
EXPUNGEMENT AND EMPLOYMENT
LAW: THE CONFLICT BETWEEN AN
EMPLOYER'S NEED TO KNOW ABOUT
JUVENILE MISDEEDS AND AN
EMPLOYEE'S NEED TO KEEP
THEM SECRET

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There is a policy conflict between a juvenile offender's right to obtain a job for which he or she is qualified and an employer's interest in hiring trustworthy employees. This Article explores the tension between an employer's need to know about an applicant's background and an applicant's right to keep relevant information confidential. The Article focuses on expungement statutes, their underlying policies, and their effect on employment law. Much has been written about the criminal law aspects of expunging juvenile delinquency adjudications, but little attention has been devoted to the employment aspects of expungement. This Article addresses that need.

I. THE CASE AGAINST EXPUNGEMENT

For employers, complete disclosure by job applicants is the best pol-

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icy. While employers share a responsibility to create an environment which encourages and permits juvenile offender rehabilitation, satisfaction of this responsibility requires leaving employment hiring discretion with employers.¹ To accomplish this objective, employers need complete disclosure of the applicant's past offenses.

The requirement of complete disclosure flows from an employment relationship based on trust rather than faith. As one author has observed, "trust requires knowledge; and knowledge allows appropriate supervision."² An employer has a common sense need for job applicant information because an employer bears the ultimate risk of an employee's damage. If an employer breaches his or her duty to use reasonable care in selecting competent employees, the employer can be held liable for an employee's intentional torts inflicted on third parties.³ An employer has a duty to protect employees, company property, and the general public. Imposition of vicarious liability requires that the employer had, or should have had, knowledge about an employee's propensity to injure a third party.⁴

An employer has a common-law duty to provide a safe work environment.⁵ This duty gradually has been extended to hiring safe em-

1. Bevan Greenslade, "Eyes Open" Policy: *Employment of a Person with a Criminal Record*, 1986 N.Z.L.J. 386, 386 (an employer should not be prohibited from inquiring about a job applicant's past criminal offenses).

2. *Id.* at 388.

3. These third parties may include business customers, clients, or employer's tenants. See Gary D. Miller & James W. Fenton, Jr., *Negligent Hiring and Criminal Record Information: A Muddled Area of Employment Law*, 42 LAB. L.J. 186, 191-92 (1991) (recommending that employers request criminal records from every state where a job applicant has lived to avoid negligent hiring suits).

4. *Id.* at 186-87.

5. *Id.* at 186-87. See, e.g., *Int'l Bhd. of Elec. Workers v. Heckler*, 481 U.S. 851, 860 (1987) (recognizing a Florida employer's duty to provide a safe workplace); *Chesapeake & Potomac Tel. Co. v. Chesapeake Utils. Corp.*, 436 A.2d 314, 321 (Del. 1981) (discussing an employer's duty to provide a safe workplace for its independent contractor's employees); *Gordon v. Raven Sys. & Research, Inc.*, 462 A.2d 10, 14 (D.C. 1983) (recognizing an employer's duty to employees in providing a reasonably safe workplace); *Smith v. Western Elec. Co.*, 643 S.W.2d 10, 12 (Mo. Ct. App. 1982) (stating an employer's duty to use reasonable care to provide employees with a reasonably safe workplace); *Rounds v. Standex Int'l*, 550 A.2d 98, 102 (N.H. 1988) (holding that the duty to maintain a safe workplace rests exclusively with an employer); *Shrimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408, 410 (N.J. Ch. 1976) (discussing an employer's affirmative duty to provide a safe work environment); *McCarthy v. Department of Social & Health Servs.*, 759 P.2d 351, 354 (Wash. 1988) (same); Alfred W. Blumrosen et al., *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CAL. L.

ployees.⁶ A dangerous employee creates risks comparable to a defective machine. If an employer knows about a job applicant's past convictions, an employer can weigh the risk and take appropriate steps to tailor security and supervision needs.

Under the theory of vicarious liability, hiring applicants with expunged juvenile records is potentially hazardous for employers and employees alike. An employer is vicariously liable for an employee's torts committed while employees are acting within the scope of their employment.⁷ Assuming an employer owed a duty to an injured party, an

REV. 702, 721 (1976) (discussing OSHA's recognition of the employer's common law duty to provide a safe healthy work environment).

6. See, e.g., *Najera v. Southern Pac. Co.*, 13 Cal. Rptr. 146, 149 (Cal. Ct. App. 1961) (discussing the employer's common law duty to his employees to use reasonable care in selecting their fellow employees); *Fleming v. Bronfin*, 80 A.2d 915, 917 (D.C. 1951) (recognizing an employer's duty to a third person to refrain from retaining an unfit employee's services); *Evans v. Morsell*, 395 A.2d 480, 483 (Md. 1978) (imposing a duty that an employer refrain from hiring or retaining an employee that the employer knew or should have known was potentially dangerous); *Di Cosala v. Kay*, 450 A.2d 508, 515-16 (N.J. 1982) (holding that an employer may be liable for injuries to third persons caused by a negligent hiring); *F & T Co. v. Woods*, 594 P.2d 745, 747 (N.M. 1979) (finding that an action for negligent hiring or retention of an employee lies where the employer knew or should have known that the employee was dangerous); *Welsh Mfg. v. Pinkerton's, Inc.*, 474 A.2d 436, 438-39 (R.I. 1984) (recognizing an employer's liability to third parties injured by acts of employees negligently hired); see also *Cindy M. Haerle, Development, Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 MINN. L. REV. 1303 (1984) (discussing Minnesota's recognition of the negligent hiring doctrine); *Ferdinand S. Tinio, Annotation, Employer's Knowledge of Employee's Past Criminal Record as Affecting Liability for Employee's Tortious Conduct*, 48 A.L.R. 3D 359 (1973) (discussing the relationship between an employer's knowledge of the employee's criminal record and the employer's potential liability for negligent hiring or retention). For a comprehensive discussion of employer negligent hiring liability, see generally *Donald J. Petersen & Douglas Massengill, The Negligent Hiring Doctrine — A Growing Dilemma for Employers*, 15 EMPLOYER REL. L.J. 419 (1989-90).

7. RESTATEMENT (SECOND) OF AGENCY § 219 (1958); see also *Williams v. Alyeska Pipeline Serv. Co.*, 650 P.2d 343, 349 (Alaska 1982) (recognizing an employer's liability for the torts of an employee committed within the scope of the employee's employment); *Allen v. Milton Martin Enters.*, 397 S.E.2d 586, 587 (Ga. Ct. App. 1990) (discussing an employer's liability for injuries that his employee causes if the latter was acting within the scope of his employment); *Morgan v. Veterans of Foreign Wars*, 565 N.E.2d 73, 77 (Ill. App. Ct. 1990) (discussing an employer's liability for his employee's torts occurring in furtherance of the employer's business and in the course of the employee's employment); *Hale v. Peabody Coal Co.*, 343 N.E.2d 316, 320 (Ind. Ct. App. 1976) (discussing the doctrine of respondeat superior within the context of the employer-independent contractor relationship); *Albain v. Flower Hosp.*, 553 N.E.2d 1038, 1043 (Ohio 1990) (addressing the applicability of the respondeat superior doctrine to a hospital-independent staff physician relationship).

employee's misdeeds impose liability on the employer. Whether a person committed a tort within the scope of his or her employment is normally a jury question.⁸ This increases an employer's need to pierce expungement law's protective shield, especially if an expunged offense is of a violent nature.

*Carr v. William C. Crowell Co.*⁹ illustrated a violent intentional tort committed within the scope of employment. In *Carr*, a general contractor's employee became angry at a subcontractor's employee on a construction site and hit him with a hammer.¹⁰ The court rejected the defendant employer's claim that the assault was not done for the purpose of performing the employee's work.¹¹ Instead, the court explained that gatherings of employees create occasions for emotional flare-ups which may result in injuries.¹² The *Carr* court held the defendant liable for the employee's conduct because the altercation arose solely out of the course of his employment.¹³ *Carr* shows that courts may consider intentional torts within the scope of employment, depending on the circumstances.¹⁴

8. See, e.g., *Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976) (holding that a question of fact for the factfinder is whether an employee's assault of a third person arose within the scope of the employer's business); *Sunseri v. Puccia*, 422 N.E.2d 925, 930 (Ill. App. Ct. 1981) (determining whether an employee departed from the scope of his employment is normally a jury question). But see *Alma v. Oakland Unified Sch. Dist.*, 176 Cal. Rptr. 287, 289 (Cal. Ct. App. 1981) (explaining that whether the employee was acting within the scope of his employment is a question of law if undisputed relevant facts fail to support an inference that the employee was acting within the scope of his employment); *Leitch v. Switchenko*, 426 N.W.2d 804, 806 (Mich. Ct. App. 1988) (holding that summary disposition of whether the employee was acting within the scope of his employment is appropriate when it is clear that the employee is acting for his own purposes).

9. 171 P.2d 5 (Cal. 1946) (en banc).

10. *Id.* at 6.

11. *Id.* at 7.

12. *Id.* at 8. The court explained that these risks are inherent to a working environment. *Id.*

13. 171 P.2d at 8.

14. For a more detailed discussion of employer liability for employee's intentional torts, see generally Ralph L. Brill, *The Liability of an Employer for the Wilful Torts of His Servants*, 45 CHI.-KENT L. REV. 1, 4-14 (1968) (analyzing the master's liability for his employee's wilful torts under the doctrine of respondeat superior); Harvey J. Garod, *Master's Liability for the Torts of His Servant*, 57 FLA. B.J. 597 (1983) (explaining Florida law pertaining to employer liability for an employee's torts); Jane Swanton, *Master's Liability for the Wilful Tortious Conduct of His Servant*, 16 U.W. AUSTL. L. REV. 1 (1985) (summarizing Australia law regarding employer's liability for their employee's intentional torts).

In *LeBrane v. Lewis*,¹⁵ the Louisiana Supreme Court held an employer liable for an intentional tort even though the underlying argument was purely personal. In *LeBrane*, a supervisor stabbed a discharged employee while the victim was on the employer's business premises.¹⁶ Although the argument underlying the stabbing was of a personal nature, the court believed that it was sufficiently related to the employee's discharge.¹⁷ Because the supervisor's duties included firing employees, the intentionally wrongful conduct erupting from performance of that duty was within the scope of the supervisor's employment.¹⁸

It is important to contrast the analysis in *Carr* and *LeBrane* with the situation in *Mays v. Pico Finance Co.*¹⁹ In *Mays*, the court concluded that a company's assistant manager did not act within the scope of employment when he raped a woman applying for a position with the company.²⁰ The court reasoned that, although the supervisor used his position with the company to place the plaintiff in a vulnerable position, the supervisor was not working at the time of the incident and his duties did not include hiring employees.²¹ Thus, the employer was not responsible for the supervisor's intentional tort.²²

Common carriers should have considerably heightened concern about a job applicant's expunged juvenile records because of the unusual liability that common carriers ordinarily face. For example, in *Nazareth v. Herndon Ambulance Service*,²³ the court held an ambulance service liable for an employee's sexual assault.²⁴ The employee was attending to the plaintiff during ambulance transport to a hospital when he sexually assaulted her.²⁵ The court held the employer liable for the employee's intentional tort regardless of whether the act was

15. 292 So. 2d 216 (La. 1974).

16. *Id.* at 217.

17. *Id.* The court stated that the fight "was reasonably incidental to the performance of the supervisor's duties in connection with the firing of the . . . employee." *Id.* The court further noted that the fight occurred during working hours at the place of employment. *Id.*

18. *Id.* at 219.

19. 339 So. 2d 382 (La. Ct. App. 1976), *cert. denied*, 341 So. 2d 1123 (La. 1977).

20. *Id.* at 385.

21. *Id.*

22. *Id.*

23. 467 So. 2d 1076 (Fla. Dist. Ct. App. 1985).

24. *Id.* at 1079.

25. *Id.* at 1077.

committed within the scope of employment.²⁶ The court found vicarious liability appropriate because there was an implied contract between the passenger and the carrier for safe passage, free from attack by the carrier's employees.²⁷

This type of a contractual analysis with respect to tortious liability applies to a variety of businesses, such as innkeepers,²⁸ hospitals,²⁹ and railroad companies.³⁰ In *Vanna v. Hart Private Hospital*,³¹ the Massachusetts Supreme Judicial Court explained that an employer's liability for an employee's intentional torts does not depend simply on the employer's common carrier status.³² Instead, the doctrine applies whenever there is a contract between the plaintiff and employee forcing the employer to furnish services for the plaintiff's comfort.³³

An implied contractual analysis could logically apply to services provided in child care centers, senior citizen homes, or educational institutions. If an employer is potentially liable for an employee's intentional torts and criminal acts, the employer should know exactly who joins its workforce. Complete knowledge about an applicant would allow an employer to take appropriate steps to decrease any liability resulting from an employee's subsequent conduct. Employers should be able to make hiring decisions with full knowledge of the risks that they are taking.

Apart from expungement statutes, common law courts have not allowed a person to conceal his or her criminal record, even when related to the distant past, simply because others might react strongly to disclosure.³⁴ Posner observed that such an "argument would be particu-

26. *Id.* at 1078.

27. 467 So. 2d at 1079.

28. *Danile v. Oak Park Arms Hotel*, 203 N.E.2d 706, 709 (Ill. App. Ct. 1964) (holding that a hotel owes its guests a high degree of care to protect them from harm by a hotel employee).

29. *Stone v. William M. Eisen Co.*, 114 N.E. 44, 44-45 (N.Y. 1916) (holding that an implied contract existed between a corporation employed to fit braces for the plaintiff's feet and the plaintiff that the patient would be treated skillfully, decently, respectfully, and courteously).

30. *Berger v. Southern Pac. Co.*, 300 P.2d 170, 173 (Cal. Ct. App. 1956) (holding that a sleeping car company owes a duty to protect its passengers from assault).

31. 117 N.E. 328 (Mass. 1917).

32. *Id.* at 330.

33. *Id.*

34. Richard A. Posner, *Privacy, Secrecy and Reputation*, 28 BUFF. L. REV. 1, 43 (1979) (conducting an economic analysis of privacy rights).

larly weak in the context of employment, where competition exacts a heavy penalty from any firm that makes irrational employment decisions."³⁵ Expungement statutes represent a financial threat to employers who are prevented from learning about an applicant's juvenile crimes. An employer's inability to learn about a job applicant's past misdeeds prevents managers from taking precautions to minimize potential business risks.

Risks of mistakenly hiring a job applicant change with the nature of the work. In most jobs, the effect of a hiring mistake results in low productivity, theft, and employee attrition.³⁶ The effect of a mistake in other jobs, however, may have a greater societal impact. With police officers, for example, the cost of making a hiring mistake can reach unusually high levels.³⁷ An applicant's criminal record is a logical consideration for a police department to predict a former offender's success. Research has shown that terminated police officers tend to have a greater number of juvenile convictions for serious offenses.³⁸

It is sensible for employers to review a job applicant's past behavior to determine whether a problem exists that needs consideration in a hiring decision. However, expungement laws prevent an employer from fully evaluating a job applicant's reliability. Expungement statutes, in essence, compel an employer to make a potentially detrimental hiring decision. The effect of unknowingly hiring employees who have previously engaged in a pattern of theft could possibly devastate a business. Research has suggested that employee theft is responsible for more than thirty percent of business failures.³⁹ Employers need to protect themselves from the catastrophic damage that could result from employee theft.

35. *Id.*

36. John M. Malouff & Nicola S. Schutte, *Using Biographical Information to Hire the Best New Police Officers: Research Findings*, 14 J. POLICE SCI. & ADMIN. 175, 175 (1986) (identifying biographical information which predicts police officers' future job performance).

