1981

Expunging Criminal Records: Concealment and Dishonesty in an Open Society

Marc A. Franklin
Diane Johnsen

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol9/iss3/1
Convicts face problems that can be overwhelming when they try to settle into a normal life after their release from prison. They may seek jobs, credit, and housing; they may want, in all ways, to live as if the convictions had never occurred. But once outside prison, convicts find their futures constricted: Official records tell prospective employers, creditors, and landlords of their criminal backgrounds, and the former prisoners may as a result be refused the essentials of a “normal” life. States generally did
little to ease these problems until the 1960's and 1970's, however, when they utilized expungement statutes to try to erase the paper trail that follows convicts away from prison. This Article will discuss the wisdom of that legislation in light of the high cost to the public of expungement in both legal and moral terms.

The analysis will focus on adults who have been convicted and incarcerated. A convict's problem lies in resolving his or her relationship with a public that quite appropriately considers him or her guilty. Arrestees will be excluded since, although the public may unreasonably consider an arrestee to be guilty, arrests lack the implications and the public visibility of convictions. Similarly, criminals whose sentences are suspended or whose penalties are merely fines will be excluded because the nonimprisoned criminal is not isolated from society for a period of time and thus does not face the problems of reentry into society after imprisonment because life may be prejudiced thereby. The stain on his reputation may at any time threaten his social standing or affect his job opportunities, for example.


3. CAL. PENAL CODE § 1203.4 (West 1972), a version of which was first enacted in 1909, 1909 Cal. Stats. ch. 232, § 1 at 357, is by far the oldest state statute treating the problem of expunging adult convicts' criminal records. See Note, Expungement in California: Legislative Neglect and Judicial Abuse of the Statutory Mitigation of Felony Convictions, 12 U.S.F.L. REV. 155, 161 n.33 (1977). For many years it was the only such statute among the states. As written it allows felons who meet its eligibility requirements to petition for relief from all penalties and disabilities as a result of their convictions; however, as construed and amended, its effect is limited to restoration of civil liberties. Booth, The Expungement Myth, 38 L.A.B. BULL. 161, 162 (1963); Note, supra, at 171.

4. This Article advocates no specific criminal-justice or correctional philosophy. Our concern instead is with governmental actions regarding convicted adults after their release from incarceration. Therefore, various legal treatments of convicts will be analyzed in relation to their underlying correctional philosophies; however, we will not express our view of which particular philosophy is superior.

5. In addition, there are arguably stronger reasons for governmental assistance to those who may have been improperly or erroneously arrested and charged with a crime than to those who have been properly convicted of one.

6. Some states have set up special procedures for treatment of some minor criminals, typically first offenders or those accused of particular drug offenses. E.g., LA. CODE CRIM. PRO. ANN. art. 893 (West Supp. 1981); MD. CRIM. CODE ANN. § 27-292; MASS. GEN. LAWS ANN. ch. 94C, § 34 (West Supp. 1981). Such criminal proceedings ("adjudications") conclude with findings that, by statute, technically are not convictions. They are suspended sentences and/or periods of probation. Any record of the proceeding may be "erased" upon successful completion of the probationary
there is no imprisonment there is less likelihood that the public will learn of the conviction, and, if it does, less stigma is attached to it.\footnote{7} Finally, this Article will not address the problems of juvenile offenders. Unlike proceedings against adults, juvenile proceedings stress rehabilitation\footnote{8} rather than punishment and removal from society, and all details, including the identity of the offenders, have traditionally been kept secret usually even when juveniles are accused of major crimes.\footnote{9} Thus the factors involved in an analysis of the treatment of juveniles are necessarily different from those analyzed in determining the proper postimprisonment treatment of convicted adults.

In the first section of this Article, we identify the difficulties faced by a convict upon release from prison, outline four rationales for government intervention on his behalf, and describe how government in fact has acted. In the second section, we argue that the expungement route most often chosen by states is ineffective and too costly in both moral and legal terms. Expungement statutes exact a high moral toll by fostering dishonesty in government officials and in convicts themselves, while at the same time they place burdens on the right of access to judicial records and first amendment period. In any event, even without such erasure, the stigma of a real conviction is absent. For that reason, persons tried in such proceedings are excluded from our analysis.

\footnote{7} But see Argersinger v. Hamlin, 407 U.S. 25, 48 (1972) (Powell, J., concurring in the result) (stressing consequences of conviction not punishable by imprisonment).

\footnote{8} The model for special legislative treatment of adult conviction records during the past several years has been derived from the manner in which juvenile proceedings have long been treated. Although this Article will not address problems of juvenile offenders, a brief discussion of the establishment of the juvenile court in this country is necessary. The first specialized juvenile court was established in Cook County, Ill., in 1899, but even before that there had been efforts in both the United States and England to modify the application of adult criminal-court penalties and procedures to children. E. Eldefonso, Law Enforcement and the Youthful Offender 148 (3d ed. 1978). Within 25 years after the Illinois juvenile court was formed, every state but two had authorized the establishment of juvenile courts. Id. at 149. Guided by the doctrine of parens patriae, the goal of these courts was protection of the child, through rehabilitation, rather than punishment. Id. at 147-49; see In re Gault, 387 U.S. 1, 14-17 (1967); Gough, supra note 2, at 169.

rights of expression of the press and public. In the last section we briefly outline several other less costly, and probably equally effective, ways in which government could aid convicts upon their release. We conclude that lawmakers should explicitly consider these alternatives before they think seriously about the expungement approach.

THE PROBLEM, AND A POPULAR "SOLUTION"

Confinement by a Criminal Record

A convict who returns to society may find that his conviction prevents him from obtaining employment,10 housing,11 or credit.12 Absent preventive legislation, job application forms may ask whether the applicant has been convicted of any crime. Forms required by landlords and lending agencies may do the same. Even if the employer or lender does not specifically ask, resumes or employment histories on application forms reveal a gap that may raise questions about the period of time during which the convict was incarcerated.13 When an employer or lender thus becomes aware of a convict's record, he or she may quickly exclude the convict

10. United States ex rel. Caminito v. Murphy, 222 F.2d 698, 703 (2d Cir. 1955). "It is high time someone asked a question: What's wrong with hiring ex-cons? If someone doesn't hire them, they won't remain ex-cons indefinitely. . . . Where is he supposed to find employment? In a dark doorway, with a blackjack. . . . If the aim is to drive all ex-cons back to crime and prison, the surest method of accomplishing it is to shut off opportunities for an honest living." Id. at 703 n.13 (quoting Smith, Views of Sport, N.Y. Herald Tribune, Nov. 4, 1953, at 29, col. 5).

A criminal record often makes it impossible to join a labor union or to be bonded. Note, supra note 3, at 160. One study showed that "seventy-five percent of surveyed employment agencies refused to handle any applicant with a criminal record." Id. (citing PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967)). Government itself may indirectly discriminate against convicts by denying, suspending, or revoking their professional or occupational licenses on the basis of a criminal record. For example, in California, approximately two-thirds of the 60 available professional licenses may be revoked or suspended because the holder was convicted of either a felony or a crime of moral turpitude. Id.

11. See Note, supra note 3, at 161.

12. A conviction may present other difficulties, such as problems in obtaining automobile liability coverage or an operator's license. Gough, supra note 2, at 158-59.

from consideration for the job or loan. If the convict lies by submitting a fraudulent job resume and is hired, it may later provide the basis for firing him or rescinding his contract of employment.

When his community is small or his crime notorious, a convict may suffer a considerable amount of public exposure, even among those who otherwise would not usually seek out information about his criminal record. A criminal trial and sentencing, of course, are generally open to the public, and some cases naturally draw more attention than others, usually depending on the identity of the defendant, the nature of his community, and the nature of his crime. If public attention is drawn to the accused at the time of trial and sentencing, he might well be shunned by the general public if he later returns upon his release to his old neighborhood or city.

Public knowledge about a criminal record may also arise as a result of publication by the media of articles about the crime and the criminal after his release from prison. His release itself may be the occasion for such an article; a parole hearing is another; a story detailing the recovery or unrelated death of his victim may be a third.

**Justifications for Intervention**

Possible federal and state government intervention to prevent direct or indirect economic and social discrimination against the convict may be justified by one or a combination of rationales. First, the government may be concerned primarily with preventing recidivism for the public good. It may be thought that if the convict cannot return smoothly to society, he or she will return to crime instead. Under this rationale, a concern for public safety is the paramount justification for protecting the convict against acts of discrimination by the public.

A second possible justification for government action may be concern with preventing the convict's return to crime, not for the

---


17. *See Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (en banc).

sake of potential victims, but for the convict’s own sake. This view maintains that whether or not criminals are in fact rehabilitated while inside prison, their prospects of staying clear of crime after their release are much reduced if the public may hold their prior misconduct against them then. Although concern for the convict is the focus of this rationale, society clearly benefits as well.

A third justification for government intervention lies in the belief that continued punishment of the released convict by public opinion is unfair. Proponents of this view argue that by releasing a convict from prison, the state certifies that he or she is once again “equal” to other members of society. State intervention is seen, therefore, as a means of eliminating this second round of punishment administered to persons the state officially considers to have paid adequately for their crimes.

A final justification for government intervention neither attempts directly to aid rehabilitation after incarceration nor assumes that rehabilitation results from incarceration itself. Rather, intervention is justified as a reward for individual convicts who, whether through their incarceration, their own efforts after their release, or the efforts of others, show that they have actually become rehabilitated. Thus, intervention under such a rationale

19. Id.
20. See id. at 149.
21. See NATIONAL PROBATION AND PAROLE ASS’N, NATIONAL CONFERENCE ON PAROLE: PAROLE IN PRINCIPLE AND PRACTICE (1957) (arguing Constitution requires no discrimination against convicts); Comment, Criminal Records of Arrest and Conviction: Expungement from the General Public Access, 3 CALIF. W.L. REV. 121, 124, 134 (1967). Although total rehabilitation of convicts while they are in prison may be a goal of many state correctional systems, it is doubtful if any would actually certify that they release only truly reformed convicts. States may be under no duty to do so, see note 184 infra, but proponents of this third possible justification for intervention may nevertheless argue that convicts should be presumed by the fact of their release to be rehabilitated. Comment, supra, at 124.
22. Comment, supra note 21, at 128. Rehabilitation may be presumed upon a showing of certain facts. In some states, if the convict shows that during a specified number of years since his release, he has not been convicted of another crime and has remained free of further criminal charges, the court must grant him an expungement. See, e.g., COLO. REV. STAT. § 24-72-308(1.1) (Supp. 1980); cf. 18 PA. CONS. STAT. ANN. § 9122(b) (Purdon Supp. 1980) (unusual example of conditions precedent must be demonstrated, as expungement will be allowed where convict reaches age 70 and has not been involved with criminal matters for 10 years, or where convict has been dead for 3 years); S.D. COMP. LAWS ANN. § 23-6-8.1 (1979) (expungement allowed where convict reaches age 80). Some expungement proponents support such statutes as a way of clearing a convict's record before he goes to meet his maker. See, e.g., Kogon & Loughery, supra note 13, at 381.
may indirectly aid rehabilitation by encouraging individual convicts to reform.23 The validity of any or all of these justifications for aiding convicts to escape their records will not be argued here. The important point is that each justification necessarily has its own clock. When government acts out of concern for any of the first three rationales, or a combination of them, to be effective it should act no later than immediately upon the convict’s release from prison.

