

1986

Jane Doe v. Utah Department of Public Safety;
Peace Officer Standards and Training; Ted E.
Leamons, Director; William L. Flink and John
Does I thorough IV : Brief of Respondent

Utah Supreme Court

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**UTAH SUPREME COURT
BRIEF**

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.S9 IN THE SUPREME COURT OF THE STATE OF UTAH
DOCKET NO. 860138

JANE DOE,

Petitioner-Respondent,

vs.

UTAH DEPARTMENT OF PUBLIC
SAFETY; PEACE OFFICER STANDARDS
AND TRAINING; TED E. LEAMONS,
DIRECTOR; WILLIAM L. FLINK
and John Does I through IV,

Respondents-Appellants.

Case No. 860138

Category No. 13b

BRIEF OF RESPONDENT

APPEAL FROM AN ORDER GRANTING PETITIONER'S
MOTION FOR SUMMARY JUDGMENT IN A DECLARATORY
JUDGMENT ACTION, IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE DAVID B. DEE,
JUDGE, PRESIDING

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vs.

Respondents-Appellants. :

Category No. 13b

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IN THE SUPREME COURT OF THE STATE OF UTAH

JANE DOE,	:	
	:	
Petitioner-Respondent,	:	
	:	
vs.	:	
	:	
UTAH DEPARTMENT OF PUBLIC	:	Case No. 860138
SAFETY; PEACE OFFICER STANDARDS	:	
AND TRAINING; TED E. LEAMONS,	:	Category No. 13b
DIRECTOR; WILLIAM L. FLINK	:	
and John Does I through IV,	:	
	:	
Respondents-Appellants.	:	

STATEMENT OF THE ISSUE PRESENTED ON APPEAL

The issue on appeal is whether the district court correctly interpreted and applied U.C.A. Section 77-18-2 (1980) to the fact situation at hand.

The statute, in its entirety, reads as follows:

(1)(a) Any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for sealing of his record in that court. At the time the petition is filed and served upon the prosecuting attorney, the court shall set a date for a hearing and notify the prosecuting attorney for the jurisdiction of the date set for hearing. Any person who may have relevant information about the petitioner may testify at the hearing and the court, in its discretion, may request a written evaluation of the adult parole and probation section of the state division of corrections.

(b) If the court finds the petitioner for a period of five years in the case of a class A misdemeanor or felony, or for a period of three years in the case of other misdemeanors or infractions, after his release from incarceration, parole, or probation whichever occurs last, has not been convicted of a felony or of

a misdemeanor involving moral turpitude and that no proceeding involving such a crime is pending or being instituted against the petitioner and further finds that the rehabilitation of petitioner has been attained to the satisfaction of the court, it shall enter an order that all records in petitioner's case in the custody of that court or in the custody of any other court, agency or official be sealed. The provisions of this subsection shall not apply to violations for the operation of motor vehicle under Title 41. The court shall also issue to the petitioner a certificate stating the court's finding that he has satisfied the court of his rehabilitation.

(2)(a) In any case in which a person has been arrested with or without a warrant, that individual after 12 months, provided there have been no intervening arrests, may petition the court in which the proceeding occurred, or, if there were no court proceedings, any court in the jurisdiction where the arrest occurred, for an order expunging any and all records of arrest and detention which may have been made, if any of the following occurred:

(i) He was released without the filing of formal charges;

(ii) Proceedings against him were dismissed, he was discharged without a conviction and no charges were refiled against him within 30 days thereafter, or he was acquitted at trial; or

(iii) The record of any proceedings against him has been sealed pursuant to Subsection (1).

(b) If the court finds that the petitioner is eligible for relief under this subsection, it shall issue its order granting the relief prayed for and further directing the law enforcement agency making the initial arrest to retrieve any record of that arrest which may have been forwarded to the Federal Bureau of Investigation and the Utah Bureau of Criminal Identification.

(c) This subsection shall apply to all arrests and any proceedings which occurred before, as well as those which may occur after, the effective date of this act.

(3) Employers may inquire concerning arrests or convictions only to the extent that the arrests have not been expunged or the record of convictions sealed under this provision. In the event an employer asks concerning arrests which have been expunged or convictions the records of which have been sealed, the

person who has received expungement of arrest or judicial pardon may answer as though the arrest or conviction had not occurred.

