

THE EXPUNGEMENT OF ADJUDICATION RECORDS OF JUVENILE AND ADULT OFFENDERS: A PROBLEM OF STATUS*

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Over the past half-century, American correctional law has focused increasingly on the rehabilitation of the individual offender and the development of means and practices appropriate to that end.¹ Realistic appraisal compels the conclusion that the system of penal law must fulfill a complex of functions pointed toward a single ultimate goal: the ordering of society in such a manner that each member has the fullest opportunity to realize his human dignity through community life.² The law must at once serve the reconstruction of the offender, the incapacitation of the intractable criminal, the deterrence of others from criminal conduct, and the exaction of retribution and expiation for the offense.³ (Though often decried in theory and rather less often disavowed in practice, the punitive aspects of correctional policy remain an obvious reality.)⁴ If the offender reoffends, none of the purposes is served.

It is clear that any program for reform must create the institutions necessary for its realization, and that the sanctions it imposes must be functionally apposite to the end it seeks.⁵ There has been surprisingly little

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1. For a critical appraisal see Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., C. & P.S. 226 (1959-60).

2. Snee, *Leviathan at the Bar of Justice*, in GOVERNMENT UNDER LAW 96 (Sutherland ed. 1956). See also Laswell & Donnelly, *The Continuing Debate Over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 YALE L.J. 869, 876 (1959).

3. TAPPAN, CONTEMPORARY CORRECTION 4-13 (1951).

4. The imposition of punishment by the state is frequently justified as the political counterpart of individual vengeance. Sir James Stephen is quoted as remarking that "criminal procedure is to resentment what marriage is to affection: namely, the legal provision for an inevitable impulse of human beings." SUTHERLAND & CRESSEY, PRINCIPLES OF CRIMINOLOGY 287 (5th ed. 1955); see BLOCH & GEIS, MAN, CRIME, AND SOCIETY 568-71 (1962).

For an articulation of unconscious motivations operative in our treatment of law-breakers see Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L. J. 854, 856 n.11 (1963).

5. FULLER, THE MORALITY OF LAW 166 (1964).

recognition of the fact that our system of penal law is largely flawed in one of its most basic aspects: it fails to provide accessible or effective means of fully restoring the social status of the reformed offender. We sentence, we coerce, we incarcerate, we counsel, we grant probation and parole, and we treat—not infrequently with success—but we never forgive.⁶ The late Paul Tappan has observed that when the juvenile or adult offender has “paid his debt to society,” he “neither receives a receipt nor is free of his account.”⁷ His status is that of “ex-offender”—an anomalous position lying somewhere between the poles of social acceptance and social condemnation, though obviously closer to the latter. There is considerable evidence to indicate that the failure of the criminal law to clarify the status of the reformed offender impedes the objective of reintegrating him with the society from which he has become estranged.⁸ The more heavily he bears the mark of his former offense, the more likely he is to reoffend.

Despite relatively widespread judicial recognition of the perdurability and disabling effects of a criminal record,⁹ scant attention has been given by lawmakers and behavioral scientists to means whereby the law might in a proper case relieve the first offender or juvenile miscreant from this handicap. In recent years, a handful of jurisdictions have enacted legislation allowing the expungement of an adjudication record of a juvenile or a conviction record of an adult first offender. This paper will attempt to

6. RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *THE LAW OF CRIMINAL CORRECTION* 694 (1963) [hereinafter cited as RUBIN *et al.*].

7. Tappan, *Loss and Restoration of the Civil Rights of Offenders*, in NATIONAL PROBATION AND PAROLE ASSOCIATION 1952 YEARBOOK 86, 87.

Professors Schwartz and Skolnick have shown that conviction works a degradation of status which “continues to operate after the time when, according to the generalized theory of justice underlying punishment in our society, the individual’s ‘debt’ has been paid.” Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOCIAL PROBLEMS 133, 136 (1962). Aaron Nussbaum, Assistant District Attorney of Kings County (New York), has written that “a theory of law which withholds the finality of forgiveness after punishment is ended is as indefensible in logic as it is on moral grounds.” NUSSBAUM, *FIRST OFFENDERS, A SECOND CHANCE* 24 (1956).

8. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

9. *E.g.*, United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955); *cf.* Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting); United States v. Morgan, 346 U.S. 502 (1954) (Minton, J., dissenting).

Of course the record of a conviction for a serious crime is often a lifelong handicap. There are a dozen ways in which even a person who has reformed, never offended again, and constantly endeavored to lead an upright life may be prejudiced thereby. The stain on his reputation may at any time threaten his social standing or affect his job opportunities *Id.* at 519.

On the effect of juvenile court adjudication see *In re Contreras*, 109 Cal. App. 2d 787, 789-90, 241 P.2d 631, 633 (1952); *Jones v. Commonwealth*, 185 Va. 335, 341-42, 38 S.E.2d 444, 447 (1946).

survey the need for such legislation, to examine existing and proposed statutes on both adult and juvenile court levels, and to make some evaluation of their effectiveness. It is the writer's view that providing institutional means of restoring status after reformation is an appropriate way to harmonize "the sanctioning activities of the democratic body politic with the ultimate value—human dignity."¹⁰

At the outset, it is necessary to limn with some particularity what expungement is and what it is not. By an expungement statute is meant a legislative provision for the eradication of a record of conviction or adjudication upon fulfillment of prescribed conditions, usually the successful discharge of the offender from probation and the passage of a period of time without further offense. It is not simply a lifting of disabilities attendant upon conviction and a restoration of civil rights, though this is a significant part of its effect.¹¹ It is rather a redefinition of status, a process of erasing the legal event of conviction or adjudication, and thereby restoring to the regenerate offender his *status quo ante*.

The systematic study of expungement acts is hindered by the extreme lack of uniform terminology, even within a single jurisdiction. The functional process of deleting the adjudication of guilt upon proof of reformation is variously designated expungement;¹² record sealing;¹³ record destruction;¹⁴ obliteration;¹⁵ setting aside of conviction;¹⁶ annulment of conviction;

10. Laswell & Donnelly, *supra* note 2, at 876.

11. Civil rights lost on conviction are usually regained, if at all, by pardon or by statutes providing automatic restoration upon completion of sentence. Extensive analysis of these restorative mechanisms will be found in RUBIN *et al.* 613, 632; RUBIN, CRIME & JUVENILE DELINQUENCY 152 (2d ed. 1961); Tappan, *supra* note 7, at 96-104.

For a thorough discussion of the particular disabilities attendant upon conviction see Green, Post-Conviction Disabilities Imposed or Authorized by Law, 1960 (unpublished honor paper on file in Harvard Law Library).

12. CAL. WELFARE & INST'NS CODE § 781; UTAH CODE ANN. § 55-10-117 (Supp. 1965).

13. CAL. PEN. CODE § 1203.45; CAL. WELFARE & INST'NS CODE § 781. Technically, expungement imports physical destruction of the records rather than sealing. *Andrews v. Police Court*, 123 P.2d 128 (Cal. App. 1942), *aff'd*, 21 Cal. 2d 479, 133 P.2d 398 (1943); 40 CAL. OPS. ATT'Y. GEN. 50 (1962). As used in this paper, the term expungement includes both destruction and sealing unless otherwise specified.

14. IND. ANN. STAT. § 9-3215a (1956).

15. *Ibid.*

16. MICH. STAT. ANN. §§ 28.1274(101), (102) (Supp. 1965). Statutes permitting the setting aside of convictions are not true expungement acts, and have much more limited effect than the latter. See text accompanying notes 30-34 *infra*. The Michigan enactment would appear to be of the former type, save for the provision of § 28.1274 (102) that upon entry of an order setting aside a conviction, the person "for purposes of the law" shall be deemed not to have suffered any previous conviction. Because of its uncertain scope and the possibility that the broad language may reach the status of the conviction, it is included here as an expungement act, albeit a deficient one.

tion;¹⁷ amnesty,¹⁸ nullification of conviction, purging, and pardon extraordinary.¹⁹ Because many of these terms have wider use in other legal contexts, it is suggested that the term expungement be adopted to avoid confusion.

In particular, the usual denotations of amnesty and pardon must be distinguished from expungement. The former are exceptional and specific acts of grace, usually granted by executive power, rather than processes of regular and widespread application available through legislative provision.²⁰ Despite confusion engendered by murky decisional language, it seems clear—and has been widely held—that a pardon remits punishment and removes some disabilities, but does not erase the legal event determinative of the offender's status *qua* offender, *i.e.*, the conviction itself.²¹ It is the status resulting from the adjudication of guilt, more than any punishment imposed, which is characteristic of conviction; if the disabilities of conviction are to be removed effectively and the reformed offender restored to society, the remedy chosen must reach the genesis of the status.²²

I. AN EXAMINATION OF NEED

The consequences of conviction are wide in form, some authorized expressly or implicitly by law, others attached by subtle attitudes of community rejection. Commonly, the law provides for the deprivation or

17. National Council on Crime & Delinquency, *Annulment of a Conviction of Crime: A Model Act*, 8 CRIME & DELINQUENCY 97 (1962) [hereinafter cited as N.C.C.D. MODEL ACT].

18. State of N.Y. Ass'y Bill, Int. No. 233 (3d Rdg. 547, Print. 5363, Rec. 703) (1965).

19. MINN. STAT. ANN. §§ 242.31, 638.02 (Supp. 1965).

20. KORN & McCORKLE, CRIMINOLOGY & PENOLOGY 600-04 (1959); SUTHERLAND & CRESSEY, *op. cit. supra* note 4, at 544-49.

21. *Carlesi v. New York*, 233 U.S. 51 (1914) (state may charge as prior crime offense pardoned by President); *People v. Biggs*, 9 Cal. 2d 508, 71 P.2d 214 (1937) (offense in sister state deemed prior conviction despite pardon); *In re Lavine*, 2 Cal. 2d 324, 329, 41 P.2d 161, 163 (1935) (pardon "implies guilt, and does not wash out the moral stain" or restore the offender's character); *People ex rel. Jobissy v. Murphy*, 224 App. Div. 834, 279 N.Y. Supp. 762 (1935); *State v. Edelstein*, 146 Wash. 221, 62 Pac. 622 (1927). See also *Burdick v. United States*, 236 U.S. 79 (1915). For language to the contrary see *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380-81 (1867).

On the general history and scope of executive clemency see Weihofen, *Effect of a Pardon*, 88 U. PA. L. REV. 177 (1939); Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647 (1915). For a discussion of pardon in its modern context see Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13 (1965).

22. RUBIN *et al.* 690. One who has received a pardon must nevertheless disclose his conviction upon inquiry. 1953 N.J. OPS. ATT'Y GEN. 206.

suspension of political and civil rights upon conviction of a certain class of crimes, usually felonies. These explicit disabilities include the loss of the right to hold any public office or trust, to serve as a jurymen, and to practice various occupations and professions.²³ In at least forty-six states, conviction of crime may serve as a ground for divorce.²⁴ Many of these disabilities persist beyond the termination of sentence.

Every state and the federal system has some means of restoring civil and political rights.²⁵ Usually this takes the form of a pardon granted at the discretion of the governor or the board of pardons appointed by him.²⁶ In some states, the courts are empowered to restore civil rights.²⁷ A number of states provide for the automatic restoration of civil rights either upon completion of a term of probation or parole or upon termination of a prison sentence.²⁸ Both pardon and automatic restoration revive the more formal civil rights, but they are unable to remove the stigmatic disabilities attaching in such crucial social areas as employment.²⁹

Some nine states have statutes providing that upon satisfactory completion of probation and "evidence of reformation," the offender may petition the court to have his conviction and the plea or verdict of guilty "set aside"; he is thenceforth released from all "penalties and disabilities" attendant upon the conviction.³⁰ The Federal Youth Offender Act contains

23. RUBIN *et al.* 611-32; Tappan, *supra* note 7.

24. A tabulation of states which regard conviction as a ground for divorce is contained in Green, *op. cit. supra* note 11, at 64-66. See also RUBIN *et al.* 614-15.

25. RUBIN *et al.* 632-37; Green, *op. cit. supra* note 11, at 75-77.

26. There is wide variation in practices from state to state. For example, Rhode Island reserves the restoration of civil rights apart from a grant of pardon to the legislature, R.I. GEN. LAWS ANN. § 13-6-2 (1956), and Mississippi permits it alternatively to the governor or legislature, MISS. CONST. art. 5, § 124; art. 13, § 253 (restoration of suffrage by legislature only); *cf.* MISS. CODE ANN. § 4004-27 (1956) (governor may restore civil rights on completion of probation).

27. *E.g.*, N.C. GEN. STAT. §§ 13-1 to -10 (1953); TENN. CODE ANN. §§ 16-504, 40-3701 (1955).

28. See the tabulation and discussion in RUBIN *et al.* 633-34. The archetypal automatic restoration statute appears to be 9 Geo. 4, c. 32, § 3 (1828), which provides that completion of sentence in case of a felony conviction shall have the same effect as a pardon ". . . to prevent all doubts respecting the Civil Rights of Persons convicted. . . ."