If the purpose of intervention is to prevent recidivism, for example, it is apparent that the action must take effect no later than immediately upon release, for it is immediately upon release that a convict, presented with difficulties in finding a job, housing, and credit, is most likely to return to crime. Action to prevent that return, therefore, must occur immediately. If the state’s purpose is to aid the rehabilitation of a released convict for his own sake, again that help is most appropriate when it is most needed, that is, no later than his release. Similarly, if intervention is sought because it is thought that a released convict is already rehabilitated and therefore should not be subject to discrimination, intervention would be most appropriate upon the occasion of that rehabilitation; that is, upon release. Moreover, under the first two rationales, intervention could be justified as early as the date of the original indictment or conviction, if the governmental decisionmakers should prefer to so anticipate its value.24 But action taken years after the convict’s release from prison will not effectively serve any of the first three concerns.

It is only for the fourth purpose, rewarding those who have demonstrated rehabilitation after release, that intervention logically would occur subsequent to the convict’s release. Here, because intervention acknowledges the achievement of rehabilitation, it is appropriately awarded only after the convict has demonstrated that he is in fact rehabilitated.

The States’ Choice: Expungement Statutes

Although the philosophical goals of intervention may vary, states that have acted to aid convicts overcome their pasts have

23. But see notes 70-76 infra and accompanying text (questioning value of that incentive).
24. The Constitution, however, places some limits on the degree to which the criminal process prior to conviction may be concealed from the public. See Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814 (1980); Gannett Co. v. DePasquale, 443 U.S. 368 (1979).
chosen strikingly similar means. The most commonly used approach may be generically termed expungement, a process which seeks to make information about a convict's past physically unavailable to anyone else.

Procedures for erasing or setting aside convictions of juvenile or youthful offenders had existed for some time, but the broad idea of expunging adult convicts' records was apparently launched in the late 1950's by commentators and professional groups advocating rehabilitation as an integral part of correctional philosophy. The 1956 National Conference on Parole is generally credited with originating the concept of adult expungement. Concerned with the penalties that public opinion imposed on a released convict, it recommended that judges be given the discretion to expunge, at any time after the convict's release from prison, any

25. Several states restore the civil rights of convicts upon their release from incarceration. See, e.g., KAN. STAT. § 22-3722 (1974). Our concern, however, is not generally with a convict's civil rights, such as the right to vote, or to serve on a jury, but with the rights of the convict in his unofficial relationships with the general public. For a discussion concerning states that have enacted schemes other than expungement to aid convicts in the process, see notes 182-189 infra and accompanying text.

26. "Expunge" means "[t]o destroy; blot out; [or] obliterate . . . . The act of physically destroying information—including criminal records—in files, computers, or other depositories." BLACK'S LAW DICTIONARY, supra note 1, at 522 (5th ed. 1979). The term is variously used by commentators and statute drafters, however, to cover sealing, purging, setting aside, and/or segregating records. See, e.g., Gough, supra note 2, at 149-50; Kogon & Loughery, supra note 13, at 379-80. Expungement, as used in this Article, refers in general to statutory processes that seek in some way to hide information in conviction records from the public's eye.

27. See, e.g., Federal Youth Corrections Act, ch. 1115, § 2, 64 Stat. 1089 (1950) (current version at 18 U.S.C. § 5021 (1976)). The 1950 Federal Youth Corrections Act, as well as several state statutes dealing with juveniles and/or youths, allowed records of proceedings that may have been private or only semi-public from the beginning to be concealed when the offender was released and/or reached a certain age. Shielding the youth's record from public view was thought essential if he was to be able to start life anew after the offense. See Federal Youth Corrections Act, 18 U.S.C. § 5021 (1976) (authorizing youth offenders' convictions to be "set aside"). "The underlying theory of the [Federal Youth Corrections Act] is to substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the more punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation." H.R. REP. No. 2979, 81st Cong., 2d Sess., reprinted in [1950] U.S. CODE CONG. & AD. NEWS 3983, 3985; see United States v. Freyer, 545 F.2d 11, 13 (6th Cir. 1976); Morera v. United States Immigration and Naturalization Serv., 462 F.2d 1030, 1032 (1st Cir. 1972) (clear purpose of Federal Youth Corrections Act is to relieve defendant not only of usual disabilities of criminal conviction, but also to give him second chance free of record tainted by such conviction).

28. See Comment, supra note 21, at 124 n.22.
criminal record "through an order by which the individual shall be deemed not to have been convicted."\textsuperscript{29}

In 1962, the National Council on Crime and Delinquency urged that states aid the rehabilitation of released offenders by passing a model act "to annul a record of conviction for certain purposes."\textsuperscript{30} It would have given judges discretion to issue "an order annulling, canceling, and rescinding the record of conviction and disposition, when [after the convict's release] in the opinion of the court the order would assist in rehabilitation and be consistent with the public welfare."\textsuperscript{31} The convict's civil rights would be restored, and employers and others could question him only about convictions that had not been expunged. However, the pristine nature of the rehabilitative concept had already begun to erode. Although the proposed act stated that an expungement order would be issued when it "would assist in rehabilitation," a comment implied that a convict would have to demonstrate he had already achieved a certain degree of rehabilitation by himself before expungement would be permitted. In addition, evidence of the annulled conviction could be introduced when a convict was sentenced for a subsequent crime.\textsuperscript{32}

The Model Penal Code was even more cautious in its approach. It suggested allowing vacation of convictions, or orders to the effect that previous judgments would not in certain cases constitute convictions for the purpose of any disqualification or disability imposed by law.\textsuperscript{33} The procedure would be allowed, for example, when the convict "has fully satisfied the sentence and has since led a law-abiding life for at least [five] years."\textsuperscript{34} But the provision also specified that the vacated conviction could be introduced as evidence under certain circumstances and that the vacating would "not justify a defendant in stating that he has not been convicted of a crime, unless he also calls attention to the order" of vacation.\textsuperscript{35}

\textsuperscript{29} National Probation and Parole Ass'n, supra note 21, at 13.


\textsuperscript{31} Id. "It is assumed that before issuing the order the court would make any necessary investigation, typically through the resources of the probation department available to it." Id.

\textsuperscript{32} See id.

\textsuperscript{33} Model Penal Code §§ 301.5, 306.6 (Proposed Official Draft 1962).

\textsuperscript{34} Id. § 306.6(2)(b) (brackets in original).

\textsuperscript{35} Id. § 306.6(3)(f).
Thus, the original goal of aiding rehabilitation by preventing public knowledge of an offender's record was implemented in less thoroughgoing proposals. The record would be shielded only in certain cases (and then after an extended period of time) and would still be available for disclosure upon the occurrence of certain events.

In practice today, expungement procedures vary, but in general, conviction and related criminal records concerning the convict are collected, sealed, segregated, open only to limited inspection, obliterated, or actually physically destroyed. Expungement is typically performed at the request of the convict after an open hearing and, without exception, occurs no earlier than several years after release from incarceration. The original pretrial hearing and trial remain open to the public and the press; it is only several years after that process is completed that the records are closed.

The expungement statutes enacted in many states have similar provisions. For example, some states bolster the physical expungement of records with statutory provisions that require officials to lie in response to outsiders' questions about the existence of criminal records that have been properly expunged. Second,

36. See generally Kogon & Loughery, supra note 13, at 390.
40. See, e.g., MD. CRIM. LAW CODE ANN. § 735 (Supp. 1980).
42. See COLO. REV. STAT. § 24-72-308(b) (Supp. 1980). In general, an expungement order is granted by the trial court upon petition by the convict or another person. It is customary for the court to give notice of the petition to the prosecutor and corrections and law-enforcement officials, who may have the opportunity to present evidence at a hearing on the request. Id. Some statutes give the court wide discretion in granting the order by providing that it shall be granted only if the judge finds the convict to be rehabilitated. See, e.g., MD. CRIM. LAW CODE ANN. § 735 (Supp. 1980). In other states, expungement appears to be nearly automatic if the convict can show he has not been arrested, indicted, or convicted for a specific number of years following his release from prison and is not currently under investigation for any other offense. See, e.g., COLO. REV. STAT. § 24-72-308(b) (Supp. 1980); MONT. REV. CODES ANN. § 44-5-301(1)(b) (1979). But see note 73 infra. Typically, the court that issues the expungement order will send copies of it to all officials who were notified of the hearing, and all state law-enforcement agencies that the convict claims have his record on file. See, e.g., COLO. REV. STAT. § 24-72-308(b)(h) (Supp. 1980).
43. See, e.g., KAN. STAT. § 21-4619(h) (Supp. 1980) (excepting responses to
several states allow convicts with expunged records to deny their existence to others. Thus, in some states a court clerk must respond untruthfully to an inquiry from a prospective employer or other outsider about the existence of a criminal record that has been expunged; in others, the criminal subject of the records himself may respond untruthfully to the same questions if he so chooses.

A third common aspect of the standard expungement statute is a provision that prohibits an employer from inquiring about any criminal conviction that has been properly expunged. That may be accomplished by barring any questions on employment applications about criminality other than the question, "[h]ave you ever been arrested for or convicted of a crime that has not been annulled by a court?" Some states attempt to achieve the same result by prohibiting employers from asking any questions regarding criminal records, or perhaps, from asking questions about records of criminal convictions that may not be directly applicable to the position sought by the convict.

A few states have sought to minimize the effect of a convict’s record by other means, but the statutory approach outlined here contains the elements most often used in varying combinations by the states. This approach is analyzed in the next section.

44. See, e.g., KAN. STAT. § 21-4619(g) (Supp. 1980); MASS. GEN. LAWS ANN. ch. 276, § 100A (West Supp. 1981) (excepting answers to questions from appointing authority); N.J. STAT. ANN. § 2C:52-15 (West 1979). "In response to requests for information or records of the person who was . . . convicted, all noticed officers, departments and agencies shall reply, with respect to the . . . conviction or related proceedings which are the subject of the order, that there is no record information." Id.

