, after a hearing on the petition, finds by clear and convincing evidence that the proposed patient is a danger to himself or others, it may order him to undergo treatment for as long as 180 days. *Id.* § 540(A).

114. *Id.* § 36-523(C).

115. *Compare id. with id.* § 36-540.

116. *Compare id.* § 36-523(C) *with id.* § 36-542.

117. U.S. CONST. amend. XIV.

118. *See* Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 505 (1973); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 33 (1973).

equal protection involved strict review of statutes or other state action creating suspect categories[119] or infringing fundamental rights.[120] On the other hand, the Supreme Court adopted a deferential review of restrictions on nonfundamental and less suspicious categories.[121] The strict scrutiny test required that whenever a statutory classification created a suspect category or infringed on a fundamental right, the statute would be invalidated unless the classification was shown to be necessary to promote a compelling state interest.[122] Under the rational basis standard, the more deferential approach taken when the rights infringed were less important, so long as any hypothetical set of facts could support the statutory classification, the statute would be sustained.[123] Suspect categories recognized by the Supreme Court included race,[124] alienage,[125] and national origin,[126] whereas fundamental rights included the right to vote[127] and the right to travel interstate.[128]

The traditional tests applied to equal protection questions suffered from a rather mechanistic approach: When strict scrutiny was applied, statutes invariably failed to survive equal protection attack; when the rational basis test applied, statutes invariably withstood the assault.[129] The rigidity of the analysis became apparent, as the outcome was determined by the initial characterization, leaving some important rights without protection and providing too much protection for others.[130]

Apparently in response to the rigidity of the traditional approach, the Burger Court has entered the realm of analysis between the two extremes.[131] In *Craig v. Boren*,[132] Justice Brennan, speaking for the Court, outlined certain factors which could invoke a standard more stringent than the rational basis test. First, if a group affected by a state classification historically has suffered pervasive discrimination, the Court would be likely to

119. *See* Graham v. Richardson, 403 U.S. 365 (1971); Loving v. Virginia, 388 U.S. 1 (1967).
120. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).
121. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Nebbia v. New York, 291 U.S. 502 (1934).
122. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261-62 (1974); Graham v. Richardson, 403 U.S. 365, 376 (1971); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
123. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Williamson v. Lee Optical Inc., 348 U.S. 483, 488 (1955); Nebbia v. New York, 291 U.S. 502, 521 (1934).
124. Loving v. Virginia, 388 U.S. 1 (1967).
125. Graham v. Richardson, 403 U.S. 365 (1971).
126. *Id.*
127. Dunn v. Blumstein, 403 U.S. 330 (1972).
128. Shapiro v. Thompson, 394 U.S. 618 (1969).
129. *See generally* Goodpaster, *supra* note 118, at 498-99; Gunther, *supra* note 118, at 17-18; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969).
130. *See* Goodpaster, *supra* note 118, at 498-99.
131. Craig v. Boren, 429 U.S. 210 n.* (1976) (Powell, J., concurring); *see* Eisenstadt v. Baird, 405 U.S. 438 (1971); Reed v. Reed, 404 U.S. 71 (1971). *See generally* Gunther, *supra* note 118.
132. 429 U.S. 190 (1976). In *Craig*, the Court held that an Oklahoma statute which prohibited males under the age of 21, but females under the age of 18, from drinking so-called "nonintoxicating" 3.2% beer, was violative of equal protection.

impose a level of review greater than the rational basis test.[133] Second, if the classification is based on some immutable characteristic, the statute will be given greater scrutiny than that traditionally employed under the rational basis test.[134] These factors are virtually identical to those employed in determining a "suspect category" under the traditional test.[135] Despite the apparent difficulty of mapping a pattern that will be of predictive value in all circumstances, examination of previous equal protection cases dealing with mental health laws suggests that the Court will invoke a heightened rationality test in applying the equal protection clause to civil commitment laws.[136]