29. See authorities cited note 23 *supra*.

30. CAL. PEN. CODE §§ 1203.4, 1203.4a; DEL. CODE ANN. tit. 11, § 4332(i) (1953); IDAHO CODE ANN. § 19-2604 (Supp. 1965); NEV. REV. STAT. § 176.340 (1959); N.D. CENT. CODE § 12-53-18 (1960); TEX. CODE CRIM. PROC. ANN. arts. 42.12 § 7, .13 § 7 (1965); UTAH CODE ANN. § 77-35-17 (1953); WASH. REV. CODE ANN. § 9.95.240 (1961); WYO. STAT. ANN. § 7-315 (1957) (statute uses term "parole," but seemingly refers to probation or "court parole" only). For an invidious use of the Utah statute see *State v. Schreiber*, 121 Utah 653, 245 P.2d 222 (1952), where the conviction had been vacated on the condition that defendant "permanently leave the state on account

essentially similar provisions applicable to youth offenders; however, under the federal statute, the issuance of an order setting aside the conviction is automatic upon the unconditional discharge of the offender before the expiration of his sentence.³¹ The effects of such statutes are not entirely clear, and they have been subjected to interpretations quite at variance with the post-conviction relief they purport to provide.³² Though the scope of alleviation provided by them is said to be broader than that provided by pardon,³³ they are clearly not statutes of expungement and do not in fact restore the offender's former status among his fellow men, despite some judicial language to that effect.³⁴

of his ill health." MODEL PENAL CODE § 306.6(2) (Prop. Official Draft, 1962) permits discretionary vacation of conviction if the offender is discharged from probation or parole before expiration of the maximum term, or if he has led a law-abiding life for five years after expiration of sentence.

CAL. WELFARE & INST'NS CODE §§ 1179, 1772 provide that a person honorably discharged from the control of the Youth Authority shall be released from all penalties and disabilities resulting from the offense. Section 1179 operates automatically, while § 1772 requires the discharged offender to petition the court for relief, which may be denied. The apparent overlap of the two sections is not clarified by the statutory language, but it is the interpretation of the Youth Authority that § 1179 applies only to juvenile court commitments and § 1772 only to commitments from criminal courts. Baum, *Wiping Out a Criminal or Juvenile Record*, 40 CAL. S.B.J. 816, 821 (1965). MODEL PENAL CODE § 6.05(3) allows vacation of the conviction of a young adult offender as an alternative to providing that his conviction shall not constitute a disability.

31. 18 U.S.C. § 5021 (1964).

32. For example, note the interpretation of CAL. PEN. CODE § 1203.4 in *Garcia-Gonzales v. Immigration & Naturalization Service*, 344 F.2d 804 (9th Cir.), *cert. denied*, 382 U.S. 840 (1965). Despite the language of the statute that the setting aside of the guilty plea and the dismissal of the information "shall . . . [release the petitioner] from all penalties and disabilities . . .," the court ruled that the conviction was not expunged for purposes of 8 U.S.C. § 1251 (1964), authorizing deportation of an alien convicted of a narcotics offense. 18 U.S.C. § 5021 (1964) was similarly treated in *Hernandez-Valensuela v. Rosenberg*, 304 F.2d 639 (9th Cir. 1962). See *Adams v. United States*, 299 F.2d 327 (9th Cir. 1962) (discusses CAL. WELFARE & INST'NS CODE § 1772).

33. 18 U.S.C. § 5021 (1964) acts to "expunge the conviction" while pardon only removes disabilities and restores civil rights. *Tatum v. United States*, 310 F.2d 854, 856 n.2 (D.C. Cir. 1962). *But see* 1957 N.J. OPS. ATT'Y GEN. 143 (expungement of record has less effect than a pardon).

34. If the conditions of probation are fulfilled, the plea or verdict of guilty may be changed . . . [and] the proceedings expunged from the record. . . . He has then . . . received a statutory rehabilitation and a reinstatement to his former status in society insofar as the state by legislation is able to do so. . . . *Stephens v. Toomey*, 51 Cal. 2d 864, 870-71, 338 P.2d 182, 185 (1959) (dictum).

Contra, In the Matter of *Phillips*, 17 Cal. 2d 55, 61, 109 P.2d 344, 348 (1941).

[I]t cannot be assumed that the legislature intended that such action by the trial court under [Penal Code] section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime.

The *Phillips* case involved a lawyer disbarred upon conviction of a misdemeanor involving moral turpitude; the court held that relief under CAL. PEN. CODE § 1203.4 did not work reinstatement. It is not entirely clear whether the decision turned upon the

It is not the explicitly articulated disabilities which are most troublesome to the reformed offender. It is rather the less-direct economic and social reprisals engendered by his brand as an adjudicated criminal. The vagaries of public sentiment often discriminate against persons with a criminal past, with very little regard for the severity of the offense, and they do not frequently distinguish between persons arrested and acquitted or otherwise released and persons convicted.³⁵ This is particularly true in the vital matter of employment, which perhaps as much as anything else influences a man's concept of himself and his worth, and accordingly influences the values which guide his conduct.

A recent study found that only eleven per cent of employers who were seeking to hire were willing to consider a man convicted of assault.³⁶ Only one-third would consider a man who had been charged with the same crime and acquitted. Despite the small sample used (25 employers, of whom 9 had need of employees), the crippling effects of the stigma ensuing from criminal adjudication are immediately apparent.

Not only will the offender have trouble finding unskilled employment, but his difficulty will increase directly with the skill level of the job sought. In a study of the employment experiences of 258 men with criminal records,

non-obliteration of the judgment or upon the fact that the court viewed disbarment as outside the "penalties and disabilities" clause of the statute. MODEL PENAL CODE § 306.6 (Prop. Official Draft, 1962) provides that the order vacating the conviction does not, *inter alia*, preclude proof of conviction whenever relevant to the exercise of official discretion, nor does it justify a defendant in denying conviction unless he also calls attention to the order.

35. Cf. RUBIN *et al.* at 630-31. As a partial solution to the problem, some states require the destruction of fingerprints and arrest data upon acquittal or discharge without trial, *e.g.*, IOWA CODE ANN. § 749.2 (1950), or their return to the person involved, *e.g.*, ILL. ANN. STAT. ch. 38, § 206-5 (Smith-Hurd 1964). Often the fingerprints are not returned unless requested. *E.g.*, CONN. GEN. STAT. REV. § 29-15 (1958). Absent a statute, return or destruction has been denied even when the arrest has been found patently improper. In *Sterling v. City of Oakland*, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962), a woman was arrested under a city ordinance prohibiting the defrauding of a taxicab operator when the driver refused to change a twenty dollar bill. Despite her judgment against the cab company for false arrest and malicious prosecution, return of the fingerprints and "mug shots" from police files was denied. See generally Note, 42 ILL. L. REV. 256 (1947); Note, 27 TEMP. L.Q. 441 (1954); Annot. 83 A.L.R. 127 (1933).

36. Schwartz & Skolnick, *supra* note 7, at 134-38. In conducting this portion of the study, the authors prepared four hypothetical application files, which were submitted to prospective employers by an employment agent. Three of the files reflected an arrest for assault: the first file showed a conviction and satisfactory completion of sentence, the second an acquittal, and the third an acquittal with a personal letter from the judge verifying the finding of not guilty and stressing the legal presumption of innocence. The fourth file made no mention of any criminal record. All applications were for lowest-level positions as unskilled laborers.

the participants were asked whether a criminal record truly handicaps a person in seeking employment, and whether criminal conduct is stimulated by discriminatory rejection of those with past records of offense. Ninety-four per cent of the men replied affirmatively to each question. When the same questions were put to 223 businessmen, 57% responded affirmatively to the first query and 84% to the second.³⁷ Another oft-cited study surveyed 44 business and professional employers: 16% expressed a policy of total exclusion of persons with any criminal past, while 84% would hire a former offender for unskilled labor.³⁸ However, only 64% would consider such a person for a skilled labor position; only 40% for clerical work; and only 8% for sales jobs. None would consider a person with a record of criminality for a position as an accountant, cashier, or executive.³⁹ The principal determinants in the policy of complete exclusion may have been the assumptions, first, that any former offender was by definition untrustworthy, and, second, that the engagement of such a person would undermine the morale of the present employees.⁴⁰

37. Wallerstein, *Testing Opinion of Causes of Crime*, 28 Focus 103 (1949), cited in Tappan, *supra* note 7, at 89.

38. Melicherck, *Employment Problems of Former Offenders*, 2 N.P.P.A.J. 43 (1956). See also RUBIN, *op. cit. supra* note 11, at 151-54.

39. In the course of several informal interviews with personnel administrators of companies located on both the east and west coasts, the writer gained the impression that personnel officers regard the picture given by this study as unrealistic. Most said that they had no definite policy of exclusion, but wanted full disclosure of the details of the offense in order to weigh each case "on the merits" and to match the individual to the job. Several expressed distrust of an expungement procedure, and indicated that they would not look favorably on someone who had invoked it. As one man put it: "We probably wouldn't fire the guy outright [*i.e.*, in the event of subsequent discovery of the offense], but I think we'd be rather hurt that he didn't feel he could come and tell us about it."

Administrators of two of the concerns (a major university and a nationwide temporary-help service) indicated that they did not ask the applicant about prior offenses, but relied exclusively upon the recommendations of former employers. (This would effectively foreclose those who had been incarcerated and could not "account for their past.") On the other hand, firms in the electronics field typically made searching inquiry of all applicants, even those applying for the most menial positions. Presumably, this practice reflects the companies' concern over security risks, but in some cases the probing exceeds relevant inquiry. In one firm, an applicant for the position of microwave tube assembler (two dollars/hour) was required to list all arrests or convictions and give full details, indicate in detail any other "misconduct" with which he or she had been charged (presumably relating to employment but not clearly), account for all past absences from work, explain all garnishments or other credit impairment, and sign an "agreement" that he or she could be immediately discharged without recourse if any information given was found to be "false or misleading." (Application form in possession of the author.)

40. Melicherck, *supra* note 38, at 48-49.

The ex-offender's chances of employment by public or governmental agencies—even in the most ordinary positions—are no brighter. One study has concluded that nearly one-half of the states, and the federal government, do not automatically exclude a person with an adjudication of criminal guilt from consideration for public employment.⁴¹ This is by no means indicative of the extent of former-offender employment, because denial of hire usually results from the exercise of administrative discretion by the examining or certifying agency.⁴² Only one state expressly provides that a rehabilitated offender shall not be barred from public employment by his conviction.⁴³ Exclusion from employment may result either from rejection because of a former offense or from dismissal because of the commission of a present offense. Surely these situations are different, and different policies should apply.

It would be naive in the extreme to suggest that the governmental employers of our nation drop their bars and become a haven for unregenerate brigands, and no such proposal is put forth here. The public good demands the utmost probity of its servants. It also demands, however, the reassimilation into full social status of all who have offended against it. The removal of the stigma of conviction by annulling it upon proof of reform would open large areas of public employment now closed to the rehabilitated offender.

It is necessary to differentiate, moreover, among the kinds of positions sought. This need applies to licensing mechanisms as well as to direct employment, and in general it is not met. Surely the considerations that require exclusion of former offenders from law enforcement and public safety positions do not thrust with the same force in the case of a truck-driver, or an engineering aide, or a forest firefighter. There are valid and necessary reasons for permanently foreclosing those with records of violative conduct from certain critical and highly sensitive positions in the public service, but surely some account must be taken by the law of the gravity of the offense, and some reasonable criteria—other than the shopworn

41. RUBIN *et al.* at 628-30; see Wise, *Public Employment of Persons with a Criminal Record*, 6 N.P.P.A.J. 197, 198 (1960). Rubin's figures are based largely upon Widdifield, *The State Convict*, 1952 (unpublished doctoral thesis on file at Yale Law School Library). Variant results were reported by Green in a study conducted in 1960: forty-two states were reported as having no rule completely prohibiting employment of ex-offenders. However, only twenty-eight states indicated that they did in fact hire such persons, usually in positions of unskilled labor. Green, *op. cit. supra* note 13, at 74. This survey also included a limited inquiry into municipal hiring practices. *Id.* at 73.

42. RUBIN *et al.* at 625, 628.

43. MD. ANN. CODE art. 64A, § 19 (1957). The appointing authority may consider the conviction in granting employment.

dichotomy of felony and misdemeanor—must be developed.⁴⁴ Not infrequently the disability of a record for even a single offense bars military enlistment, though the selection standards vary with the national need for service manpower.⁴⁵

The effects of criminal stigma are felt perhaps even more strongly in the area of licenses and government-regulated occupations than they are in the sector of public employment. Green lists some fifty-nine occupations, from accountancy to yacht selling, in which a license is required and from which a reformed offender may be barred; his list is only illustrative, not exhaustive.⁴⁶ The relevance of an offense of petty theft to the practice of the profession or trade may be immediately apparent, as in the practice of law, or may be recondite in the extreme—if there at all—as in the case of barbering. Even though the offense may be relevant, this is not to say that it should be determinative of entry into the trade or profession.

A few years ago, a young man of twenty-one celebrated his college's basketball victory with more enthusiasm than good sense, and with two cohorts—all in a happy state of bibulosity—broke into the rear service porch of a vacant apartment, from which he abstracted a large metal garbage can. When the police arrived shortly thereafter, he was busily engaged in rolling it up and down the rear stairs of the apartment, to the vast annoyance of the building's occupants. His comments to the police were not of the politest sort. He was arrested on charges of burglary, malicious mischief, disturbance of the peace, public intoxication, and contributing to the delinquency of minors (his companions were below the age of twenty-one). The burglary charge was dropped; he pleaded guilty to the other counts, and was granted probation conditioned upon replace-

44. For discussion on the need for an expungement statute to make some differentiation on the basis of the gravity of the offense and the criticality of the purposes for which the information is sought see text accompanying notes 132-44 *infra*.

45. Broadly speaking, persons convicted of felonies are excluded. Major commanders may grant waivers to persons convicted of lesser offenses if they have been free of all forms of civil control for at least six months. Adjudicated juvenile and youthful offenders may be granted waivers by main station commanders, who may delegate their authority to recruiting main station commanders. The latter may grant waivers for certain single minor offenses such as drunkenness and truancy. 32 C.F.R. § 571.2(e)(5) (1962). See generally McCormick, *Defense Department Policy Toward Former Offenders*, NATIONAL PROBATION AND PAROLE ASSOCIATION 1951 YEARBOOK 1.