37. *Id.* Mistakes in hiring police officers can result in death and erosion of trust in government. *Id.*

38. Ruth J. Levy, *Predicting Police Failures*, 58 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 265, 274 (1967). In addition, officers who were later fired tended: (1) to have had a greater number of motor vehicle violations, (2) to have shorter work histories, and (3) to have had more than one marriage at the time they were hired as police officers. *Id.*

39. Peter D. Bullard and Alan J. Resnick, *SMR Forum: Too Many Hands in the Corporate Cookie Jar*, 25 SLOAN MGMT. REV. 51, 51 (1983) (exploring employee theft and proposing means to combat the problem).

Employers also have a legitimate interest in knowing about expunged offenses involving drug and alcohol abuse. Drug companies in particular need to obtain information about a job applicant's criminal convictions because certain positions may give an employee direct access to controlled substances. Arguably, employers need this information in order to comply with the Occupational Safety and Health Agency (OSHA) regulations. OSHA's Records Access Rule requires employers to give OSHA access to records containing employees' toxic substance exposure histories.⁴⁰

Management's concern with economic stability also justifies giving an employer access to expunged offenses for substance abuse. It is estimated that American businesses lose as much as \$70 billion annually as a result of employee drug and alcohol addiction.⁴¹ Losses result from accidents, low production, absenteeism, civil suits, workers' compensation, increased health and medical costs, property damage, and theft. Employees with alcohol problems account for forty percent of worker fatalities and forty-seven percent of on-the-job injuries.⁴² An employer's ability to evaluate whether a prospective employee has a substance abuse problem, as shown in part by a juvenile court record, may help companies minimize the economic impact of alcohol and substance abuse in the workplace. In the process, an employer would also minimize dangers to others from employees prone to substance abuse.

The principal purpose of expungement statutes is to facilitate concealment of information.⁴³ Expungement statutes are designed to prevent employers from learning the truth about job applicants. Proponents of expungement laws argue that an employer should not be able to refuse to hire all juvenile offenders simply because management believes that these applicants are generally untrustworthy.⁴⁴ However,

40. 29 C.F.R. § 1910.20 (1991). The purpose of this section of the Occupational Safety and Health Act is "to provide employees and their designated representatives a right of access to relevant exposure and medical records." *Id.* § 1910-20(a).

41. Charles S. Pendleton, *Drug Abuse Strategies for Business*, 1986 SECURITY MGMT. 75, 76 (evaluating business strategies to cope with employee drug abuse). See also Richard I. Lehr & David J. Middlebrooks, *Work-Place Privacy Issues and Employer Screening Policies*, 11 EMPLOYEE REL. L.J. 407 (1985-86) (discussing employee and employer rights regarding employers' screening methods).

42. Pendleton, *supra* note 41, at 76.

43. Barry M. Portnoy, Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 316 (1969-70) (proposing federal legislation prohibiting discrimination because of a criminal record).

44. *Id.*

as explained previously, hiring officials in many industries should have access to expunged juvenile offenses.⁴⁵

Some courts reject a broad disqualification rule. In *Green v. Missouri Pacific Railroad*,⁴⁶ the Eighth Circuit Court of Appeals held that the railroad's absolute policy of refusing employment consideration to any person convicted of a crime other than minor traffic offenses was discriminatory.⁴⁷ The court could not conceive of a business necessity that automatically excluded convicted individuals from employment consideration.⁴⁸ The court suggested that a procedure involving an evaluation of an individual's particular offense in relation to a specific job may be satisfactory.⁴⁹ Such a procedure, however, fails to account for promotions and transfers that realistically occur soon after a person commences employment.

A better approach from an employer's perspective would allow a hiring official to know exactly with whom the employer is dealing. With this knowledge, managerial officials can determine appropriate safety precautions. Employers should have the latitude to refuse to hire an applicant for a particular position because of expunged offenses.

Employers' interests in knowing the truth about job applicants mirror society's need for protection from inordinate dangers. A system which compels an employer to unknowingly hire individuals who have committed serious offenses as juveniles poses as many risks to society as it does gains. A balance is necessary between the risk the public should have to bear and the right of an offender to find employment.

One justification for expungement statutes is that they foster juvenile rehabilitation. The U.S. Attorney General's Task Force on Violent Crime reported that children up to eighteen years old accounted for

45. For example, a bank certainly needs information about an applicant who, as a juvenile, committed robbery offenses and had them expunged. Likewise, child care centers need complete disclosure before hiring applicants who, as juveniles, have committed sexual abuse against minors.

46. 523 F.2d 1290 (8th Cir. 1975).

47. *Id.* at 1298-99. The court found that the railroad's practice disqualified black applicants or potential black applicants at a higher rate than whites. *Id.* at 1295.

48. *Id.* at 1298. The court explained that the defendant's exclusion policy "would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed." *Id.*

49. *Id.* at 1297. See also *Butts v. Nichols*, 381 F. Supp. 573, 581-82 (S.D. Iowa 1974) (holding that an Iowa code prohibiting *all* civil service employment based on previous felony convictions violated the Fourteenth Amendment's Equal Protection Clause).

twenty percent of all violent crimes, and thirty-nine percent of overall serious crime arrests in the United States in 1979.⁵⁰ Arguably, the high juvenile crime rate suggests that the present policy limiting access to juvenile records has had little or no impact on achieving its rehabilitative goal.

Although some expungement statutes exclude violent crimes⁵¹ and/or crimes of abuse against children⁵² from legislative protection, many statutes fail to exclude specific offenses.⁵³ Caretakers of our children should exhibit high moral character, but this concern generally is not reflected in most expungement legislation.⁵⁴ In those states that permit job applicants to deny committing sex crimes against children as juveniles, it is possible for an individual convicted of an offense such as child molestation to obtain employment as, for example, a school bus driver.⁵⁵ In most states, even the best managed day care centers do not have access to expunged conviction records.

In jurisdictions where violent offenses are not excluded from expungement statute protection, a company may unknowingly give a youth convicted of a violent crime access to a customer's home. It is reasonable to permanently foreclose juveniles with violent crime convictions from such jobs as well as other highly sensitive positions.⁵⁶

State legislatures should be more aware of work requirements when designing expungement statutes. The nature of work in particular employment areas requires the exclusion of certain prior offenses from protection under expungement statutes. For example, suppose that a former sex offender wants to work as an elementary school teacher, or an individual with a pattern of expunged offenses seeks employment in

50. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL TASK FORCE ON VIOLENT CRIME, FINAL REPORT 81 (1981) (citing statistical information about juvenile involvement in violent crime).

51. See, e.g., S.C. CODE ANN. § 20-7-1335 (Law. Co-op. Supp. 1990). The South Carolina Statute provides that "under no circumstances is a person allowed to expunge from his record an adjudication for having committed a violent crime." *Id.*

52. See, e.g., OR. REV. STAT. § 419.800(4)(j) (1989).

53. See *infra* notes 182-85 and accompanying text discussing statutes excluding specific offenses from expungement.

54. See *infra* note 182 and accompanying text discussing states that bar expungement of crimes against children.

55. Allyson Dunn, Note, *Juvenile Court Records: Confidentiality vs. the Public's Right to Know*, 23 AM. CRIM. L. REV. 379, 379 (1986) (suggesting that statutes require disclosure for serious offenses but maintain confidentiality for other offenses).

56. See, e.g., Karen A. Henson, Note, *Criminal Procedure: Expunction - Fact or Fiction?*, 31 OKLA. L. REV. 978, 987 (1978) (examining Oklahoma's expunction laws).

a national security position. Expungement statutes create a "legally authorized lie."⁵⁷ In many jurisdictions, it is possible for a seventeen year old student convicted of manufacturing and selling narcotics to have his or her record expunged while in college. The student could then conceivably obtain the requisite training and apply to the Pharmacy Board for license to work as a pharmacist. As a result of expungement statute protection, many states would allow the student to answer in the negative to the question, "have you ever been convicted of a crime involving controlled substances?"

Expungement statute protection is also incompatible with the relatively recent negligent hiring doctrine. Courts have recognized the need for community protection and have held that employers owe the public a duty to hire safe employees.⁵⁸ There are three necessary elements for employer liability in negligent hiring cases: (1) the employee and the plaintiff were in a place where each had a right to be when the wrongful act occurred; (2) the plaintiff and employer's meeting was a direct result of the employment; and (3) the employer would have received some benefit from the meeting had the wrongful act not occurred.⁵⁹

The negligent hiring doctrine is distinguishable from the doctrine of respondeat superior. Unlike respondeat superior, in a negligent hiring suit, an employer may be liable for his or her employees' acts committed outside the scope of employment. Consequently, the negligent hiring theory is useful because it provides the public with a remedy for wrongs where no other remedy may be available.⁶⁰ However, an employer cannot be held liable for an employee's acts committed outside the scope of employment when the employee has had a criminal past expunged. The expungement makes it impossible to uncover the information in a routine background check. If information which would

57. See Steven K. O'Hern, Note, *Expungement: Lies That Can Hurt You in and out of Court*, 27 WASHBURN L.J. 574, 574 (1988).

58. See *supra* note 6 for cases recognizing an employer's duty to hire safe employees.

59. See generally John C. North, Note, *The Responsibility of Employers For The Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717, 724 (1977) (explaining an employer's duty and the negligent hiring theory). See also *Garcia v. Duffy*, 492 So. 2d 435, 440 (Fla. Dist. Ct. App. 1986) (discussing negligent hiring liability requirements).

60. Liability under respondeat superior requires that the employee act within the scope of his or her employment when the injury to the plaintiff occurred. See *supra* note 7.

make an employee unfit for employment is not discoverable in a routine background investigation, there cannot be a breach of an employer's duty to hire safe and competent employees.⁶¹ Expungement statutes therefore allow an employer to unknowingly hire potentially unfit employees, and the public will have no recourse against the employer for resulting injuries if the employee acts outside the scope of the individual's employment.

Expungement statutes also interfere with effective law enforcement and court proceedings. Jurisdictions that expunge arrests and identification information impede police officers in their efforts to uncover criminal conduct. In *Menard v. Mitchell*,⁶² the court explained that arrest records play a significant role in a prosecutor's exercise of discretion.⁶³ Courts use arrest records to set bond levels, determine sentences, and facilitate the work of penal institutions.⁶⁴ Denying access to this information may undermine effective law enforcement.⁶⁵

Expungement statutes may also be undemocratic and inconsistent with fundamental values of liberty in this country. Statutes that limit the public's access to expunged records impinge on a democratic society's ability to inform itself about all aspects of the criminal justice

61. Expungement protection also renders records inaccessible for detecting repeat offenders. See, e.g., RITA KRAMER, *AT A TENDER AGE: VIOLENT YOUTH AND JUVENILE JUSTICE* (1988). The author describes an incident in which a fifteen year old was arrested and pleaded guilty to armed robbery. *Id.* at 22. He was previously arrested several times for violent crimes, but the presiding judge had no access to the prior records because they were sealed by law. *Id.* The judge released the boy after being assured the youth soon would enter a residential facility. *Id.* Shortly after his release, the boy shot and paralyzed a police officer who confronted him during an attempted bicycle theft. *Id.* at 21-24.

62. 328 F. Supp. 718 (D.D.C. 1971), *rev'd sub nom.* *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

63. *Id.* at 727. See also *Utz v. Cullinane*, 520 F.2d 467, 479 (D.C. Cir. 1975) (stating that arrest records serve valuable law enforcement purposes); *United States v. Hall*, 452 F. Supp. 1008, 1012 (S.D.N.Y. 1977) (stating that the dissemination of criminal records promotes public welfare); *United States v. Dooley*, 364 F. Supp. 75, 77 (E.D. Pa. 1973) (stating that "unresolved" arrest records provide significant information and may aid in the resolution of criminal actions).

64. 328 F. Supp. at 727. These arrest records are still subject to due process limits in the criminal context. *Id.* Within the employment arena, by contrast, no such due process limits safeguard the arrest records from improper use. *Id.*

65. *Id.* at 726. In the employment context, the *Menard* court noted that "it is abundantly clear that Congress never intended to or in fact did authorize dissemination of arrest records to any state or local agency for purposes of employment or licensing checks." *Id.*

system.⁶⁶ Most importantly, these statutes impinge upon the public's ability to learn about decision makers within the system.⁶⁷ In order to be informed voters, citizens need to know about the work of judges, prosecutors, and police.⁶⁸ Moreover, voters should be permitted to judge the importance of juvenile misconduct for themselves. The public has shown considerable interest in "character" issues with regard to a number of politicians. A voter may think that a politician's juvenile criminal conviction is more relevant than a candidate's previous conduct involving plagiarism or marital infidelity.

Expungement of records deprives the public of potentially important information about the criminal justice system and its participants. Regardless of whether juvenile records are merely "sealed" or actually destroyed, the data becomes less available for research purposes.⁶⁹ As a result, not only is the general public unable to evaluate the juvenile justice system accurately, but sociologists and criminologists are also less able to study the roots of criminal behavior. This handicaps society, preventing it from confronting its values and clarifying its attitudes about convicted felons and their reentry into society. Expungement protection makes it more difficult for society to learn to accept people with criminal convictions. Arguably, expungement statutes thwart emotional healing on both sides. The symbolic message to a convicted juvenile is that he or she should bury the shame. Meanwhile, society never faces the need to forgive and make peace with the imperfections in each of us.

66. Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 754 (1981).

67. *Id.* Franklin and Johnsen proposed the following hypothetical situation: "Suppose, for example, an elected judge is under criticism for, over a period of years, granting lenient prison sentences or for granting expungements themselves improvidently or in a pattern suggesting graft." *Id.* at 754-55. The expunged records may include important information. *Id.* at 755. This information may provide a way to evaluate the criminal justice system and its participants. *Id.*

The authors also urged that access to expunged records may provide information about elected officials and candidates who seek elective office. *Id.* at 755. The author explains that "it is not inconceivable to believe that an elected official or a candidate was once convicted of a crime." *Id.* These same officials may have subsequently enjoyed expungement statute protection. *Id.*

68. *Id.* at 754.

69. See *infra* note 130 and accompanying text for a discussion of whether there should be access to sealed records for research purposes.

II. THE CASE FOR EXPUNGEMENT

A confidential policy regarding youthful indiscretion has existed in the United States for a long time. This policy precludes employer access to juvenile conviction data.⁷⁰ Job applicants who have committed juvenile misdeeds in the past generally favor expungement protection.

Conventional wisdom dictates that most juveniles with police records will outgrow their reckless behavior since their youth theoretically makes them more suitable for rehabilitation.⁷¹ Thus, society should not force juvenile offenders to forever wear the stigma of their youthful misconduct. One concern is that a "juvenile delinquent" label may become self-defeating⁷² and youthful offenders will respond with conduct appropriate to the label.⁷³ If this concern is legitimate, society has a vested interest in easing the difficult passage from teenager to adult.

Some scholars, especially in the 1960s and 1970s, advocated "expungement" and "sealing" statutes to encourage juvenile delinquent rehabilitation and to help rehabilitated youth enter adulthood without the stigma of a criminal conviction.⁷⁴ There is a desire to avoid an eternal blot on a youth's record because of an immature, impulsive act.

The stigma of a criminal conviction is particularly unfair for juveniles who are arrested only once prior to age eighteen and not found guilty of a serious offense. Research suggests that sixty percent

70. See, e.g., Dunn, *supra* note 55, at 379 (noting that states rarely allow employer access to arrest records).

71. Adrienne Volenick, *Juvenile Court and Arrest Records*, 9 CLEARINGHOUSE REV. 169, 169 (1975). The author explains that "[b]ecause juvenile offenders are young and impressionable, they are thought to be capable of learning to behave in a socially acceptable manner given the proper supervision and surroundings." *Id.* See also Dunn, *supra* note 55, at 379 ("juveniles are more malleable and responsive to rehabilitative efforts than adult offenders").