In *Baxstrom v. Herald*,[137] the Court struck down a state statute while purportedly employing the rational basis standard of review. The Court held in *Baxstrom* that a New York statute under which a person could be civilly committed without jury review at the end of a penal sentence, while such jury review was available to all others civilly committed, violated equal protection.[138] In addition, the Court held that the statutory procedure violated equal protection in that it permitted a person whose sentence had expired to be confined to an institution under authority of the Department of Corrections without a jury determination as to dangerousness, a determination required by statute for all other commitments.[139] *Baxstrom* represents a somewhat aberrational application of the equal protection doctrine, in that it invalidated a statutory scheme as being "wholly arbitrary,"[140] "capricious,"[141] and without any "semblance of rationality."[142] In light of the traditional deference given to state legislatures under the rational basis test, it is arguable that the Court was actually applying a somewhat more stringent standard in this case. Unlike most rational basis cases,[143] the Court

133. *Id.* at 212 n.1. *See generally* Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1251-58 (1974).

134. 429 U.S. at 213 n.2; *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *But see* Mathews v. Lucas, 427 U.S. 495, 513 (1976) (Social Security Act provision which discriminated against illegitimate child upheld so long as statutory classifications had a substantial relation to the statutory purposes).

135. See text & notes 124-26 *supra*. *See generally* Goodpaster, *supra* note 118, at 494.

136. It may be argued that mental illness will be held to constitute a suspect category, and thus that classifications on this basis will be subject to strict judicial scrutiny. *See generally* Note, *supra* note 133, at 1258-68. However, such a development seems to be unlikely in view of the Court's reluctance to create new suspect categories. *Id.* at 1268; *see* Gunther, *supra* note 118, at 11-20.

It would seem extremely unlikely that a court would scrutinize civil commitment statutes under the rational basis standard, since this test has been traditionally confined to economic matters. *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976) (rational basis applied to law prohibiting pushcart food sales); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (rational basis applied to statute regulating the practice of optometry). *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Civil commitment laws arguably infringe on more fundamental rights.

137. 383 U.S. 107 (1966).

138. *Id.* at 110.

139. *Id.*

140. *Id.* at 114.

141. *Id.* at 115.

142. *Id.*

143. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961); Railway Express Agency v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948); Tigner v. Texas, 310

could find no conceivable justification for New York's classification. However, the Court also examined the legislation with more care than it usually gave statutes under this test, and actively sought a rational basis. Chief Justice Warren, writing the majority opinion in *Baxstrom*, indicated the scope of analysis used:

> Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*.[144]

At the very least, *Baxstrom* represents an early application of a "middle ground" standard of review, and it seems to be a valid indication that the Court will apply a rather stringent rational basis test to classifications in civil commitment legislation. *Baxstrom* suggests that the particular statutory scheme will pass constitutional muster only if there is a relatively close relation between the end sought and the means employed.[145]

The analysis suggested in *Baxstrom* was employed more directly in *Jackson v. Indiana*.[146] In *Jackson*, the Court invalidated an Indiana law which subjected a criminal defendant to a more lenient commitment standard and to a more stringent standard of release than those persons who were not criminally charged. The Indiana statute allowed commitment merely upon showing that an alleged criminal was unable to stand trial.[147] Under Indiana civil commitment standards, the state was required to show that the petitioner was either "feeble minded" or "mentally ill."[148] The Indiana statute further allowed a feeble minded person to be released when his condition justified release, and allowed release of the mentally ill when the superintendant discharged the patient or when he had been cured of his illness.[149] However, under the criminal statute, Jackson could only be

U.S. 141 (1940). *See also* Dandridge v. Williams, 397 U.S. 471 (1970); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

144. 383 U.S. at 111 (emphasis in original; citation omitted).