46. Green, *op. cit. supra* note 11, at 26. For a more enlightened example of statutory exclusion from occupation see § 504 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 504 (1964), which bars persons convicted of specified crimes from holding various positions in labor unions. It should be noted that even in so "high-risk" an occupation, the ban is not perpetual but extends only five years from conviction. The statute recognizes the possibility of reformation.

ment of the battered garbage can and suitable apologies to its owners. His probation was satisfactorily completed; he graduated from college, went on to a large law school, and graduated with honors near the head of his class. Save for this casual and unfortunate incident, his record is otherwise without blemish. Would it really make sense to require that for the rest of his life he be foreclosed from the practice of his profession?⁴⁷ The labels of "malicious mischief," "disturbance of the peace," "drunk in public," and "contributing to the delinquency of a minor" (this last particularly opprobrious and connotative of moral turpitude) are surely not properly descriptive of his offense, or of his moral character. Yet, he must bear them the rest of his life, listing them on credit and job applications, and otherwise having them dredged up in a host of ways.

Should such persons—and no one can estimate successfully how many there may be—be forced to bear forever the stain of their immature and impulsive conduct? To take a few examples: someone in the shoes of this young man, if he were a barber, would likely lose his license in Michigan or California.⁴⁸ Apparently, he could not work as a physical therapist or practice optometry or chiropractic in Minnesota.⁴⁹ He could be denied a license to breed or raise horses or to process or sell horsemeat in Illinois,⁵⁰ and might lose his cosmetologist's license in Wisconsin.⁵¹ Without the aid of an expungement statute, he would be compelled to bear the mark of his past mistake. Statutes permitting the setting aside of convictions are no help here;⁵² it is not uncommon for the law to provide that despite the vacation of conviction under such an act, the conviction may nevertheless be considered for licensing and disciplinary purposes.⁵³

47. This roughly describes a case known to the author. The young man in question was admitted to the bar examination after giving a full explanation and now enjoys a successful practice.

48. CAL. BUS. & PROF. CODE § 6576 (disqualification on conviction of crime of moral turpitude); MICH. STAT. ANN. § 18.106 (1957) (disqualification upon conviction of any crime).

49. MINN. STAT. ANN. §§ 147.02 (optometrist), 148.10 (chiropractor), 148.75 (physical therapist) (Supp. 1965).

50. ILL. REV. STAT. ch. 56 1/2, § 242.2 (Supp. 1965) (disqualification on conviction of felony or "any crime opposed to decency or morality").

51. WIS. STAT. § 159.14 (1961) (disqualification on conviction of any crime).

52. See text accompanying notes 30-34 *supra*.

53. See, *e.g.*, exceptions to the stated effect of CAL. PEN. CODE § 1203.4 in CAL. BUS. & PROF. CODE §§ 1679 (dentists), 2383, 2384 (physicians), 2963 (psychologists), 6102 (attorneys), 6576 (barbers), 10177(b) (real estate brokers), 10302(b) (business opportunity brokers), 10562(b) (mineral, oil, and gas licensees); CAL. EDUC. CODE § 12910 (teachers); CAL. VEHICLE CODE § 13555 (revocation of driver's license). See also *Epstein v. California Horse Racing Board*, 222 Cal. App. 2d 831, 35 Cal. Rptr. 642 (1963).

In ways more indirect than employer rejection or legal restriction, the stigma of a former offense is likely to militate against successful employment of the redeemed offender. He may be denied union membership, although apparently no union admits to a hard-and-fast policy of exclusion. Moreover, many positions require bonding as a precondition of hire, and former offenders are generally not bondable, whatever the relevance of their offense to the risk covered by the bond. One young man who fights another on the street over the latter's interference with his lady fair, and who is convicted of assault and battery or disturbing the peace as a result of his passions, should not *necessarily* be marked thereafter as an employment risk, unworthy of trust. The problem is particularly acute in companies using low-cost "blanket bonds" which commonly contain provisions voiding protection if the employer hires any person with an offense record, at least without the prior consent of the surety.⁵⁴

Similarly, a person with a record of criminal conduct may experience substantial difficulty in obtaining automobile liability coverage (or in getting inclusion under his employer's liability policy), and may be foreclosed from any work requiring the use of a car either in the course of the job or in getting to and from his place of employment. Alternatively, he may not be precluded from coverage but may be treated as an "assigned risk," whatever his offense.⁵⁵ Although this has the advantage of giving the former offender access to insurance, it has the disadvantage of subjecting him to perhaps prohibitive expenses at a time when he can least likely afford them. Further, a person with an arrest or conviction record may in

54. Frequently, it is said that hiring of an offender will void all coverage. See Frym, *The Treatment of Recidivists*, 47 J. CRIM. L., C. & P.S. 1 (1956). The following is a typical liberal "blanket bond" provision:

The coverage of this bond shall not apply to any employee from and after the time that the Insured or any partner or officer thereof, not in collusion with such employee, shall have knowledge or information that such employee has committed any fraudulent or dishonest act in the service of the Insured or otherwise, whether such act be committed before or after the date of employment by the Insured. Lykke, *Attitude of Bonding Companies Toward Probationers and Parolees*, 21 Fed. Prob. 36 (1957).

This study suggests that the surety companies may be willing to examine individual cases and permit the employer to assume the risk himself, and the wording of the bond would import that the cancellation of protection would apply only to the individual and not to the concern as a whole. This is preferable to blanket invalidation, but it nevertheless requires uncommon understanding and effort on the part of the employer and there is no guarantee that the consent of the surety will be given. The bonding firms interviewed in the course of Lykke's study felt that their alleged unwillingness to give coverage was more often than not used as an excuse to mask the employer's hostility toward hiring persons with an offense record.

some jurisdictions be denied a vehicle operator's license (or even, apparently, a fishing license).⁵⁶

Typically, a former offender who is called as a witness is subject to impeachment of his credibility on the basis of his prior conviction.⁵⁷ This may be so despite an order "setting aside" or vacating a conviction and releasing him from "all penalties and disabilities."⁵⁸ Once a person has been cast as an offender, he seems always to be suspect as a liar.⁵⁹ Let us suppose that the young purloiner of garbage cans, whose fate is recounted above, observes a traffic accident some five years after his conviction and is asked whether he has pertinent testimony. It is not beyond the bounds of reason to suppose that he would be strongly tempted to deny that he had seen anything, that he would do whatever he could to avoid the witness stand and the possibility of public exposure and humiliation. Last, but as usual not least, the former offender becomes a target for future investigation and suspicion. This is simply a fruit of his error, and he should bear it—up to a point. Unfortunately, that point may be passed, and the former offender may be subjected to unwarranted harassment by a law enforcement agency whose standards of courtesy and professional practice have not caught up with its zeal.⁶⁰ It is not at all unreasonable for a young man who burglarized a service station one month before to be quizzed regarding a burglary perpetrated by similar *modus operandi* at another station—providing his rights are respected and he is handled with the courtesy incumbent upon a police officer. It is highly unreasonable for him to be "rousted" on a service station break-in five years later, when the events of the interim indicate that he is comporting himself as a law-abiding citizen.

The point distills to this: should we permanently maintain, as a matter of social policy, the stigmatic ascriptions of a single adjudication? How

56. See the commentary to the N.C.C.D. MODEL AGT, *supra* note 17, at 98.

57. MCCORMICK, EVIDENCE 89-94 (1954). There are very great variations among the states as to the crimes that will serve as a ground of impeachment.

58. *E.g.*, *People v. O'Brand*, 92 Cal. App. 2d 752, 207 P.2d 1083 (1949); *People v. James*, 40 Cal. App. 2d 740, 105 P.2d 947 (1940). The new *California Evidence Code* (to take effect on January 1, 1967) codifies in § 788(d) the dictum of *People v. Mackay*, 58 Cal. App. 123, 208 Pac. 135 (1922), that a conviction set aside under CAL. PEN. CODE § 1203.4 cannot be used to impeach unless the person is the defendant in a subsequent criminal proceeding. The present state of the law is by no means clear, and the *Mackay* case has been seriously eroded by later holdings; these cases are discussed in Comment, 2 STAN. L. REV. 222 (1949).

Even under the new *California Evidence Code* the offender who has erred in a state lacking a vacation or expungement statute would be open to attack in a California court.

59. Griswold, *The Long View*, 51 A.B.A.J. 1017 (1965).

60. *Id.* at 1021.

long is enough? In the recent case of *DeVeau v. Braisted*,⁶¹ the Supreme Court of the United States sidestepped this question in affirming the exclusion of petitioner from the position of secretary-treasurer of a longshoreman's local under § 8 of the New York Waterfront Commission Act of 1953.⁶² Petitioner had pleaded guilty to attempted grand larceny thirty-five years before his removal from office and had received a suspended sentence. Though terming the result "drastic," the Court noted the long history of abuses on the New York waterfront and upheld the application of the Act. While one cannot quarrel with the Court's assessment of the "high risk" of the occupation, one must regret the Court's failure to confront the problem of how long disqualification resulting from an adjudication of criminal guilt should endure.⁶³

It is not for the confirmed recidivist that primary concern about restoration of status is due, but for the first offender—the "accidental" criminal, if you will—whose violative conduct never reoccurs. Though an accurate count is impossible, the number of such persons is staggering. Nussbaum has estimated that in the United States today there are nearly 50,000,000 persons with offense records; he concludes that between 15,000,000 and 20,000,000 are first offenders who do not recidivate.⁶⁴ His calculations are based upon extrapolations from the number of arrests per 100,000 population as determined by the Federal Bureau of Investigation's *Uniform Crime Reports* in 1953 and 1954 (assuming a recidivism rate of 63%), projected over one generation of 30 years. He places the number of first-time offenders arrested each year at roughly 1,600,000.⁶⁵

It is beyond the present capacity of the social sciences to verify these estimates; adequate statistical information is not available. Nussbaum's

61. 363 U.S. 144 (1960).

62. N.Y. UNCONSOL. LAWS § 9933 (McKinney 1961).

63. For a suggestion that the problem is one of due process see Green, *op. cit. supra* note 11, at 31-35. It must be remarked that petitioner had not obtained a certificate of good conduct, N.Y. EXECUTIVE LAW § 242, following his discharge from sentence; if he had, he would have escaped the bar of § 8. There is no indication that he was aware of the availability of this relief.

64. NUSSBAUM, *FIRST OFFENDERS, A SECOND CHANCE* 8-11 (1956). The arrest rate per 100,000 population in 1953 is given as 4,231.6. 1954 FBI UNIFORM CRIME REP. 52-53 (table 17). The most recent rate (for the year 1963) is shown as 3,460.4. 1964 FBI UNIFORM CRIME REP. 106-07 (table 18). Frym estimates that there are 10,500,000 persons with offense records exclusive of traffic matters. Frym, *supra* note 54, at 3. While Nussbaum's estimate seems excessive, Frym's seems too low, in the light of the F.B.I. figures.

65. NUSSBAUM, *op. cit. supra* note 64, at 9. The F.B.I. indicates that 41% of the arrests reported nationally are of persons under the age of 25. 1964 FBI UNIFORM CRIME REP. 108-09 (table 19) (1,919,641 arrests out of 4,685,080 below age of 25).

totals may be faulted for assuming too high a recidivism rate,⁶⁶ yet one study being conducted by the Federal Bureau of Investigation indicates that the rate may be as high as 76% in the case of persons who commit major crimes.⁶⁷ Further, it is apparent that the Federal Bureau of Investigation's base figures are not accurate indices of the incidence of crime and arrest; many police agencies do not report at all, or do so sparsely. The totals commonly exclude vagrancy, drunkenness, peace disturbance, and other low-order offenses, and they generally do not include arrests of juvenile offenders. The imprecision of our count is obvious, but however imprecise it may be, the conclusion is surely apt that there are millions of persons in the United States who bear the opprobrium of a criminal record despite their reformation and avoidance of further crime.

To say that the prevention of crime is served by the resocialization of the offender is to utter the obvious, and yet the proposition is largely gain-said by present penal practice. From the nearly impenetrable morass of conflicting theories regarding the etiology of crime, we may at least—without pretending causational expertise—extract the common sense principle that if a man is permanently marked a criminal outcast, he will be isolated from social groups whose behavior patterns and values are anti-criminal. Sutherland and Cressey have stated

When he is effectively ostracized, the criminal has only two alternatives: he may associate with other criminals, among whom he can find recognition, prestige, and means of further criminality; or he may become disorganized, psychopathic, or unstable. Our actual practice is to permit almost all criminals to return to society, in a physical sense, but to hold them off, make them keep their distance, segregate them in the midst of the ordinary community.⁶⁸

If the offender is to be rehabilitated, two things must be done: he must be made a part of groups emphasizing values conducive to reform and law-abiding conduct, and he must concurrently be alienated from groups whose values are conducive to criminality.⁶⁹ Neither of these goals is furthered by the failure of the law to provide means of restoring status.

66. Note 65 *supra*.

67. 1964 FBI UNIFORM CRIME REP. 26-29. Of a special study group of 92,869 offenders, 76% had a prior arrest record. On the other hand, any statistical measurement of rehabilitation is extremely difficult, because it involves the determination of a negative factor, that is, the absence of arrest or conviction over a given period of time. Cf. Glaser, *Differential Association and Criminological Prediction*, 8 SOCIAL PROBLEMS 6 (1960).

68. SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 318 (5th ed. 1955).

69. Cressey, *Changing Criminals: The Application of the Theory of Differential Association*, 61 AMERICAN J. SOCIOLOGY 116 (1955).