45. Certain restrictions may be placed on lies by convicts to cover up their records. See KAN. STAT. § 21-4619(g) (Supp. 1980) (allowing convict to respond untruthfully about his record anywhere but on certain firearm-registration forms and on applications for security-related jobs).

46. See, e.g., MASS. GEN. LAWS ANN. ch. 276, § 100A (West Supp. 1981); id. ch. 151B, § 4; NEV. REV. STAT. § 179.285 (1979) (if court orders records sealed all proceedings recounted in record are deemed never to have occurred, and subject of record may properly answer accordingly to any inquiry concerning conviction and events and proceedings relating to it); UTAH CODE ANN. § 77-18-2(3) (Supp. 1980).


49. See notes 182-189 infra and accompanying text.
PROBLEMS WITH EXPUNGEMENT AS PRACTICED

Sporadic Effectiveness

The effectiveness of the typical expungement model described above will now be tested against the purposes for which the government may have adopted it. Recall that the four rationales for expungement legislation (reducing recidivism, aiding rehabilitation for the convict's own sake, eliminating discrimination against presumptively rehabilitated convicts, and rewarding convicts who prove they have rehabilitated themselves) may be separated for implementation purposes into two groups. A state that seeks to achieve any of the first three objectives would find it appropriate to expunge no later than upon the convict's release from prison. One that favors expungement as a reward for proven rehabilitation, on the other hand, would seal or destroy records only after passage of enough time to ensure that rehabilitation has indeed taken place.

We have seen that, as practiced, expungement renders criminal records unavailable only several years after the convict is released from incarceration. That approach is totally ineffective in achieving any of the first three legislative goals, because a convict's records are shielded from the public too late to help her find the initial job that will prevent her from returning to crime and too late to eliminate the other unequal treatment by prospective creditors and landlords she may face upon release.50

A state seeking to achieve any of the first three legislative goals may try to correct the deficiency by eliminating the time gap between the convict's release and the time when her record is suppressed. Conceivably, it could choose to make expungement thereby available to all convicts immediately upon their release, or it could make the process instantly effective for only a few former prisoners; for example, only those convicted of certain crimes, or those who have particularly good prison-behavior records. But even if that time gap were somehow eliminated, expungement provisions would still fail to achieve legislative goals of reducing recidivism, aiding the convict's rehabilitation, or eliminating discrimination against released prisoners who are presumed to be rehabilitated.51 Information about the offender's conviction would remain public through official records that are left untouched52 by

50. See Kogon & Loughery, supra note 13, at 386.
51. Id. at 383-85.
52. Id. at 384.
the statutes and through unofficial sources such as media accounts and the memories of reporters and others who at the time witnessed or otherwise knew of the crime, the trial, or the sentencing. Thus, even expunging conviction records immediately upon a convict's release from prison will not erase all public knowledge of her conviction.

As written, for example, the statutes expressly allow conviction information to be disseminated to certain persons under specified conditions. Thus, those conviction records are not shut off forever from the public. Some states allow access only to certain law-enforcement officials, who arguably will be the source of "leaks" to others about the convict's record. Other statutes, however, allow dissemination of expunged records at the discretion of a judge. The criminal-record information may be abused by the judge or by persons he allows to see the expunged records.

Where statutes secure the convict's records more thoroughly, questions remain of exactly which records will be expunged. Certain states carefully identify the records to be sealed or destroyed; others state in general form only that the convict's "[criminal] records" are to be shielded from public view. Even where states specify in detail the records to be expunged, gaps remain. Entries on police blotters, for example, are not erased or sealed, neither are entries on appellate-court dockets outside the jurisdiction of the expunging entity.

53. Convicts who realize that their records will not be effectively shielded by present expungement processes may decide against returning to their old community after they are released from prison. Like released prisoners in states without expungement statutes, they may move to a new state, perhaps returning home only after sufficient time has passed for their neighbors and acquaintances to have forgotten, or at least forgiven, them. See Gough, supra note 2, at 161.


56. See generally Kogon & Loughery, supra note 13.


59. Kogon & Loughery, supra note 13, at 384.

60. A state trial court issuing an expungement order, for example, would lack authority to order a federal appeals court to expunge records dealing with the convict from its files. A state statute allowing or directing a court to expunge criminal records would, however, seem to authorize the trial court to order expungement of higher state court records. A state expungement statute, moreover, allows the sealing only of convictions under state law. Cf. 18 U.S.C. § 5021 (1976) (allowing certain youthful offender's convictions under federal law to be set aside); 21 U.S.C. § 844(b)(2) (1976) (similar procedure for certain offenders of federal drug laws).
Other official sources of information about the expunged conviction remain uncovered by the typical expungement statute. It is common practice, for example, for law-enforcement agencies of different states to share among themselves and with the federal government identification and other information about criminals.61 Even where a court orders the expungement of data within the files of all of its own state law-enforcement agencies, it is powerless to do so where the information has been sent outside the state.62

Furthermore, even within the state official sources of information about the conviction remain. State correction or parole officials, for example, are rarely required by an expungement order to refuse to disclose information about a convict. Even where they are so required, that duty may be informally ignored by officials who have close relationships with inquirers, such as hiring personnel of large businesses.63

Even if the time between release and expungement were eliminated and all official sources of information about the conviction suppressed, a problem would confront a convict who must prepare a resume or job application listing his employment history over the previous several years. If the applicant is honest, a period of years corresponding to his incarceration will show no employment. How is he to respond to an employer who reasonably inquires about the gap? (The inquiry is all the more to be expected when the job is sought immediately upon release, so that the unemployed period immediately precedes the time of application.)

Prospective employers may logically assume that the gap represents time spent in prison, even in states that prohibit employers from asking applicants directly whether they have served a prison term or have been convicted of a crime that has not been expunged. Even employers who are so constrained may nevertheless discover that the applicant is in fact a convict and may discriminate against him because of it.64 Since authorization for the convict to

61. See Gough, supra note 2, at 188.
62. See Booth, supra note 3, at 163 n.16; cf. KAN. STAT. § 21-4619(e) (Supp. 1980) (requiring expunging court to send copy of expungement order to F.B.I. and any other agency that has been provided a copy of original conviction record); Nev. REV. STAT. § 179.245(3) (1979) (expunging court may “order” F.B.I. and certain other law-enforcement agencies to return copies of expunged records).
63. See Kogon & Loughery, supra note 13, at 384-85; Comment, supra note 21, at 132. Reporters may develop similar relationships with officials to whom they talk regularly.
64. See Gough, supra note 2, at 189 n.165.
lie about his background apparently extends only to direct inquiries to and responses by the convict, it may not help him fill in a sparse employment record.65

In addition to these ways in which the public may learn about an expunged conviction, the world of unofficial sources of information also remains. Witnesses to the crime who testified in court, attorneys, officers of the court,66 cellmates of the convict while he was in prison, and reporters who covered the trial and subsequent appeals all may recall information about the conviction and tell it to others.67 Unofficial written records also remain, in files in newspaper libraries,68 in notes reporters may have kept about the conviction, and in school and other public libraries that retain newspaper and magazine issues that contained the originally published articles about events leading to the conviction that has now been expunged.

A fully effective expungement statute would shut off these unofficial sources by closing the entire criminal process from arrest and arraignment through trial and sentencing and by prohibiting speech or publication by those who somehow manage to obtain information about the case. But because of the sixth amendment and Richmond Newspapers, Inc. v. Virginia,69 criminal trials may not

65. See Kogon & Loughery, supra note 13, at 385. Statutes allowing a convict to respond falsely to a potential employer about his background leave open exactly the degree to which he may lie. May he list or make up references for nonexistent previous employers? Does such a statute allow lying by the convict’s friends, who agree to write letters or references for him as his previous “employers”?

66. See United States v. Klusman, 607 F.2d 1331 (10th Cir. 1979) (trial judge did not have to erase from his memory in sentencing defendant earlier conviction that had been set aside). Some states have attempted to prohibit these persons from disclosing this information. See, e.g., N.H. REV. STAT. ANN. § 651.5(X.) (Anderson 1974) (prohibiting “a person” from disclosing during life of convict existence of his annulled conviction); N.J. STAT. ANN. § 2C:52-30 (West 1979) (prohibiting “any person” from revealing existence of expunged proceeding, with knowledge that it has been expunged, except for disclosure for certain law-enforcement purposes). These provisions would seem to prohibit the press and members of the public from disclosing information about an expunged conviction. Such prohibitions on speech and press raise serious first amendment questions. See notes 121-175 infra and accompanying text.

67. Some states have attempted to prohibit these persons from disclosing this information. See, e.g., N.H. REV. STAT. ANN. § 651.5(X.) (Anderson 1974) (prohibiting “a person” from disclosing during life of convict existence of his annulled conviction); N.J. STAT. ANN. § 2C:52-30 (West 1979) (prohibiting “any person” from revealing existence of expunged proceeding, with knowledge that it has been expunged, except for disclosure for certain law-enforcement purposes). These provisions would seem to prohibit the press and members of the public from disclosing information about an expunged conviction. Such prohibitions on speech and press raise serious first amendment questions. See notes 121-175 infra and accompanying text.

68. Libraries maintained by newspapers and magazines can be extensive. The Time, Inc., library claims to be “the largest facility of its kind” in the United States, with 25 librarians and 63 clerks, newspaper markers, and indexers. It retains far more than the precise material published in Time itself, with about 500,000 information folders on people, companies, and news topics, 87,000 books and government publications, and several hundred periodicals. TIME, Mar. 9, 1981, at 3.

69. 100 S. Ct. 2814 (1980).
constitutionally be closed as a matter of course, and it is inconceivable that the public would stand for the broad speech and press restrictions that would be necessary to seal the other “unofficial” sources of criminal-record information. Thus, even if all official records were to be expunged immediately upon a prisoner’s release from incarceration, the remaining unofficial sources of information available to the public about the conviction would frequently render expungement ineffective in serving any of its first three possible legislative goals.

If, however, the legislative goal is the fourth: that is, if expungement is considered a reward to be given to those convicts who, on their own, have achieved rehabilitation, the time lapse between release and expungement is entirely appropriate. Problems remain, however, even if the goal of expungement is simply to reward.

Many of the deficiencies that make expungement ineffective in reducing recidivism and discrimination also make it ineffective as a reward for those who have achieved rehabilitation. Expungement as a reward becomes that much less of a reward—and that much less of an incentive to reform—when so many official and unofficial sources of information about the conviction remain despite the statute. Chief among those sources is the statute itself, which requires that the rehabilitated convict come forward in public to request that his conviction be expunged. It may be argued that on the one hand, the convict at that point no longer requires the privacy that expungement offers; by the time expungement is available to him, he already has the job and housing for which the privacy might have been sought earlier. However, if the convict does decide to seek expungement after the statutory waiting period, he must bring himself into the public limelight again in further court proceedings before privacy once again may—this time officially—be his.