145. The most recent description of the necessary relationship between the classification and the state purpose in the new equal protection is that the classification and purpose must be substantially related to each other. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). *See generally* Gunther, *supra* note 118, at 21-37 (stating other formulations of necessary relationship between statutory classifications and means). Although no general rule was enunciated in *Baxstrom*, the case nevertheless is illustrative of the required nexus between the means and ends of mental health statutes. The state argued that the classification was a reasonable differentiation between the criminally and civilly insane. 383 U.S. at 111. Although the Court recognized that such a classification could be justified in determining the type of care to be given, it did not justify the underlying purpose of determining mental illness. *Id.*

146. 406 U.S. 715 (1972).

147. Ch. 291, § 2, [1967] Ind. Acts 947 (current version at IND. CODE ANN. § 35-5-3.1-1 (Burns 1975)).

148. *See* IND. CODE ANN. § 16-15-1-3 (Burns 1973); *id.* §§ 16-14-9-1(1), 18.

149. *See* IND. CODE ANN. § 16-15-4-12 (Burns 1973); *id.* § 16-14-16-2.

released when he was competent to stand trial.[150] Although it was likely that Jackson could qualify for release under the civil statutes, the Court noted that it was unlikely that Jackson would be released under the criminal statute.[151] The Supreme Court held that the pretrial commitment of criminal defendants, where standards for commitment were more lenient and standards for release were more stringent than standards applicable to those not charged with offenses, violated equal protection.[152] In addition, the Court held that a state may not indefinitely commit a criminal defendant solely on his lack of capacity to stand trial: The defendant cannot be held for a period longer than is reasonably necessary to determine whether there is substantial probability that he will attain competency in the foreseeable future.[153] Finally if it is determined that the defendant cannot stand trial, the state must institute civil commitment proceedings or release the defendant.[154]

The analysis applied in *Jackson* bears a close resemblance to that applied in *Baxstrom*. In striking down the legislation, the Court in *Jackson* examined each of the state's asserted interests in detail, and concluded that each one bore an insufficient relationship to the means employed by the statutory scheme. In analyzing the standards for commitment and release, the Court referred to *Baxstrom* and stated: "The harm to the individual is just as great if the State, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to all others afford him a substantial opportunity for early release."[155] Although the Court in *Jackson*, as in *Baxstrom*, did not enunciate a general rule as to the required nexus between the statutory purpose and its means, *Jackson* suggests that there must be a relatively close relationship between means and ends.

Another example of this analysis can be seen in *Humphrey v. Cady*.[156] In *Humphrey*, the Court held that commitment for compulsory treatment under a Wisconsin sex crime law could not be accomplished without a jury determination, when the defendant would have been given the right to a jury determination under civil commitment laws.[157] Petitioner Humphrey was convicted of contributing to the delinquency of a minor, an offense punish-

150. Ch. 291, § 2, [1967] Ind. Acts 947 (current version at IND. CODE ANN. § 35-5-3.1-1 (Burns 1975)).
151. 406 U.S. at 728.
152. *Id.* at 730.
153. *Id.* at 738.
154. *Id.*
155. *Id.* at 729. *See also* State v. Clemens, 110 Ariz. 79, 515 P.2d 324 (1973) (commitment after criminal judgment of not guilty by reason of insanity requires same procedural safeguards as those applicable to civil commitment).
156. 405 U.S. 504 (1972).
157. The Court in *Humphrey* did not specifically overrule the Wisconsin statutory scheme, but held that the petition for habeas corpus had presented a sufficiently compelling constitutional claim to require an evidentiary hearing. *Id.* at 506.

able by one year imprisonment.[158] In lieu of his sentence, Humphrey was committed to a "sex deviate facility," pursuant to the Wisconsin sex crimes statute.[159] The statute authorized an initial commitment if the court found the defendant in need of "specialized treatment for his mental or physical aberrations,"[160] and provided for commitment for a period equal to the maximum sentence authorized for the defendant's crime.[161] At the end of that period, the defendant could be recommitted for a period of five years, if the court, after a notice and hearing, determines that defendant would be dangerous to the public.[162] Further commitments for a period of five years were permitted without limitation.[163] Humphrey challenged a five year renewal order under the equal protection clause claiming that his recommitment was substantially similar to commitment under the Wisconsin mental health laws,[164] which gave him a right to a jury determination of whether he met the standards for civil commitment. It further provided for treatment if the court or jury found the person is mentally ill and a "proper subject for custody and treatment."[165]