In sum, there has been insufficient recognition of the responsibility of the penal law in alleviating the corrosive effects of the stigma its application necessarily creates. Dean Joseph Lohman of the University of California School of Criminology, a former sheriff of Cook County, Illinois, has written:

There is too little concern with the stigmatizing and alienating effect of arrests of such violators [minor offenders, especially first offenders]. We equate them with bank robbers and murderers. Once a youngster has a police record, this fact, in the eyes of the law—and potential employers—is more real than the person himself. People stop looking at a young man. They look at his record, his “sheet” as it is called. Over and over boys told me, “It isn’t me; it’s the sheet. They won’t listen to me.” We have pushed these boys on the other side of the law. They may well stay there.⁷⁰

In a very real sense, the problem is one of the “self-fulfilling prophecy”: the offender initially moved toward reform becomes what we condemn him to be. The failure of the law to treat the former offender as a person with the potential to become a law-abiding and useful member of society, by omitting means of removing the infamy of his social standing, deprives him of an incentive to reform. To the extent that this shortcoming contributes to the repetition of criminal conduct, it renders the system of penal law a “monument to futility” and tends to erode public confidence in the legal order.⁷¹

II. THE ANNULMENT OF ADULT CONVICTIONS

To date, few jurisdictions have adopted expungement laws permitting the annulment of conviction upon proof of reform, and, of those that have, fewer still provide truly effective relief.⁷² Because so little information on such statutes is available, a summary survey of existing laws may be helpful; the outline below excludes statutes dealing with juvenile court adjudication, which are discussed in part III.

70. Lohman, *Upgrading Law Enforcement*, 9 POLICE 19 (1965). For psychiatric comment to the same effect see Erickson, *The Problem of Ego Identity*, 4 J. AMERICAN PSYCHOANALYTIC A. 56 (1956).

71. Correctional policy must be viewed not only in terms of its direct effect upon criminal activity but also in terms of its effect upon other value systems of society. Cf. BLOCH & GEIS, *MAN, CRIME & SOCIETY* 494 (1962).

72. The first offender's need for expungement has been recognized in at least two other legal systems. Japanese law provides that after five years in the case of a minor crime and after ten years in the case of a serious crime, the “sentence [conviction] loses its effect” if there has been no further offense. PENAL CODE OF JAPAN, art. 34-2, 2 E.H.S. LAW BULL. 10 (Ministry of Justice transl. 1961).

Interestingly, among the most comprehensive provisions for the cancellation of

California: Cal. Pen. Code § 1203.45 provides that a person under the age of twenty-one committing a misdemeanor

may petition the court for an order sealing the record of conviction and other official records in the case, including records of arrests resulting in the criminal proceeding, and including records relating to other offenses charged in the accusatory pleading, whether defendant was acquitted or charges were dismissed.

If the order is granted, the "conviction, arrest or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence."

The section is expressly inapplicable to traffic violations, registrable sex offenses,⁷³ and narcotics violations. It seems further to be limited to persons who (1) were not convicted on the charge they seek to have expunged, or (2) if convicted, were eligible to have the conviction set aside under section 1203.4 or section 1203.4a of the Penal Code (respectively, satisfactory completion of probation or satisfactory completion of misdemeanor sentence where probation was denied). It is not wholly clear whether the relief is available to one who has had a prior conviction, though the thrust of the less-than-pellucid language and the history of the statute would suggest that it is not.⁷⁴ It is also not clear just how the operation of section 1203.45 overlaps that of the "setting-aside" provisions, sections 1203.4 and 1203.4a. The latter provide for the abolition of all "penalties and disabilities" resulting from a conviction; section 1203.45 does not so specify, but the provision that the arrest or conviction shall be deemed never to have occurred must surely include this, if the language is to have any consistency of meaning.

Notable in this statute is the lack of any provision directing the court's order of sealing to the attention of arresting or repository law enforcement agencies who may have records of petitioner on file. The expungement

offense records are those of the Soviet Union. The law specifies various probationary periods, based on the severity of the original sentence, during which there must be no new offense. Upon cancellation of the record of conviction, the offender reverts to his former status; the relief is not necessarily limited to first offenders. RSFSR CRIM. CODE art. 57, in BERMAN, SOVIET CRIMINAL LAW & PROCEDURE: THE RSFSR CODES 173-75 (1966). The cancellation is initiated by petition of the offender or of a social organization, and the cause is heard by the district people's court at the offender's place of residence. Notice must be given to the procurator, and the presence of the offender at the hearing is apparently jurisdictional. If the petition is denied, a new petition may not be filed for one year. RSFSR CODE OF CRIM. PROCEDURE, art. 370, in BERMAN, *op. cit. supra*, at 402.

73. Persons convicted of specified sex offenses are required by CAL. PEN. CODE § 290 to register with local police departments.

74. See Baum, *supra* note 30, at 823.

statute relating to juvenile courts⁷⁵ so provides, and experience has shown it to be necessary, in order to give the law full effect. If one agency retains unsealed an arrest or crime report, fingerprint card, "mug shot," or other record naming petitioner, a check is likely to reveal it, and the expungement will be rendered nugatory.⁷⁶ Further, section 1203.45 does not provide for examination of records so sealed upon subsequent petition of the person who is their subject; the juvenile court expungement statute has such a provision.⁷⁷ At first examination, this would seem highly anomalous, probably derogative of the intent of the enactment. It has become apparent, however, that there may be situations in which the person who has had his record sealed has made disclosure—such as in security clearance applications—and finds it impossible to prove that his record was in fact expunged.⁷⁸ The order of the court sealing the records is by common practice sealed with the other material in the case.

A further point may be noted with respect to the California enactment which is equally applicable to the other acts discussed, save for the National Council on Crime and Delinquency Model Act.⁷⁹ Though such an action would quite evidently be in conflict with the spirit of the act, an employer or licensing agency is apparently able to compel a former offender to disclose whether he has ever sought the relief provided by the statute.⁸⁰

75. CAL. WELFARE & INST'NS CODE § 781.

76. The author was informed of a recent case in which a young man had been granted relief under § 1203.45 following his conviction for gasoline theft. The arresting police agency had learned of the sealing order and had closed its files, as had the State Bureau of Criminal Identification and Investigation. However, in the particular county where the young man was arrested, the booking of all prisoners is handled at the county jail and separate records are kept by the sheriff's department. The booking record reflecting the theft came to light in a record check prior to a military appointment. Because the military authorities not unnaturally raised the question of wilful concealment of the record, the young man was in a worse position—at least until full explanation could be given—than he would have been had no sealing order been entered.

77. CAL. WELFARE & INST'NS CODE § 781.

78. On the desirability of full disclosure of record in applications for certain critical positions, see text accompanying note 135 *infra*.

79. N.C.C.D. MODEL ACT, 8 CRIME & DELINQUENCY 97, 100 (1962). Of the existing or proposed enactments found in the course of this study, only the Model Act prohibits employers or licensing bureaus from inquiring into the fact of expungement. CAL. PEN. CODE § 1203.45 has been interpreted, however, to require any official agency with records which have been sealed to answer any inquiry: "We have no record on the named individual." 41 CAL. OPS. ATT'Y GEN. 102, 104 (1963); *cf.* 40 CAL. OPS. ATT'Y GEN. 50 (1962).

80. Baum, *supra* note 30, at 824. Several California probation officers indicated to the author that they had encountered instances of such questioning, and as expungement becomes more widely invoked one would expect the practice to spread.

A major consideration in evaluating the effectiveness of any expungement statute is its realistic use: does it in fact afford an accessible relief, actually invoked, or does it simply sit as dressing upon the statute books? It is impossible to determine the proportion of eligible offenders who utilize section 1203.45 but there appears to be a steadily rising use of the section, 1,066 actions being received by the Department of Justice during the last fiscal year.⁸¹ Of these, 862 were reported to have been processed to completion. During the last six months of 1965, 732 such closures were completed, as compared to 243 in the period from July 1962 through June 1963. On the basis of these figures, the conclusion that the relief is relatively accessible is not inappropriate.⁸²

Michigan: Mich. Stat. Ann. § 28.1274(101) (Supp. 1965) provides that any person who pleads guilty to or is convicted of not more than one offense occurring before he is twenty-one (other than traffic violations and crimes punishable by life imprisonment), may, when five years have elapsed from the time of conviction, move the court to set aside judgment. As previously indicated,⁸³ this alone would not be considered an expungement statute without the provisions of Mich. Stat. Ann. § 28.1274(102) (Supp. 1965), which specify that upon entry of such an order vacating judgment, the applicant shall "for purposes of the law" be deemed not to have been previously convicted. This language is broad but has not yet been subjected to interpretation. Insofar as this section fails to indicate the disposition of the records and on its face omits to cover the problem of proper answer to inquiry, it fails as an effective expungement statute.

Under these provisions, notice must be served upon the prosecuting attorney, who must be given the opportunity to contest the setting aside of the judgment. Since the statutes were enacted in 1965,⁸⁴ no statistical information relative to their invocation is available.

The inquiry may take various forms, from "Have you ever had an offense record expunged?" to "Have you ever appeared as a moving party in any court? Explain fully." Cf. Note, 79 HARV. L. REV. 775, 800 (1966).

81. Letter from Ronald H. Beatty, Chief, Bureau of Criminal Statistics, California Department of Justice, to the author, January 17, 1966. The Bureau reports 2,917 actions filed under section 1203.45 in the period from July 1962 through December 1965. Of these, 2,379 were processed to completion and the identification files closed; in the remaining cases, the Bureau was unable initially to identify the defendant, and the order had therefore to be returned with a request for more information.

82. Whether it is accessible enough, and how it might be made more accessible, is considered in part IV below.

83. Note 16 *supra*.

84. Mich. Laws 1965, act 213, at 1134.

Minnesota: Under Minn. Stat. Ann. § 638.02(2) (Supp. 1965), any person convicted of a crime may upon discharge from his sentence petition the Board of Pardons for a "pardon extraordinary." This the Board may grant if it finds that he is a first offender (" . . . not convicted of [any crime] other than the act upon which [his present conviction was] founded") and determines that he is of good character and repute. The pardon extraordinary restores all civil rights and sets aside and nullifies the conviction, "purging" the offender. The statute specifically provides that petitioner shall never thereafter be required to disclose the conviction at any time or place other than in subsequent judicial proceedings. Since the judicial proceedings in which the conviction may be raised are not limited to those in which petitioner is a defendant, it would seem that the record might be revived for impeachment purposes in a later civil or criminal proceeding where petitioner is a witness.

The statute does not treat the problem of police and arrest records, fingerprint cards, and the like, and it is probable that a routine check of enforcement agencies would turn up the fact of arrest, thus frustrating the enactment's intended end.⁸⁵

Prior to 1963, the law applied only to those under twenty-one years of age.⁸⁶ There is apparently no limitation as to kind or type of offense for which expungement may be had, although the statute has been interpreted to be inapplicable to traffic violations.⁸⁷

The Minnesota law is distinctive in providing for expungement by administrative action rather than judicial order. Since an effective expungement process requires the sealing of court and agency records, court action would appear preferable.

New Jersey: N.J. Stat. Ann. § 2A:164-28 (1953) permits the court to order expungement when petitioner (1) has received a suspension of sentence or a fine not exceeding \$1,000 and (2) has suffered no subsequent conviction. Ten years must elapse from the date of conviction before application for expungement can be made, and the remedy is unavailable to persons convicted of treason or misprision thereof, anarchy, any capital offense, kidnapping, perjury, any crime involving a deadly weapon including the carrying of such a weapon concealed, rape, seduction, aiding or concealing persons convicted of high misdemeanors, aiding the escape of prisoners, embracery, arson, robbery, or burglary. The petitioner must pay all costs

85. See note 76 *supra*.

86. In 1963, the law was extended to all first offenders regardless of age. Minn. Sess. Laws 1963, ch. 819, at 1441-42.

87. 1949 MINN. OPS. ATT'Y GEN. 328-B.

of the expungement proceeding, and notice must be served upon the prosecutor and police department(s) concerned. No provision is made for the expunging or sealing of police and enforcement agency records.

The exact utility of this statute is open to much doubt. No figures as to its invocation could be found, but the long period of time before relief is possible (ten years) and the fairly extensive catalogue of ineligible offenses restrict both the efficacy of the relief and the likelihood of its being sought. More to the point, the statute has been construed as "lacking the force and effect of a full pardon" (whatever that may be), apparently on the basis that to grant the law any greater effect would be to impinge upon the pardoning power of the governor.⁸⁸ Since New Jersey has taken the position that a pardon does not permit the recipient to respond in the negative to questions about his conviction,⁸⁹ it would seem *a fortiori* that a successful petitioner under section 2A:164-28 would also be constrained to disclosure. In terms of restoring the essential status of the former offender, the relief afforded by this enactment is limited at best and illusory at worst.

There is one further provision of New Jersey law upon which comment must be made: after five years (presumably from the date of entry), the records of "disorderly persons" on file in the office of the county clerk *may* be destroyed.⁹⁰ This appears to be a "housekeeping" provision rather than an enactment designed to affect the status of such "disorderly persons"—which is doubtful, to say the least. A "disorderly person" has been defined as one guilty of a "quasi-criminal act," something below a misdemeanor, who is spared "the brand of being adjudged a criminal with all of its political, business and social implications. . . ."⁹¹ It is hard to see how he is so spared when he is subject to immediate arrest without process,⁹² may be summarily tried without indictment or jury,⁹³ and may be imprisoned.⁹⁴ Since "being a disorderly person" is something less than committing a crime, such person is apparently ineligible even for the meagre relief of section 2A:164-28.⁹⁵

88. 1951-53 N.J. OPS. ATT'Y GEN. 143.

89. *Id.* at 206.

90. N.J. STAT. ANN. § 47:3-9(i) (Supp. 1965).

91. *In re Garofone*, 80 N.J. Super. 259, 271, 193 A.2d 398, 405 (1963), *aff'd*, 42 N.J. 244, 200 A.2d 101 (1964) (possession of barbiturates).