The model expungement procedure, moreover, lacks sufficient flexibility to be used effectively as a reward for convicts who rehabilitate themselves. In some states, expungement is awarded to all convicts who can demonstrate certain facts to a court. But the

70. See Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976).
71. See COLO. REV. STAT. § 24-72-308(b) (Supp. 1980).
72. See Kogon & Loughery, supra note 13, at 390. Even “celebration of successful rehabilitation inevitably would be condemnatory by its acknowledgement of the graduate’s earlier ‘criminal’ status. ‘To know him is to despise him.’” Id.
73. See, e.g., COLO. REV. STAT. § 24-72-308(b) (Supp. 1980); UTAH CODE ANN. §
privilege is available to all only after passage of a number of years after release. The period usually is the same, regardless of the convict or the specific crime he or she committed. Thus a convict who becomes truly rehabilitated earlier than the specified statutory minimum period is not rewarded for doing so. At the same time, a convict who is not truly rehabilitated but is able to satisfy the minimum statutory conditions nevertheless will be "rewarded" with expungement.

The High Costs of Expungement

The typical expungement model is likely to be ineffective at achieving the first three legislative goals, and sporadically effective, at best, at achieving the fourth. Against this minor benefit must be balanced the tremendous social costs of expungement in dishonesty and secrecy. The expungement model attempts to rewrite history: it denies reality. This deliberate deception of the public violates our longstanding and generally unquestioned preference for truth over falsity. But beyond that ethical and moral issue, a number of political and legal questions arise about expungement. Such statutes, for example, limit the traditional common law right of access to judicial records, threaten first amendment rights with regard to privacy and defamation, and may result in even wider discrimination than the practices they are drafted to eliminate. All this is done by a government paternalistically trying to delude a public

77-18-2 (Supp. 1980). Expungement only grows ineffective if it is unavailable for any reason to a large percentage of convicts. In New Jersey, for example, only 25% of all expungement petitions are granted. TIME, Nov. 10, 1980, at 92. Its ineffectiveness increases when convicts who are aware of the odds against expungement decide not to request it. For them, the chance they will win the "guaranteed" privacy of expungement is not worth the public exposure they will certainly encounter in the expungement proceedings themselves.


75. Cf. Special Project, supra note 2, at 1240 (suggesting that expungement time limits should vary with particular convicts).

76. Statutes that reward convicts with expungement require varying degrees of proof of actual rehabilitation. Compare Colo. Rev. Stat. § 24-72-308(1.1)(f) (Supp. 1980) (court shall grant expungement petition unless convict has been formally charged with another crime within specified time period) with Utah Code Ann. § 77-18-2 (Supp. 1980) (expungement order may be issued if court finds that convict has remained free of criminal activity and that rehabilitation of petitioner has been attained to its satisfaction). Thus, under some regimes, the court may be required to grant an expungement, even if the convict shows signs, short of another criminal arrest or indictment, of lingering criminal tendencies.
that would not otherwise be as willing to accept a person it discovers to be a convict. Even if one could easily agree that the public should indeed forgive the majority of convicts who live in their midst,\textsuperscript{77} one must ask whether government should by deception force such acceptance by the public at such tremendous costs.

\textbf{Honesty and dishonesty in government.}—As previously described,\textsuperscript{78} several states expressly provide that a convict whose conviction is expunged may lie when responding to an inquiry about that aspect of his past. Other provisions require lies by certain officials who are asked about a criminal record that has been expunged.\textsuperscript{79} Lies thus are sometimes officially authorized and at other times are required. But expungement itself, without these provisions, introduces its own brand of implicit dishonesty. For even where convicts and officials are not authorized or required to lie, the very act of expunging is an attempt to conceal the past and to convey to inquirers the impression that something that has in fact occurred has not.

Dishonesty, whether explicit or implicit, thus is a fundamental aspect of expungement that should be considered before its other costs are examined. Are the benefits of expungement so great that they outweigh the preference for truth that is inherent in any society?\textsuperscript{80} In our own society, legal sanctions, ranging from statutory perjury\textsuperscript{81} and common law fraud to statutory false-statement provisions,\textsuperscript{82} reflect hundreds of years\textsuperscript{83} of firm belief in the value of truth over falsity.\textsuperscript{84} Advocates of expungement must shoulder a

\begin{itemize}
\item \textsuperscript{77} See Gough, supra note 2, at 148.
\item \textsuperscript{78} See note 44 supra and accompanying text.
\item \textsuperscript{79} See note 43 supra.
\item \textsuperscript{80} Trust in veracity has been called the foundation of human relations, a requirement that enables societies to function, regardless of their other values. S. Bok, \textit{Lying} 18-20 (1978).
\item \textsuperscript{81} 18 U.S.C. § 1621 (1976).
\item \textsuperscript{82} Id. § 1001 (prohibiting false, fictitious, or fraudulent statements by any person in any matter within jurisdiction of any department or agency of United States); Ga. Code Ann. § 26-2311 (1977) (prohibiting false certificate or writing by state officer or employee); N.J. Stat. Ann. § 2C:28-1(a) (West 1979) (state perjury).
\item \textsuperscript{83} See S. Bok, supra note 80, at 33-46.
\item \textsuperscript{84} Cf. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (false statements of fact have no constitutional value); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (although honest utterances, even if inaccurate, are protected, it does not follow that lies should enjoy same protection since use of lies is at odds with premises of democratic government and with orderly manner in which economic, social, or political change is to be effectuated).
\end{itemize}
heavy burden of proof before honest ways of achieving the same
goals are disregarded in favor of expungement. 85

Apart from concerns about the value of truth, expungement
legislation calls into question the basic morality of a government
whose officials lie to each other 86 and to its own citizens. It would
be naive to argue that the government should never be permitted
to lie—national security and other vital interests of survival and
safety may in some rare cases justify dishonesty. 87 But it is legiti-
mate to ask whether the benefits of mandatory dishonesty in the
expungement context justify the loss of public confidence 88 in gov-
ernment such dishonesty fosters. 89

Government mandates the dishonesty of expungement because
it does not believe its citizens are mature enough to deal with ex-
prisoners in a manner it considers proper. 90 This it cannot and

85. Cf. S. Bok, supra note 80, at 86-89 (No lie can be morally justified if there
are truthful alternatives to dishonesty.).

86. The statutes requiring officials to reply falsely to inquiries about expunged
records often, however, permit true answers when the inquiry is from a law-enforce-
ment agency or a court concerning a subsequent criminal matter involving the con-
vict. See, e.g., KAN. STAT. ANN. § 21-4619 (Supp. 1980). See also MASS. GEN. LAWS
ANN. ch. 276, § 100A (West 1972 & Supp. 1981) (excepting answers to questions
asked by authorized persons).

87. Lying for purposes of national security will occur for a relatively short pe-
riod of time. Expungement statutes, on the contrary, require lying throughout the
lifetime of the convict and, perhaps, even thereafter.

88. Surveys repeatedly show declines in overall public confidence in our gov-
ernment. See, e.g., S. Bok, supra note 80, at xviii (69% of respondents nationwide
agreed that from 1966 to 1976, America's leaders had consistently lied to the people).
Obviously, a low opinion of governmental trustworthiness does not justify purposely
stimulating further decline.

89. Deceptive practices may tend to multiply and reinforce each other, as the
liar loses his ability to properly examine whether each particular lie is justifiable.
Where government is the liar, long-term effects of deception are worse because the
entire political system, rather than a single relationship between liar and listener, is
undermined. See id. at 173-75, 181.

90. See Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) (unani-
mous Court struck down prohibition on certain "for sale" signs).
The Council has sought to restrict the free flow of these data because it fears
that otherwise homeowners will make decisions inimical to what the Coun-
cil views as the homeowners' self-interest and the corporate interest of the
township . . . . "It is precisely this kind of choice, between the dangers of
suppressing information, and the dangers of its misuse if it is freely avail-
able, that the First Amendment makes for us."
Id. at 96-97 (quoting Virginia State Bd. of Pharmacy v. Virginia Consumer Citizens
Council, Inc., 425 U.S. 748, 770 (1976)). In an earlier case, the Court struck down a
regulation against commercial speech after noting that "on close inspection it is seen
that the State's protectiveness of its citizens rests in large measure on the advantages
of their being kept in ignorance." Virginia State Bd. of Pharmacy v. Virginia Con-

85. Cf. S. Bok, supra note 80, at 86-89 (No lie can be morally justified if there
are truthful alternatives to dishonesty.).

86. The statutes requiring officials to reply falsely to inquiries about expunged
records often, however, permit true answers when the inquiry is from a law-enforce-
ment agency or a court concerning a subsequent criminal matter involving the con-
vict. See, e.g., KAN. STAT. ANN. § 21-4619 (Supp. 1980). See also MASS. GEN. LAWS
ANN. ch. 276, § 100A (West 1972 & Supp. 1981) (excepting answers to questions
asked by authorized persons).

87. Lying for purposes of national security will occur for a relatively short pe-
riod of time. Expungement statutes, on the contrary, require lying throughout the
lifetime of the convict and, perhaps, even thereafter.

88. Surveys repeatedly show declines in overall public confidence in our gov-
ernment. See, e.g., S. Bok, supra note 80, at xviii (69% of respondents nationwide
agreed that from 1966 to 1976, America's leaders had consistently lied to the people).
Obviously, a low opinion of governmental trustworthiness does not justify purposely
stimulating further decline.

89. Deceptive practices may tend to multiply and reinforce each other, as the
liar loses his ability to properly examine whether each particular lie is justifiable.
Where government is the liar, long-term effects of deception are worse because the
entire political system, rather than a single relationship between liar and listener, is
undermined. See id. at 173-75, 181.

90. See Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) (unani-
mous Court struck down prohibition on certain "for sale" signs).
The Council has sought to restrict the free flow of these data because it fears
that otherwise homeowners will make decisions inimical to what the Coun-
cil views as the homeowners' self-interest and the corporate interest of the
township . . . . "It is precisely this kind of choice, between the dangers of
suppressing information, and the dangers of its misuse if it is freely avail-
able, that the First Amendment makes for us."
Id. at 96-97 (quoting Virginia State Bd. of Pharmacy v. Virginia Consumer Citizens
Council, Inc., 425 U.S. 748, 770 (1976)). In an earlier case, the Court struck down a
regulation against commercial speech after noting that "on close inspection it is seen
that the State's protectiveness of its citizens rests in large measure on the advantages
of their being kept in ignorance." Virginia State Bd. of Pharmacy v. Virginia Con-
should not do. Such pernicious paternalism not only runs counter
to statutes that forbid lies by government officials and private citi-
zens alike; it also violates our basic democratic notion that gov-
ernment is our agent, not our parent. It may be argued that lying
by government about expunged records is permissible because the
people, through their elected legislators, have adopted the expungement statutes; that in effect the people have asked to be lied to, presumably because they realize it is for their own good. It
has been claimed, for example, that the only lies justifiable on
their face are those to which the deceived have in advance agreed.
But consent may only justify a lie where it is given freely, after open debate, and upon adequate information. It is
questionable whether the full implications of expungement statutes
whose goal is to rewrite history were ever made known to the vot-
ers. In theory, legislators are the simple agents of the people, car-
rying out their will. Here, however, it is doubtful that if they had
the chance, voters would approve legislation requiring that they be
lied to by government, or that they may be lied to by their fel-
lower citizens.