72. See Dunn, *supra* note 55, at 379.

73. See Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 171-74 (1966). The author argues that there are three important reasons to expunge all juvenile records: (1) arrest records provide a major source of knowledge about a minor's past; (2) the offense stated on the police record may not accurately describe the juvenile's conduct; and (3) there is a blurred distinction between dependency and delinquency. *Id.*

74. *Id.* at 150-62. The author concludes that "most offenders do not remain criminals all their lives, and we should not treat them as if they do." *Id.* at 189.

of juvenile delinquents do not become adult violators⁷⁵ while forty-six percent of juvenile offenders only commit one offense prior to age eighteen.⁷⁶ These individuals should not have to pay for immature judgments for the rest of their lives. This study showed that, of the remaining fifty-four percent of juvenile offenders who continued to commit crimes, eighteen percent were chronic juvenile offenders, meaning they had five or more arrests.⁷⁷ Moreover, the study showed that juvenile offenders with extensive police records were more likely to have extensive criminal records as adults.⁷⁸ In fact, forty-five percent of chronic juvenile offenders became chronic adult offenders.⁷⁹ This class of juveniles should not be permitted to hide behind expungement statutes when applying for employment.

Without the protection of expungement statutes, there is a substantial risk that juvenile conviction records will create "social lepers" who must live as best they can on the outskirts of society.⁸⁰ The risk is that

75. DAVID MATZA, *DELINQUENCY AND DRIFT* 22 (1964) (stating that about sixty to eighty-five percent of juvenile offenders do not become adult criminals).

76. MARVIN E. WOLFGANG ET AL., *FROM BOY TO MAN, FROM DELINQUENCY TO CRIME* 2 (1987). The study estimated that, of 3,475 juvenile offenders born before 1945, forty-six percent were arrested only once prior to age eighteen. *Id.* The other fifty-four percent of the juvenile delinquents cited in the study were recidivists. *Id.*

77. This group of eighteen percent accounted for nearly fifty-two percent of the sample group's offenses. *Id.* Although they only constituted six percent of the entire group, they committed 5,305 offenses, or 51.9 percent of all the cohort's offenses. *Id.* The authors of the study were surprised to find that such a small group of "chronic offenders" was responsible for such a large proportion of the misdeeds. *Id.* at 2-3.

78. *Id.* at 196. The study concluded that there is a "strong" correlation between the delinquency of a juvenile and the delinquency of the same individual as an adult. *Id.* at 196.

79. *Id.* The study determined that, where race and socio-economic status are held constant, whether an individual was a juvenile delinquent is "the best predictor of adult criminality." *Id.*

80. See Richard S. Harnsberger, *Does the Federal Youth Corrections Act Remove the "Leper's Bell" From Rehabilitated Offenders?*, 7 FLA. ST. U. L. REV. 395, 397 (1979) (quoting *Criminal Justice Information and Protection and Privacy Act of 1975: Hearings on S. 2008 (1975) Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 235 (1975) (statement of Aryeh Neier, Executive Director of the American Civil Liberties Union)). In a thought-provoking hearing on Senate Bill 2008, the Executive Director of the American Civil Liberties Union argued that:

[A]rrest and conviction records often create social lepers who must exist as best they can on the fringes of society.

The dissemination of records places a series of obstacles in the path of persons who wish to enter society's mainstream and end the half-life of the world of crimes. *Id.*

information sharing which occurs without expungement statute protection would act like a symbolic millstone around a youngster's neck. This would not allow society's youth to put their mistakes behind them and become productive members of society. Without expungement laws, there is a risk that prejudice and legal barriers would deny employment opportunities to young adults with juvenile records.

Some research suggests that African-American juvenile offenders are most likely to suffer.⁸¹ In 1980, for example, African-Americans represented twenty-nine percent of all national records in the Crime Information Center,⁸² almost three times the total percentage of African-Americans in the United States.⁸³

Conventional wisdom suggests that social prejudice against former offenders is widespread and difficult for a juvenile to combat without expungement statute protection. The statutes are based on the fear that some employers might assume that all former offenders are untrustworthy and that their employment would undermine existing workforce morale.⁸⁴ One survey suggested that seventy-two percent of the public is uneasy about working with a former offender.⁸⁵ In the face of such prejudice, a former offender, without the protection of expungement laws, would have difficulty obtaining unskilled employment, much less a job requiring journeyman skills and ability. Legislators have responded to this prejudice by enacting expungement laws that hide all records of youthful offenses from employers. These laws remove the "leper's bell" from juvenile offenders and improve an individual's opportunity to obtain employment.⁸⁶ If a juvenile offender can enter the employment market without the stigma of a criminal conviction, he or she may be less likely to become a repeat offender

81. Anne Chwat, *Privacy Interests in Criminal Records: Accuracy and Dissemination*, 1986 ANN. SURV. AM. L. 545, 547 (explaining that minorities appear to suffer most from the existence of criminal records).

82. *Id.*

83. *Id.*

84. See Gough, *supra* note 73, at 153-54. The author also explains that a former offender will encounter great difficulty in finding an unskilled job and this difficulty increases proportionately with the skill level of the position applied for. *Id.*

85. Portnoy, *supra* note 43, at 307 (noting that the concern of most citizens and employers is that "the former offender, especially one who served time in prison, is an ex-convict rather than an ex-criminal.").

86. See *supra* note 80 and accompanying text for a discussion of the "leper's bell" analysis.

because the individual will want to protect his or her economic stake in continued employment.

By 1970, more than half the states had barred persons with criminal convictions from public employment.⁸⁷ During this period there was virtually nationwide enactment of expungement statutes. By concealing or destroying criminal records, expungement statutes gave youthful offenders access to a broad range of employment opportunities. Some states, however, dealt with the "youthful criminal conviction" employment barrier more directly. In these states, criminal conviction expungement was not necessary for a juvenile delinquent to qualify for public employment.⁸⁸ Some states have enacted laws that allow youthful offenders to apply for work despite a juvenile criminal conviction.⁸⁹ Other states have chosen not to automatically disqualify a person from public employment because of a criminal conviction.⁹⁰ These statutes remove legal barriers to public employment for former offenders, but also permit an employer to have knowledge of a job applicant's criminal past.

87. Portnoy, *supra* note 43, at 310. Many states barred former offenders from public employment because it is more highly regulated than many other licensed vocations. *Id.*

88. See *infra* notes 89-90 and accompanying text for a discussion of which states do not automatically disqualify individuals from a public position solely on the basis of past criminal convictions.

89. See CONN. GEN. STAT. ANN. § 54-76k (West 1985) ("No [youthful offender] determination . . . shall operate as a disqualification of any youth subsequently to hold public office or public employment . . ."); N.Y. CRIM. PROC. LAW § 720.35 (Consol. 1986) ("A youthful offender adjudication . . . does not operate as a disqualification of any person so adjudged to hold public office or public employment . . .").

90. See COLO. REV. STAT. ANN. § 24-5-101 (West Supp. 1990) ("[T]he intent of this section is to expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society."); HAW. REV. STAT. § 378-2(1) (Supp. 1990) (it is unlawful for "any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate . . . because of . . . arrest and court record"); MINN. STAT. ANN. § 364.03 (West 1991) ("[N]otwithstanding any other provision of law to the contrary, no person shall be disqualified from public employment . . . solely or in part because of a prior conviction . . . unless the crime . . . directly relate[s] to the position of employment sought . . ."); N.M. STAT. ANN. § 28-2-3 (Michie 1991) (convictions may be taken into account, but "such conviction shall not operate as an automatic bar to obtaining public employment"); WASH. REV. CODE ANN. § 9.96A.020 (West 1988) ("[A] person shall not be disqualified from employment by the state of Washington . . . solely because of a prior conviction of a felony: . . . [but] [t]his section shall not preclude the fact of any prior conviction of a crime from being considered.").

In view of the legal and social barriers youthful offenders face as they enter the workforce, there is a strong public interest in expunging juvenile court records. Instead of removing legal barriers to employing juvenile offenders, however, expungement statutes circumvent those barriers. By failing to confront private discrimination against a former offender, expungement statutes avoid the fundamental problem that prompted the legislation. The underlying issue is not primarily a youthful offender's criminal record, but rather, societal attitudes toward juvenile violations. A better approach would focus more attention on laws that combat discrimination against people with criminal records. These laws would directly confront the reality that juveniles sometimes make serious errors of judgment. Juvenile offenders deserve punishment, but the proper punishment certainly is not a lifetime of economic hardship because of the failure to secure employment.

III. A LEGISLATIVE PATCHWORK

A. *Boundaries of the Legislative Models*

Over the last thirty years, nearly every state has established some type of juvenile expungement statute to clear a juvenile offender's record of arrests not followed by an adjudication or criminal conviction. Rhode Island does not have a juvenile expungement statute, but it does have legislation which provides that juvenile adjudications should not be considered criminal convictions.⁹¹

Rhode Island does not provide adequate protection for the juvenile offender against discrimination. Although Rhode Island clearly distinguishes an adjudication from a criminal conviction, the distinction bears little impact on public perception. Some research shows that the public is unwilling to make the distinction between an administrative adjudication against a juvenile offender and an adult criminal conviction.⁹² At least one court has recognized society's failure to comprehend the semantic distinction contained in the Rhode Island statute. The California Court of Appeals in *In re Contreras*⁹³ noted that the difference between an adjudication of a minor to be a ward of the court

91. See R.I. GEN. LAWS § 14-1-40 (Supp. 1990) (“[N]or shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction . . .”).

92. Gough, *supra* note 73, at 170 (noting that “[i]n the public eye, an offender is an offender, be he juvenile or adult.”).

93. 241 P.2d 631 (Cal. Ct. App. 1952).

and a criminal conviction is merely a "legal fiction."⁹⁴ Realistically, an adjudication is just as likely as a conviction to seriously impede a minor's future.⁹⁵

Hawaii has taken a vastly different approach to juvenile record expungement by making it unlawful for employers and others to discriminate against persons with arrest and court records.⁹⁶ Hawaii does allow for the expungement of minor drug offenses, however, if a person is twenty-one or under at the time of the offense⁹⁷ and the crime constitutes his or her first offense.⁹⁸

While most states have enacted juvenile expungement statutes, they are far from uniform. The statutes vary with respect to terminology, effect, applicable offenses, procedure, age requirements, applicable conditions, access to expungement records, and commencement. The following section provides a critique of various provisions in selected statutes and proposes a uniform model.

B. *Legislative Terminology*

There is no uniform terminology in the world of expungement statutes. The process is variously described as expungement,⁹⁹ erasure,¹⁰⁰ destruction,¹⁰¹ sealing,¹⁰² setting aside,¹⁰³ expunction,¹⁰⁴ and purg-

94. *Id.* at 633. The court stated that courts must take notice to the "everyday contemporary" occurrence that society cannot distinguish the difference between a juvenile adjudication and a criminal conviction. *Id.*

95. *Id.* A juvenile adjudication "is a serious impediment to the future of such minor." *Id.* See also *supra* note 80 and accompanying text for an explanation of the "leper's bell" analysis.

96. HAW. REV. STAT., § 378-2(1) (Supp. 1990) (It is an unlawful discriminatory practice for "any employer to refuse to hire or employ or to bar or discharge from employment . . . because of . . . arrest and court record").

97. HAW. REV. STAT. § 712-1256(2) (1985).

98. *Id.* § 712-1255(1).

99. The following states use the words "expunge" or "expungement" to characterize the treatment of juvenile records: ARK. CODE ANN. § 9-27-309(b) (Michie 1991); COLO. REV. STAT. ANN. § 19-2-902 (West 1990); DEL. CODE ANN. tit. 10, § 930 (Supp. 1990); HAW. REV. STAT. § 712-1256 (1985); ILL. REV. STAT. ch. 37, para. 801-9 (1989); IND. CODE ANN. § 31-6-8-2 (Burns 1987); KAN. STAT. ANN. § 38-1610 (Supp. 1990); MICH. CT. R. 5.925 (1989); N.J. STAT. ANN. § 2C:52-4.1 (1982); 18 PA. CONS. STAT. ANN. § 9123 (Supp. 1991); UTAH CODE ANN. § 78-3a-56 (1987); W. VA. CODE § 49-5-17 (1986); WIS. STAT. ANN. § 973.015 (West 1985); WYO. STAT. ANN. § 14-6-241 (1986).

100. The following state statute uses the term "erasure" to characterize the treatment of juvenile records: CONN. GEN. STAT. ANN. § 46b-146 (Supp. 1991).

101. The following state statutes use the words "destroy" or "destruction" to char-

ing.¹⁰⁵ Evaluating expungement statutes is further complicated because of confusion about the meaning of the term used in the legislation.¹⁰⁶ A majority of jurisdictions use either the term "sealing" or "expungement."¹⁰⁷ Accordingly, these terms will receive closer scrutiny.

"Sealing" means that a record or proceeding is simply sealed, rather than destroyed; to "seal" is to close by any kind of fastening that must be broken before obtaining access.¹⁰⁸ The implication of the term "sealing" is that the sealed record may, under certain circumstances,

acterize the treatment of court records: ALA. CODE § 12-15-103 (1986); ARIZ. REV. STAT. ANN. § 8-247 (Supp 1990); N.D. CENT. CODE § 27-20-54 (1991); OKLA. STAT. ANN. tit. 10, § 1506 (West Supp. 1992) (providing that the records be destroyed or obliterated); S.C. CODE ANN. § 20-7-1335 (Law. Co-op. Supp. 1990); TENN. CODE ANN. § 37-1-155 (1991) (providing that fingerprints will be removed from the file and destroyed); VA. CODE ANN. § 16.1-306 (Michie Supp. 1991).

102. The following state statutes use the words "seal" or "sealing" to describe their treatment of juvenile records: ALA. CODE § 12-15-103 (1986); ALASKA STAT. § 47.10.090 (1990); CAL. WELF. & INST. CODE § 781 (West Supp. 1991); IDAHO CODE § 16-1816A (1979); IOWA CODE ANN. § 232.150 (1985); KY. REV. STAT. ANN. § 610.330 (Michie/Bobbs-Merrill 1990); MD. ANN. CTS. & JUD. PROC. CODE ANN. § 3-828(c) (1989); ME. REV. STAT. ANN. tit. 15 § 3308(8) (West Supp. 1990); MASS. ANN. LAWS ch. 276 § 100B (1980); MO. ANN. STAT. § 211.321 (Vernon Supp. 1991); MONT. CODE ANN. § 41-5-604 (1991); NEV. REV. STAT. § 62.370 (1987); N.H. REV. STAT. ANN. § 169-B:35 (1990); N.M. STAT. ANN. § 32-1-45 (Michie 1989); N.Y. FAM. CT. ACT § 375.2 (McKinney 1983); OHIO REV. CODE ANN. § 2151.358 (Anderson 1990); S.D. CODIFIED LAWS ANN. § 26-8-57.1 (1984); VT. STAT. ANN., tit. 33, § 665 (1981); VA. CODE ANN. § 16.1-306 (Michie Supp. 1991); WASH. REV. CODE ANN. § 13.50.050 (West Supp. 1991).

103. The following state statutes use the word "setting aside" to characterize their treatment of juvenile records: MICH. CT. R. 5.925 (1989); MINN. STAT. ANN. § 242.31 (West Supp. 1991); NEB. REV. STAT. § 43-2102 (1988).

104. The following state statutes use the term "expunction" to characterize treatment of juvenile records: N.C. GEN. STAT. § 7A-676 (1990); OR. REV. STAT. § 419.800 (1989).

105. The following state statute uses the term "purge" to describe its treatment of juvenile records: MINN. STAT. ANN. § 242.31 (West Supp. 1991).

106. Bernard Kogon and Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records - The Big Lie*, 61 J. CRIM. L., CRIMINOLOGY, & POLICE SCI., 378, 378-79 (1970) (stating that there is no consensus as to the meaning of the words "seal" and "expunge" and that, although they are not the same, they are tremendously confused).