92. N.J. STAT. ANN. § 2A:169-3 (1951).

93. *In re Garofone*, 80 N.J. Super. 259, 193 A.2d 398, (1963), *aff'd*, 42 N.J. 244, 200 A.2d 101 (1964).

94. N.J. STAT. ANN. § 2A:169-5 (1951).

95. Parenthetically, the scope of the disorderly person classification is disturbingly broad. In one startling case, a disgruntled husband procured a revolver, jimmied the

Texas: Though not an expungement act insofar as it fails to provide for the destruction or sealing of records, Tex. Code Crim. Proc. Ann. art. 42.13, § 7 (1966) deserves mention if only because it does not classify easily. Subsection (a) provides that upon completion of probation following conviction of a misdemeanor, the court shall enter an order setting aside the finding of guilt and dismissing all accusatory pleadings. By subsection (b), the offender's finding of guilt may not be considered *for any purpose* (italics in the statute) except to determine entitlement to probation in a trial for a subsequent offense. The relief is available only to misdemeanants.

It will be noted that the statute appears to be (like the Michigan enactment discussed above) simply a "setting-aside" provision, which does not reach the status of an offender.⁹⁶ However, provisions similar to subsection (b) are not found in article 42.12, section 7, the cognate statute permitting the setting aside of felony convictions. It is thus inferable that the legislature intended the broader relief of article 42.13, section 7 to extend to the status itself. The section may well go farther in giving the reformed offender protection against forced divulgence of his record to employers and licensing agencies than would most expungement acts. The great lack of this hybrid statute—in terms of its efficacy—lies in its failure to provide for the closure of court and agency records.

III. EXPUNGEMENT AND THE JUVENILE COURT

A. *The Need*

Every state, most territories, and the United States have provided special adjudicative and dispositive procedures in the case of juvenile offenders. It is truistic to say that the juvenile court is not a criminal court, and that adjudications, since not convictions, are not productive of criminal disabilities. Nearly every jurisdiction so provides.⁹⁷ All but a handful of states

screen of his long-estranged wife's bedroom with a putty knife, and shot her lover when the latter attacked him with an axe. His argument of self-defense was denied on the ground that by carrying implements of entry (the putty knife) and the revolver, he was a "disorderly person" who was subject to immediate arrest, which the deceased was simply trying to effect—with the axe. *State v. Agnesi*, 92 N.J.L. 53, 104 Atl. 299 (1918), *aff'd*, 92 N.J.L. 638, 106 Atl. 893, 108 Atl. 115 (1919). Just what are the bounds of "quasi-criminality"?

96. See text accompanying notes 30-34 *supra*.

97. ALA. CODE tit. 13, § 378 (1958); ALASKA STAT. § 47.10.080(g) (1962); ARIZ. REV. STAT. ANN. § 8-228A (1956); CAL. WELFARE & INST'NS CODE § 503; COLO. REV. STAT. § 22-8-1(3), -13 (1963); CONN. GEN. STAT. REV. § 17-72 (1958); DEL. CODE ANN. tit. 10, § 982(b) (1953); D.C. CODE ANN. § 16-2308(d) (Supp. IV, 1965); FLA. STAT. § 39.10(3) (1961); GA. CODE ANN. § 24-2418 (1959); HAWAII REV. LAWS § 333-1 (1955); IDAHO CODE ANN. § 16-1814(5) (Supp. 1965); ILL. REV. STAT. ch. 37,

expressly prohibit public access to records of the juvenile court,⁹⁸ and many extend the restrictions to the files of law enforcement and social agencies.⁹⁹ Commonly, the fact of adjudication in juvenile court and any evidence given in connection therewith are inadmissible against the minor in any other court,¹⁰⁰ and a large number of states provide that such adjudication is no bar to future military service or public employment.¹⁰¹

§ 702-9 (1965); IND. ANN. STAT. § 9-3215 (Supp. 1966); KAN. GEN. STAT. ANN. § 38-801 (1964); KY. REV. STAT. § 208.200(5) (1962); LA. REV. STAT. § 13-1580 (1952); ME. REV. STAT. ANN. tit. 15, § 2502(1) (1964); MD. ANN. CODE art. 26, § 54 (1957); MASS. GEN. LAWS ANN. ch. 119, § 53 (1958); MICH. STAT. ANN. § 27.3178(598.1) (1962); MINN. STAT. ANN. §§ 242.12, 260.211(1) (Supp. 1965); MISS. CODE ANN. § 7185-09 (Supp. 1964); MO. REV. STAT. § 211.271(1) (1959); MONT. REV. CODES ANN. § 10-611 (Supp. 1965); NEV. REV. STAT. § 62.190(3) (1963); N.H. REV. STAT. ANN. § 169:26 (1955); N.J. STAT. ANN. § 2A:4-39 (1951); N.M. STAT. ANN. § 13-8-65 (Supp. 1965); N.Y. FAMILY CT. ACT § 781; N.C. GEN. STAT. § 110-24 (1959); N.D. CENT. CODE § 27-16-21 (1960); OHIO REV. CODE ANN. § 2151.35 (Page Supp. 1965); OKLA. STAT. tit. 20, § 891 (1961); ORE. REV. STAT. § 419.543 (1963); PA. STAT. ANN. tit. 11, §§ 261, 269-417 (1965); P.R. LAWS ANN. tit. 34, § 2011 (Supp. 1965); R.I. GEN. LAWS ANN. § 14-1-40 (1956); S.C. CODE ANN. § 15-1202 (1962); S.D. CODE § 43.0327 (1939); TENN. CODE ANN. § 37-267 (Supp. 1965) (by implication); TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (Supp. 1965); UTAH CODE ANN. § 55-10-105(2) (Supp. 1965); VT. STAT. ANN. tit. 33, §§ 601, 627 (1958) (by implication); VA. CODE ANN. § 16.1-179 (1950); V.I. CODE ANN. tit. 5, § 2506 (1957); WASH. REV. CODE ANN. § 13.04.240 (Supp. 1965); W. VA. CODE ANN. § 4904(83) (1961); WIS. STAT. § 48.38(1) (1961); WYO. STAT. ANN. § 14-109(d) (1957). The federal provision is found in 18 U.S.C. § 5032 (1964).

98. Only Iowa, Maryland, Nebraska, and Vermont appear to lack statutes explicitly governing juvenile court records. In these states, the matter may be covered by court rule. *Cf.* MD. ANN. CODE art. 26, § 64 (1957). MISS. CODE ANN. § 7185-20 (1942) prohibits divulgence of the names of minors for statistical reporting purposes, but does not expressly protect police or court records from public inspection. MONT. REV. CODES ANN. § 10-633 (Supp. 1965) limits disclosure of identity and opening of hearing to cases where the minor is charged with a felony. See Geis, *Publication of the Names of Juvenile Felons*, 23 MONT. L. REV. 141 (1961). In several states, only the probation officer's reports are withheld from public access. *E.g.*, N.M. STAT. ANN. § 13-8-66 (1953); *cf.* MO. REV. STAT. § 211.321(3) (1959) (discussed pages 177-78 *infra*). In Ohio, the exclusion of persons other than parents, child, or counsel of record is implicit rather than express. See OHIO REV. CODE ANN. § 2151.18 (Page Supp. 1965).

99. ILL. REV. STAT. ch. 37, 702-8(3) (1965); MINN. STAT. ANN. § 260.161 (Supp. 1965); and N.Y. FAMILY CT. ACT § 784 are typical statutes requiring police department segregation of juvenile files and prohibiting public disclosure. The Minnesota statute has been interpreted as forbidding the furnishing of police records to governmental agencies, at least without court order. 1965 MINN. OPS. ATT'Y GEN. 268-L. A number of states have statutes regulating the taking and transmission of fingerprints and identification photographs in juvenile cases. See MYREN & SWANSON, *POLICE WORK WITH CHILDREN* 77-80 (1962).

100. On the use of juvenile court adjudication records in later adult proceedings see Annot., 96 A.L.R.2d 792 (1964); Note, 32 So. CAL. L. REV. 207 (1959).

101. *E.g.*, MASS. GEN. LAWS ANN. ch. 119, § 60 (1965) (no disqualification for public service either under the Commonwealth or in any political subdivision thereof);

In the face of this panoply of statutory insulation to shield the youthful offender from the criminalization that would normally attach to him, the question must be put: are expungement procedures needed for juvenile records, and if so, why? One may conjecture that those jurisdictions which have provided for the annulment of adult conviction records and have omitted such provision for juvenile adjudications—such as Alaska, Minnesota, and New Jersey—have done so because it was believed such protection was unnecessary and superfluous.¹⁰²

The plain fact is that expungement provisions *are* necessary to effectuate the intent of the juvenile court acts, because society does not make the fine semantic distinctions attempted by the law. As a recent survey put it, "the results of . . . [statutory classification of juvenile court records as confidential] have been so unsatisfactory that it may fairly be characterized as a failure."¹⁰³ In the public eye, an offender is an offender, be he juvenile or adult. The clichés of noncriminality and lack of stigma attendant upon the juvenile court process¹⁰⁴ have so often been repeated that we have become piously obtuse to the fact that the enlightened instrumentality of the juvenile court is frequently not as felicitous in practice as it is in theory.¹⁰⁵

UTAH CODE ANN. § 55-10-105(2) (Supp. 1965) (no disqualification for any civil or military service appointment). Several Massachusetts probation officers informed the author that the law is ineffective as a real aid to employment because it fails to cover private hiring. An attempt to deal with private employment would probably be ineffective unless it restricted the scope of permissible questioning of an applicant. Some jurisdictions expressly preserve the right to examine juvenile records when application is made for a law enforcement position. *E.g.*, ILL. REV. STAT. ch. 37, § 702-9(3) (Supp. 1965).

102. *Cf.* ALASKA STAT. § 47.10.060(e) (1962) which provides for expungement of the record of any minor tried as an adult on a waiver of juvenile court jurisdiction. No comparable provision is available for juvenile court adjudications. See also MINN. STAT. ANN. § 242.31 (Supp. 1965).

103. Note, 79 HARV. L. REV. 775, 800 (1966).

104. *E.g.*, *In re Holmes*, 379 Pa. 599, 604, 109 A.2d 523, 525 (1954): "No suggestion or taint of criminality attaches to any finding of delinquency by a juvenile court."

105. MATZA, *DELINQUENCY AND DRIFT* 73 (1964). The problem is not limited to the United States. In Great Britain, expungement procedures were proposed in 1960; these were rejected by the Committee on Children and Young Persons on the ground that there was not "a record" in the case of a juvenile delinquent, but in fact many records. While the Committee was sympathetic to the need, it apparently felt an expungement law would be ineffective. COMMITTEE ON CHILDREN & YOUNG PERSONS, REPORT, Cmd. No. 1191, at 74-75 (1960-61).

In Finland, on the other hand, the law permits the "abolition" of all accusatory pleadings and adjudication records where a punishable offense occurred before the offender's eighteenth birthday. Dölling, "Finnish Juvenile Penal Law" (*Das Finnische Jugendstrafrecht*, *Recht. Jugend* [1961], 9/21, at 325-28), abstracted in 2 EXCERPTA CRIMINOLOGICA 501-02, No. 1221 (1962).

Recognition of the stultifying effect of juvenile court adjudication was forcefully given in the much-cited case of *In re Contreras*:

While the juvenile court law provides that adjudication . . . [as] a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. Courts cannot and will not shut their eyes to everyday contemporary happenings.

It is common knowledge that such an adjudication . . . is a blight upon the character of and is a serious impediment to the future of such minor. Let him attempt to enter the armed services of his country or obtain a position of honor and trust and he is immediately confronted with his juvenile record.¹⁰⁶

The considerations set forth in the preceding discussion of the adult offender's plight of status apply with equal force to a juvenile. In fact, they may thrust with more force in his case, because he may more surely be foreclosed from the education and training needed to fit him for a useful and productive life.¹⁰⁷ As well, he may more likely be discouraged from applying for military service.¹⁰⁸

Additionally, there are three factors in juvenile cases which especially compel an expungement statute reaching not only police and arrest records but *all* juvenile records, including those of dependency and neglect.

First, the arrest records of the referring enforcement agencies are the principal source of knowledge of a minor's past. Because the court records are commonly made confidential by statute or court practice,¹⁰⁹ employers, licensing agencies, and other persons seeking information usually resort to

106. 109 Cal. App. 2d 787, 789-90; 241 P.2d 631, 633 (1952); *accord*, Jones v. Commonwealth, 185 Va. 335, 341-42, 38 S.E.2d 444, 447 (1946). In a mordant dissent in *In re Holmes*, 379 Pa. 599, 612, 109 A.2d 523, 529 (1954), Musmanno, J., terms the notion that a juvenile record does its owner no lasting harm a "most disturbing fallacy" and a "placid bromide." He colorfully describes a juvenile record as

a lengthening chain that its riveted possessor will drag after him through childhood, youthhood, adulthood and middle age It will be an ominous shadow following his tottering steps, it will stand by his bed at night, and it will hover over him when he dozes fitfully in the dusk of his remaining day.

107. NUSSBAUM, *FIRST OFFENDERS, A SECOND CHANCE* 4 (1956), quotes the application form of a leading university as asking, "Have you ever been placed on probation or parole, or had any other penalty, scholastic or disciplinary, imposed?" The application for graduate fellowship assistance under Title IV of the National Defense Education Act requires full reporting and certification of all crimes other than those committed before the applicant's sixteenth birthday and minor traffic violations. U.S. Dep't of Health, Educ. & Welfare, form OE 4149. The NDEA application, however, provides that all information will be "treated confidentially" and will be weighed "only as to the suitability of the applicant as a . . . Fellow."