In upholding petitioner's assertion, the Court indicated that Humphrey's claim was substantially similar to the equal protection claim made in *Baxstrom*.[166] The state argued that the special characteristics of sex offenders rendered a jury determination inappropriate or unnecessary.[167] However, in comparing the Wisconsin mental health law and the sex crime statutes, the Court concluded that the standards for commitment were substantially the same.[168] The Court held that depriving a defendant of a jury determination under one and allowing such a determination under the other could not be justified, unless the state could demonstrate on remand that petitioner was deprived of a jury determination in order to fulfill a legitimate state purpose.[169] The Court's comparison of the laws in *Humphrey*, as in *Baxstrom*, suggests that there must be a relatively close fit between the means and purpose of the statute.[170] The analysis applied in *Humphrey* again

158. WIS. STAT. ANN. § 947.15 (1958 & Supp. 1977).
159. 405 U.S. at 506.
160. *See* Ch. 541, § 2, [1951] Wis. Laws 401 (current version at WIS. STAT. ANN. § 975.06 (1971 & Supp. 1977)). The statute provided for court hearings and a mental examination before commitment.
161. *See* Ch. 541, § 2, [1951] Wis. Laws 401 (current version at WIS. STAT. ANN. § 975.12 (1971)).
162. *See* Ch. 541, § 2, [1951] Wis. Laws 401 (current version at WIS. STAT. ANN. § 975.13, 14 (1971)).
163. *See* Ch. 541, § 2, [1951] Wis. Laws 401 (current version at WIS. STAT. ANN. § 975.15 (1971 & Supp. 1977)).
164. 405 U.S. at 508.
165. Ch. 319, § 4, [1897] Wis. Laws 719 (current version at WIS. STAT. ANN. § 51.20 (Supp. 1977)).
166. 405 U.S. at 508.
167. *Id.*
168. *Id.*
169. *See id.*
170. *Id.* at 512.

indicates that the Court will take an activist posture in scrutinizing classifications made in the context of mental health laws.

Before applying equal protection analysis to the Arizona civil commitment statutes, it will be helpful to first outline the classifications created by the statutes. It will be remembered that the Arizona laws allow destruction of the petition if the medical director finds no "reasonable cause" to believe the person needs an evaluation.[171] Destruction of records is allowed at no other stage of the civil commitment process. This classification is arguably arbitrary because the expungement remedy is extended to those who have their petitions destroyed as a result of a decision by the medical director, but the petition must be retained if the court, once the petition has been filed, finds no "reasonable cause" to proceed further in the commitment process.[172] Since a person's entitlement to destruction of his records is based solely on when the "reasonable cause" determination is made there is an insufficient nexus between the need for privacy of the individual and need of the state for the records. As the statute is now drafted, it could not survive an equal protection attack under any level of scrutiny.

The state, however, arguably could render the statute rational by simply permitting destruction of the petition after a judicial determination that a person should not undergo evaluation. In this situation, the state could argue that records would be needed at later stages of the commitment process because it is more likely that the records will be useful in subsequent commitment proceedings than those generated at an earlier stage of the commitment process. Although there is some rational basis for such a classification, the question under equal protection analysis turns on whether the nexus between the means and the purpose of the statute is justifiable when balanced against any harm occurring to an individual as a result of the classification.[173] The harm arising in *Baxstrom*, *Jackson*, and *Humphrey* involved the deprivation of the right to the same protections afforded in civil commitment proceedings. The civil commitment cases suggest that where there are classifications which may deprive a person of liberty based on mental aberrations, courts will rigorously scrutinize such statutes. In the

171. ARIZ. REV. STAT. ANN. § 36-521(B), -523(C) (1974). The statute does not explicitly provide for mandatory destruction of the prepetition screening report, but a reasonable interpretation of the statute is that the legislature intended destruction of all prepetition information. This argument is based on the statutory indication that the screening report should usually be included in the petition for evaluation. *Id.* § 36-523(A).