107. See *supra* notes 99 & 102 for a breakdown of states using the terms "expungement" and "sealing."

108. BLACK'S LAW DICTIONARY 1349 (6th ed. 1990).

be unsealed.¹⁰⁹ However, "expungement" literally means that the record has been erased as though the event never occurred;¹¹⁰ there is no longer a record to unseal because none exists. The term "expungement" is defined as "the act of physically destroying information."¹¹¹

State expungement statutes do not always use terms in accordance with their literal meaning. For example, both the Colorado and Kansas statutes use the term "expunge" to describe a process in which records are actually sealed.¹¹² The Colorado statute defines the term "expungement" as the placement of a conspicuous seal on the beginning of the record.¹¹³

Although the Kansas statute fails to define the term "expungement," it is clear from the statute's plain meaning that "expunged" records are not permanently destroyed.¹¹⁴ For example, one section of the Kansas statute provides for a limited inspection of the "expunged" records.¹¹⁵ Had the records actually been "expunged," there would be nothing to inspect. The Kansas legislature should define the meaning of "expungement" and clarify whether a literal expungement was intended. This would help both juveniles and courts involved in an expungement proceeding.

Similarly, other states do not provide for literal "expungement" of juvenile delinquency records. Indiana's expungement law, for example, requires the destruction of records unless they are given to the subject.¹¹⁶ Commentators have criticized this approach as giving a

109. Kogon and Loughery, *supra* note 106, at 379 (arguing that when an item is sealed, it is intended that the item may be unsealed under certain circumstances).

110. *Id.*

111. BLACK'S LAW DICTIONARY 582 (6th ed. 1990).

112. COLO. REV. STAT. § 19-2-902(2) (1990) (providing that "[e]xpungement shall be effectuated by physically *sealing* or conspicuously indicating on the face of the record . . . that said record has been designated as expunged" (emphasis added)); KAN. STAT. ANN. § 38-1610(e) (Supp. 1990) (providing that in certain instances, "[i]nspection of the expunged files or records thereafter may be permitted").

113. COLO. REV. STAT. § 19-2-902(2) (1990).

114. *See* KAN. STAT. ANN. § 38-1610 (Supp. 1990).

115. The Kansas statute provides, in pertinent part:

Inspection of the expunged files or records thereafter may be permitted by order of the court upon petition by the person who is the subject thereof. The inspection shall be limited to inspection by the person who is the subject of the files or records and those persons designated by that person.

KAN. STAT. ANN. § 38-1610(e) (Supp. 1990).

116. IND. CODE ANN. § 31-6-8-2(e) (Burns 1987) (providing that "[t]he records may be destroyed or given to the person to whom they pertain"). If the subject whose

person who has received a court ordered expungement a false sense of security, leading a juvenile to believe that no trace of the records exists when, in fact, the records may continue to be available.¹¹⁷ For example, state statutes may not have authority over the Federal Bureau of Investigation's access to records, and some state and federal agencies may not receive notification of a judicial expungement order.¹¹⁸

The State of Oregon also provides for literal "expungement," but uses the term "expunction."¹¹⁹ The Oregon Legislature defines "expunction" as: (a) the removal and destruction of a judgment or order relating to a contact; and (b) the removal and destruction of all records and references.¹²⁰ The State of Oregon has taken steps to protect juveniles from the situation where, although records appear to be expunged, some authorities may still have access to them. The state has adopted provisions allowing the juvenile to deny the existence of the expunged record without penalty.¹²¹ This statute also prohibits discrimination against persons with expunged juvenile records.¹²²

Some commentators have argued that expungement statutes should provide for the complete destruction of a juvenile's record. This would insure that future employers do not discover expunged records and condemn the juvenile involved.¹²³ While literal record destruction is the most complete method of protecting a juvenile's interests, it does nothing to protect society's and the court system's interests. Literal "expungement" of all offenses in all cases is not necessarily in the best interests of society. A better approach is to seal juvenile records and provide limited access when necessary. In all jurisdictions, the goal of

records have been expunged is a plaintiff in a subsequent suit, however, he may be required to disclose the contents of the records under oath if the records are pertinent to the defendant's case. IND. CODE ANN. § 31-6-8-2(f) (Burns 1987).

117. See, e.g., Leonard Edwards & Inger J. Sagatun, *A Study of Juvenile Record Sealing Practices in California*, 4 PEPP. L. REV. 543, 561 (1977).

118. *Id.* (arguing that a procedure where records are actually destroyed on a systematic basis should be employed as a matter of equity and efficiency).

119. OR. REV. STAT. § 419.800(2) (1989).

120. OR. REV. STAT. § 419.800(2)(a)-(b) (1989).

121. See OR. REV. STAT. § 419.835(2) (1989). The statute explains that a person who has been the subject of an expunged record "may assert that the record never existed and that the contact, which was the subject of the record, never occurred." *Id.*

122. *Id.* § 659.030(e)(C).

123. Pasco L. Schiavo, *Condemned by the Record*, 55 A.B.A. J. 540, 540 (1969) (explaining how retaining records can condemn a rehabilitated offender or innocent person arrested, but not tried for a crime).

clarity would be promoted if the term "expungement" would refer to the concept of "record sealing," rather than to literal expungement. This would promote uniformity and clarity while preserving society's need for adequate protection.

C. Access to Expunged Records

1. In the Court's Discretion

Absent literal expungement, most state statutes provide criteria for determining who shall have access to expunged juvenile court records. Unfortunately, states do not use uniform criteria to regulate who is allowed access to the records and for what purposes. States have adopted a variety of approaches, the most popular of which is judicial discretion.

Colorado's statute is typical of those states allowing courts to exercise discretion in giving access to expunged juvenile records.¹²⁴ The statute allows inspection of expunged records only if a court order is obtained following a hearing and a showing of good cause.¹²⁵ Unfortunately, the statute fails to set forth criteria for a court to follow in exercising its discretion.

Connecticut's law provides a different approach to the use of judicial discretion. The statute calls for erasing a juvenile's record, leading a person to believe that there is no record left in existence.¹²⁶ Even though the record is erased, however, the court's "erasure" order remains. The Connecticut statute allows substantiation of an erasure, through the existence of the "erasure" order if a court believes that doing so would best serve the child's interests.¹²⁷

This legislative approach allows substantiation of delinquency record erasure, but evaluation of the nature of the offense is impossible because the underlying facts of the offense have been erased.¹²⁸ This approach is still problematic and may unduly prejudice a juvenile offender who has committed a minor offense because an employer seeing merely an erasure order may tend to assume that a heinous misdeed was erased.

124. See COLO. REV. STAT. § 19-2-902(4) (1990).

125. *Id.*

126. See CONN. GEN. STATS. ANN. § 46b-146 (Supp. 1991).

127. *Id.*

128. The underlying facts no longer exist. All that is left is the erasure order.

2. Repeat Offenders

Some legislation provides that a court may access "sealed" juvenile records when the information is used in sentencing proceedings following a subsequent conviction or delinquency adjudication. For example, Massachusetts' statute allows a judge or probation officer to view the record.¹²⁹

There is some merit in the Massachusetts approach. The public is not adequately protected when sealed records are unavailable to the court during sentencing. A court with access to sealed records can more effectively evaluate and sentence a repeat offender. A sentencing court should consider previous misdeeds, especially if a juvenile has a violent behavior pattern. Otherwise, a juvenile is treated as though no prior offense occurred and may receive an unjustifiably light punishment.

3. Access for Research

Several states have enacted laws which allow access to sealed juvenile records for research purposes. Access is usually limited to prevent a researcher from identifying particular individuals. For example, the Kansas statute permits courts to maintain information relating to any offense if the information is kept in a manner as to prevent identification of the offender.¹³⁰

Access to sealed records for research purposes helps scholars effectively evaluate the criminal justice system. Scholars can use the data to assess the impact of a juvenile record on employment prospects. Society therefore has an interest in allowing scholarly access to expunged records provided that the records do not identify specific individuals.

129. MASS. ANN. LAWS ch. 276, § 100B (Law. Co-op. 1980). The statute provides in pertinent part:

The information contained in said concealed delinquency record shall be made available to a judge or probation officer who affirms that such person, whose record has been sealed, has been adjudicated a delinquent or has pleaded guilty or has been found guilty of and is awaiting sentence for a crime committed subsequent to sealing of such record. Such information shall be used only for the purpose of consideration in imposing sentence.

Id.

130. See KAN. STAT. ANN. § 38-1610(h) (Supp. 1990). *But see* IOWA CODE ANN. § 232.150(6) (1985) (permitting inspection of reports for research purposes to a person conducting bona fide research without requiring procedures to prevent identification of offenders).

4. Access by the Subject of the Records

Some statutes specify that the subject of the records may have access to sealed records. These statutes often provide that others may also gain access to the records if the subject so requests in a petition.¹³¹ Kentucky, for example, allows the subject to petition for inspection of the records and permits only the persons named in the petition to view the records.¹³²

The subject of the record should have access to his or her own records. Courts should exercise caution, however, in permitting those mentioned in the petition to access a subject's records. It is possible that a prospective employer could coerce an applicant into providing it with sealed records. Therefore, courts should question any other names that are mentioned on a subject's petition for access to sealed records.

5. A Different Approach in Florida

Florida has taken a different approach to record sealing and expungement. Florida's system includes two levels: literal expungement and record sealing.¹³³ When a person reaches age nineteen, courts are authorized to destroy all records that do not fall within crimes specifically excluded in the statute.¹³⁴ The statute specifically lists categories of material that may not be destroyed. If the offense falls within the "nondestructible" category,¹³⁵ the records are only sealed and may

131. See KAN. STAT. ANN. § 38-1610(e) (Supp. 1990) (allowing inspection by the subject of the records and those persons designated by the subject).

132. See KY. REV. STAT. ANN. § 610.330(6) (Michie/Bobbs-Merrill 1990).

133. See FLA. STAT. ANN. § 39.045 (West Supp. 1991).

134. *Id.* § 39.045(2). However, a court may not destroy records of a juvenile until age 21 if he is a serious or habitual delinquent. *Id.*

135. Some samples of offenses that cannot be literally expunged and, accordingly, remain accessible to some employers are records involving: murder; manslaughter; vehicular homicide; killing an unborn child by injuring the mother; assaulting a minor; aggravated assault; battery to a minor; aggravated battery; kidnapping; false imprisonment; removing a child from the state or concealing children; sexual battery; engaging in prohibited acts of persons in a familial or custodial authority; prostitution; lewd and lascivious behavior; lewdness and indecent exposure; arson; robbery; incest; aggravated child abuse; child abuse; negligent treatment of children; sexual performance by a child; abuse, neglect, or exploitation of aged or disabled persons; obscene literature; drug abuse prevention and control if the offense was a felony or the offense involved another minor; and acts related to the fraudulent sale of controlled substances, if the offense constituted a felony. See FLA. STAT. ANN. § 110.1127 (West Supp. 1991).

subsequently be accessed for limited screening.¹³⁶

Depending on the type of employer, the Florida expungement statute gives employers limited access to sealed juvenile offenses.¹³⁷ The following employers may have access to juvenile offenses: (1) public employees within the Department of Health and Rehabilitative Services who provide care to children or the developmentally disabled for fifteen hours or more a week;¹³⁸ (2) caretakers of the developmentally disabled who are unrelated to their clients;¹³⁹ (3) the Department of Health and Rehabilitative Services' mental health personnel;¹⁴⁰ (4) treatment resource personnel for alcohol and controlled substance abuse;¹⁴¹ (5) child care personnel at licensed child care facilities;¹⁴² and (6) persons who care for children in family foster homes, residential child care agencies, child placing agencies, and twenty-four hour summer or recreation camps.¹⁴³ If these employers locate "nondestructible" evidence relating to a juvenile's previous delinquency adjudication or criminal conviction, the applicant is automatically excluded from consideration for the position.

The statute is unique because it protects those persons, especially children, who may be unable to protect themselves from those who care for them. The statute permits prospective employers to access records about a job applicant's offenses when the applicants may have supervisory or disciplinary power over minors. Although the legislation has not covered all employees in such a position, it has given protection to sensitive areas like day care centers, foster homes, and caretakers for the developmentally disabled.

The Florida Legislature's balance is appealing because it has concluded that children's need for protection from abuse is greater than a juvenile's need to have his or her record literally expunged. However, the Florida legislation may be broader than necessary. For example, a job applicant who has committed vehicular homicide as a juvenile may not constitute a threat to a child when the applicant later seeks employment at a drug or alcohol treatment program, yet the Florida stat-

136. *Id.* § 39.045(3).

137. *Id.*

138. *See* § 110.1127(3)(a).

139. *See* § 393.0655.

140. *See* § 394.457.

141. *See* §§ 396.0425 and 397.0715.

142. *See* §§ 402.305(1) and 402.3055.

143. *See* §§ 409.175(4)(a)(5) and 409.176.

ute would bar the juvenile offender from employment in those areas. The statute is problematic because it does not provide any mechanism for the former offender to challenge the applicability of the offense and its relationship to his or her fitness for the job sought.

The Florida statute only covers a narrow range of employers, thus, it may inadequately protect public interests. The Florida legislation does not provide access to local law enforcement agencies, nor does the statute allow access to employers who employ individuals in positions involving national security. More importantly, the statute has unnecessarily limited an employer's hiring prerogative. It has stripped an employer of discretion in making its own employment decisions by forbidding the employer to hire persons who have committed offenses listed in the legislation.

D. *What Records Does an Expungement Order Cover?*

1. Court Records

When a juvenile is arrested and adjudicated as a "delinquent," the system creates a paper trail that attests to the findings. This could include a record of arrest, fingerprinting, photographing, and booking information at the relevant law enforcement agency. After an arrest, the juvenile generally is delivered to a juvenile probation center, and a record is possibly created there. Usually the matter is then referred to the district attorney to file a petition. If a petition is filed, a juvenile court record is created reflecting the case's disposition. Additionally, records often are produced if a juvenile offender is lodged in any detention facility. If a minor is not placed in detention but instead is sent to a foster home, group home, a camp, or a ranch, each may also maintain records. Moreover, copies of the records may be sent to the Federal Bureau of Investigation in Washington, D.C..

State legislators have adopted a variety of approaches to deal with this cumbersome paper trail. Florida refers only to destroying court records of juvenile proceedings.¹⁴⁴ Florida legislation does not authorize courts to destroy agency files, including law enforcement records. Thus, an employer making a diligent investigation may uncover large segments of the juvenile offender's paper trail.

Florida legislation covers slightly different records when the records are sealed rather than destroyed. Florida courts seal Department of Health and Rehabilitative Services records, including copies of court

144. See FLA. STAT. ANN. § 39.045(2) (West Supp. 1991).

records.¹⁴⁵ Although the legislation specifically includes records kept by one department, it fails to reach records that other departments or local law enforcement agencies are holding.

2. Legislation Covering Criminal Records

Minnesota legislation seals criminal records of youths transferred from juvenile court for criminal prosecution as adults. The statute does not cover records of juvenile court proceedings when the juvenile is not prosecuted as an adult.¹⁴⁶ Under Minnesota law, juvenile court proceedings are not "criminal" in nature and do not result in a conviction unless the juvenile has been transferred to criminal court for prosecution as an adult. As a result, the juvenile has not committed a "crime" or received a "conviction" warranting record sealing. The legislation seems to operate on the assumption that employers will distinguish between a juvenile "adjudication" and a criminal conviction. In other words, a minor could have his or her record nullified by the Commissioner of Corrections in Minnesota only if he or she commits an offense serious enough to warrant trial as an adult. For juveniles who commit less serious offenses, it appears that their records will not be sealed and the paper trail will remain intact.

3. Which Agency Records Are to be Expunged?

Although limited to criminal convictions, the Minnesota statute provides a more comprehensive approach than the Florida legislation. In Minnesota, a court has authority to seal all records pertinent to the conviction.¹⁴⁷ Furthermore, the statute provides a broad definition of the term "records,"¹⁴⁸ giving the court the necessary flexibility to reach

145. § 39.045(3). *See also supra* notes 137-40 and accompanying text.

146. The Minnesota legislation states in pertinent part:

Whenever a person who has been committed to the custody of the commissioner of corrections upon conviction of a crime following reference for prosecution under the provisions of section 260.125 [the provision transferring juveniles to prosecution as adults] is finally discharged by order of the commissioner, that discharge shall restore the person to all civil rights and, if so ordered by the commissioner of corrections, also shall have the effect of setting aside the conviction, nullifying the same and of purging that person thereof.