(4) Inspection of the sealed records shall be permitted by the court only upon petition by the person who is the subject of those records and only to the persons named in the petition.

STATEMENT OF THE CASE

Respondent stipulates to Appellant's Statement of the Case and Statement of the Facts.

SUMMARY OF THE ARGUMENT

The Utah "Expungement and Sealing of Records" statute, Utah Code Annotated Section 77-18-2 (1980), is ambiguous on its face as to its applicability to P.O.S.T.. The history and intent of the framers was to provide a meaningful opportunity for ex-felons to rehabilitate and assimilate back into society, especially through employment. Neither the expungement statute nor the P.O.S.T. authorizing statute, Utah Code Annotated Section 67-15-1 et seq. (1985), provide for any but the court to determine when an expungement should be granted, and once given, only the pardoned person may reopen the records.

ARGUMENT

The public policy behind the enactment of Utah's "Expungement and sealing of records" statute has been the same since its inception, when "the legislature intended that trial

courts should have considerable authority to reform wrongdoers." William v. Harris, 106 Utah 387, 149 P.2d 640, 642 (1944). See also State v. Zolantakis, 70 Utah 296, 259 P. 1044 (1927). In effect, expungement embodies the age old notion of "forgiving and forgetting", thereby providing the ex-felon an opportunity to start over again, unhampered by the attendant disabilities of her past conviction. While this has been the basic premise behind the policy of expungement, a split exists among the states as to the actual effect an expungement. Gough, The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status, 1966 Wash. Univ. L.Q. 147 (1966).

In Utah, the expungement statute originated in 1943 when the legislature amended the statute on probation, to include the following language in pertinent part:

Where it appears to the court from the report ... that the defendant has complied with the conditions of such probation the court may, if it be compatible with the public interest ... terminate the sentence or set aside the plea of guilty or conviction of the defendant, and dismiss the action and discharge the defendant. (emphasis added)

U.C.A. Section 105-36-17 (1943)

The case law during this period indicated that the statute "was enacted for the court under the unusual circumstances and for good cause to expunge the record of crime." State v. Schreiber, 121 Utah 653, 245 P.2d 222, 224 (1952).

The "Expungement of records" statute was explicitly created in 1973 when the legislature enacted Section 77-35-17.5, which stated in part:

(2) If the court finds that ... the rehabilitation of the petitioner has been attained to the satisfaction of the court, it shall enter an order that all records in the petitioner's case ... be sealed.

(3) ... the petitioner shall be deemed judicially pardoned and the petitioner may thereafter respond to any inquiries relating to convictions of crimes as though that conviction never occurred.

Utah Code Annotated Section 77-35-17.5 (1973)

In the case of State v. Jones, 581 P.2d 141 (1978), the Utah Supreme Court construed the new statute, holding that an ex-felon whose record had been expunged could not be impeached as a witness on his own account. The Court's holding implied that the expungement erased the ex-felon's past records. In 1980, both statutes described above were replaced by the present "Expungement and sealing of records" statute, Utah Code Annotated Section 77-18-2, when the legislature recodified the Code of Criminal Procedure. This most recent statute generally remains the same as its predecessor except in the following relevant parts:

(1)(b) If the court finds ... that the rehabilitation of petitioner has been to the satisfaction of the court, it shall order that all records ... be sealed.

(2)(a) In any case in which a person has been arrested ... that individual after 12 months, ... may petition the court ... for an order expunging any and all records of arrest and detention which may have been made, if any of the following occurred:...

(iii) The record of any proceedings against him has been sealed pursuant to subsection (1). (emphasis added)

(3) ... In the event an employer asks concerning arrests which have been expunged or convictions the records of which have been sealed, the person who received expungement of arrest or judicial pardon may answer as though the arrest or conviction had not occurred. (emphasis added)

Utah Code Annotated Section 77-18-2 (1980)

A general rule of statutory construction directs courts to ascertain the legislative intent of the statute and favor the public interest and purpose behind the statute. See 82 C.J.S. Statutes Section 311 (1953). See also Utah Code Annotated Section 68-3-2 (1985); Bateman v. Board of Examiners, 7 Utah 2d 221, 322 P.2d 381 (1958).