172. After the medical director files his petition, the court can order an evaluation if it has reasonable cause to believe that person is a danger to himself or others. *Id.* § 36-529(A).

173. *See* Craig v. Boren, 429 U.S. 190, 210 & n.* (1976) (Powell, J., concurring). In *Craig*, the Court indicated that a classification based on sex must be justified by "important governmental objectives, and must be *substantially* related to the achievement of those objectives." *Id.* at 197 (emphasis added); *see* text & note 120 *supra*. The degree of nexus required between the means and ends is determined by the degree of offensiveness created by the classification. 429 U.S. 212 (Stevens, J., concurring). The mental health cases examined previously all required some nexus greater than could be justified by the state. *See* text & notes 157-69 *supra*.

case of expungement of patient-identifiers, however, the harm arising from not permitting destruction of records is a potential loss of privacy. Although the individual's liberty is not at stake, as it was in *Baxstrom*, *Jackson*, and *Humphrey*, the threat of immediate and substantial harm is evident, justifying a requirement of a reasonably stringent nexus between the means employed and the state's purpose.

A person will be subjected to a loss of privacy indefinitely unless patient-identifiers are removed from the records. Justifying retention of records indefinitely on the strength of the probability that a person may undergo later commitment does not supply a substantial relationship between statutory means and ends when weighed against the importance of freedom from invasions of privacy.[174] Indeed, the level of scrutiny applied to statutes which infringe on the right to privacy suggests that this level of scrutiny is as rigorous as that employed in *Baxstrom*, *Jackson*, and *Humphrey*.[175] The state cannot assert a sufficient interest in using only one type of record at a later commitment proceeding, when the same determination governed the underlying basis for release—the finding that the individual is not a danger to himself or others. Since the statutory purpose is clearly the confinement of persons who are dangerous to themselves or others, the state may not arbitrarily determine that the records of an individual going further in the process before release, or one who is released after commitment, will be of substantially greater value in a later proceeding than an individual released early in the process.

Due Process Right to Expungement

In addition to the susceptibility of the Arizona commitment statutes to equal protection attack, a mental patient may also claim that retention of his psychiatric records by the state for an indefinite period of time infringes

174. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court held that a Massachusetts statute which prohibited all distributions of contraceptives except those made by registered physicians and pharmacists to married persons violated equal protection. *Id.* at 440 n.1. The Court held that, by restricting access to contraceptives to the unmarried, the statute employed a classification that was not rationally related to a valid public purpose. Although the Court did not specifically hold that classifications which inhibit the right to privacy would always trigger rigorous analysis under the equal protection clause, the Court suggested that such a rationale could justify a high level of scrutiny.

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything it is the right of the *individual* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (emphasis in original). *See generally* Gunther, *supra* note 118, at 35-36; *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 116 (1972).

175. *See* text & notes 170, 174 *supra*.

rights which are protected by the due process clauses of the fifth and fourteenth amendments to the Constitution. These constitutional provisions prohibit the government from depriving individuals of life, liberty, or property without due process of law. Procedural due process requires a bifurcated analysis. First, the court must determine if the requirements of procedural due process apply, and then it must analyze what kind of process is due.[176] The analysis of the applicability of due process protection centers on whether the state has deprived an individual of either a liberty or property interest.[177]

Although retention of records may be construed as a deprivation of liberty under the due process clauses, recent Supreme Court cases have all but eliminated this possibility. Traditionally, a liberty interest in due process had been recognized when the government stigmatizes an individual by threatening his good name, honor, or reputation.[178] Recently, however, the Court has also required that the damage to reputation be accompanied by another deprivation which amounts to a change in legal status or change in an individual's property.[179] Therefore, the individual is forced to show some protected property interest. It has generally been held that a constitutionally protected property interest exists when a person, either through contract, understandings, or state law, has a legitimate claim to it.[180] The primary

176. *See* Goss v. Lopez, 419 U.S. 565, 577 (1975); Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring). *See generally* Note, *Procedural Due Process After Goss v. Lopez*, 1976 DUKE L.J. 409.