There is . . . an alternative to this highly paternalistic approach. That
alternative is to assume that this information is not in itself harmful, that
people will perceive their own best interests if only they are well enough
informed, and that the best means to that end is to open the channels of
communication rather than to close them.

Id. at 770.
91. “A long tradition in political philosophy endorses some lies for the sake of
the public.” S. Bok, supra note 80, at 167. However, lies by government, in general,
are the most dangerous body of deceit of all. Beyond the general presumption
against dishonesty, governmental lies should be especially suspect, because they de-
ceive a wider range and greater number of persons than other lies. See id. at 175.
92. See statutes cited notes 81-82 supra.
93. See A. Meiklejohn, Free Speech and Its Relation to Self-Gov-
ernment (1948).
94. See S. Bok, supra note 80, at 87-88, 103-04. In general, anyone who agrees
to the rules cannot complain of unfairness when deception is used, so long as the
rules permitted it.
95. Id. at 90-106.
96. A statute requiring government to lie to its citizens also might violate con-
stitutional guarantees of the right of the public to self-government. It is unclear
whether the people may, through their legislators, waive that right in such a manner.
97. It seems unlikely that the public at this point would allow the altruism that
is reflected in expungement to outweigh its own fears that released convicts will en-

http://scholarlycommons.law.hofstra.edu/hlr/vol9/iss3/1
The dishonesty of expungement, moreover, handicaps society by preventing it from confronting and clarifying its own attitudes about convicts and their reentry into society. When the public is deceived by the concealment of criminal records or by lies about their existence, it is deprived of the opportunity to learn to accept convicts, particularly those who have rehabilitated themselves.

These moral arguments have existed since the early days of expungement and may have been implicitly rejected by expungement advocates. But legal objections were evolving at the same time. When the public is questioned solely about the significance of crime, however, the figures show a deep concern. Of 1,931 persons surveyed nationally in the fall of 1977, 88% called street crime a "very serious" or "serious" problem. Another question related to the respondents' feelings about released convicts. Asked how useful it is to spend tax dollars to learn "more about how to prevent convicted criminals from committing crimes in the future," 68% said it would be "extremely helpful," or "very helpful." Id. at 52. For the results of a study showing bias among employers against convicts, see Schwartz & Skolnick, supra note 14. See also Dow, The Role of Identification in Conditioning Public Attitude Toward the Offender, 58 J. CRIM. L.C. & P.S. 75 (1967) (public is unable to identify with adult offender).

The effect of expungement legislation on the convict's attitudes is debatable. Some have argued that it gives him an inappropriate message. Kogon & Loughery, for example, argue that,

"In encouraging him to lie, the society communicates to him that his former offender status is too degrading to acknowledge, and that it is best forgotten [sic] or repressed, as if it had never existed at all. Such self-delusion and hypocrisy is the very model of mental ill health—the reverse of everything correctional philosophy stands for."

Kogon & Loughery, supra note 13, at 385.

If the legislation were to operate immediately upon release and were to include a provision authorizing lying about the conviction, one might well argue that this is not the proper way to bring the convict back into society. Apart from the dishonesty that he is being encouraged to practice, the process may inadequately impress upon him the seriousness of what he did. In fact, however, the statutes operate only after the passage of several years, and proof (by varying standards) of individual rehabilitation. In such cases, the message to the convict is probably of less concern in terms of distorting his view of his past behavior. It may, however, be an accurate signal to the convict that the public is not eager to forgive or forget—no matter how long ago the offense and no matter how clearly rehabilitation has been shown. Still, it is hard to see how, under the existing approach, the signal to the convict plays a critical part in the analysis.

Expungement, furthermore, hurts the interest of society by denying it access to information about its members. See text accompanying notes 105-112 infra.

Other commentators have taken nonlegal approaches to the issue of privacy. See, e.g., Posner, Privacy, Secrecy, and Reputation, 28 BUFFALO L. REV. 1 (1979) (attacking some forms of concealment from economic standpoint); Stigler, An...
time that states were adopting expungement statutes. These legal arguments, which had not crystallized earlier, must now be addressed.

Limited access to records.—The Supreme Court has not recognized any constitutional right of access to information in the possession of government, or to information about legislative- or executive-branch functions in general.101 Although the Court has indicated that parts of the criminal process may not be closed simply on agreement of the parties and the judge,102 these cases fall far short of imposing a constitutional obligation to open records or to keep open indefinitely records that were once open.

As emphasized in Richmond Newspapers, Inc. v. Virginia,103 however, our tradition of public criminal trials for adults suggests a long-perceived value in the openness of the criminal-justice process. Thus, a common law right of access to judicial records and evidence has been recognized by the Court.104 Although important legislative goals may justify denial of, or limitations on, that right of access, there are strong arguments against any such limitations.

As Justice Brennan argued in Richmond Newspapers, the free flow of information about the criminal-justice system plays an important structural role in our democratic society.105 A statute that limits access to expunged records prevents the public from informing itself about the conduct of players in the criminal-justice system: the prosecutors, the police, and the judges. Suppose, for example, an elected judge is under criticism for, over a period of years, granting lenient prison sentences or for granting ex-

Introduction to Privacy in Economics and Politics, 9 J. LEGAL STUD. 823 (1980). We will not analyze those arguments here.


103. 100 S. Ct. at 2825-26.


105. 100 S. Ct. at 2835-37 (Brennan, J., concurring in the judgment, joined by Marshall, J.).
EXPUNGING CRIMINAL RECORDS

Pungements themselves improvidently or in a pattern suggesting graft. The public as well as the press is free to attend the original sentencings and the hearings that precede the expungement orders. But it is unrealistic to expect the press or the public to be in attendance in every courtroom every day for every hearing or trial.\textsuperscript{106} The thorough compilation of information and the proper perspective required if the public is to make well-informed electoral judgments is possible only if records are permanently\textsuperscript{107} available for perusal.\textsuperscript{108}

Although it has been said that expunged records are “as newsworthy as cold mashed potatoes,”\textsuperscript{109} the information they include may be important to the public in several ways. In addition to providing a means of evaluating the performance of the criminal-justice system and its participants, they may provide information about other elected officials or candidates who seek to become officials. Today it is not inconceivable that an elected official or a candidate was once convicted of a crime. Certainly the electorate deserves to know of such a conviction, if one exists, regardless of the offense, or how old it is, or how long it has been since the candidate was released from prison.\textsuperscript{110} The privacy interests served by

\begin{itemize}
  
  \item \textsuperscript{107} Housekeeping and space limits may demand that all criminal-system records not be kept permanently. \textit{See} ALASKA STAT. § 12.62.040(3) (1980); N.J. STAT. ANN. § 47:3-9 (West Supp. 1980). But the concern here is that records which are still manageable are selectively destroyed solely for the purpose of keeping their existence secret.
  
  \item \textsuperscript{108} Because an elected juvenile court judge may be just as likely as any other trial court judge to be guilty of misconduct in office, this argument logically would demand that all juvenile proceedings and records be open as well. Stronger state interests in preserving the anonymity of the youthful offender, however, demand restrictions on access to juvenile matters. Even so, however, at least 13 states have adopted “conditional access” statutes or rules, allowing certain persons, including media representatives, inside juvenile court, providing they not reveal the identities of the offenders. \textit{Comment, Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of “Conditional Access,”} 13 U. CAL. D. L. REV. 123, 124 (1979).
  
  
  \item \textsuperscript{110} See Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300 (1971). “[A] charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always ‘relevant to his fitness for office. . . .’ ” \textit{Id.} (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971)). When elections are involved it is
releasing a typical rehabilitated convict from his record pale when the convict seeks elected office. A candidate or an elected official surrenders many of his rights to privacy when he seeks office;\textsuperscript{111} the statutory right to expungement of a criminal record should be among them. Similarly, the public's interest in the background of a high-level executive of a firm that does extensive work under government contract or of an aspirant for union office would outweigh that individual's interest in privacy.\textsuperscript{112}

It may be argued that to the extent the crime committed is notorious or the community in which it is committed is small, public memory or newspaper clipping files are still available to the public for inspection and are sufficient sources of any needed information. But such unofficial compilations of information focus by necessity on a very small percentage of all records, and only on those that, at the time, appear to be the most important.\textsuperscript{113} Public access to information about a current candidate for office or a judge running for reelection, however, should not hinge on the ability of the press and the public to have predicted years ago which convictions and which convicts might later become important.\textsuperscript{114}

In \textit{Stephens v. Van Arsdale},\textsuperscript{115} the Kansas Supreme Court recently examined the right of a newspaper to view adult criminal records that had been statutorily expunged, and found it to be outweighed by the legislative policy reflected in the statute: the common law right of the public to inspect and copy judicial records must fall in the face of the state's legitimate concern for rehabilitation of criminals. But the Kansas court measured that state interest relevant that most voters would not find the facts important in casting their vote. See Vanasco v. Schwartz, 401 F. Supp. 87 (S.D.N.Y. 1975), aff'd, 423 U.S. 1041 (1976).

\textsuperscript{111} An extreme example, but one probably unrelated to any specific criminal activity, is the printing during the 1976 political campaign by the \textit{Detroit News} of a story alleging that the Democratic candidate for the United States Senate had had an extramarital sexual relationship seven years earlier with a member of his congressional staff. See \textit{M. Franklin, The First Amendment and the Fourth Estate} 336 (1977).

\textsuperscript{112} Beruan v. French, 56 Cal. App. 3d 825, 128 Cal. Rptr. 869 (2d Dist. 1976). Although a carefully designed expungement scheme might keep conviction records of individuals shielded from the public only until the former prisoners become public officials or figures, such a dual system would be most difficult to administer.

\textsuperscript{113} See note 68 supra. The files of other newspapers and magazines are usually far less extensive than those of Time, Inc.

\textsuperscript{114} When the convict has settled in another state after his release, see note 53 supra, he would not be included in local unofficial compilations, regardless of any extraordinary forecasting abilities of the local media.