The present Utah expungement statute is unquestionably ambiguous as concerns the right of an agency such as P.O.S.T. to consider the past expunged convictions of an ex-felon. Consequently, the court must look to the legislative intent behind the present expungement statute.

The Federal Court in Thompson v. Department of the Treasury, 557 F. Supp. 158 (D. Utah 1982) was correct insofar as it found that "[t]here is no explanation in the legislative history for the changes in the amended statute...." However, the attached affidavit of Professor Boyce provides some insight into the legislative intent behind the enactment. Affidavit of Ronald N. Boyce (July 30, 1986) (discussing U.C.A. 77-18-2 on expungement). Professor Boyce was a member of the Utah State Bar Code of Criminal Procedure Committee responsible for the

drafting of U.C.A. 77-18-2, the present expungement statute. According to Professor Boyce, the Committee's primary concern while drafting U.C.A. 77-18-2 was to provide a meaningful opportunity for an ex-felon to rehabilitate and assimilate back into society. At the time the committee viewed employment as the greatest bar to rehabilitation for ex-felons. Consequently, the intent of the committee was to remove the attendant disabilities of a past conviction for an ex-felon, especially with respect to employers. This intent largely conforms with the Model Rules, on which the committee heavily relied in reaching its conclusion.

Under the Model Rules for Law Enforcement a provision has been made for "Closing" or sealing the record of an individual's past conviction:

Rule 602 Designation of a Closed Record
(B) Conviction. If a person has been arrested and convicted, the record of that conviction shall be designated a closed record ten years after the date of the person's last known arrest or conviction....

Model Rules for Law Enforcement Release of Arrest and Conviction Records, College of Law, Arizona State University and University Police Foundation 20, 36 (1974) (Hereinafter referred to as Release Records).

Under the Model Rules 401(v), dissemination of past arrest records to prospective employers, even those not closed, is permitted "to the extent expressly and specifically required by state or federal statute or federal executive order." Id. at

22. It might be noted that prior to the alteration of Rule 401(v) which resulted in the present proscription against dissemination, the prior subsection "permitted release when, in the judgment of an agency head, reasons of national security so required." Id. at 24.

The commentary to Rule 401 suggests that "the best policy is for law enforcement agencies to eliminate altogether the voluntary dissemination of record information for employment related purposes." Id. at 24. It was apparently felt that concerns for national security would be covered by statute or executive order. See Executive Order No. 10,450, 3 C.F.R. 936 (1953), and Cole v. Young, 351 U.S. 536 (1956).

In short, the Model Rules for Law Enforcement, upon which U.C.A. Section 77-18-2 was patterned, provided for the "closing of records" for any person who maintained a clean record for ten years. Upon the closing of a record, only the person who was the subject of the record could re-open the file. The drafters of the Model Rules made clear their desire to promote the rehabilitation of ex-felons as well as their recognition that the lack of employment opportunities was the greatest impediment to this goal. (See Release of Records at 20.)

The fact that impediments to employment create the greatest barrier to rehabilitation is well supported. In the Report of the President's Task Force on Prisoner Rehabilitation,

10 J. Offender Counseling, Services and Rehab. 195 (1985),
(Hereinafter referred to as Task Force), it was recommended
that:

The United States Civil Service Commission should
devise and put into operation a plan to stimulate
Federal Employment of ex-offenders. Id. at 201.

The Task Force cogently indicated that:

Surely, the very first step toward improving its
correctional process that any government -- municipal,
state or Federal -- should take is to allow ex-
offenders to be employed by government. The
government is scarcely persuasive when it urges
industry to adopt employment policies toward ex-
offenders that itself is unwilling to adopt. Id. at
201.

In light of the foregoing, it becomes clear that the
only traceable "legislative intent" behind the expungement
statute was to promote rehabilitation by removing impediments to
employment opportunity. It is a well recognized fact that
evidence of a past arrest record is tantamount to an automatic
foreclosure to employment. See Schwartz and Skolnick, Two
Studies of Legal Stigma, 10 Soc. Probs. 133 (1962); Special
Project -- The Collateral Consequences of a Criminal Conviction,
23 Vand. L. Rev. 929 (1970).