177. Paul v. Davis, 424 U.S. 693, 710 (1976); Goss v. Lopez, 419 U.S. 565, 572-74 (1975). In *Paul*, a photograph of the respondent was included in a police flyer naming "active shoplifters," after he had been arrested on a shoplifting charge. The charge was subsequently dropped, but the flyer was circulated to local merchants. 424 U.S. at 696. The respondent then filed an action under 42 U.S.C. § 1983 (1970), alleging an unconstitutional deprivation of liberty. 424 U.S. at 696. The Supreme Court indicated that mere stigmatization was not sufficient to invoke procedural due process protections. *Id.* at 708-09. Mr. Justice Brennan, in a vigorous dissent, argued that stigmatization was sufficient to establish an unconstitutional deprivation of liberty, and that the additional requirement of change in status was contrary to existing authority. *Id.* at 764. Although the Court requires a change of legal status before there is deprivation of liberty, a liberty interest in the expungement of mental health files may not be precluded by *Paul* because retention of mental health files can be construed as a change in legal status. *See* ARIZ. REV. STAT. ANN. § 28-413(5) (1976) (denial of application for driver's license if applicant has been judged mentally disabled); *id.* § 28-1304(5) (application for automobile dealer's license requires any information the assistant director for motor vehicles requires).

178. Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

179. Bishop v. Wood, 426 U.S. 341, 347 (1976); Paul v. Davis, 424 U.S. 693, 708-09 (1976). In *Bishop*, police officer Bishop was terminated by the Marion, North Carolina police department pursuant to a statute that permitted termination by written notice, without a hearing. Bishop sued under section 42 U.S.C. § 1983 (1970) for reinstatement and back pay. 426 U.S. at 342-43. The Court held that there was no deprivation of liberty because of the state interest in maintaining forthright communication between employer and employee. *Id.* at 349. The Court's analysis suffers for two reasons. First, the Court failed to recognize that once an employee is terminated, there is no apparent need for maintaining an employment relationship that no longer exists. Second, the Court failed to take into account the practical ramifications of stigmatizing employment records. Mr. Justice Brennan, in his dissent, correctly recognized that Bishop's file eventually would become available to prospective employers. *Id.* at 351-52. *See generally The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 101 (1976).

180. Perry v. Sinderman, 408 U.S. 593, 599-603 (1972); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). *See generally* Comment, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L.J. 89. In *Roth*, a state university professor employed under a fixed one year contract

distinction to be made in cases dealing with procedural due process is one between a legitimate claim of entitlement to property and a mere expectancy.[181] The question that is to be addressed here is whether the former patient has a property right in the expungement of the file.

In *Gotkin v. Miller*,[182] the Second Circuit held that a former mental patient did not have a property right in her psychiatric file for purposes of using the records in writing a book on her experiences in a mental institution. Plaintiff Gotkin relied on a New York statute which required confidentiality of mental health files,[183] and court decisions,[184] to show that she had a legitimate claim of entitlement. The court dismissed her claim, however, stating that neither the confidentiality statute nor New York case law was sufficient to establish a right of unrestricted access to her psychiatric records.[185] However, the court did recognize that certain cases permitted the inference that Ms. Gotkin had a limited property right in her records.[186]