MINN. STAT. ANN. § 242.31(1) (West Supp. 1991).

147. *Id.*

148. *See* § 242.31(3). The term "records" includes, but is not limited to, "all matters, files, documents and papers incident to the arrest, indictment, information, complaint, trial, appeal, dismissal and discharge, which relate to the conviction for which the order was issued." *Id.*

and seal all records regarding the conviction. At the same time, the Minnesota legislation does not provide for expunging the "sealing" order itself or for certification of compliance with the court's order. In Minnesota, a court seals the actual records but leaves a paper trail leading to the existence of the records.

California legislation has taken the next logical step and allows for sealing of a court's order to seal records.¹⁴⁹ The California approach has recognized the paper trail problem, sealing any evidence that could lead to improper discovery of a juvenile offense. This approach protects a juvenile offender from unauthorized public access to the records.

4. When Should Expungement Take Effect?

State legislatures have used a variety of approaches to determine when expungement statutes take effect. For example, Alaska provides for expungement within thirty days of a minor's eighteenth birthday or, if the court retains jurisdiction over the minor past that date, within thirty days of the termination of the court's jurisdiction.¹⁵⁰ After turning eighteen, a juvenile's record is sealed, allowing the juvenile to seek employment or higher education without a history of offenses.

The California approach is similar to the Alaska approach, but there are several key differences. The California statute allows a juvenile offender to petition for sealing his or her records any time after age eighteen, with two exceptions.¹⁵¹ First, an offender may petition before age eighteen if five years have elapsed since termination of the court's jurisdiction.¹⁵² Second, in a case where no petition is filed, records are sealed if five years have elapsed since the person was cited to appear before a law enforcement agency or a probation officer.¹⁵³

The California statute also provides a longer rehabilitation period for

149. The provision in California states in pertinent part:

[T]he court shall send a copy of the order to each agency and official named therein, *directing the agency to seal its records* and stating the date thereafter to destroy the sealed records. Each such agency and official shall seal the records in its custody as directed by the order, shall advise the court of its compliance, and thereupon *shall seal the copy of the court's order for sealing* of records that it, he, or she received.

CAL. WELF. & INST. CODE § 781(a) (West Supp. 1991) (emphasis added).

150. ALASKA STAT. § 47.10.090(a) (1990).

151. See CAL. WELF. & INST. CODE § 781(a) (West Supp. 1991).

152. *Id.*

153. *Id.*

more serious crimes. If a person is sixteen years of age or older and commits an offense listed in the statute, the individual may not petition for expungement until three years have elapsed since commission of the offense.¹⁵⁴ Some examples of the offenses listed in the statute are murder, arson of an inhabited building, armed robbery, and rape with force, violence, or threat of great bodily harm.¹⁵⁵

Under the California statute, a seventeen year old juvenile could commit an unarmed robbery and have his or her record expunged any time after attaining age eighteen. This allows the individual to enter the workforce or college with an unblemished record. This legislative attempt to prevent recidivism benefits the individual and the public.

The two exceptions in the California legislation to the "age eighteen" eligibility date offer an inducement to a juvenile to avoid further infractions. Under the "five year" provision, a child of age ten could commit an offense and have no further contact with the juvenile court system for five years. At age fifteen the juvenile would receive an expungement award for his or her good behavior. Likewise, a sixteen year old who committed one of the more serious offenses set forth in the legislation, first, must prove that he or she is worthy of expungement. If, after a three year period, the individual has not committed another offense, records of the offense are expunged.¹⁵⁶ In trying to balance competing interests, the legislature has, in certain special cases, placed the public's safety interest above an individual's need to enter the adult job market with an unblemished police record.

A number of states have adopted approaches similar to the California approach. The length of the period varies depending on the state. For example, Illinois does not allow a petition for expungement until the later of (1) age twenty-seven, or (2) ten years from the termination of all juvenile court proceedings relating to the person.¹⁵⁷ This statute does not help a young offender entering the job market or applying to colleges. The statute instead rewards an individual for successfully completing a ten year probationary period.

Two years is the most common rehabilitation period adopted by states. Georgia provides that a person can petition for expungement if

154. *Id.*

155. See CAL. WELF. & INST. CODE § 707(b) (West Supp. 1991). Other listed offenses include kidnapping with bodily harm, assault with intent to murder, attempted murder, and several other offenses. *Id.*

156. See *supra* note 154 and accompanying text.

157. See ILL. REV. STAT. ch. 37, para. 801-9(2) (1989).

“two years have elapsed since the final discharge of the person.”¹⁵⁸ A two year period accommodates both the interests of the juvenile entering the job market and the public’s safety concern by providing a “test” period for the juvenile to prove that he or she will not continue to break the law.

A two year time period is often more favorable to a juvenile than a statute stating a specific age. For example, assume that a thirteen year old who commits an offense in Alaska must wait five years until age eighteen before he or she can have the offense expunged.¹⁵⁹ The same thirteen year old would be eligible for expungement as early as age fifteen in Georgia, depending on the disposition of the case.¹⁶⁰ A two year period without any further incidents strikes a reasonable balance between an offender’s and society’s needs, although certain categories of employers may still need access to a juvenile’s misdeeds.

5. Who Requests Expungement?

Virtually all state legislation provides that either the court, the juvenile, or both, can petition for expungement. Alaska law provides that the court shall order the records sealed within thirty days of an offender’s eighteenth birthday.¹⁶¹ Alaska fails, however, to provide a provision permitting a hearing or some other review process to certify that the juvenile offender is worthy of expungement. Moreover, no provision requires authorities to notify the interested juvenile that his or her record has been expunged and to explain the effect of such action.

Expungement of a juvenile’s record based solely on a court’s motion may be the best alternative because requiring a juvenile to petition for expungement would fail to provide the opportunity to all qualified juveniles. Economic barriers would stand in the way of many juveniles and expungement availability would depend on the knowledge and resources of a small group of juvenile offenders. Some states have re-

158. GA. CODE ANN. § 15-11-61(a)(1) (Michie 1990). For more states that allow a petition for expungement if two years have elapsed since final discharge, see CONN. GEN. STAT. ANN. § 466-146 (West Supp. 1991); IOWA CODE ANN. § 232-150(1)(a) (West 1985); VT. STAT. ANN. tit. 33, § 663(a)(1) (1981).

159. ALASKA STAT. § 47.10.090 (1990). See *supra* note 150 and accompanying text. Alaska provides for expungement within thirty days of a minor’s eighteenth birthday, or if the court retains jurisdiction thereafter, expungement thirty days after termination of jurisdiction. § 47.10.090.

160. See *supra* note 158 and accompanying text.

161. See ALASKA STAT. § 47.10.090 (1990).

moved economic expungement barriers allowing a juvenile to initiate expungement without payment of court costs.¹⁶²

An offender's knowledge of the expungement process and understanding of the effect of expungement are key ingredients for those who would make use of the system. Some jurisdictions, including Oregon, specifically state when notice of expungement availability is given to the juvenile offender.¹⁶³ Regardless of whether the expungement process is initiated by the court or by the juvenile offender, the offender needs to be informed about the availability of expungement, how it occurs, and its impact on the individual's employment prospects. Oregon legislators have simplified the process by allowing expungement to occur without a hearing, except when a timely expungement objection is filed.¹⁶⁴

6. Impact of Expungement

Approximately half of the states permit a juvenile offender to deny that an expunged offense ever occurred. The California expungement statute is typical of this approach.¹⁶⁵ This statute permits a juvenile offender to legally deny the existence of an offense when completing an employment application.¹⁶⁶ If hired, the denial does not jeopardize the individual's employment at a later date for falsifying employment documents.

The effect of expungement is less clear in states where there is no

162. For example, Colorado does not require payment of a filing fee. See COLO. REV. STAT. ANN. § 19-2-902(5)(a) (West 1990). Kansas requires that the offender, or if he is a juvenile, his parent or next friend, initiate expungement, but does not require a docket fee. See KAN. STAT. ANN. § 38-1610(a) (Supp. 1990).

163. See OR. REV. STAT. § 419.802 (1989). In Oregon, the juvenile court or department must make a reasonable effort to notify the child and his parents in writing of the expunction procedure at the following times: (1) at an informal disposition or dispositional hearing; (2) at termination; (3) when notifying the offender of a pending expunction; and (4) at the time of notice of an expunction order. *Id.*

164. OR. REV. STAT. § 419.827(a) (1989) (explaining when expunction hearings are required and the rules governing such hearings).

165. See CAL. WELF. & INST. CODE § 781 (West Supp. 1991). In California, after the court has sealed the offender's records, the person may reply to inquiries regarding the events in the case as though the events never occurred. *Id.*

166. *Id.* The statute states in pertinent part:

Once the court has ordered the person's records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply according to any inquiry about the events, the records of which are ordered sealed.

Id.

analogous statutory provision. A juvenile with a previously expunged record may see certain questions on employment applications that statutes fail to provide guidance on how to answer. For example, an application may ask whether an applicant has ever been adjudicated a delinquent, convicted of a criminal offense, or convicted of an offense making it necessary to forfeit collateral. Many statutes do not expressly sanction answering such questions in the negative.¹⁶⁷ In these states it is unclear whether the juvenile offender may be subsequently discharged if the employer discovers the truth. The problem, of course, is resolved if the effect of expungement is specifically covered in the relevant statute.

Some states go one step further and prohibit an employer from inquiring about an applicant's participation in the entire expungement process. If a statute affords a juvenile offender the right to deny the fact that the offense occurred, it logically follows that the individual has the right to deny the fact that he or she went through the expungement process. Ohio has adopted this approach, coupled with a provision allowing a juvenile offender to deny that the offense ever occurred.¹⁶⁸ This approach provides the former juvenile offender with complete protection in employment situations. It balances the interest completely in the juvenile offender's favor and allows him or her to begin employment with a "clean slate."

7. Eligibility for Expungement

a. *Age*

All states use an age limit as a condition for expungement qualification. Age limits range from sixteen to twenty-one years of age, with the overwhelming majority of states choosing to restrict expungement applicability to offenses committed while the juvenile is under eighteen. Because of the diversity in age limits, a sixteen year old who commits an offense in New York cannot enter the workforce with an unblemished record under New York's expungement statute.¹⁶⁹ In contrast, the sixteen year old offender in California can commit the same offense,

167. See, e.g., DEL. CODE ANN. tit. 10, § 930 (1975 & Supp. 1990) (granting the court jurisdiction to expunge juvenile records, but not addressing whether, once expunged, the juvenile may deny that the adjudication happened).

168. See OHIO REV. CODE ANN. § 2151.35.8(I) (Anderson 1990). The Ohio statute prohibits questioning an offender regarding an expunged arrest. If an individual is questioned about an expunged proceeding, the person may properly deny the offense. *Id.*

169. See N.Y. FAM. CT. ACT § 301.2(1) (McKinney 1983) (defining "juvenile delin-

take advantage of the expungement statute in California, and return to the individual's pre-offense status.¹⁷⁰ In view of easy interstate travel and mobility, it seems unfair to punish or reward a juvenile solely on the basis of the jurisdiction where the offense occurred.

b. *Were the Charges Dropped?*

Some states strike a balance entirely in favor of an employer and permit expungement statute protection only if the charges were subsequently dropped. The Delaware expungement statute extends expungement rights only to juvenile offenders who were charged with a delinquent act and have had the charges dismissed or disposed of through any means not involving a delinquency adjudication.¹⁷¹ This type of statute does little to help a juvenile offender. It merely restates in different language a rule found in most jurisdictions that employers are prevented from inquiring about arrests not resulting in a conviction.

c. *The Court's Discretion*

Some legislation premises the right of expungement on a single factor: the court's discretion. These statutes give the court complete discretion in whether to grant expungement. Missouri's statute permits the court to expunge a juvenile offender's record if the court finds that "it is in the best interest of the child."¹⁷² This legislation generally fails to give a court further guidance in how to exercise discretion. Moreover, this legislative approach is problematic because it is unlikely to produce uniform results and is unpredictable. Unfortunately, each expungement decision will depend on which judge happens to rule on the petition. It clearly does not allow advocates to predict with any certainty the success or failure of an expungement petition.

A variation of this approach gives a court discretion in granting expungement based on the court's determination of whether the juvenile offender is satisfactorily rehabilitated.¹⁷³ Although this determination

quent," and consequently the scope of the expungement provision, to include persons over seven and under sixteen years old).

170. See CAL. WELF. & INST. CODE § 781 (West Supp. 1991) (allowing courts to seal records of crimes committed before the juvenile reaches age eighteen).

171. DEL. CODE ANN. tit. 10, § 930(b) (Supp. 1990).

172. MO. ANN. STAT. § 211.321(4) (Vernon Supp. 1991).

173. The Vermont statute allows a court to order the sealing of all files applicable to an expungement proceeding if the court finds, among other things, that a subject's "re-

is a completely subjective and vague evaluation, some statutes try to provide guidance to the courts. For example, the Vermont statute provides for a two year probationary period during which time an offender cannot commit a subsequent offense.¹⁷⁴ A Vermont court cannot grant expungement unless a juvenile meets this requirement. If a juvenile has successfully completed the required probationary period without a subsequent offense, a court should consider this prima facie evidence of rehabilitation and should automatically grant an expungement petition.

d. *A Subsequent Offense?*

Most states will not approve an expungement petition if a juvenile has committed a subsequent offense without a required "probationary" period. However, state legislation is not in agreement with regard to the type of subsequent offense which will preclude expungement. For example, the Oregon expungement statute will not allow a court to expunge records if the person seeking expungement has subsequently been convicted of a felony or Class A misdemeanor.¹⁷⁵ This statute is clear and makes it easy for a court to determine whether committing a subsequent crime prevents a court from granting expungement. Pennsylvania follows a similar approach and allows a court to order expungement if it finds that a juvenile offender has not been convicted of a subsequent felony or misdemeanor or has not been adjudicated "delinquent" since the discharge.¹⁷⁶

California follows a slightly different approach. The California approach allows the court to order expungement if the court finds that, since the termination of the court's jurisdiction, the person has not been convicted of a felony or of any misdemeanor involving moral turpitude.¹⁷⁷ Most legislation fails, however, to clarify the definition of a "misdemeanor involving moral turpitude." This is problematic because one judge's perception of moral turpitude might differ from an-

habilitation has been attained to the satisfaction of the court." VT. STAT. ANN., tit. 33, § 665(a)(3) (1981).

174. *Id.* § 665(a)(1).

175. OR. REV. STAT. § 419.805(1)(a)—(c) (1989).

176. *See* 18 PA. CONS. STAT. ANN., § 9123 (Supp. 1991).

177. CAL. WELF. & INST. CODE § 781(a) (West Supp. 1991). The court must also believe that the petitioner is satisfactorily rehabilitated prior to granting an expungement order. *Id.*

other's. Using this approach also makes it difficult to predict whether or not an individual qualifies for the expungement process.

e. *The Passage of Time*

Some states provide for automatic expungement by operation of law. West Virginia, for example, automatically expunges juvenile records upon an individual reaching a certain age or upon a passage of time since the termination of the court's jurisdiction.¹⁷⁸ The West Virginia approach does not attempt to determine whether a juvenile offender poses a risk of recidivism due to a subsequent adult conviction during the one year period.

8. Offenses That Cannot be Expunged

a. *Nothing Excepted*

States have adopted a dazzling variety of approaches to decide which juvenile offenses are capable of being expunged. These approaches range from expunging all juvenile offenses to limiting the expungement right to a statutory list. The Massachusetts statute, for example, applies to any person in the commonwealth with a delinquency court appearance on record.¹⁷⁹ Massachusetts defines a "delinquent child" as a juvenile between the ages of seven and seventeen who disobeys a city, town, or commonwealth law.¹⁸⁰ Accordingly, unless referred for prosecution as an adult,¹⁸¹ a child is within the juvenile court's jurisdiction and may file for expungement of any state law offense. This approach strikes a balance completely in favor of the juvenile offender and does nothing to protect the interests of society.