\textsuperscript{115} 227 Kan. 676, 608 P.2d 972 (1980).
in rehabilitation by a standard it had developed six years earlier in an opinion116 dealing not with a statute expunging adult criminal records, but with one annulling convictions of youthful offenders. "Although the approach taken by the legislature to help in the rehabilitation of an offender is not exactly the same, the statutes essentially have the same purposes. . . ."117

Although the youthful-offender provision118 to which the court referred allows annulment of a youth's conviction at any time after she completes her sentence, under the adult expungement provision119 at issue in Van Arsdale the record can be sealed no earlier than two or five years after release from incarceration, depending on whether the convict has committed a misdemeanor or a felony. Thus the purposes of the statutes are different: the former is an actual attempt to aid rehabilitation; the latter, a reward for accomplished rehabilitation. The state's interest is therefore less in the case of the adult expungement, and, under state law, should be outweighed by the interest of the public in viewing the records.120

Thus, even if the issue of access to judicial records is not of constitutional dimension, rules such as these that deviate from the common law tradition of openness raise political questions about the balance of interests that they represent.

Constitutional Rights of Expression of the Press and the Public

Criminal sanctions.—Although a statute expunging criminal records may constitutionally limit the access of the press and the public to the records, further provisions in some statutes infringe first amendment freedoms by prohibiting "any person" from divulging information contained within the expunged records.121 The statutes ban statements by members of the public or the media who wish to convey information about an expunged conviction, presumably even if the speaker obtains the information from a source left untouched by the expungement order. For example, such a statutory provision appears to prohibit a newspaper from re-

117. 227 Kan. at 690, 608 P.2d at 984.
118. KAN. STAT. § 21-4616 (Supp. 1972) (current version at KAN. STAT. § 214619 (Supp. 1980)).
119. Id. § 21-4619 (Supp. 1980).
120. Although the analysis following here from Van Arsdale is couched in political balancing terms, it could be plausibly argued that there is a first amendment right of access to judicial proceedings. See text accompanying note 102 supra.
printing from its own files information about a conviction that has been subsequently expunged. So, too, would it prohibit a witness to the crime, or the victim, who perhaps testified in court and was present during the sentencing, from discussing the conviction after it has been expunged.\footnote{122}

The Supreme Court, however, held in Smith v. Daily Mail Publishing Co.,\footnote{123} that a state must demonstrate an interest "of the highest order" before it constitutionally may prohibit a newspaper from publishing lawfully obtained information about a juvenile suspect.\footnote{124} In that case, two newspapers learned by routinely monitoring a police band radio frequency that a shooting had occurred at a school yard. Reporters obtained the name of the alleged assailant by asking a police official, an assistant prosecutor, and witnesses at the scene. Despite a statute barring newspapers from publishing the name of any child in connection with juvenile proceedings without a written court order, the newspapers published the name of the suspect, a juvenile.\footnote{125}

The Supreme Court, in an opinion by Chief Justice Burger, unanimously held that prosecution of the newspapers under the statute violated the first and fourteenth amendments. Although several earlier cases\footnote{126} pointing that way had involved information obtained from government sources, that factor was "not controlling."\footnote{127}

Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information. . . . If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.\footnote{128}

\footnote{122. A statute may require knowledge of expungement as an element of the crime. See, N.J. STAT. ANN. § 2C:52-30 (West 1979). Beyond that, it seems possible that a court would narrowly construe statutes banning disclosure of the expunged matter. A reviewing court might read in a requirement of knowledge, for example, or might interpret the prohibition as applying only to public officials.}
\footnote{123. 443 U.S. 97 (1979).}
\footnote{124. Id. at 103.}
\footnote{125. Id. at 98-100.}
\footnote{126. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).}
\footnote{127. 443 U.S. at 103.}
\footnote{128. Id. at 103-04 (citations omitted).}
The state’s interest in Smith was identified by the Court to be “to protect the anonymity of the juvenile offender.”\textsuperscript{129} Naming the juvenile “may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense.”\textsuperscript{130} Although it understood the importance the state placed on anonymity, the Court concluded that this interest was “not sufficient to justify application of a criminal penalty to respondents.”\textsuperscript{131}

In its final paragraph, the majority asserted that its “holding in this case is narrow. There is no issue before us of unlawful press access to confidential judicial proceedings . . . ; there is no issue here of privacy or prejudicial pretrial publicity.”\textsuperscript{132}

Justice Rehnquist disagreed with the majority’s analysis, concurring in the result only because the statute had applied solely to newspapers. Because it did not apply also to broadcasters, he said, he doubted that the state really attached great importance to the need for anonymity.\textsuperscript{133} He did, however, believe that a statute covering all media would have been valid because the protection of the anonymity of juvenile offenders was an interest he considered of the “‘highest order’”—one that “far outweighs any minimal interference with freedom of the press that a ban on publication of the youths’ names entails.”\textsuperscript{134}

Furthermore, Justice Rehnquist argued that without allowing punishment for such unauthorized publications it will be virtually impossible for a State to ensure the anonymity of its juvenile offenders. Even if the juvenile court’s proceedings and records are closed to the public, the press still will be able to obtain the child’s name in the same manner as it was acquired in this case.\textsuperscript{135}

Although exposure of a juvenile’s name may impair his rehabilitation, embarrass his family, and cost him employment opportunities, on the other hand, “[i]t is difficult to understand how publication of the youth’s name is in any way necessary to performance of the press’ ‘watchdog’ role,” particularly where the statute, as in

\textsuperscript{129} Id. at 104.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 105 (citation omitted).
\textsuperscript{133} Id. at 110 (Rehnquist, J., concurring in the result).
\textsuperscript{134} Id. at 107 (Rehnquist, J., concurring in the result).
\textsuperscript{135} Id. at 109 (Rehnquist, J., concurring in the result) (citation omitted).
West Virginia, allows the judge to permit publication where appropriate.136

Justice Rehnquist realized that “[s]uch publicity also renders nugatory States’ expungement laws, for a potential employer or any other person can retrieve [after it has been legally expunged or sealed] the information the States seek to ‘bury’ simply by visiting the morgue of the local newspaper.”137 The result, he said, defeats the “beneficent and rehabilitative purposes” of the juvenile justice system.138

The parallels between the publication of the juvenile’s name in Smith and publication of expunged criminal-record information of an adult could hardly be closer, and where differences exist, they point to greater press protection in the expungement situation. Both cases involve the truthful reporting of a person’s identity—a juvenile suspect in Smith, an adult convict in our hypothetical case. The state in Smith regularly closed juvenile proceedings to keep the identities of juvenile offenders from the public. The statute attempted to seal an otherwise unavoidable gap in that scheme of closed official proceedings. But despite the obvious state concern for anonymity, the Court concluded that it was not of the “highest order” and could not outweigh the interest in truthful reporting. Note that the Court did not inquire into why the newspaper wanted to name the juvenile or what social purpose might be served by the disclosure.

The direct parallel with Smith would be an expungement statute that makes it a crime to identify a person as a convict once her conviction had been expunged.139 On the side of a free press is the value in publication of a truthful report (without concern for why it was published). On the other side is the state’s interest in protecting the privacy of a convict who, by proving her rehabilitation, has earned the “right” to have the public forget, or never learn of, her past.140

136. Id. at 108-09 (Rehnquist, J., concurring in the result).
137. Id. at 108 (Rehnquist, J., concurring in the result).
138. Id. (Rehnquist, J., concurring in the result) (footnote omitted).
140. As discussed, see notes 18-23 supra and accompanying text, the state’s interest in an expungement statute conceivably could lie in preventing recidivism, aiding the convict to rehabilitate herself for her own sake, or preventing discrimination because she is presumed to be rehabilitated upon her release. But in reality, the only interest that is effectively served by expungement regimes actually in effect is that of rewarding with privacy the convict who proves she is in fact rehabilitated.
This state interest seems markedly less important than the Smith interest in achieving rehabilitation of juveniles and avoiding their recidivism. By definition, the rehabilitated convict is unlikely to return to crime; she already has a job and respect in the community. The likeliest effect of the disclosure would be to lead some members of the community who had befriended the convict in ignorance to turn away from her.141 This resultant embarrassment cannot conceivably rise to the level of state interest of the “highest order” to justify making the disclosure of the prior conviction itself a crime.

Moreover, in Smith the state sought to keep the information from ever becoming public—adopting the approach suggested as a possibility in Cox Broadcasting Corp. v. Cohn of developing processes to keep the name from ever appearing in a public record.142 By contrast, in the expungement situation, the information was once public—whether because the defendant insisted on a public trial, because the press or public demanded access to the trial, because some other aspect of the process was open to the public, or because public records were made and filed at various stages of the criminal process. Regardless of how the information came to be part of an official public record, Cox should bar any action for publication of it. In Cox, a Georgia statute made publication of the name of a rape victim a misdemeanor.143 The defendant broadcast the name of a deceased seventeen-year-old rape victim after learning her identity from indictment records that were publicly available for inspection in court.144 The Court held that the first amendment prohibits a state from exposing the press to liability for truthfully publishing information released to the public in official court records.145

Cox involved information from a record that was open to the public at the time of publication. But where the record is now expunged, and a newspaper relies on a copy of a once-public record now in its files, does Cox no longer apply? The Cox majority at no

141. If the persons turn away because the convict dissembled, that is itself a reflection on the “wisdom” of expungement statutes. If they turn away because they wish to have nothing to do with a former criminal no matter how much she may have reformed, that may be a “right” they have had all along, but could not use because of ignorance.
144. The father of the victim sought money damages, relying on the statute and claiming his right to privacy had been invaded by the broadcast. 420 U.S. at 474.
145. Id. at 496-97.
point limited its holding to contemporaneous reports. Indeed, it stated:

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published . . . . At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.\textsuperscript{146}

This passage makes clear at least that the media need not concern themselves about whether a particular public record is still timely or how the public will react to its publication. Those considerations are too complex and uncertain to justify restraining editors and others from publishing true information obtained from public records.

But Cox arguably also addresses the question of publication of information from records that were once public but are no longer officially available because they have been expunged. The quoted passage protects publication of information “released to the public in official court records.” Release triggers protection. The government cannot remove first amendment protection, once granted, by simply withdrawing the record because it may create unwanted public reaction. The release was an act of government upon which the public might truthfully comment. Indeed, Justice White in Cox suggested that the only hope\textsuperscript{147} for a state that wanted to keep a rape victim’s name secret was to develop processes to keep the name from ever appearing in a public record.\textsuperscript{148} This suggestion of elaborate new procedures would have been unnecessary had the Court been prepared to countenance a process by which an indictment naming a rape victim is presented at the trial and is then immediately withdrawn so that the information in that record is usable, but only during its brief existence as a “public” record.

\textsuperscript{146} Id. at 496.