The cases cited by the appellant in *Gotkin* generally held that patients are entitled to a court order granting them access to their records for purposes of litigation.[187] In addition, a New York court held that a doctor's will which required the destruction of his patients' records was invalid on grounds of public policy.[188] Although the patients claimed that they were entitled to access to the records,[189] the court held only that the records were to be made available to any other physicians who treated the patients.[190] While it is clear that a patient does not have an unrestricted property interest in his mental health files, the theory of a limited property interest may be applied in Arizona to require the removal of patient-identifiers from those files.[191] The Arizona confidentiality statute is somewhat similar to the New York statute,[192] and under *Gotkin* it would appear that the former patient

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was denied employment for the ensuing year without a hearing or explanation. The Supreme Court held that due process did not require an opportunity for a hearing in such a case, since no protected liberty or property interest was involved. The Court in *Roth* explained that a property interest is a benefit to which a person must have a legitimate claim of entitlement; it must be more than a unilateral expectation of such a benefit, and a person must have more than abstract need for the benefit. 408 U.S. at 577. In contrast, the Court in *Perry* held that even though a subjective "expectancy" of tenure of a state college teacher is not protected by due process, a de facto tenure policy arising from rules and understandings entitled the teacher to prove his claim to job tenure. 408 U.S. at 601.

181. Perry v. Sinderman, 408 U.S. 593, 599-603 (1972); Roth v. Board of Regents, 408 U.S. 564, 577 (1972).

182. 514 F.2d 125 (2d Cir. 1975).

183. *See* N.Y. MENTAL HYG. LAW § 15.13 (McKinney 1976).

184. *See* 514 F.2d at 128-29.

185. *Id.* at 129.

186. *Id.*

187. *In re* Weiss, 208 Misc. 1010, 147 N.Y.S.2d 455 (Sup. Ct. 1955); *In re* Greenberg's Estate, 196 Misc. 809, 89 N.Y.S.2d 807 (Sup. Ct. 1949); Hoyt v. Cornwall Hosp., 169 Misc. 361, 6 N.Y.S.2d 1014 (Sup. Ct. 1938); *see* 514 F.2d at 128.

188. *See In re* Culbertson's Will, 57 Misc. 2d 391, 292 N.Y.S.2d 806 (Sur. Ct. 1968).

189. *Id.* at 392, 292 N.Y.S.2d at 807.

190. *Id.* at 395, 292 N.Y.S.2d at 810.

191. *See* Gotkin v. Miller, 514 F.2d 125, 129 (2d Cir. 1975).

192. *Compare* N.Y. MENTAL HYG. LAW § 15.13 (McKinney 1976) *with* ARIZ. REV. STAT. ANN. § 36-509 (1974).

could successfully assert a protected property interest in mental health records. Under the Arizona civil commitment laws, a patient may consent to the disclosure of his mental health record,[193] and a property right may be inferred from this consent.[194] Once a protected property interest is found to exist, it cannot be taken away or diminished without minimal constitutional safeguards.[195]

Arguably, the Arizona confidentiality statute confers a property right in confidentiality, by permitting a patient to consent to disclosure of his records in some circumstances.[196] Since the other statutes infringe on the patient's right of confidentiality by allowing the state to retain such records for an indefinite time,[197] the state could not deprive a patient of his right to confidentiality without a hearing. In addition, so long as the patient merely asserts a limited property interest to have his name and other identifying material removed from the file, *Gotkin* would not prohibit the finding of such a right.

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193. *See* ARIZ. REV. STAT. ANN. § 36-509(2) (1974).

194. In *In re* Culbertson's Will, 57 Misc. 2d 391, 292 N.Y.S.2d 806 (Sur. Ct. 1968), the court held that patients would be allowed the power of transferring their files to a succeeding doctor upon the death of their original doctor. This right to transfer the records and allow consent to disclose the records to a succeeding physician was interpreted in *Gotkin* as giving the patients a limited property interest in their records. 514 F.2d at 129.