The effect of allowing P.O.S.T. to consider the past
expunged convictions of an offender is to bar that individual
from state employment, as a general rule. The underlying intent

behind the enactment of the Utah Code should be given effect by denying P.O.S.T.'s request to review the respondent's past record.

The appellant cites to Thompson v. Department of Treasury, 557 F. Supp. 158 (D. Utah 1982), in support of the proposition that the amendment to the expungement statute was intended "to limit the effect of a judicial pardon and expungement". Id. at 167.

However, this is an erroneous interpretation of the holding in that case. The facts of Thompson involved an ex-felon who had been previously found guilty of violating 18 U.S.C.A. Section 922, a federal firearms statute. Under the statute it was illegal for anyone who had a prior felony conviction to carry firearms. Thompson, who was employed as private firearms trainer for private security guards, obtained a judicial pardon and an expungement of his records under Utah law. One of the issues in Thompson was "whether a state expungement relieves a former convict of the Section 922 disability". Id. at 166. Under Title VII, which encompasses Section 922, a provision was made for exempting any person from the Section 1202 disability who "...has been pardoned by the chief executive of a State and expressly been authorized by ...such chief executive ...to receive, possess, or transport in commerce a firearm." Id. at 164 (citing 18 U.S.C. App. Section 1203). Such an exemption clearly distinguishes Thompson from

the case at bar where no other relief exists for the ex-felon except for the expungement statute.

The appellant cites several other cases to support the proposition that P.O.S.T. cannot reasonably be regarded as an employer and therefore, as a licensing agency, can require disclosure of expunged convictions. However, the cases cited do not directly parallel the case at bar with respect to expungements.

In Dixon v. McMullen, 527 F. Supp. 711 (N.D. Tex. 1981) the facts involved an ex-felon who had received a gubernatorial pardon which Utah does not have. The Texas Court, after reviewing the history of "pardons" concluded that "a pardon implies guilt." Id. at 718.

The case of Patt v. Nevada State Board of Accountancy, 93 Nev. 548, 571 P.2d 105 (1977), did not involve an expungement. In Patt, the petitioner had received an honorable discharge from probation. Neither the statute nor the court's discussion of it considered the removal of attendant disabilities to a conviction.

In Meyer v. Board of Medical Examiners, 34 Cal. 2d 62, 206 P.2d 1085 (1949), the petitioner had received a court order terminating his probation and dismissing the information against him pursuant to Section 1203.3 of the California Penal Code. The petitioner challenged the right of the Board of Medical Examiners to suspend his license based upon his conviction. The

court reviewed the respondent Board's authority to suspend the license under Section 1203.4 which released the petitioner from all penalties and disabilities resulting from the offense. The court then concluded that the order did not "remove or wipe out the conviction", where 1203.4 contained a provision for allowing the conviction to be used against the petitioner in any later prosecution. Id. at 1086, 1087.

The Utah statute specifically blocks employer inquiries, unlike the California Penal Code which preserved the right to use the past conviction in the future.

(4) Inspection of the sealed records shall be permitted by the courts only upon petition by the person who is the subject of those records and only to the persons named in the petition.

Utah Code Annotated Section 77-18-2 (1980).
(emphasis added).

The Utah Expungement statute contains no provision similar to that of the California penal code which clearly allowed inspection of past convictions, thereby distinguishing Meyer from the case at bar.

Appellant cites Amberson v. Leamons, Third District Court No. C85-6240 (November 25, 1985), in support of the proposition that "P.O.S.T. could properly deny certification to an individual whose felony conviction had been expunged under Colorado's deferred sentencing law." (Appellant's Brief at 10). This proposition correctly states the law, but does not apply to the present case.

The present case involves an expungement, not a deferred sentence. This distinction is critical where under the

Colorado deferred sentencing scheme, Colo. Rev. Stat. Section 16-7-403 (1978), required that the conditions imposed be similar to those conditions imposed on probation. Expungement, on the other hand, relieves the ex-offender of any 'probationary requirements "as though the arrest or conviction had not occurred." Utah Code Annotated Section 77-18-2(3).

The case of Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1982) is cited as "[p]articularly applicable to the instant case." (Appellant's Brief at 10). However, Dickerson is not applicable to the present case for the same reasons that Thompson v. Department of the Treasury, supra, is not. Both cases involve a violation of the federal firearms statute, 18 U.S.C. Section 922(g).