\textsuperscript{147} It appears to be a slim hope, at that. See id. at 496 n.26. “We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile-court proceedings.” Id.

\textsuperscript{148} Id. at 496.
Should the result differ if the published information was not obtained in the first instance from an official public record—and can no longer be so obtained because the records have been expunged? Where a public trial has occurred and public criminal records have existed for all to see and copy, but the state has since expunged those records, the event does not "unhappen." Should the matter become relevant to the press or to any other investigator with the desire and resources, there are many witnesses available—those involved in the original crime, those who participated in or viewed the first criminal proceedings, wardens, fellow inmates, and those who knew about or participated in the expungement process—who could supply information about the convict and his crime.

If the newspaper can thereby accurately reconstruct the event after the fact without current use of official records, does not the philosophy of Cox still apply? Once information has become officially available, it would be dangerous to allow a state to (a) behave as though the information had never been made public in the first place, and (b) punish persons who accurately piece together the event from unofficial sources. The first amendment cannot tolerate attempts by government to rewrite history by denying that events it once publicized ever occurred and by punishing people who now report about them.

Even if Cox is not read to reach this result, Smith requires it nevertheless. If truthful publication of proceedings involving a juvenile, gathered entirely from unofficial sources, is not enough to justify the prosecution in Smith, despite all the attendant future private and public harm that may follow disclosure, the naming of an already rehabilitated adult who earlier committed a crime presents a much weaker case for punishment of the publisher. Whether we follow the rationale of Cox or Smith, no criminal prosecution can lie when a newspaper accurately recounts the con-

149. For a discussion of other aspects of statutes that explicitly allow or require false statements by convicts and public officials about conviction records that have been expunged, see notes 78-89 supra and accompanying text.

150. Different difficulties may arise when the press or the public's version of the expunged information is inaccurate. Whether the Constitution would protect such statements, and if so, to what extent, are beyond the scope of this Article.

151. It is unclear whether the state could punish a private defendant for behavior that would be protected if undertaken by a member of the media. In the related area of defamation, the question of a double standard for press and public is also unresolved. See Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979) (Court has
vicction of a person who committed a crime and whose records of conviction were once available to the public.\textsuperscript{152}

\textbf{Civil sanctions.}—What are the implications of a civil action for invasion of privacy against a publisher of expunged information? It is true that in its last paragraph, the majority in \textit{Smith} stressed that the case did not involve "privacy."\textsuperscript{153} The majority was probably attempting to reserve the question of the juvenile's tort action for invasion of privacy, the same sort of general question avoided in \textit{Cox}. Nonetheless, it is hard to see how that could fare better than did the \textit{Smith} criminal prosecution itself.

On the merits of the speech in question, a court would confront a truthful report that an identified juvenile has shot another youth. Under state law, these facts are probably not only not private, they are also newsworthy (at least to warn the neighborhood if the juvenile is released).\textsuperscript{154} These factors alone should thwart a state action in the first instance. If the plaintiff should survive at the state level, the Court would be confronted with the question that was reserved in \textit{Cox}: the liability for publication of truthful information that concerns the public but is gathered from unofficial sources. Given the \textit{Smith} answer to the criminal prosecution for the same behavior, the result the Court would reach in a comparable civil case is clear.
In his civil action, the juvenile would necessarily be relying on a state interest framed in privacy terms. Can that interest possibly be stronger than the state's broad interest in juvenile rehabilitation that was found not to be "of the highest order" in the actual Smith case? In short, the interests here on the plaintiff's side seem weaker than in Smith. Yet, the free-expression interests on the media side are virtually identical to those pressed in Smith: the truthful publication of the identity of a juvenile who was suspected in a shooting. The balance in Smith in favor of expression in the face of an explicit criminal statute prohibiting such expression would seem to ensure that a similar result would be reached in a common law invasion-of-privacy action, in which editors would have had no such explicit warning of what the law would permit.155

The plaintiff might attempt to distinguish criminal from civil liabilities by arguing that punishment by the state requires interests of the highest order, but that the "mere" imposition of civil damages does not require such a powerful interest. The response is to be found in New York Times Co. v. Sullivan,156 in which the Court observed that what a state could not constitutionally do by criminal law because of first amendment impediments, it could not achieve indirectly by the civil law of damages for defamation.157 That lesson would be especially appropriate here because of the close parallel between defamation and privacy in terms of the chilling effect on expression that may result from the difficulty of forecasting liability and damages.158 The cases are similar also in terms of the criminal sanction that was threatened. In New York Times, the Alabama law of criminal libel raised the possibility of a corporate fine of $500;159 in Smith, the exposure of the corporation was a fine of $100 (persons could go to jail for six months).160

155. Guided by Smith, in fact, editors reasonably would have expected protection against such a common law action.
157. Id. at 277.
158. Cf. Cox Broadcasting Corp. v. Cohn, 420 U.S. at 496 (rule forbidding publication of public records if they are offensive to reasonable person would invite timidity and self-censorship and very likely lead to suppression of many items that would otherwise be published and that should be made available to public); 376 U.S. at 279 (under rule requiring media defendant to prove truth of defamatory statement about public official, potential critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of expense of having to do so).
159. 376 U.S. at 277.
160. 443 U.S. at 99.
Our analysis suggests that an invasion-of-privacy action brought for a story revealing an expunged conviction must fail. The plaintiff’s interests in a civil case after expungement are essentially the same as the state’s in rewarding successful rehabilitation. Those interests must be outweighed by a truthful report of information in a once-public record that the plaintiff committed a crime.\footnote{161}

In both the criminal case and the civil privacy case, the newspaper should not have to rely on unofficial sources to prove the accuracy of the story. In case of disputed fact, a strong first amendment argument exists that original official documents that support the newspaper’s account must be available to the defense as evidence in a civil or criminal case brought for the revelation. Although a few states expressly now provide for it,\footnote{162} the protection accorded by \textit{Cox} to publication of official records that once were public suggests that access to the evidence may be mandated everywhere by the first amendment.\footnote{163}

Two lower-court privacy cases have involved expungement. In the 1971 case of \textit{Anonymous v. Dun \& Bradstreet, Inc.},\footnote{164} the defendant’s credit report accurately stated that the plaintiff businessman was once convicted of third-degree burglary, but that he had been pardoned (because his guilty plea was coerced), and the conviction was subsequently expunged. Plaintiff sued to enjoin distribution of the credit report. That relief was granted on the ground that “it would be illogical to permit the defendant to publish to its subscribers information about the plaintiff which is not available to the public generally, and which never should have been available to the defendant.”\footnote{165} The first reason—that the information is not available to the public generally—suggests that information not now readily available (even if it once was), may not be disseminated by anyone who happens to possess it. No reasoning accompanied that statement, and it is hard to see why information

\footnote{161. Under this line of argument, \textit{Briscoe v. Reader’s Digest Ass’n}, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), could no longer be decided the same way. Whether Reader’s Digest got its information from an official record—which was not expunged in that case—or from unofficial sources, the story was true and apparently still available from public records. It should not matter whether Reader’s Digest actually used these public, official sources.}

\footnote{162. \textit{See, e.g., CAL. PENAL CODE § 1203.45(f) (West Supp. 1980).}}

\footnote{163. 420 U.S. at 496. By the same logic, the first amendment would require access to expunged records by a media defendant seeking to prove the truth of an alleged defamatory statement. \textit{See} note 174 infra.}

\footnote{164. \textit{N.Y. L.J.}, Sept. 15, 1971, at 19, col. 1.}

\footnote{165. \textit{Id.}}
should not be disseminated simply because the public can no longer obtain it firsthand. Indeed, the very service performed by credit-reporting agencies is to bring information quickly and efficiently to interested persons who would individually find that information very hard and expensive to compile. That it was acquired by means such as agency newspaper files, for example, rather than from now-unavailable public records, should make no difference.

The second explanation—that the records “never should have been available to the defendant”—raises other questions. The court notes that the record had been sealed “retroactively to the date of conviction.” If the court means that the defendant somehow acquired the information improperly in the first instance, it is simply mistaken. At the time the agency acquired the information, it was public. Retroactive closure does not mean that it was never available, or that people who properly learned something from a public record can later be ordered not to discuss or disseminate it.

If the court meant that the conviction should never have occurred because the plea was coerced, the short answer is that much that happens in public official proceedings does not stand up on appeal or is later set aside for a variety of reasons. That alone does not justify gagging persons who happen to know what happened. Since this case was decided before Cox, its weight is particularly doubtful.

In the second case, decided in 1978, also named Anonymous v. Dun & Bradstreet, Inc., the credit report apparently indicated the conviction, but not the later expungement. A suit for invasion of privacy under Illinois law was dismissed. Relying on Cox, the judge understood Illinois law to bar an action for truthful reporting from public records even though the reports cause damage or embarrassment.

166. Id.
167. Although criminal records may be ordered expunged when an arrest is found to have been without probable cause, or otherwise illegal, or when a conviction is overturned because the statute on which it is based is held unconstitutional, see Severson v. Duff, 322 F. Supp. 4, 10 (M.D. Fla. 1970), an ordinary acquittal is usually not sufficient grounds to expunge an arrest record, United States v. Linn, 513 F.2d 925, 927-28 (10th Cir. 1975), and it has been held an overbroad exercise of judicial authority to automatically expunge all records when a conviction is overturned under ordinary circumstances. Rogers v. Slaughter, 469 F.2d 1084, 1085 (5th Cir. 1972) (per curiam).
168. 3 MED. L. RPRTR. 2376 (N.D. Ill. 1978).
169. The facts are unclear which is the case. Id.
170. Id.
Even where expungement statutes omit direct prohibitions on publication or discussion of expunged convictions, and common law privacy actions are analyzed in favor of the press as above, other first amendment rights of speech and press are nevertheless implicated. For example, truth alone generally has been a defense in a defamation action and is constitutionally required to be a defense in suits against the media. But consider the effect of an order expunging a conviction on a defendant seeking to prove the truth of an alleged defamatory statement concerning the conviction. The expungement statute threatens to deprive the news media of a constitutional defense against a defamation action. It is common, for example, for a newspaper preparing to publish an article about a newly announced candidate for public office to research its own files for articles published years ago about the person. Suppose that in the course of doing so, it encounters an article reporting a previous conviction and reprints in the current article the substance of the charges and the sentence handed down. If the candidate were to sue the newspaper for defamation, alleging that the material concerning the conviction is false, the newspaper ordinarily would plead truth as a defense. Therefore, as noted earlier, expunged records establishing truth should be available to the defense.