195. Goss v. Lopez, 419 U.S. 565, 575 (1975). In *Goss*, nine Ohio high school students were suspended for a period of 10 days without a hearing, under a state statute which gave school principals this authority. The students brought an action under 42 U.S.C. § 1983 (1970) alleging that this procedure violated due process. The Court held that the right to a public education provided by Ohio law was a protected property right under the fourteenth amendment. 419 U.S. at 575. In addition, the Court held that in weighing the individual interest against the interest advanced by the government, the students were entitled to notice and an explanation of the action taken. The decision further required school administrators to hold an informal hearing before suspension. *Id.* at 581. This notion of a protected property interest seems to be at variance with the doctrine of entitlement advanced by the plurality opinion of Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, in Arnett v. Kennedy, 416 U.S. 134 (1974). Mr. Justice Rehnquist indicated in his opinion that the statutes which grant entitlement may also limit its availability. *Id.* at 154; *see* Note, *supra* note 176, at 417.

In *Arnett*, plaintiff Kennedy, a field representative in the Office of Economic Opportunity, was charged with making slanderous public statements accusing his superiors of bribery. As a civil service employee, Kennedy was protected from arbitrary discharge under the Lloyd-La Follette Act, 5 U.S.C. § 7501 (1970), which permits removal only for cause. In addition, the Act and regulations thereunder provided for 30-day written notice of the charges against him, an opportunity to submit a written answer to the charges, the right to appear personally before the deciding official, and a written statement of reasons for the decision. *Id.* § 7501(b); 5 C.F.R. §§ 754.102 - .104 (1977). The employee was allowed a full evidentiary hearing with the opportunity to cross-examine witnesses before dismissal. The employee could appeal an adverse decision within the agency itself or to the Civil Service Commission, at which time he is entitled to a trial-type hearing if he did not receive one earlier. *Id.* §§ 771.210 - .212. The plurality opinion found that federal employees have a property right in their jobs only because of the Act's prohibition of removal except for cause. Where the grant of the benefit is accompanied by procedural limitations, Justice Rehnquist stated that the employee must learn to take the "bitter with the sweet." 416 U.S. at 154. Mr. Justice Powell's concurring opinion indicated that the state's freedom to create an unlimited range of substantive property rights did not imply an equal freedom to determine the procedural safeguards for such rights. *Id.* at 168.

196. ARIZ. REV. STAT. ANN. § 36-509(2) (1974).

197. *Id.* §§ 36-529, -540.

A STATUTORY REMEDY

The inadequacy of the two current Arizona statutory provisions prohibiting discrimination and requiring confidentiality in regard to mental health records evidences the need for legislation allowing expungement of patient-identifiers from mental health files, but allowing retention of treatment records in carefully guarded, coded form. Only those who are involved in the treatment of the patient would be allowed access to the coded files. A statute should be enacted to provide for expungement of patient-identifiers from all files after a period of 2 years following the patient's discharge. This specific period of time was chosen to allow third-party users of records, such as insurance companies and researchers, access to the files. It represents a fair compromise between the patient's right to confidentiality and legitimate needs for access to the information. Finally, the statute should allow patients to deny involvement with the civil commitment process without risk of penalty.[198] This will enable the Arizona statutory scheme to provide maximum protection against discrimination without sacrificing other statutory purposes.

CONCLUSION

Two key provisions of the Arizona mental health laws—the provisions regarding confidentiality and discrimination—fail of their essential purposes. A mental patient may be forced to forego certain valuable benefits unless he consents to release of statutorily protected information. Further, a patient who is discriminated against due to his former connection with the commitment process will have tremendous practical problems in proving such discrimination. These factors make it imperative that the legislature provide relief by way of mandatory expungement. Once the records are expunged, only mental health care professionals actually engaged in treating the patient should be allowed access to the patient-identifier. The need for this statutory remedy is demonstrated by the substantial likelihood of invasions of constitutional rights to privacy, equal protection, and due process of law.

198. See text & note 10 *supra*.