108. For a discussion of military regulations see note 45 *supra*.

109. Note 98 *supra* and accompanying text.

police files, where they all too often gain access.¹¹⁰ The effect on an adult of arrest without conviction has already been remarked.¹¹¹ It is apparent that the devastation of arrest may well be much greater in the case of a juvenile, because the confidentiality of court records may preclude verification of non-involvement. The inquirer is more likely to stop with the arrest record and draw his own conclusions regarding guilt.¹¹² Even if the dismissal by the juvenile court is reflected (as it should be) upon the police record, the observer is likely to conclude that the minor did *something*, at least, and the court "let him off light."

Further, many—if not most—juvenile cases are disposed of at the police level, without referral to juvenile court.¹¹³ Of those that are referred, many are "settled at intake," or are placed on informal supervision in lieu of immediate adjudication. Because of widely varying practices and policies, no meaningful national figures can be given, but California has reported that only 42.5% of boys and 42.2% of girls referred to the juvenile courts for delinquent acts are handled by court hearing.¹¹⁴ In virtually all cases, police arrest or contact records exist.

The second factor making the need for an expungement statute particularly acute in juvenile cases is closely tied to the first: the labels or offense designation on the police department's records (or even the juvenile court's, for that matter) may not fairly reflect the minor's conduct. While this is true for adult offenders, it is even more the case in juvenile matters. Not uncommonly, the more serious of two possible crime classifications will be selected, either in honest doubt as to which is applicable or in an effort to make the clearance rate for the more serious offense appear higher.¹¹⁵ There

110. Cf. Note, 79 HARV. L. REV. 775, 785-86 (1966).

111. Note 35 *supra* and accompanying text.

112. Authority cited note 110 *supra*.

113. The F.B.I. estimates that 51.5% of all juvenile cases are settled without referral to the court, either within the police department itself (47.2%), referral to a welfare agency (1.6%), or referral to another police agency (2.7%). 1964 FBI UNIFORM CRIME REP. 102 (table 13). On the informal handling of delinquents see Tappan, *Unofficial Delinquency*, 29 NEB. L. REV. 547 (1950).

114. CAL. DEP'T OF JUSTICE, DELINQUENCY AND PROBATION IN CALIFORNIA 92-94 (1963).

115. A common example is the choice between "grand theft auto" (commonly a felony) and the lesser offense of "joyriding" (commonly a misdemeanor). The author was informed by officials of the Office of Economic Opportunity on the West Coast that this was a particularly troublesome dichotomy, since some police agencies and juvenile courts classified all automobile thefts by minors as felonious, while others classified them as joyriding unless there were aggravating circumstances. The net effect of these disparate policies is to exclude some youths from Job Corps placements while permitting the admission of others who committed precisely the same act but did so in a more lenient jurisdiction.

is less chance that the officer will be called in a juvenile case to account either for his judgment or the evidence to support it.

Extreme cases, while they may make bad law, can be apt examples, and two may serve to illustrate the point. In one case handled in 1958 by the author as a probation officer, an eleven year old boy was placed in juvenile hall for burglary: he had stolen a package of bologna from a grocery store to sustain himself while running away from home, because of conflict with his present "Uncle." The California definition of burglary technically includes entry into an open place of business with intent to steal,¹¹⁶ and when the young man told the policeman he had gone into the store intending to shoplift the meat, the officer (under some pressure from the ired shopkeeper) concluded he was indeed a burglar. The minor was presented to the court as a dependent child, but there nevertheless remains an apprehension record for burglary in the police files.

In an even more ludicrous case, the author was informed of a highly respected and capable police juvenile sergeant who had contacted the juvenile court for assistance in shedding a record of apprehension for "child molesting," which had occurred when he was fourteen years old. While walking home from school with his thirteen year old inamorata, he had succumbed to his vernal urges and kissed her—in public view upon the street. His heinous conduct was espied by the city's sole juvenile-aid-officer *cum* pursuer-of-truants, and he was hustled to the police station, where appropriate forms were filled out before he was sternly admonished and his parents called. The section under which he was "charged" deals with conduct arousing or tending to arouse the passions of a child under the age of fourteen years!¹¹⁷ The arrest record remained in the police department's files. He obviously had little trouble in obtaining public safety employment by divulgence and explanation, but the significant point is that the record was there, buried in some dust-covered bin, and that it turned up and *needed* explanation.

Manifestly, the moral of these tales is not that outlandish results occur in juvenile cases and that we should therefore protect their subjects. It is rather that records of very real offenses do exist in a variety of places from which they can be retrieved, and that without the protection of an expunge-ment statute reaching them, the bromidic recitals of the juvenile court's

116. CAL. PEN. CODE § 459.

117. CAL. PEN. CODE § 288. The municipality in question, it may be noted in passing, seems to have displayed singular concern over the osculatory activity of its citizens. Reportedly, it had upon its books until very recently an ancient ordinance prohibiting any two persons from kissing unless each first wiped the lips of the other with carbolized rose-water.

non-punitive philosophy will not save the juvenile from the records' stigma.

The third reason underlying the especial need for expungement in juvenile cases is shortly stated. The distinction between delinquency and dependency is blurred enough in theory and frequently not drawn at all in fact. The public often identifies the juvenile court with delinquency and assumes a child under its care to be an offender.¹¹⁸ Further, even a status of dependency or neglect carries its own special measure of opprobrium which the child should not have to bear.

B. *The Existing Law*

In recognition of the need, a few states have enacted expungement provisions of varying efficacy. As in the case of the acts applicable to criminal convictions, some extended comparison may prove helpful.

Alaska: Alaska Stat. § 47.10.060(e) (1962) permits a minor who has been tried as an adult after waiver of juvenile court jurisdiction to petition the court for the sealing of his record. The petition may not be filed until the sentence has been successfully completed and five years have elapsed. (It is not clear whether this period is to be measured from the date of conviction or from the date of completion of the sentence.) The petition may be made by the Department of Health and Welfare on his behalf, and the order restores all civil rights. The statute provides that no person may ever use the records so sealed for any purpose, but is silent on the appropriate response to questions regarding the past offense.

No comparable provision exists for actions under the juvenile court law, and the section does not reach police records.

Arizona: Ariz. Rev. Stat. Ann. § 8-238 (1956) provides for mandatory destruction of the court records upon the expiration of the period of probation or after two years from the date of discharge from an institution, unless before that time the minor has been convicted of another offense. By implication, this relief is not available to dependent or neglected children, and the law is silent as to the effect of the sealing. The language ("records of the proceeding") would not seem to reach police records.

California: Under Cal. Welfare & Inst'ns Code § 781, any person who has been the subject of a petition in juvenile court or of a citation to appear before a probation officer, or who has been taken to a probation officer, may petition for the sealing of his records. The section does not apparently cover the minor whose case has been concluded by the police without re-

118. REPORT OF CAL. SPECIAL STUDY COMM. ON JUVENILE JUSTICE, pt. 1, at 19 (1960).

ferral. The relief extends to children referred for dependency and neglect as well as to those referred for delinquent conduct. Either the person involved or the probation officer may file the petition, which cannot be done until five years have elapsed from the termination of jurisdiction (in cases of court disposition) or from the date of referral (in informal dispositions).¹¹⁹ The relief is mandatory if the court finds that the petitioner has not since been convicted of any felony or misdemeanor involving moral turpitude, and has attained rehabilitation "to the satisfaction of the court."

The sealing is expressly extended to records and files in the possession of other agencies, and the application for the order requires the applicant to list agencies he thinks may possess records. The order is directed to each such agency, and requires it to seal its records, advise the court of its compliance with the order, and then seal the order of sealing itself.¹²⁰ The law specifies that after sealing, the events shall be deemed never to have occurred, and the person "may properly reply accordingly" to any inquiry. The statute does not preclude inquiry as to the fact of expungement, nor does it specify whether official agencies may disregard its provisions and press for information, though its plain wording would seem to compel the conclusion that they could not. The statute has been interpreted to require an official agency whose files have been sealed to respond to any inquiry: "We have no record on the named individual."¹²¹

119. In a number of counties it is the practice for the probation department to offer to file the petition for expungement. This reflects recognition of the need to make the persons involved aware of the possibility of such action and to minimize expense and red tape.

120. The intricacies of these provisions have not insured their uniform success, and a number of ploys have been developed to circumvent them. In one police department surveyed by the writer, the "sealing" is accomplished by stamping "sealed" upon the face of the master index card (the so-called "alpha card") and then replacing it in the file. Los Angeles County reportedly interprets the statute as narrowly as possible and seals only the records of the particular offense or situation which resulted in wardship or adjudication as a dependent child, leaving untouched any prior or subsequent entries. Where the case has been transferred between counties, Los Angeles county—and apparently others following its lead—allegedly will not honor an expungement order from another juvenile court, but will require the institution of new proceedings in its own jurisdiction. (It has not been possible to verify these practices because the writer's inquiries to the county in question have gone unanswered.)

Upon occasion a minor is first brought to municipal court and then is certified to juvenile court when his age is established. The author was told of two instances where the municipal court refused at first to honor the sealing order of the juvenile (superior) court.

The probation department personnel interviewed indicated, however, that such evasive tactics are relatively rare, and from the author's observations, the general level of cooperation has been quite high.

121. 40 CAL. OPS. ATT'Y GEN. 50 (1962).

The statute uniquely provides that the person whose records are sealed may at a later time petition the court to grant the right of inspection to persons named in the application, apparently to effectuate security clearances and other investigations for high-risk employment.¹²²

Far less utilization has been made of this relief than that afforded by Cal. Pen. Code § 1203.45 to misdemeanants under twenty-one. The records of the Bureau of Criminal Statistics indicate that for the period July 1962-December 1965, 791 requests for file clearance were received by the Identification Bureau; 545 were processed to completion.¹²³ The possibility that this is due to a large number of juvenile referrals who become recidivists and are ineligible does not seem to be borne out in fact; probably the best guess is that somewhere between 60% and 85% of delinquents do not become adult violators.¹²⁴ A more plausible explanation is threefold: minors are not as aware as more mature offenders of the possibility of expungement; they less frequently have the advice of counsel; and there is no required lapse of time before relief is possible under section 1203.45. It is likely that by the time five years have elapsed since the jurisdiction of the court was terminated (frequently if not typically at age eighteen) the person involved may feel the relief is too delayed to be worth the effort.¹²⁵

Indiana: Ind. Ann. Stat. § 9-3215(a) (Supp. 1966) empowers the court to order the destruction or obliteration of the record of any child adjudged a delinquent but never committed to a public or private institution, provided he has not been arrested for a delinquent act or "cited for any offense," is reformed, and has been of good behavior for at least two years after judgment. The order of obliteration may be made upon the court's own motion or upon the motion of the probation officer, either with or without formal hearing. The court, at its discretion, may order law enforcement agencies to produce their records for destruction, and may continue the case for one year before ruling on the motion for obliteration. The section is not applicable to children handled for dependency and neglect and is silent as to the effect of destruction.

122. Cf. text accompanying note 78 *supra*. Only Utah has a similar provision. See UTAH CODE ANN. § 55-10-117 (Supp. 1965) (discussed in text accompanying notes 128-31 *infra*).

123. See note 81 *supra*.

124. MATZA, *op. cit supra* note 105, at 22.

125. "[T]he period of time that must elapse before the procedures are available is often that in which the existence of the record is most important—the time of higher education, military service or initial employment." Note, 79 HARV. L. REV. 775, 800 (1966).

Kansas: Kan. Gen. Stat. Ann. § 38-815(h) (1964) provides that when a record is made of any public offense committed by a boy under sixteen years of age or a girl under eighteen, the juvenile court in the county where the record is made may order either a peace officer or a judicial officer having such records to destroy them. A unique feature of this law is that it provides for use of the contempt power to enforce compliance. It does not reach dependency or neglect records, but does reach records of police agencies even where the child was not referred to the court.¹²⁶ The statute requires any person making a record to notify the juvenile court both of the fact of the record and its substance. The law sets down no criteria for the exercise of the court's discretion, and this is one of the most troublesome facets of expungement acts. It must be presumed that a "standard of reformation" guides the judge in his decision.¹²⁷

Minnesota: Minn. Stat. Ann. § 242.31 (Supp. 1965) permits the "nullifying" of adjudication records if a minor is committed to the care of the Youth Conservation Commission and discharged before the expiration of his maximum term, or if he is placed on probation. In the former case, the nullification is at the discretion of the court. The order of nullification has the effect of "setting aside" the conviction and "purging the person thereof." The conviction shall not thereafter be used against him except when "otherwise admissible" in a subsequent criminal proceeding. The precise scope of the section is unclear, and the relief available under it apparently overlaps that afforded by Minn. Stat. Ann. § 638.02(2) (Supp. 1965), discussed above.

While this enactment applies to juveniles, by its terms it does so only upon conviction of crime. Under Minn. Stat. Ann. §§ 242.12, 260.211 (Supp. 1965), juvenile court proceedings are not criminal in nature and do not result in conviction. Thus, the anomalous conclusion is compelled that a minor can have his record nullified only if he commits an act sufficiently grave to warrant waiver of juvenile court jurisdiction and trial as an adult. *A fortiori*, the law does not reach neglect adjudications.

The section makes no provision respecting police or other agency records, and it is not clear whether the conviction is actually to be removed from the judgment record.

Missouri: Though it is sometimes referred to as an expungement statute, Mo. Rev. Stat. § 211.321(3) (1959) does not have the full effect of wiping

126. The Attorney General has ruled that a sheriff or county attorney cannot disclose information from juvenile records even before expungement. See 6 KAN. L. REV. 396 (1958).