A more properly balanced statutory scheme is achieved if a jurisdiction refers juveniles who have committed heinous crimes to adult

178. W. VA. CODE § 49-5-17(a) (1986). The West Virginia statute provides in pertinent part:

One year after the child's eighteenth birthday, or one year after personal or juvenile jurisdiction shall have terminated, whichever is later, the records of a juvenile proceeding conducted under this chapter, including law enforcement files and records, fingerprints, physical evidence and all other records pertaining to said proceeding shall be expunged by operation of law.

Id.

179. MASS. ANN. LAWS ch. 276, § 100B (Law. Co-op. 1980).

180. MASS. ANN. LAWS ch. 119, § 52 (Law. Co-op. 1975).

181. If a child is referred for prosecution as an adult, the child is no longer within a juvenile court's jurisdiction.

courts for prosecution under a state's criminal laws. Since most juvenile expungement statutes do not extend to criminal convictions, the juvenile offender who is tried and convicted as an adult would be ineligible for expungement as a juvenile delinquent. If the juvenile offender has committed an offense so grave that it later cannot be expunged, the judicial system arguably should prosecute those individuals as adults.

b. *Crimes Against Children*

Some states have barred the expungement of an offense if it constitutes a crime of abuse against a child. Legislation in Oregon, for example, excludes a specific list of crimes against children from expungement possibility.¹⁸² This type of statutory approach is problematic because it is overly broad. Instead of limiting access to these records to employers hiring applicants for work involving the discipline or supervision of children, the statute gives all prospective employers access to the records. As a consequence, a juvenile offender with a record of child abuse may not have access to employment that has absolutely no relationship to the crime committed. A more sensible approach would limit access to such records to those employers who have a legitimate need to evaluate personnel who will be working with children.

c. *Heinous Crimes*

Some states specifically exclude from the expungement process specific crimes which legislators believe are more heinous than other misdeeds. The specific crimes vary from state to state. The Louisiana statute typically grants expungement to a juvenile offender who has been adjudicated "delinquent" for the commission of a felony unless the juvenile has committed murder, manslaughter, rape, or other listed offenses.¹⁸³ Generally speaking, expungement statutes tend not to protect those juveniles who commit violent crimes against persons rather than property.

Nebraska has taken a different approach and allows a court to grant expungement if the court finds that it is in the best interests of the

182. See OR. REV. STAT. § 419.800(4)(j) (1989). The expected crimes against children under Section 419.800(4)(j) includes criminal mistreatment, rape, sodomy, sexual abuse, and promoting or compelling prostitution.

183. See LA. CODE JUV. PROC. ANN. art. 125 (West Supp. 1991). The Louisiana statute article 125 also disallows expungement for "sexual battery, aggravated kidnapping, or armed robbery."

juvenile and consistent with public welfare.¹⁸⁴ In determining whether to grant expungement, Nebraska legislators have directed courts to consider the juvenile's behavior after adjudication, the juvenile's response to rehabilitation, the seriousness of the juvenile's offense, and whether failure to set aside the judgment will disproportionately punish the juvenile.¹⁸⁵ Courts balance these factors to determine whether to grant expungement. Under this approach, a court has the ability to weigh the severity of the crime and the level of the offender's rehabilitation against the interests of the public.

IV. A MODEL STATUTE

A. *Terminology*

The model statute set forth below is limited to juvenile adjudications and does not apply to criminal convictions. The proposed model statute also does not include traffic ordinance violations. It attempts to deal with problems inherent in the legislative patchwork on this subject in the United States.

To prevent confusion, each state statute should provide a definition of the term "expungement." A complete destruction of juvenile records is probably not possible, and is inadvisable because it would not protect the interests of the public. The term "expungement" should be defined as "record sealing."

B. *Access*

The following groups should be entitled to have access to sealed records: (1) the subject of the record; (2) courts for use in presentencing hearings when the subject of the records commits a subsequent offense or is subsequently adjudicated a delinquent; (3) individuals using the materials for research purposes after the removal of identifying information; (4) law enforcement agencies for employment screening; (5) employers hiring for positions involving national security interests; and (6) employers hiring for positions involving the supervision and discipline of minors or the care and supervision of infirmities due to age or mental disabilities.

It is inappropriate for legislation to bar individuals from jobs based on juvenile offenses. The better approach is to provide employers in

184. See NEB. REV. STAT. § 43-2104 (1988).

185. *Id.* § 2103(1)-(3).

certain sensitive areas mentioned above with a complete file when making hiring decisions. The ultimate hiring decision should still remain with the employer.

C. *What Records Should be Sealed?*

A court should have authority to seal all records related to an adjudication or conviction of a juvenile offender. This would include files, documents, papers incident to the arrest, petition, adjudication, appeal, dismissal, and discharge. After a court ordered expungement, all agencies holding these records should be required to advise the court that they have complied with the order. After doing this, all agencies should then have to seal the sealing order itself.

D. *When Should the Records be Expunged*

A probationary period prior to expungement is necessary. A juvenile offender should have to demonstrate that he or she is rehabilitated and is no longer a risk to the public. A two year time frame during which a juvenile cannot commit a subsequent offense is reasonable. If a two year period were adopted, a juvenile offender would be eligible to petition for expungement by age twenty at the latest unless a court retains jurisdiction after the offender reaches age eighteen.

E. *Who Initiates the Process?*

Either the court or the juvenile should be permitted to initiate an expungement petition. If a court initiates the process, the juvenile offender should be notified of the action as well as its effect. The court should also have to notify a juvenile in writing of expungement availability any time there is a dispositional hearing or informal disposition of the matter. If a juvenile initiates the expungement process, legislation has to allow juveniles to do so free of any financial barriers. The expungement process should be kept simple and inexpensive to provide equal access to all juvenile offenders.

F. *Effect of Expungement*

Expungement of juvenile records should restore an individual to his or her pre-offense status. The juvenile offender with an expunged record should have permission to deny that the offense ever occurred. Statutes should also prohibit an employer from inquiring about prior expunged delinquency adjudications. Alternatively, a state might

make it illegal for an employer to discriminate against persons with expunged juvenile records. A limited exception is necessary for employers seeking workers for national security positions, law enforcement agencies, and work involving child care and less able individuals.

G. *Eligibility for Expungement*

A uniform age limit for expungement is necessary because of the inherent mobility of being a United States citizen. A reasonable age is eighteen because it would give a juvenile offender the benefit of the maturation process. It is improper to limit the expungement right to juvenile offenders who have committed only one delinquent act. Courts should grant expungement as long as the juvenile has successfully completed a required probationary period without committing any excluded offense.

To be eligible for expungement, a juvenile offender should be required to complete a two year probationary period during which time he or she has not been convicted of a subsequent criminal offense or adjudicated "delinquent." Likewise, courts should not grant expungement if criminal or delinquency proceedings are currently pending. Successful completion of this probationary period is prima facie evidence of rehabilitation. Courts should grant expungement unless the court determines that the juvenile has committed an offense that prevents expungement eligibility.

Some crimes are so heinous as not to merit expungement. Courts need the discretion to deny the expungement process to offenders who continue to present a clear and present danger to society. This approach would avoid the development of an extensive list of exclusions to the expungement statute.

V. CONCLUSION

Employers should have a degree of latitude in piercing the shield of juvenile expungement statutes. Employers need to know the background of applicants being considered for employment in order to assess and minimize risks. If an offense relates directly to the proposed employment, an employer needs to be able to decide not to hire an individual. Employers are concerned about vicarious liability which can expose a company to potential damages for an employee's intentional torts committed within the scope of employment.

Without expungement statute protection, however, a juvenile offender faces social prejudice and legal barriers to employment. A juve-

nile's interest in maintaining expungement statutes is stronger for the individual who has committed only one or two minor offenses due to emotional immaturity than the juvenile offender who has committed more serious offenses involving violent crimes. Without expungement legislation, juveniles face barriers to employment; barriers that could arguably lock them into a life of crime.

There is a strong public interest in expungement statutes. On the one hand, if the expungement process actually reduces recidivism rates among juvenile offenders, society enjoys a human and economic benefit from the process. On the other hand, society has a vested interest in seeing that employers hire competent employees, especially if those individuals will have access to children, homes, or national security information.

To balance the conflicting interests, states may adopt one of two approaches. One choice is to maintain expungement statutes but to exclude certain offenses, such as violent crimes and violations involving abuse against children or the elderly. The other option is to remove expungement statutes and all legal barriers facing juvenile offenders in the employment market.

The first option would allow employers to discover if a prospective employee had a record of violence or child abuse. This approach would help employers fulfill their duty toward employees as well as the public and would permit management to hire fit and competent workers. It would also help protect the public because employers would know that they were not entrusting the care of children to a convicted child molester or giving an employee who had been convicted of rape or some other violent crime access to a customer's home.

If states select the option of maintaining expungement statutes but excluding certain offenses, the most difficult step is deciding which types of offenses should not be expunged. A statute that disallows expungement for all violent crimes as well as abusive crimes against children and the elderly will still allow certain crimes to be expunged that may be relevant to some businesses. For example, a pattern of shoplifting offenses might be expunged from records of a job applicant for work that involves handling money.

A modified approach would permit limited disclosure to employers for serious crimes while permitting concealment of less serious crimes. There is some justification for this approach if the more serious crime involves a pattern of misconduct. If it is reasonable to believe that the

past is some prediction of the future, a court needs to use the pattern of past infractions in order to detect recidivism.

The approach of completely rejecting expungement statutes has appeal in that it is an honest approach. It would allow an employer to know with whom it was dealing so that management could better protect employees and company interests as well as needs of society generally. To protect past offenders, legislation would have to make it illegal for employers to discriminate against former offenders. This would protect all juvenile offenders in some way, regardless of the offense. This more direct approach would force the society to confront its attitudes about former offenders. The legislation prohibiting discrimination would help remove legal barriers to employment.

Rejecting all expungement protection might take one of two paths. The first would limit an employer's access only to those records that are directly relevant to employment. A juvenile offender's conviction for breach of the peace would not be directly relevant, for example, to working as a beam setter in high steel work, and an employer would not have access to the information. The difficulty with this approach is in designing relevant criteria and applying them. This approach would not allow an employer to assess risks posed by an employee who had committed offenses not directly relevant to particular work but who posed general risks to supervision.

This approach would allow an employer to question a job applicant about former offenses, but not to disqualify an applicant unless an offense was directly relevant to the work. This would give discretion to an employer in deciding whether an offense bore a direct relationship to the employment. If a juvenile offense was found directly relevant to the position sought, a statute should require an employer to inform an applicant in writing of the reasons for disqualification. This would further protect the offender.

This approach would certainly require a definition of "direct relationship" to the employment being sought. This is not an impossible task, for several states already have done so in public employment statutes that prohibit discrimination against persons with conviction records.¹⁸⁶ This approach could also include a requirement that an

186. Minnesota has decided that, in determining if a conviction directly relates to the position sought, the hiring authority shall consider:

- (a) The nature and seriousness of the crime or crimes for which the individual was convicted;
- (b) The relationship of the crime or crimes to the purposes of regulating the

employer have no authority to question an employee about any offense that is over a certain number of years old. After a certain number of years, the "direct relationship" test would no longer be applicable, and it would be unlawful to consider an applicant's past offense in employment decisions.

The problem of expunging records of juvenile offenses is one that implicates fiercely competing interests. This Article proposes no ultimate solutions. Current statutes appear to favor the interests of juvenile offenders far more than those of employers or society generally. Legislators must take measures to redraw the lines so that there is a more careful weighing of the interests on both sides of the equation.

position of public employment sought or the occupation for which the license is sought;

(c) The relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge responsibilities of the position of employment or occupation.

MINN. STAT. ANN. § 364.03(2) (West 1991).

APPENDIX

Alabama

ALA. CODE § 12-15-103 (1986)

Term Used: 1. Seal
2. Destroy

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or by court.

Who Has Access To Records: Subject, or any clinic, hospital, or agency that has subject under care.

Which Records Are Affected: Arrests, complaint, referrals, petitions, reports and orders removed from all agency and official files.

When Occurs: 1. Sealed - Two years after final discharge.
2. Destroy - Five years from majority = age 24.

Cut-off Age: 18. *See* § 12-15-30 (Supp. 1990).

Conditions And Factors To Consider: Since discharge, has not been convicted of a felony or a misdemeanor involving moral turpitude or adjudicated delinquent nor any such proceeding currently pending.

Offenses Excluded: Traffic offenses, if age 16-17.

Alaska

ALASKA STAT. § 47.10.090 (1990)

Term Used: Seal

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Motion of court.

Who Has Access To Records: Officers of the court when making a pre-sentencing report for the court. Also, the court may order for good cause shown.

Which Records Are Affected: Official court records, the information, and social records, and law enforcement records other than fingerprints. *See* § 47.10.097 and § 12.62.040.

When Occurs: Later of 30 days after age 18 or 30 days after final discharge or, if tried as an adult, five years after end of sentence.

Cut-Off Age: 18.

Conditions And Factors To Consider: If tried as an adult, must show

that the punishment had its intended rehabilitative effect. Otherwise, mandatory.

Offenses Excluded: Non-felony traffic offenses.

Arizona

ARIZ. REV. STAT. ANN. § 8-247 (Supp. 1991)

Term Used: Destruction

Right To Say Never Happened: No mention in statute.

Expungement Procedure: At age 18, on court's motion or by subject rehabilitated. At age 23, court may order.

Who Has Access To Records: N.A.

Which Records Are Affected: Files and records in the proceeding, including arrest.

When Occurs: Age 18 or 23.

Cut-Off Age: 18. *See* § 8-201(6) (Supp. 1991).

Conditions And Factors To Consider: At age 18, no proceeding is pending seeking a conviction and subject convinces court he or she is rehabilitated. At age 23, no adult record, no pending criminal complaint and Department of Corrections has no jurisdiction.

Offenses Excluded: The buying, receiving, possession or consumption of spirituous liquor. *See* § 8-201(9) and § 4-244(9).

Arkansas

ARK. CODE ANN. § 9-27-309 (1991)

Term Used: Expunge (Destroy)

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Motion of court.

Who Has Access To Records: N.A.

Which Records Are Affected: Findings of the court - "The Juvenile Record."

When Occurs: Anytime, but mandatory at age 21.

Cut-Off Age: 18. *See* § 9-27-303(1) (1991).

Conditions And Factors To Consider: Discretionary prior to age 21, then mandatory.

Offenses Excluded: Traffic and Fish & Game violations. *See* § 9-27-303(11) (1991).

California

CAL. WELF. & INST. CODE § 781 (West Supp. 1991)

Term Used: 1. Seal
2. Destroy

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or county probation officer.

Who Has Access To Records: Subject, and anyone named by subject in a petition, or by court order in defamation proceedings.

Which Records Are Affected: All agency records and papers, any minute book entries, dockets and judgment dockets and seal copy of sealing order itself.

When Occurs: Five years after end of court's jurisdiction or anytime after age 18, but three years after offense if age 16-17 and violated § 707(B).

Cut-Off Age: 18.

Conditions And Factors To Consider: Since end of jurisdiction, has not been convicted of a felony or a misdemeanor involving moral turpitude and has been rehabilitated to the satisfaction of the court.

Offenses Excluded: Traffic offenses.

Colorado

COLO. REV. STAT. ANN. § 19-2-902
(West 1990 and Supp. 1991)

Term Used: Expunge (records are actually sealed)

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject (no filing fee).

Who Has Access To Records: Access allowed only by order of court with showing of good cause.

Which Records Are Affected: All records in custody of the court and any other agency or official.

When Occurs: One year after contact not resulting in referral, two

years from date of termination of court's jurisdiction or completion of diversion, or seven years from end of jurisdiction if the subject is a violent, repeat offender.

Cut-Off Age: 18. *See* § 19-1-103.

Conditions And Factors To Consider: Not adjudicated as an aggravated juvenile offender - § 19-2-804; since discharge, no conviction for a felony, misdemeanor, or delinquent adjudication and no such proceeding is pending; has been rehabilitated to court's satisfaction.