173. See note 163 supra and accompanying text.
174. Once the conviction record has been expunged, an official record of the conviction may no longer exist, or be accessible. As argued earlier in the context of privacy cases, see note 111 supra and accompanying text, the first amendment would seem to require that defamation defendants, asserting the truth of what they have published, be entitled to access to the official documents to make viable the theoretical defense. See Stephens v. Van Arsdale, 227 Kan. at 693, 608 P.2d at 986 (noting that court in its inherent powers could permit release of certain documents contained in expunged file in order to achieve ends of justice). A court also might treat a defamation or privacy action brought by a convict as a waiver of any right to keep the expunged records private. See Ulinsky v. Avignone, 148 N.J. Super. 250, 372 A.2d 620 (1977). But see State ex rel. Curtis v. Crow, 580 S.W.2d 753 (Mo. 1979).
175. The Constitution protects a false defamatory statement by the media about a public official or figure, provided that the defendant did not publish the false statement deliberately or recklessly. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). If the publisher is aware that the conviction that is to be reported has been expunged, does failure to report the expungement make something that was once true (the fact of the conviction) now false? It seems unlikely that such a publication would be considered false.
We have considered several legal aspects, both criminal and civil, of expungement statutes and their effect on freedom of expression. At the very least, serious constitutional and judgmental questions have been raised. That fact alone should obligate proponents of expungement to explore carefully other ways to aid convicts before pressing forward with their approach.

Other Costs of Expungement

Though the legislative purpose in erasing criminal backgrounds may be to eliminate discrimination against convicts, expungement may instead encourage wider discrimination against discretely identifiable groups. Employers and creditors who, because of expungement statutes, are allowed no criminal-background information on their individual applicants may simply subtly discriminate against members of identifiable groups that have proportionately higher conviction rates. Government concededly should seek to eliminate unjustified discrimination. But given a choice, it should protect a wider group that is made up of predominantly innocent persons over a smaller group of persons who have in fact been convicted of, and served time for, a crime.

Another cost of expungement is that whether criminal records are merely sealed or actually destroyed, they become less available for research purposes, thus depriving the public of the value of knowledge about the criminal-justice system and its participants. Not only is the public then less able to evaluate the criminal-justice system, but sociologists and criminologists are less able to study the origin and correction of criminal behavior.

Though the arguments will not be made in detail here, expungement statutes that threaten rights under the United States Constitution may also implicate similar freedoms guaranteed by state constitutions. It has been argued as well that such statutes violate general state-protected rights of the public to self-government. Thus, the media in Van Arsdale maintained that the concealment of information about the conduct of public officials in the criminal-justice system frustrated rights reserved by the Kansas constitution to the people to “consult for their common good” and to “instruct their representatives,” as well as the rights of suffrage and election. The media also argued there that the expungement

176. Kogon and Loughery, supra note 13, at 386.
177. See, e.g., KAN. CONST. Bill of Rights, § 11.
178. Id. §§ 2-3.
HOFSTRA LAW REVIEW

statute violated the separation of powers reserved by the state constitution.\textsuperscript{179} The Kansas court rejected the separation-of-powers argument, stating that the legislature had not infringed on powers of the judiciary because expungement of a conviction by statute still requires the exercise of judicial discretion.\textsuperscript{180} Likewise, it concluded that the statute involved no judicial usurpation of the executive power to pardon, because the power to pardon is not equivalent to the limited statutory power of a court to expunge a conviction.\textsuperscript{181}

The real value of the typical expungement statute can be determined only by comparing its effectiveness with its moral, constitutional, legal, and political costs. On the one hand, given legislative goals of reducing recidivism, aiding rehabilitation for the sake of the convicts themselves, and eliminating discrimination for its own sake, such statutory provisions are totally ineffective. Expungement as practiced, however, may be moderately effective if the legislative goal is simply to reward those convicts who have somehow managed to rehabilitate themselves.

Although the statutes fail to achieve any of the first group of legislative goals, their cost—in limits on free expression and access to information that might be vital to the workings of the democratic structure of the government, and in the very real dangers caused when government permits, even requires, lying to its citizens—is overwhelming. Expungement may be more effective at rewarding rehabilitated convicts, but its tremendous costs still must be weighed against that single benefit. When they are, we believe that the price the public pays far exceeds the minor benefit received by a few convicts long after their release from prison, and only as long as they stay out of the public eye.

**ALTERNATIVES TO EXPUNGEMENT**

As stated initially, this Article accepts the validity of the goals sought to be achieved by expungement—generally, to reduce the problems encountered by both the public and convicts when former prisoners attempt to reenter society. A legislature should

\textsuperscript{179} 227 Kan. at 681, 608 P.2d at 977.
\textsuperscript{180} Id. at 694, 608 P.2d at 986; accord, Underwood v. State, 529 S.W.2d 45, 47 (Tenn. 1975). But see Johnson v. State, 336 So. 2d 93 (Fla. 1976) (state statute directing destruction of criminal records held unconstitutional encroachment by legislative branch on procedural responsibilities of judiciary, though right to have records sealed subject to disclosure for cause upheld).
\textsuperscript{181} 227 Kan. at 694, 608 P.2d at 986.
carefully weigh the costs and benefits of various alternative means of achieving that goal. Expungement statutes are simple on their face, and appear to involve little public financial expenditure. Moreover, if they erase a criminal record only years after the convict is released from prison, they hold very little threat for lawmakers that a former convict whose record is expunged will subsequently commit another crime. But legislators should look beyond those considerations to questions of effectiveness and costs—who will be helped, or burdened, how, and how much—before they act.

The principal goal of this Article is to expose and assess ethical, moral, legal, and constitutional problems inherent in current expungement statutes. The alternatives to the defective expungement statutes are subjects requiring comprehensive treatment in their own right. At this time it is sufficient to point out that the typical expungement model is not the only way to help convicts overcome their records. Legislatures may attempt to achieve the same purposes in other ways.

Some examples:

— Promote, through advertising and other means, fair treatment of convicts by presenting as examples the stories of convicts who have been successfully rehabilitated and are now valuable members of society.

— Encourage development by the media of ethical guidelines for publication of information about a released prisoner’s criminal background. Public and private correctional experts might help the press formulate guidelines with respect to the proper publication of such facts, which the convict may want desperately to keep private.

— Encourage nondiscrimination by compensating any victims of crimes committed by convicts subsequent to their release.

182. Their relatively cheap cost might be illusory. Because expungement is relatively ineffective, see text accompanying notes 50-76 supra, it does little to actually reduce the gross costs of recidivism. The cost of the crime, however, is usually borne by its victims, rather than the public as a whole, so the price is hidden from taxpayers. Programs for state compensation to victims of violent crime are an exception to this rule. In 1977-1978, for example, New York paid out $4,313,078 in benefits; California, $5,025,289; and Florida, $47,971. D. CARMOW, CRIME VICTIM COMPENSATION: PROGRAM MODEL 160 (1980). States generally limit the amount of payments and the injuries for which compensation will be paid, however, id. at 19, and it is not known what overall percentage of total costs are thereby reimbursed.

183. See note 182 supra. Such an insurance plan would differ from a state plan...
Thus an employer who hires a convict would be guaranteed against harm, as would the residents and landlord of an apartment house in which a convict rents a flat. Here again, government could limit the intervention by choosing to insure against actions by only certain convicts, or by those who have been convicted of only certain crimes. It could restrict the beneficiaries of the insurance to those persons who knew about the convict’s record and chose to ignore it and deal with him regardless of it, or the government also could insure the apparently random victims of crime who would have made no conscious decision to deal with the former prisoner. In addition to discouraging discrimination against convicts, such an insurance plan would also spread the costs of recidivism. Now, these costs tend to be borne by individual victims, rather than by society as a whole.

— Offer wage subsidies to employers who hire convicts. Lawmakers might choose instead to offer employers tax credits, or to improve job training within prisons so that upon their release, convicts would be more valuable to employers, in spite of their records.

— Prohibit, by statute, discrimination of any sort against convicts. This alternative may be modified by prohibiting only certain sorts of discrimination, such as in employment but not in housing, or by allowing employers and others to refuse jobs and other privileges only to those who have been convicted of certain crimes. Another version would allow discrimination only when the crime committed has a particular applicability to the job sought.

— Prohibit certain groups, such as employers, creditors, and


185. See note 182 supra.

186. See, e.g., W. VA. CODE § 49-5-17 (1979) (prohibiting discrimination against former juvenile delinquents in access to, terms of, or conditions of employment, housing, education, credit, contractual rights, or otherwise).

187. See, e.g., HAWAII REV. STAT. § 378-2(1) (1976) (barring discrimination by private employers on basis of criminal records, except for “good cause” or where criminal record substantially relates to function and responsibility of job sought); N.Y. CORREC. LAW § 752 (McKinney Supp. 1980) (prohibiting similar discrimination by employer unless there is direct relationship between job sought and record, or where employment would involve unreasonable risk to property or to safety or welfare of specific individuals or general public).
landlords (and perhaps the general public) from inquiring about the criminal background of any other citizen.188

— Establish halfway houses, where convicts can live immediately upon their release. Such homes are already a popular and successful way of aiding the former prisoner to reestablish a normal life.

Legislators, of course, could choose more than one of these or other alternatives, perhaps combining features of one with another. The effectiveness of the alternatives may vary, but rather than seeking to deny the existence of convicts, each would encourage long-run changes in attitudes about them as the public finds that a sizable percentage of former prisoners may actually reenter society without further criminal involvement. Thus, these alternatives, in addition to solving immediate problems of convicts, may over time tend to eliminate negative public attitudes about them altogether. On the other side of the balance, none involves the tremendous cost in terms of dishonesty and secrecy in government that is inherent in the expungement alternative.

CONCLUSION

In contrast with cases involving juvenile and youthful offenders, where criminal-background information is withheld from the public because the public is thought to agree that youths are rehabilitated before they are released from the state’s jurisdiction, the crimes of adult offenders generally are viewed more seriously. Because adult convicts are not presumed by the public to be rehabilitated, they face greater difficulty upon their release from prison
than do juveniles. Thus, in the case of an adult offender, it is either the released convict or the public, or both, who require rehabilitation: the convict, so that he or she will seek a life without crime, and the public, so that it will allow the convict to do so without further obstacles.

This Article has argued that while it may be desirable to foster rehabilitation of convicts and, by doing so, promote their acceptance by the public, expungement falls far short of accomplishing that. Such a procedure in fact can be only sporadically effective in achieving even the lesser purpose of rewarding those convicts who have rehabilitated themselves. At the same time the costs of expungement, both in terms of the dishonesty it fosters and the curtailment of legal and constitutional rights, outweigh its benefits.

Before legislators choose expungement, therefore, they should consider carefully what they hope to achieve by intervening. Once the objective is identified, honest and forthright methods of achieving that objective should be sought before secrecy and dishonesty are considered. Our moral, political, and legal traditions require no less.