127. The difficulties in application of such a standard and the Gordian question of who should be excluded from expungement are taken up in greater detail in part IV.

the slate clean and should not properly be so termed. It provides that the court may destroy, in January of each year, the social histories and information *other than* the official court file pertaining to any person who has reached the age of twenty-one. Though other subdivisions of this section impose confidentiality on both court and law enforcement records, it is apparent that the statute leaves untouched the essential adjudication of status.

Utah: Utah Code Ann. § 55-10-117 (Supp. 1965) permits anyone whose case has been adjudicated in a juvenile court (seemingly including dependents) to petition the court for sealing of records after one year from the termination of court jurisdiction or release from the state industrial school. The section provides that the court shall order the sealing if petitioner has not since been convicted of (and does not have pending) any felony or misdemeanor involving moral turpitude, and if the court is satisfied as to his rehabilitation. The language of the statute appears quite similar to that of the California law, specifying that upon entry of the order, the proceedings are deemed never to have occurred and the petitioner may so respond to inquiry. The sealing order may be extended to law enforcement records, and subsequent inspection of records is permitted only upon request of petitioner. Since the statute was enacted in 1965,¹²⁸ it is too soon to assess its effects. There is indication, however, that the courts regard the relief afforded by the section as exceptional, rather than viewing it as regularly to be given absent some affirmative reason to the contrary.¹²⁹ The latter position is apparently taken by the California courts.¹³⁰

In some states, physical destruction of court records may be effected at the court's discretion, but there is no indication that such destruction affects the status or nullifies the adjudication.¹³¹

IV. TWO PROPOSED LAWS AND SOME THOUGHTS FOR THE FUTURE

Two recently proposed acts represent especially significant attempts to readjust the status of the reformed first offender: the New York "Amnesty Law for First Offenders" proposed in 1965¹³² and the National Council on Crime and Delinquency's Model Act for the Annulment of a Conviction

128. UTAH CODE ANN. § 55-10-117 (Supp. 1965).

129. Note, 79 HARV. L. REV. 775, 800.

130. *Ibid.*

131. Compare WASH. REV. CODE ANN. § 13.04.230 (Supp. 1965), with VA. CODE ANN. § 16.1-193 (1950). The latter permits destruction of juvenile and adult records at the clerk's discretion, after the passage of varying periods of time depending on the seriousness of the offense.

132. State of N.Y. Ass'y Bill, Int. No. 233 (3d Rdg. 547, Print. 5363, Rec. 703) (1965).

of Crime.¹³³ The two proposals adopt different means of achieving roughly the same end. Taken in comparison, they point up three of the most pressing considerations of policy that must be met in constructing an expungement law: whether the relief should be automatic or a matter of discretion; whether the record should be required to be revealed in some circumstances; and by what means the purpose of the statute is best achieved.

The New York bill very nearly became law. After passage by both the Assembly and Senate of New York, the act was vetoed by Governor Rockefeller on the ground that it was "unsound" because "too broadly conceived."¹³⁴ The enactment provided for the automatic amnesty of all first offenders—adult, youthful, or juvenile—who had not been convicted of a felony or misdemeanor involving moral turpitude during a "probationary interval" immediately following completion of sentence. Before amnesty could be granted, the offender was to file an affidavit of eligibility in the court of original conviction.¹³⁵ The probationary period was established as five years in the case of felony, three years in the case of misdemeanor, and one year in the case of an adjudication as a youthful offender, wayward minor, or juvenile delinquent.¹³⁶

The act specifically restored to the amnestied first offender his accreditation as a witness, his right of franchise, his right to hold public office, and his right to have issued or reinstated any license granted by federal, state, or municipal authority (provided, of course, that he were otherwise qualified).¹³⁷ The amnestied offender was granted the "absolute right to negate" the fact of his arrest or conviction whenever inquiry was made by either private persons or public authority.¹³⁸ All records including fingerprints, photographs, and the like would be sealed against disclosure by the grant

133. 8 CRIME & DELINQUENCY 100 (1962). The Model Act was drafted in response to recommendations of the National Conference on Parole. NAT'L PROBATION & PAROLE ASS'N, PAROLE IN PRINCIPLE AND PRACTICE 136 (1957).

134. New York Times, July 23, 1965, p. 1, col. 7; p. 32, col. 6. A revised version of the bill has been introduced in the 1966 legislative session. State of N.Y. Sen. Bill, Int. No. 1146 (Print. 1159) (1966). It removes the "automatic amnesty" provision of its predecessor, and provides for the initiation of proceedings by a verified petition. Under this modified bill, the petitioner would be entitled to amnesty if he "reasonably establishes" to the court's satisfaction that amnesty "would best serve and secure his rehabilitation and would best serve the public interest." *Id.* at § 91. *Cf.* note 147 *infra* and accompanying text. This bill was reported passed by the Senate on March 8, 1966. New York Times, March 9, 1966, p. 30, col. 2. To avoid confusion, all references in the text are to the 1965 bill.

135. State of N.Y. Ass'y Bill, *supra* note 132, at §§ 90-91.

136. *Id.* at § 90(6).

137. *Id.* at §§ 92(3)-(6).

138. *Id.* at § 92(2).

of amnesty, but express provision was made for retention, use, and disclosure by law enforcement personnel actually engaged in investigation of crime.¹³⁹ Expungement was extended to the records of persons arrested and released without charge or acquitted after the lapse of a probationary interval of one year.¹⁴⁰ Provision was made for acceleration of amnesty for first offenders released on probation or parole, at the discretion of the sentencing court,¹⁴¹ and the amnestied status of any first offender granted relief under the statute was to be forfeited on subsequent offense.¹⁴²

The N.C.C.D. Model Act differs from the New York bill in several ways. The relief of annulment of conviction is not restricted to first offenders, as it is under the New York legislation.¹⁴³ The Model Act provides that the order may be entered immediately upon discharge from sentence; the proceedings may be initiated either by the individual or the court.¹⁴⁴ The granting of the relief is discretionary rather than automatic, though it is submitted that this is a difference somewhat more illusory than real: the New York bill in effect provided automatic issuance after the court's discretion had been exercised. It is nevertheless true that the New York approach makes the grant more a matter of right. The Model Act by implication permits the court to withhold some or all civil rights, though it provides that the person shall be treated in all respects as if he had never suffered conviction.

The most striking feature of the Model Act is its provision to protect the offender whose record has been expunged from the bind of disclosure of his past. In any application for employment, license, or "other civil right or privilege," or in any appearance as a witness, a person may be questioned about his previous criminal conduct *only* in language such as the following: "Have you ever been arrested for or convicted of a crime which has not been annulled by a court?"¹⁴⁵ This approach to the very difficult balance of disclosure against denial has not been adopted in any existing enactment, and seems eminently sound. As will be later discussed, it lends itself to the solution of the problem of high-risk employment.¹⁴⁶ To date, no jurisdiction has adopted the Model Act.

139. *Id.* at § 93.

140. *Id.* at § 99.

141. *Id.* at §§ 97, 98.

142. *Id.* at § 95. Enforcement of the bill was vested in the State Commission for Human Rights, and specific penalties were provided for violation of its provisions. *Id.* at § 94.

143. 8 CRIME & DELINQUENCY 100 (1962).

144. *Ibid.* Presumably, the offender would be required to file a petition in either case.

145. *Ibid.*

146. See p. 183 *infra*.

In vetoing the New York bill, the Governor remarked its failure to distinguish among the various grades of crime, and its apparent grant of relief regardless of the individual's efforts at rehabilitation.¹⁴⁷ In part, these criticisms are pertinent; in part, they miss the mark of the bill. A significant aspect of the bill was its express reservation to the court of the power to deny amnesty in the case of a "dangerous offender," defined as one deemed by the court "to be suffering from a serious personality disorder indicating a marked propensity towards continuing criminal conduct or activity."¹⁴⁸ For the realistic protection of the community, such a provision is indispensable, and this standard of classification seems far preferable to differentiation on the basis of felony versus misdemeanor, or even on the basis of crimes against person versus crimes against property. The young man who, on impulse, attempts to hold up a candy store with a toy pistol and is charged with armed robbery may be far less a menace to the community's safety than the would-be cat burglar who sets out to "hot prowl" an apartment, is found loitering on the rear stairs under suspicious circumstances, and is charged with disorderly conduct (very likely on the agreement that he will "cop a plea"). Under the usual grade-of-crime standard, the former would (it is assumed) be ineligible for amnesty or expungement, and the latter would be qualified.

Manifestly, some safeguard must be built into an expungement statute against the erasure of criminal records in improper cases, but the safeguard must be grounded on rational criteria. The vice of the "dangerous offender" standard adopted by the New York bill is in its vagueness, but therein may be precisely its strength as well. The legislature cannot fix with exactness every case that it wishes to exclude from the operation of the law. If the law is to work realistically and effectively, the enactment must enunciate the standard and leave its application to the courts.

In the author's view, the yardstick of the "dangerous offender" as a measure of exclusion would be improved by eliminating the "serious personality disorder" term and expanding the "clear and present danger" test embodied in the standard of "marked propensity towards continuing criminal conduct." The test of serious personality disorder requires a finding that the trial court is ill-equipped to make, at least without more effective psychiatric assistance than is presently available. The expansion of the standard of clear and present danger to the community would require that the court be empowered, in the case of specified serious crimes (murder, forcible rape, vicious assaults, and the like), to find the person a "dangerous

147. *New York Times*, July 23, 1965, *supra* note 134.

148. *State of N.Y. Ass'y Bill*, *supra* note 132, at § 90(2).

offender" ineligible for expungement simply on the gravity of the offense, without specific finding on the likelihood of further criminality.

Such a standard would permit a more realistic discrimination between offenses than can be gained by the use of a felony-misdemeanor formula. Practically speaking, the likelihood of a person committing a crime of such serious magnitude seeking expungement seems small.

The assertion that the New York bill granted expungement without regard to rehabilitative effort is chimerical and overlooks the presumption obviously indulged in by the legislature; *i.e.*, that if the person has completed the probationary interval without conviction, he has in fact made efforts toward rehabilitation. If the requirement were added that the judge could not grant expungement without a finding of "sincere effort toward rehabilitation," by what other criteria would this be measured and by what other evidence could it be proved? Surely the best evidence of rehabilitative effort is the avoidance of future criminality.

Two examples are frequently chosen to illustrate the unrealistic "do-gooder" spirit and visionary blindness to danger often claimed for those who advocate expungement statutes: the embezzler could deny his past in seeking a position at a bank, and a school teacher could conceal a sex offense. These illustrations of the breadth of the proposed New York law were used by Governor Rockefeller, and the point is by no means invalid. There is no easy answer to it. What it comes to is this: are we willing to run the risk of the embezzler's resumption of his larcenous habits in return for the opportunity to restore a very large number of persons to a useful social state? The risk of the repetition of the school teacher's offense upon one of his charges? Surely it is immediately apparent that these risks are of vastly different magnitude and cannot be singly answered. In order to have any sensible assessment of the risk, the offense cannot be viewed *in vacuo*, but only in terms of the individual who committed the offense and the circumstances in which he committed it. It is precisely here that the "dangerous offender" discretion of the court is essential.

Beyond this, however, is another consideration: we cannot lose sight of overriding values society wishes—and needs—to protect. We value so highly the sacrosanctity of the child's person that we may very well wish to preclude a former sex offender from again dealing with children, on the off chance that he may reoffend. The possibility of serious harm is too great, though the probability of reoffense might be small. By the same token, the harm caused by a repetition of embezzlement is more easily insured against and more easily borne, and this risk we may wish to assume.

As a matter of policy in view of the risk, we may deem it necessary to bar

a prior offender from police employment because he may be unable to withstand the stresses of his position; the risks to the public from his defalcation are too great. (But again, the risk cannot be intelligently weighed in abstraction from the offense and the offender. Some of the most compassionate and effective policemen of the author's acquaintance have had rather besmirched pasts. Lacking any sure calculus of risk, we are remitted to the sound and understanding discretion of the hiring agency, and it would seem necessary to have full disclosure.) To require a former offender to divulge his past offense in seeking police employment is not to say that he cannot reform, or even that he will likely reoffend. It is rather to say that by his past difficulty, he has indicated possible instability and lack of judgment, and the appointing authority must be made aware of the risk before it places him in a position requiring coolness of head and firmness of self-control to accompany the loaded sidearm. This is a very different thing from forever holding him a social outcast because of his past.

Even greater risks exist in the area of the national security and defense, and here too full disclosure seems essential. Consider the position of an airman charged with responsibility for a missile or other vastly lethal piece of modern armament. To prevent an unauthorized detonation or launch, it is imperative that the personnel chosen for control operate at a continued high level of reliability. Those who are *possibly unreliable* must be excluded.¹⁴⁹ Since a prior unlawful act may be indicative of an impulsive character, and an individual who possibly could not cope with the tremendous pressures of such an assignment, its commission must be divulged.

The antagonistic *desiderata* of abolition of record on the one hand and required revelation of it in particular circumstances on the other are not as irreconcilable as they seem. If an expungement statute only authorizes a response denying any record, it fails to meet the problem and throws the whole matter upon the person whose record is expunged. *Per contra*, if the statute adopts the "limitation on inquiry" mode of the Model Act, it is possible not only to permit the regenerate offender to take advantage of his new status, but also to protect the overriding interests of public security. This might feasibly be done with provisos, excepting from the limited inquiry enjoined by the statute any cases where the person granted expungement makes application (for example) for a position involving the supervision of children, for a position in law enforcement, or for a position

149. On the compelling need for personal stability in a "dispenser of lethal power" see U.S. Dep't of the Air Force, *Guidance for Implementing the Human Reliability Program*, AFM 160-55 (1962), in KATZ, GOLDSTEIN & DERSHOWITZ, *MATERIALS ON PSYCHOANALYSIS & LAW* 577-92 (5th temp. mimeo. ed. 1965) (cited with permission of the authors).

sensitive in terms of national security. The use of the limited inquiry would do much to facilitate employment and would eliminate the circumvention of the expungement order save in the few excepted cases.