Offenses Excluded: Aggravated juvenile offenses - § 19-2-804 (Supp. 1991), e.g., Class 1 or 2 felonies if over 12 (includes child abuse if the crime against the child is a Class 1 or 2 felony, e.g. abuse causes death).

Connecticut

CONN. GEN. STAT. ANN. § 46b-146 (West 1991)

CONN. GEN. STAT. ANN.
§§ 54-76 (West 1985 and Supp. 1991)

Term Used: Erasure

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or guardian.

Who Has Access To Records: Fact of erasure may be substantiated if, in the court's opinion, it is in the best interests of the child.

Which Records Are Affected: All police and court records.

When Occurs: Child (under 16) - Two years after discharge or age 16 (the later).

Youth (16-17) - age 21.

Cut-Off Age: Child - 16. *See* § 46b-120.

Youth - 18. *See* § 54-76b.

Conditions And Factors To Consider: Child - no subsequent juvenile proceeding since discharge and has not been found guilty of a crime.

Youth - not subsequently convicted of a felony.

Offenses Excluded: If 16-17, Class A felonies and aggravated sexual assault in the first degree - e.g. uses a dangerous weapon. *See* §§ 53a-70a (Supp. 1991).

Delaware

DEL. CODE ANN. tit. 10, § 930 (Supp. 1991)

Term Used: Expunge

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or representative.

Who Has Access To Records: N.A.

Which Records Are Affected: All evidence of adjudication and indicia of arrest.

When Occurs: Anytime.

Cut-Off Age: 18. *See* tit. 10, § 930(b).

Conditions And Factors To Consider: Charges have been *nolle prosequied*, dismissed or dropped or charges have been disposed of through arbitration or otherwise without adjudication of delinquency - court's discretion.

Offenses Excluded: Adjudications involving second degree murder, first degree arson, and first degree burglary.

Florida

FLA. STAT. ANN. § 39.045 (West Supp. 1991)

Term Used: 1. Destroy

2. Seal (those that cannot be destroyed as need to be kept for personnel screening under § 402.3055(f))

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Destroy - court "may"

Seal - automatic

Who Has Access To Records: Persons specified in § 402.3055 (for screening requirements for personnel) have access to sealed records.

Which Records Are Affected: All official court records in the proceeding.

When Occurs: Age 19 (age 21 if subject is a serious or habitual delinquent) or five years from last entry, whichever is first. Also, three years after subject's death.

Cut-Off Age: 18. *See* § 39.01(7)(a) (Supp. 1991).

Conditions And Factors To Consider: 1. Cannot destroy certain

records of offenses specified in § 393.0655, as well as other sections. Destroying records of other offenses is discretionary.

2. Sealing is automatic for all records that are not destroyed.

Offenses Excluded: Cannot destroy (can only seal) - murder, manslaughter, aggravated assault, aggravated battery, kidnapping, arson, and sex crimes. *See* § 393.0655 for a specific list of excluded crimes.

Georgia

GA. CODE ANN. § 15-11-61 (Michie 1990)

Term Used: Seal

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: Subject and those the subject includes in petition.

Which Records Are Affected: All court, department and law enforcement records in the proceeding.

When Occurs: Two years from final discharge.

Cut-Off Age: 17. *See* § 15-11-2(a).

Conditions And Factors To Consider: Since discharge no convictions for a felony or misdemeanor involving moral turpitude or adjudicated delinquent and no such proceeding is pending. Also, rehabilitation has been achieved to the court's satisfaction.

Offenses Excluded: Juvenile traffic offenses. *See* § 15-11-2(6)(a).

Hawaii

HAWAII REV. STAT. § 712-1256 (1988)

Term Used: Expunge

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject.

Who Has Access To Records: N.A.

Which Records Are Affected: All official records, all recordation relating to arrest, trial and finding of guilt.

When Occurs: After discharge and dismissal.

Cut-Off Age: 20. *See* § 712-1256(1).

Conditions And Factors To Consider: Is first offense, subject pleads guilty or is found guilty, but proceedings are deferred. Must successfully complete probation before charges will be dismissed.

Offenses Excluded: All offenses except first offenses involving the promotion of a dangerous drug, a harmful drug or intoxicating compound. *See* § 712-1255.

Idaho

IDAHO CODE § 16-1816A (1979)

Term Used: Seal

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject.

Who Has Access To Records: Subject and those subject includes in petition.

Which Records Are Affected: All records of the case in the court's custody and any other agency or official.

When Occurs: First of five years from end of court's jurisdiction, age 18, or unconditional release from youth training center.

Cut-Off Age: 18.

Conditions And Factors To Consider: Since end of jurisdiction, no conviction for a felony or misdemeanor involving moral turpitude or a delinquent adjudication nor is any such proceeding pending. Subject rehabilitated to court's satisfaction.

Offenses Excluded: Traffic, watercraft and Fish & Game violations.

Illinois

ILL. REV. STAT. ch. 37, para. 801-9 (1989)

Term Used: Expunge

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Motion of subject.

Who Has Access To Records: N.A.

Which Records Are Affected: All law enforcement and juvenile court records.

When Occurs: Later of age 27 or 10 years from end of proceedings or end of commitment to the Department of Corrections.

Cut-Off Age: 17. *See* § 37-801-9(2).

Conditions And Factors To Consider: No convictions for any crime since 17th birthday.

Offenses Excluded: First degree murder. *See* § 37-801-9(2).

Indiana

IND. CODE ANN. § 31-6-8-2 (Burns 1987)

Term Used: Expunge (records either destroyed or given to subject)

Right To Say Never Happened: No.

Expungement Procedure: Motion of subject.

Who Has Access To Records: N.A. - records are either destroyed or given to subject.

Which Records Are Affected: Court and law enforcement records.

When Occurs: Anytime.

Cut-Off Age: 18. *See* § 31-6-4-1.

Conditions And Factors To Consider: Age, nature of offense, time since jurisdiction ended, whether or not person acquired a subsequent criminal record, and whether there was an informal adjustment or adjudication.

Offenses Excluded: Child is 16 and over and offense is: murder, kidnapping, rape, robbery with a deadly weapon or which causes bodily injury, dealing in a sawed-off shotgun, or traffic misdemeanors. *See* § 31-6-2-1(d) (Supp. 1989).

Iowa

IOWA CODE § 232.150 (1985)

Term Used: Seal

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: Subject and research participants if court deems proper.

Which Records Are Affected: Court, agency and law enforcement records.

When Occurs: Two years from final discharge.

Cut-Off Age: 18. *See* § 232.2(5) (1985).

Conditions And Factors To Consider: Since discharge, no conviction or delinquent adjudication for a felony or an aggravated or serious misdemeanor and no such proceeding is pending.

Offenses Excluded: Offenses which would be felonies or aggravated misdemeanors unless court decides that sealing would be in best interest of child and society. *See* § 232.150(1)(b). Traffic and Fish & Game violations. *See* § 232.8(1).

Kansas

KAN. STAT. ANN. § 38-1610 (Supp. 1990)

Term Used: Expunge (not actually destroyed)

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject, parent or next friend. No docket fee.

Who Has Access To Records: Court for sentencing in subsequent offenses. Statistical records; subject and those subject includes in petition.

Which Records Are Affected: Any records concerning a juvenile offender held by public offender and agencies.

When Occurs: Age 21 or two years from final discharge.

Cut-Off Age: 18. *See* § 38-1602(a).

Conditions And Factors To Consider: Since discharge, no felony or misdemeanor conviction except misdemeanor traffic offenses or adjudicated delinquent, and no such proceeding pending, and behavior of subject warrants expungement.

Offenses Excluded: 3rd felony offense of 16-17 year old. *See* § 38-1602(b)(3). Sex crimes with children under 16. *See* § 38-1610(b). Aggravated juvenile delinquent convictions. *See* § 21-3611. Traffic offenses by children over 14. *See* § 38-1602(a)(1). Fish & Game violations. *See* § 38-1602(a)(2).

Kentucky

KY. REV. STAT. ANN. § 610.330 (Michie 1990)

Term Used: Seal

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: Subject and those subject includes in petition.

Which Records Are Affected: Records in the custody of the court and any other agency, including law enforcement records.

When Occurs: Two years from end of jurisdiction or two years from unconditional release from commitment.

Cut-Off Age: 18. *See* § 610.010(1).

Conditions And Factors To Consider: Since end of jurisdiction or release from commitment, no conviction for a felony or adjudicated a public offender and no such proceeding is pending.

Offenses Excluded: Capital offenses: 14-17 years old and committed Class A or B felony; 16-17 years old and committed Class C or D felony with two prior felony offenses on record; 16-17 years old and committed motor vehicles offense. *See* § 635.020(2)-(3).

Louisiana

LA. CODE JUV. PROC. ANN. art. 124 & 125 (West Supp. 1991)

Term Used: Destruction

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Motion of subject.

Who Has Access To Records: N.A.

Which Records Are Affected: Records of court and other agencies including law enforcement, except arresting agency may preserve name and address of juvenile and facts of case for investigative purposes only. *See* art. 44:9(c)(2) (West Supp. 1990).

When Occurs: 1. Age 17 - if non-felony.
2. Later of age 21 or five years from judgment if felony offense.

Cut-Off Age: 17.

Conditions And Factors To Consider: Age 17 - no delinquent adjudications involving a felony. Age 21 - no conviction for a felony or misdemeanor involving a dangerous weapon since reaching age 17 - court "may" order, is discretionary.

Offenses Excluded: 1st degree and 2nd degree murder, manslaughter, rape, sexual battery, aggravated kidnapping and armed robbery. *See* art. 125(1) (West Supp. 1990).

Maine

ME. REV. STAT. ANN. tit. 15, § 3308(8) (Supp. 1990)

Term Used: Seal

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject.

Who Has Access To Records: Courts, criminal justice agencies, subject, and subject's designees.

Which Records Are Affected: All records relating to the juvenile crime.

When Occurs: At least three years since discharge.

Cut-Off Age: 18. *See* tit. 15, § 3003(14).

Conditions And Factors To Consider: No subsequent juvenile or adult convictions and no proceedings pending.

Offenses Excluded: None.

Maryland

MD. CTS. & JUD. PROC. CODE ANN. § 3-828(c) (1989)

Term Used: Seal

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: Division of Parole and Probation, Division of Corrections. Research participants, court's order good cause shown.

Which Records Are Affected: Court records.

When Occurs: Age 21. Discretionary prior to 21.

Cut-Off Age: 18. *See* § 3-801(d).

Conditions And Factors To Consider: Prior to age 21, court's discretion - "for good cause shown"; at age 21, mandatory - "court shall".

Offenses Excluded: None.

Massachusetts

MASS. ANN. LAWS ch. 276, § 100B (Law. Co-op. 1980)

Term Used: Seal

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Motion of subject to Commissioner of Probation.

Who Has Access To Records: Judge or probation officer in subsequent crime for sentencing.

Which Records Are Affected: Records for delinquency appearances and dispositions.

When Occurs: Three years after court appearance or disposition sought to be sealed.

Cut-Off Age: 17. *See* ch. 119, § 52 (Law. Co-op. 1975).

Conditions And Factors To Consider: Since appearance or disposition subject has not been adjudicated delinquent or convicted of a criminal offense in three years, except motor vehicle offenses under fifty dollars.

Offenses Excluded: None.

Michigan

MICH. CT. R. 5.925

Term Used: Expunge (destroys)

Right To Say Never Happened: Yes.

Expungement Procedure: Court's motion.

Who Has Access To Records: N.A.

Which Records Are Affected: Court's files and records pertaining to the offense.

When Occurs: Must expunge at 30; may do so earlier. Must expunge diversion records within 28 days after 17th birthday.

Cut-Off Age: 18.

Conditions And Factors To Consider: May expunge for good cause.

Offenses Excluded: Cannot expunge felony life offenses, criminal traffic violations, and reportable juvenile offenses. *See* 5.925(E)(3).

MICH. COMP. LAWS ANN. § 712A.18e (West Supp. 1991)

Term Used: Set aside (rescinds)

Right To Say Never Happened: Yes, with limited exceptions. *See* § 712A.18e(11).

Expungement Procedure: Subject petitions.

Who Has Access To Records: Courts, judicial agencies, law enforcement agencies, prosecuting attorney, attorney general or governor for limited statutory purposes.

Which Records Are Affected: Court records; copy of order sent to central records division of state police and to law enforcement agency which arrested the juvenile.

When Occurs: Later of age 24 or five years from disposition or completion of sentence.

Conditions And Factors To Consider: Court "may" set aside if adjudicated on only one juvenile offense and no subsequent felony convictions.

Offenses Excluded: Cannot set aside felony life offenses or criminal traffic violations.

Minnesota

MINN. STAT. ANN. § 242.31 (West Supp. 1991)

Term Used: Purges (set-aside/records sealed)

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: Courts in later criminal proceedings, if otherwise admissible.

Which Records Are Affected: All matters, files, papers, regarding arrest, indictment, trial, dismissal, conviction, appeal, and discharge.

When Occurs: Upon final discharge from commitment or discharge from probation.

Cut-Off Age: 18. *See* § 260.015(2) (West 1982).

Conditions And Factors To Consider: If committed, is the discretion of the Commissioner of Corrections. If probation, court has discretion.

Offenses Excluded: Juvenile delinquency adjudications.

Mississippi

MISS. CODE ANN. § 43-21-263 (1972)

Term Used: Seal

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Court may order or party to a youth court cause may apply.

Who Has Access To Records: Court's discretion.

Which Records Are Affected: Records involving children - youth court records, social records, agency records, and law enforcement records. *See* § 43-21-105(s).

When Occurs: Age 20.

Cut-Off Age: 18. *See* § 43-21-105(d).

Conditions And Factors To Consider: Discretionary - may also order unsealed.

Offenses Excluded: Offenses punishable by life in prison or death. *See* § 43-21-105(j).

Missouri

MO. REV. STAT. § 211.321 (Supp. 1990)

Term Used: Seal

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: Victim or victim's family cannot be prevented from receiving general information.

Which Records Are Affected: Official court file and peace officers' records.

When Occurs: Anytime after age 17 or, if jurisdiction continues past 17, on closing of case.

Cut-Off Age: 17. *See* § 211.021(2) (1986).

Conditions And Factors To Consider: If court finds it is in best interests of child.

Offenses Excluded: If 16, violations of traffic regulations which are not felonies. *See* § 211.031(2)(e).

Montana

MONT. CODE ANN. § 41-5-604 (1991)

Term Used: Seal

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Operation of law - "shall" be sealed.

Who Has Access To Records: Statute does not mention.

Which Records Are Affected: All youth court records and law enforcement records except fingerprints and photographs.

When Occurs: Age 18 or end of extended jurisdiction.

Cut-Off Age: 18. *See* § 41-5-103(1) (1991).

Offenses Excluded: Felonies and traffic violations. *See* § 41-5-604(5) (1991).

Nebraska

NEB. REV. STAT. §§ 43-2102, 2105 (1988)

Term Used: Set-aside ("nullifies adjudication")

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Any interested party may petition.

Who Has Access To Records: Any person if court orders upon good cause shown.

Which Records Are Affected: Court, law enforcement, agency, and county attorney records.

When Occurs: After satisfactory completion of probation, commitment, or a treatment program.

Cut-Off Age: 18.

Conditions And Factors To Consider: Must be consistent with public welfare and be in the best interests of the subject. May consider behavior after adjudication, response to treatment; whether it will de-

preciate the gravity of the offense, or promote disrespect for the law, and whether failure to set-aside will unduly burden the subject.

Offenses Excluded: None.

Nevada

NEV. REV. STAT. § 62.370 (1987)

Term Used: Seal

Right To Say Never Happened: Yes.

Expungement Procedure: Subject or probation officer petition.

Who Has Access To Records: Subject and those named in subject's petition; court for subsequent sentencing of convicted adult (the subject) who is under 21; agencies charged with medical or psychiatric care of subject.

Which Records Are Affected: All court records, records of probation officers, law enforcement, or any other agency.

When Occurs: Three years after termination of jurisdiction or automatic at age 24.

Cut-Off Age: 18. *See* § 62.020(2) (1987).

Conditions And Factors To Consider: Since end of jurisdiction, no conviction of a felony or misdemeanor involving moral turpitude, and court satisfied with rehabilitation.

Offenses Excluded: Murder, attempted murder, misdemeanor traffic offenses.

New Hampshire

N.H. REV. STAT. ANN. § 169-B:35 (1990)

Term Used: Seal

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Operation of law - "shall be sealed and placed in inactive file".

Which Records Are Affected: All court and institutional records, including police records.

When Occurs: Age 19.

Cut-Off Age: 18. *See* § 169-B:2(IV) (1990).

Conditions And Factors To Consider: Operation of law.

Offenses Excluded: None.

New Jersey

N.J. STAT. ANN. § 2C:52-4.1 (West 1982)

Term Used: Expunge

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: N.A.

Which Records Are Affected: Entire record of delinquency adjudication.

When Occurs: Five years after final discharge from legal custody or from entry regarding custody or supervision.

Cut-Off Age: 18. *See* § 2A:4A-22 (West 1982).

Conditions And Factors To Consider: Since discharge or entry, no subsequent criminal conviction or disorderly or petty disorderly person offense or adjudged a delinquent and no such proceeding is pending. Also, has never had adult conviction expunged. *See* § 2C:52-4.1(b).

Offenses Excluded: Criminal homicide (except death by auto), kidnapping, aggravated sexual assault, robbery, arson, perjury, false swearing, attempts or conspiracy to commit the above, and conviction pursuant to repealed statutes specified in § 2C:52-2(b).

New Mexico

N.M. STAT. ANN. § 32-1-45 (Michie 1989)

Term Used: Seal

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: Subject, or any clinic, hospital or agency that has the subject under care or treatment.

Which Records Are Affected: Court, probation services, law enforcement or any other agency in the case (includes both legal and social files).

When Occurs: Two years after final release or any entry involving custody or supervision.

Cut-Off Age: 18. *See* § 32-1-3(A).

Conditions And Factors To Consider: Since final release, has not been convicted of a felony or a misdemeanor involving moral turpitude and no such proceeding is pending. Also, court may set aside sealing order if subject is subsequently adjudicated delinquent or in need of supervision or convicted of a crime.

Offenses Excluded: None.

New York

N.Y. FAM. CT. ACT § 375.2 (McKinney 1983)

Term Used: Seal

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject.

Who Has Access To Records: No mention in statute.

Which Records Are Affected: "Appropriate records" - includes probation, law enforcement, court, and presentment agency records.

When Occurs: Anytime after age 16.

Cut-Off Age: 16. *See* § 301.2.1.

Conditions And Factors To Consider: Cannot expunge a "designated felony act". *See* § 301.2.8. Otherwise, court's discretion.

Offenses Excluded: 1st and 2nd degree murder, 1st degree kidnapping, 1st degree arson if committed between ages 13-15, rape, aggravated sexual abuse, as well as other crimes specified in § 301.2.8.

North Carolina

N.C. GEN. STAT. § 7A-676 (1990)

Term Used: Expungement

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject.

Who Has Access To Records: No mention in statute.

Which Records Are Affected: All adjudication records. Both court

and law enforcement records, references to arrests, complaints, referrals, juvenile petitions and orders.

When Occurs: 16.

Cut-Off Age: 16. *See* § 7A-676(a).

Conditions And Factors To Consider: The subject has not subsequently been adjudicated delinquent nor convicted as an adult for any felony or misdemeanor, other than traffic violations.

Offenses Excluded: None.

North Dakota

N.D. CENT. CODE § 27-20-54 (1991)

North Dakota has recently amended its statute on the destruction of juvenile records and as of the printing of this Volume the North Dakota Supreme Court had not yet promulgated rules relating to the expungement procedure nor when expungement occurs.

Term Used: Destroy

Right To Say Never Happened: Yes, upon final destruction.

Expungement Procedure: Statute does not mention.

Who Has Access To Records: N.A.

Which Records Are Affected: All court, law enforcement and agency records.

When Occurs: Statute does not mention.

Cut-Off Age: 18. *See* § 27-20-2(1)(a).

Conditions And Factors To Consider: Statute does not mention.

Offenses Excluded: Traffic offenses. *See* § 27-20-54.2.

Ohio

OHIO REV. CODE ANN. § 2151.358 (Anderson 1990)

Term Used: Seal

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: Subject and persons named in subject's petition.

Which Records Are Affected: All court records, index references to the case, and records kept by any governmental body or public office.

When Occurs: Two years after termination of any court order or unconditional discharge.

Cut-Off Age: 18. *See* § 2151.011(B)(1).

Conditions And Factors To Consider: The court must be satisfied that the child has been satisfactorily rehabilitated.

Offenses Excluded: Traffic offenses. *See* § 2151.021.

Oklahoma

OKLA. STAT. ANN. tit. 10, § 1506 (West Supp. 1992)

Term Used: Destroy

Right To Say Never Happened: Statute does not mention.

Expungement Procedure: Motion of subject, guardian, or court's motion.

Who Has Access To Records: N.A.

Which Records Are Affected: All court records, sheriff's records, including files, docket sheets, summons, warrants, and any other related papers.

When Occurs: Three years after the subject attains majority or three years after juvenile court jurisdiction ceases, whichever is later.

Cut-Off Age: 18. *See* § 1101.1.

Conditions And Factors To Consider: As long as time requirements are met, a court shall order destruction of records.

Offenses Excluded: If the child is age 16-17 and has committed crimes specified in § 1104.2(A). Such crimes include murder, kidnapping for extortion, armed robbery, first degree rape, burglary with explosives and first degree manslaughter as well as others. *See* § 1104.2(A).

Oregon

OR. REV. STAT. § 419.800.839 (1989)

Term Used: Expunction (removal and destruction). *See* § 419.800(2).

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject, court or juvenile department.

Who Has Access To Records: N.A.

Which Records Are Affected: Court, law enforcement and juvenile department records.

When Occurs: Two years after most recent termination of jurisdiction or, if subject was placed in a training school, three years.

Cut-Off Age: 18. *See* § 419.476(1).

Conditions And Factors To Consider: Since termination of jurisdiction, no convictions for felonies or Class A misdemeanors and no proceedings seeking criminal convictions or juvenile adjudications are pending.

Offenses Excluded: Offenses committed against children. These offenses include child abuse, rape (1st - 3rd degree), sodomy, or sexual penetration with an object. *See* § 419.800(4)(j).

Pennsylvania

18 PA. CONS. STAT. ANN. § 9123 (Supp. 1991)

Term Used: Expunge

Right To Say Never Happened: Statute does not mention.

Expungement Procedure: Motion of subject, parent or guardian, or court's motion.

Who Has Access To Records: N.A.

Which Records Are Affected: All juvenile delinquency records wherever kept or retained.

When Occurs: Five years after final discharge of jurisdiction. Court may also order expungement once the subject reaches age 21.

Cut-Off Age: 18. 42 PA. CONS. STAT. ANN. § 6302(1) (1982).

Conditions And Factors To Consider: Since discharge, juvenile has not been convicted of a felony, misdemeanor or adjudicated delinquent and no such proceeding is pending.

Offenses Excluded: Murder and summary offenses. *See* 42 PA. CONS. STAT. ANN. § 6302 (Supp. 1991).

Rhode Island

NO EXPUNGEMENT STATUTE

South Carolina

S.C. CODE ANN. § 20-7-1335 (Law. Co-op. Supp. 1990)

Term Used: Destroy

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject.

Who Has Access To Records: N.A.

Which Records Are Affected: All official records relating to the subject being taken into custody, charges filed, adjudication, disposition, including law enforcement, municipal, state and agency records.

When Occurs: Subject at least age 18 and has completed any dispositional sentence imposed.

Cut-Off Age: 17. *See* § 20-7-390.

Conditions And Factors To Consider: Granting order is discretionary. Court cannot grant unless subject has not been or is currently charged with any additional crime and has successfully completed any dispositional sentence.

Offenses Excluded: "Violent crimes" are excluded. Such offenses include murder (1st and 2nd degree), criminal sexual conduct, assault and battery with intent to kill, voluntary manslaughter, armed robbery, drug trafficking, first degree arson and burglary (1st and 2nd degree). *See* § 16-1-60.

South Dakota

S.D. CODIFIED LAWS ANN. § 26-7A-115 (Supp. 1991)

Term Used: Seal

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Motion of subject, parent of subject, or court's motion.

Who Has Access To Records: Subject, or court for other juvenile adjudications or criminal sentencing.

Which Records Are Affected: Court records and all such records of any agency or official.

When Occurs: Later of one year after unconditional release from court's jurisdiction or discharge from Department of Corrections.

Cut-Off Age: 18. *See* § 326-7A-1(6).

Conditions And Factors To Consider: Since release, subject has not been adjudicated a delinquent, no pending proceeding involving felony, sexual contact offense or misdemeanor involving moral turpitude. Also, subject has been rehabilitated to the satisfaction of court.

Offenses Excluded: Hunting, fishing, boating, park and traffic violations. *See* § 26-8C-2.

Tennessee

TENN. CODE ANN. § 37-1-155 (1991)

Term Used: Destroy

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Automatic - "shall be removed at age 18" (by operation of law).

Who Has Access To Records: Courts, counsel, officers of institution to whom child is committed, and law enforcement officers.

Which Records Are Affected: Only fingerprints are destroyed. Law enforcement records are subject to limited viewing.

When Occurs: 18.

Cut-Off Age: 18. *See* § 37-1-102(B)(4)(a).

Conditions And Factors To Consider: No criminal offense after reaching age 16.

Offenses Excluded: Those obtained on an alleged charge which would be a felony if committed by an adult.

Texas

TEX. FAM. CODE ANN. § 51.16 (West 1986 & Supp. 1991)

Term Used: 1. Seal
2. Destroy

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: Subject has access to sealed records.

Which Records Are Affected: All court, law enforcement, and agency records.

When Occurs: 1. Seal: Two years after final discharge.
2. Destroy: Seven years after 16th birthday.

Cut-Off Age: 17. *See* § 51-16(i)(1).

Conditions And Factors To Consider: 1. Seal: Since final discharge, subject has not been convicted of a felony or a misdemeanor involving moral turpitude or engaged in delinquent conduct and no such proceeding is pending. Also, a court finding that it is unlikely that subject will engage in further delinquent conduct or commit a felony or misdemeanor.

2. Destroy: No felony convictions.

Offenses Excluded: Traffic offenses. *See* § 51.03(a). Records concerning an adjudication of delinquency based on a violation of a felony can be neither sealed nor destroyed. *See* § 51.16(j).

Utah

UTAH CODE ANN. § 78-3a-56 (1987)

Term Used: Expunge (records sealed)

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject.

Who Has Access To Records: Subject.

Which Records Are Affected: All court and other agency records regarding the case.

When Occurs: One year after end of court jurisdiction or one year after unconditional release from commitment.

Cut-Off Age: 18. *See* § 78-3a-2(3).

Conditions And Factors To Consider: Since end of jurisdiction, no conviction for a felony or a misdemeanor involving moral turpitude and no such proceeding pending. Also, rehabilitation has been attained to the satisfaction of the court.

Offenses Excluded: Traffic laws and ordinances. *See* § 78-3a-16(1)(a).

Vermont

VT. STAT. ANN. tit. 33, § 665 (1987)

Term Used: Seal

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject or court's motion.

Who Has Access To Records: Subject and those persons named in subject's petition.

Which Records Are Affected: All court, law enforcement, and department records.

When Occurs: Two years after final discharge.

Cut-Off Age: 16. *See* tit. 33, § 632.

Conditions And Factors To Consider: Since discharge, no conviction for a felony or a misdemeanor involving moral turpitude or a delinquency adjudication and no such proceeding is pending. Also, subject has been rehabilitated to court's satisfaction.

Offenses Excluded: None.

Virginia

VA. CODE ANN. § 16.1-306 (Supp. 1991)

Term Used: 1. Destroy
2. Seal

Right To Say Never Happened: Yes (only upon destruction).

Expungement Procedure: 1. Destroy - on court's motion or motion of subject.
2. Seal - Court's motion.

Who Has Access To Records: Court for subsequent sentencing procedures; government agencies responsible for care or supervision; law enforcement officers upon petition to court; and parent, guardian or counsel upon court order have access to sealed records.

Which Records Are Affected: All court, law enforcement, and agency records.

When Occurs: 1. Destroy - if on court's motion, age 19 and five years after last hearing. If on subject's motion, ten years after last hearing.
2. Seal - age 19 and five years after hearing.Cut-Off Age: 18. *See* § 16.1-288(5).

Conditions And Factors To Consider: 1. Destroy - child must not have been found guilty of an offense, that if an adult, would be a felony offense. Subject may seek to destroy those records previously sealed and unable to be destroyed if ten years have elapsed. This decision is within the court's discretion.

2. Seal - all records that cannot be destroyed, court "shall" seal after five years.

Offenses Excluded: Cannot destroy any records if include a felony offense until ten years since last hearing.

Washington

WASH. REV. CODE § 13.50.050 (Supp. 1991)

Term Used: 1. Seal
2. Destroy

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject.

Who Has Access To Records: Court, subject, and the victim or victim's family for purposes of identifying the subject and the circumstances of the crime.

Which Records Are Affected: Court records, including records kept by any agency, except fingerprints held by Washington State Patrol.

When Occurs: 1. Seal - the later of two years after final discharge or two years from entry of a court relating to the offense.

2. Destroy - age 23.

Cut-Off Age: 18. *See* § 13.40.020.

Conditions And Factors To Consider: 1. Seal - no proceeding is pending seeking conviction for a juvenile or criminal offense, and no proceeding is pending seeking formation of a diversion agreement.

2. Destroy - subject has not subsequently been convicted of a felony or a serious offense, and no such proceeding is pending.

Offenses Excluded: None.

West Virginia

W. VA. CODE § 49-5-17

Term Used: Expunge (sealed)

Right To Say Never Happened: Yes.

Expungement Procedure: Automatic - by operation of law.

Who Has Access To Records: Other juvenile court proceedings; criminal proceedings; the subject; and institutions to which the child is committed.

Which Records Are Affected: Court, law enforcement, and all other records pertaining to the proceedings.

When Occurs: The later of age 19 or one year after personal or juvenile jurisdiction has terminated.

Cut-Off Age: 18. *See* § 49-5-2.

Conditions And Factors To Consider: Automatic - by operation of law.

Offenses Excluded: Records of offenses for which the subject was convicted under the criminal jurisdiction of the court; treason, murder, armed robbery, kidnapping, 1st degree arson, and 1st degree sexual assault. *See* § 49-5-17(f).

Wisconsin

WIS. STAT. ANN. § 973.015 (1985)

Term Used: Expunge

Right To Say Never Happened: No mention in statute.

Expungement Procedure: Court's motion.

Who Has Access To Records: N.A.

Which Records Are Affected: Statute refers to the expungement of "the record".

When Occurs: Upon successful completion of the sentence.

Cut-Off Age: 21.

Conditions And Factors To Consider: Successful completion of the sentence.

Offenses Excluded: All offenses excluded except misdemeanors for which the maximum penalty is one year or less in the county jail.

Wyoming

WYO. STAT. § 14-6-241 (1986)

Term Used: Expunge

Right To Say Never Happened: Yes.

Expungement Procedure: Motion of subject.

Who Has Access To Records: N.A.

Which Records Are Affected: Court records or any records in the custody of an agency or official.

When Occurs: Age 19.

Cut-Off Age: 19. *See* §§ 14-6-201 & 8-1-102.

Conditions And Factors To Consider: No felony conviction since adjudication, no such proceeding is pending and the petitioner has been rehabilitated to the satisfaction of the court.

Offenses Excluded: None.