The contrast of the New York bill and the Model Act is instructive in raising another difficult point: should expungement be wholly automatic, mandatory upon fulfillment of the prescribed conditions as the New York bill sought to make it; or wholly discretionary, as the National Council on Crime and Delinquency recommends?¹⁵⁰ Bluntly put, if the grant of expungement is wholly automatic, some will get it who should not; if it is wholly discretionary, some will not get it who should have it. Closely tied to this problem is another *desideratum*: effective accessibility. Consideration of the latter issue may help to illumine the former.

It makes no sense whatever to provide statutory means for redefinition of status and then surround their utilization with such procedural obstacles that they are not invoked. Really, the problem is twofold: the reformed offender must be made aware of the remedy (else its incentive value is lost), and he must be able to invoke it with a minimum of difficulty. Quite similar to the expungement problem is the matter of restoring competency following discharge from hospitalization for mental illness, and experience with such procedures is of significance to this inquiry.

A recent study in the District of Columbia compared the means there available for restoration: automatic restoration on certificate of discharge from the hospital superintendent, and petition for restoration upon conditional release.¹⁵¹ Of 329 persons studied, 327 were "officially restored" to competency by certificate (mandatory on discharge as cured). Only one had gained restoration by petition following conditional release. One other person had filed an application, but after six months it had not been processed. The study concluded that although the precise reasons for the extremely small number of applications for restoration on conditional release were unknown, "lack of knowledge of the necessity for taking such action is probably a factor."¹⁵²

On the other hand, the California statistics on the invocation of the youthful offender expungement statute¹⁵³ suggest that requiring the offender to petition for the relief does not necessarily deter him from procuring it. His awareness of the existence of expungement and the means of achieving

150. 8 CRIME & DELINQUENCY 99 (1962).

151. Zenoff, *Civil Incompetency in the District of Columbia*, 32 GEO. WASH. L. REV. 243 (1963).

152. *Id.* at 249.

153. CAL. PEN. CODE § 1203.45. See note 81 *supra* and accompanying text.

it, and his expectation that it may be gained without undue trouble, humiliation, and time, would seem far more significant factors.

Typically, the reformed offender may hold a dim view of the law and its processes, and be chary of invoking their aid. On the other hand, he *has* committed an offense, and it is surely not unreasonable to expect him to take some steps to initiate the process of expungement. It will be recalled that even the "automatic" New York act required the offender to commence the amnesty by filing an affidavit. The procedures necessary should be kept to a high degree of simplicity and a low degree of cost. It would not be inappropriate to permit the court to hold the hearing informally, in chambers, after appropriate notice to the agencies involved.

A satisfactory resolution of these points can be reached if the court is required to inform the first offender at the time of imposition of sentence of the possibility of expungement. Notice should be included in any copy of the sentence order given him. At the termination of his sentence, a letter informing him of the availability of the expungement remedy and of the probationary interval should be sent by the clerk of the court to his last known address. It would seem desirable to have the probation department assist in the preparation of the simple petition and any necessary supporting documents, and the offender should be informed of this in the clerk's letter and instructed to contact the probation department for assistance.¹⁵⁴

The statute authorizing the expungement should be mandatory rather than directory; that is, the court should be required to order expungement *if* the person has not suffered further conviction during the probationary interval *unless* the court finds strong affirmative cause to deny it (a finding that the person is a "dangerous offender"). In that sense, the process should be "automatic," and the filing of a simple request with a supporting document should be *prima facie* entitlement to expungement.

For yet another reason it seems wise to the writer to require that the offender initiate the proceedings, and that is the reason of incentive. As this paper has attempted to show, our penal law, in its present state, is one-sided, providing only negative motivation for reform—the avoidance of future incarceration.¹⁵⁵ If the offender is provided with a positive stimulus

154. While this suggestion might seem unrealistic in view of the fact that probation departments are often overworked and understaffed, it must be pointed out that the required documents are very largely *pro forma* and the task is essentially a clerical one. Pre-printed petition and affidavit forms may be helpful. The restoration of the reformed offender to his place in society is the goal of any probation program, and the specialized skills of probation personnel would seem particularly useful in assisting the eligible former offender to avail himself of the relief. The availability of expungement can be a powerful asset in a casework plan.

155. Professor Gresham Sykes has aptly pointed out that the system of punishment

and is given an initiating role in the process by which the readjustment of status is achieved, it is likely that he will regard it as more meaningful.¹⁵⁶ As a means of social control, reward for achievement of the conduct which punishment was designed to attain is more effective than punishment alone.¹⁵⁷ If the transgressor is forgiven by the law as he was condemned by it, he may hold the legal process in better esteem and be less impelled to violate its dictates.¹⁵⁸

Since the expungement procedure here proposed requires a certain discretion and since the sealing process should extend to agency records, it is preferable that it be a matter of judicial order rather than administrative direction. The court is likely more accessible than an administrative body and its power is better known.¹⁵⁹ The National Council on Crime and Delinquency has concluded that authorization of expungement by judicial order should produce wider and more uniform invocation of the power, while allowing for sound discretion to take individual circumstances into account.¹⁶⁰ The regular purgation of police department files is desirable from several standpoints,¹⁶¹ but for the foregoing reasons it seems unwise to expect that expungement can be accomplished by such agency action alone.

V. A SUMMING-UP

Creating a "model" statute is more often a matter of conjury than of construction, and it will not be attempted here. However, as a starting point for future discussion, it may be useful to summarize the requisites of an effective expungement statute and some of the means by which those requisites are most likely to be achieved, and to add a few interstitial remarks.

implies a scheme of reward, and that it is precisely upon this point that our system of penal law founders—at least from the point of view of the individual it seeks to control. Though he spoke in particular of the prison and its administration, his remarks are germane to the correctional law as a whole. SYKES, *THE SOCIETY OF CAPTIVES* 50-52 (1958).

156. Cf. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543, 590-92 (1960).

157. Cf. MANNHEIM, *MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION* 281-83 (1940). This observation assumes the point that we punish with a purpose of rehabilitation, and not solely to satisfy our urge for vengeance.

158. Professor Matza observes that delinquency is facilitated when the "moral bind of the law is neutralized." MATZA, *DELINQUENCY AND DRIFT* 98 (1964). A sense of injustice (*i.e.*, that even if one reforms, one will not be forgiven and cannot rid oneself of the stigma of the crime) supports the processes by which the neutralization occurs.

159. 8 *CRIME & DELINQUENCY* 99 (1962).

160. *Ibid.* The same conclusion was reached by the commentators to the Model Penal Code. MODEL PENAL CODE § 6.05, comment at 30-31 (Tent. Draft No. 7, 1957).

161. MYREN & SWANSON, *POLICE WORK WITH CHILDREN* 79 (1962).

If it is to serve its purpose, the action of expungement should be complete, accessible, realistic, and at least acceptable to the public taste. To that end, the following observations are offered.

(1) The expungement of the adjudication of guilt of a juvenile delinquent or an adult first offender should be made mandatory, upon petition of the offender, if the court finds that he has not reoffended, unless strong affirmative reason exists for denial. The court should have the power to deny expungement upon a finding that the person is a "dangerous offender," either because there is a likelihood of further criminal conduct or because the offense was sufficiently grave. A judgment denying expungement should be made appealable.

(2) A probationary interval following the completion of sentence as a precondition to expungement is a wise precaution. There is no magic in a metric of time, but what we are seeking is the man who can remain stable in his community life without the need even of minimal correctional restraint or supervision. He must be able to succeed "on his own," and expungement immediately upon discharge seems ill-conceived.

Unfortunately, there is evidently no period of time beyond which social scientists can say there is any given likelihood that the offender will not reoffend, and so we must strike a balance of common sense. An apt selection would seem to be two years (after termination of supervision) in the case of a juvenile delinquent or in the case of a misdemeanor, and five years in the case of a felony, with the court empowered to accelerate the expungement in its discretion. Whatever time selected should not be so long as to render the relief useless. (In the case of a dependency or neglect adjudication in the juvenile court, expungement should be made available immediately upon attainment of majority.)

(3) The expungement statute (or statutes) should include juvenile and adult offenders, and extend as well to dependent children of the court. On the juvenile court level, expungement should not be limited to first offenders, since a minor may commit a number of misdeeds before "straightening out" through maturation.

(4) At both adult and juvenile levels, the statute should reach not only the officially adjudicated case but cases of arrest-release and cases of acquittal as well. It should extend the order of sealing to all law enforcement and other agency records, including those in cases disposed of *intra muros*. Because the petitioner may wish to permit limited inspection of the records at a later time—for example, in making application for a security-critical job—the statute should provide for sealing rather than destruction of the records.

Records so sealed should be required to be removed from the main or master file and kept separately.

The widespread dissemination of records is an aid to effective law enforcement, but it poses a problem for effective expungement. The order of sealing should be directed to each enforcement agency having a record of the petitioner, and should be sent as well to all central indices and repositories. As one commentator has put it: "It seems that when the Moving Finger writes these days, a dozen Xerox copies likely are made."¹⁶² In this respect, consideration must be given to records and identification data forwarded by the police department to the Federal Bureau of Investigation. These submitted materials are considered by the Federal Bureau of Investigation to be the property of the transmitting agency, which must authorize any changes or deletions.¹⁶³ When a card reporting an arrest is returned to the contributor at the latter's request, the arrest entry is deleted from the individual's identification record at the Federal Bureau of Investigation. Therefore, the order of expungement should direct the local enforcement agency to request the return of any transmitted records.

Provision should be made for certification of compliance by the agencies named in the order, and, upon receipt of the certifications, the judgment reciting the order of sealing should itself be sealed, to remove any chance of unauthorized public access.

(5) The statute should expressly set forth the effects of the order in restoring the civil rights of the redeemed offender, and it should expressly annul the conviction and the offense. In addition to specifying that the person will thereafter be regarded as never having offended, it should provide that in all cases of employment, application for license or other civil privilege, examination as a witness, and the like, the person may be questioned only with respect to arrests or convictions not annulled or expunged. Exceptions should be set out in cases of high-risk employment where very great interests are at stake, such as law enforcement positions and those directly involving the national security.

The adoption of the "limited inquiry" provision will do more than enable the accommodation of the conflicting needs of the individual and the overriding public good; it will remove much of the public objection to

162. Baum, *Wiping Out a Criminal or Juvenile Record*, 40 CAL. S.B.J. 816, 824 (1965).

163. Information on the policy of the F.B.I. regarding submitted records was obtained from identification division administrators in Washington, D.C., through the help of special agents of the San Jose, California, field office. The author gratefully acknowledges their assistance.

this type of statute. In commending Governor Rockefeller's veto of the New York bill, the District Attorney of Manhattan is reported to have said that the bill was unrealistic because "it permitted a person to lie about his former conflict with the law."¹⁶⁴ It is perhaps hard to articulate but there is—to the writer's mind, at least—something objectionable about legalized prevarication even though one can rationalize the point by the worthiness of the end. It impairs the law's integrity by creating a fiction where none is needed. To only allow the offender to deny his offense leaves the burden on him; to restrict the questioning about his offense places the focus where it belongs, on the attitudes of society.¹⁶⁵

(6) Because of the differences in kind and the overwhelming need for records in the control of thoughtless and irresponsible drivers, the privilege of expungement should not be extended to traffic offenses. Moreover, these violations are regarded by society in an entirely different light than the usual order of crimes and leave no such residue of stigma; hence, there is no compelling need for their inclusion in the scope of an expungement provision.

(7) The statute should provide that upon subsequent conviction, the expunged record of an adult violator may be considered by the court for the purposes of sentencing or appropriate disposition.

In conclusion, most offenders do not remain criminals all their lives, and we should not treat them as if they do. It is manifestly not the purpose of the penal law to ascribe permanent criminality to a first offender, though that is largely its effect.¹⁶⁶ This article is not intended as a panegyric for a soft-headed penology. It is rather an attempt to point up a serious flaw in

164. New York Times, July 23, 1965, p. 1, col. 7; p. 32, col. 6. The objection that expungement and vacation of conviction laws permit the "rewriting of history" is frequently raised. See, *e.g.*, MODEL PENAL CODE § 6.05, comment at 30 (Tent. Draft No. 7, 1957).

165. The adoption of a "limited inquiry" rule does not solve all the former offender's employment problems or insure that the employer will not discern the offense. It merely blocks the route of direct inquiry, and its virtue in so doing is that it makes much more clear the spirit of the statute by cutting off the main source of forced disclosure. Total compliance with that spirit can never be assured, and employers will be able to learn by indirection what they cannot learn directly. Customarily, inquiry is made about past employment; personnel officials desire to know when, where and why no longer. Thus, an employment gap because of a jail sentence may be all too apparent. While questioning of this kind can allow the employer to evade the statute's intended end, it is neither realistic nor desirable to attempt to foreclose all questioning about past work. The "limited inquiry" mode can substantially reduce the potential for forced disclosure of offense, but it cannot wholly eliminate it.

166. *People v. Pieri*, 269 N.Y. 315, 327, 199 N.E. 495, 499 (1936).

our present legal system: the failure to provide means for redefining the status of the rehabilitated transgressor. It is submitted that an expungement process will not serve to hamper effective law enforcement, but will stand as an adjuvant to the goal of the correctional law. It should provide a potent incentive to reformation, and should render our response to criminality less febrile and more effectual. At the very least, it is deserving of serious trial.

We would do well to bear in mind that

it is a legal principle that correctional law is forgiving. Forgiveness is part and parcel of rehabilitation, whether of criminals or anyone else who has erred, or who has, in fact, what all of us have—the defects of being human.¹⁶⁷

167. RUBIN *et al.* at 694.