In effect, the Dickerson court held that the federal firearms disabilities imposed by Sections 922(g)(1) and (h)(1), were not removed by a state expunction where the federal statute provides for an "affirmative action" to remove the disability. Dickerson at 115.

In short, both Dickerson and Thompson involved a violation of the federal firearms statute which contained its own provisions for removal of the firearms disability and could not therefore be removed by a state expunction.

Finally, it is contended that where Utah Code Annotated Section 77-18-2 does not focus on the question of whether one is fit to be a police officer, it necessarily follows that the expungement statute does not apply to P.O.S.T. or the P.O.S.T. council. This conclusion is not correct.

Professor Boyce indicates in his affidavit that it was the legislative committee's intent to encourage rehabilitation of ex-offenders by enhancing the opportunity for employment. While it is not disputed that "a high standard of fitness and character pertains to police officers," it does not follow that P.O.S.T. is automatically authorized to second guess a court of law and justice on the issue of the degree of rehabilitation an individual has undergone.

Neither, the Utah expungement statute nor P.O.S.T.'s own enabling statute, Utah Code Annotated Section 67-15-10.5(1) provides P.O.S.T. with the authority to require that the petitioner unseal her records. If it had been the intent of the legislature to cloak P.O.S.T. with such authority, it would have done so.

The plain language of Utah Code Annotated Section 77-18-2(4) clearly indicates that the legislature did not intend to give P.O.S.T. the authority to consider sealed records, in stating:

(4) Inspection of the sealed records shall be permitted by the court only upon petition by the person who is the subject of those records and only to the persons named in the petition. (emphasis added)

Utah Code Annotated Section 77-18-2(4) (1980)

Nowhere in this provision is P.O.S.T. allowed to inspect the sealed records. Furthermore, while P.O.S.T.'s enabling statute, Section 67-15-1 (1985) sets forth as its purpose:

To better promote and insure the safety and welfare of the citizens of this state ...and to provide more efficient and professional law enforcement....

Utah Code Annotated Section 67-15-1 (1985).

and Section 67-15-10.5(1)(d) allows the director of P.O.S.T. to bring an action to revoke, refuse or suspend P.O.S.T.

certification against anyone who has had a "conviction of a felony ...". Utah Code Annotated Section 67-15-10.5 (1)(d) (1985), these statutes do not include the consideration of an expunged conviction.

In light of the available legislative history to have allowed P.O.S.T. to unseal the respondent's records would have been a blatant violation of the public policy behind expungement, namely rehabilitation.

CONCLUSION

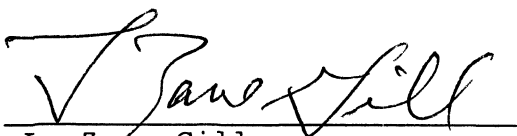
This Court should uphold the district court's order and rule prohibiting P.O.S.T. from inspecting the Respondent's sealed records.

The legislative intent behind the amended version of Utah Code Annotated Section 77-18-2 was to promote rehabilitation by providing fewer impediments to employment. This intent is manifested in both Utah Code Annotated Section 77-18-2 and Section 67-15-10.5(1)(d) where the legislature did not provide an exception for P.O.S.T. under the general "employer" provision of Section 77-18-2(3), or provide P.O.S.T. with the explicit authority to consider expunged convictions under its own enabling statute.

Finally, to allow P.O.S.T. to consider expunged convictions would violate the public policy of rehabilitation, especially where no other means to purge one's record of past convictions exists in Utah.

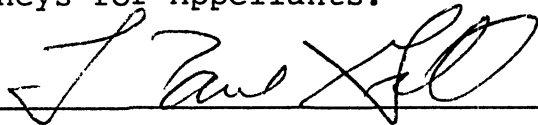
P.O.S.T. is not better qualified than the court to determine whether an ex-offender has rehabilitated. Throughout the history of Utah, this has remained the province of the court, and so should remain.

DATED this 18 day of August, 1986.

By 
L. Zane Gill
Attorney for Respondent

CERTIFICATE OF HAND DELIVERY

I hereby certify that 10 true and correct copies of the foregoing BRIEF OF RESPONDENT were hand delivered on the 18th day of August, 1986, to the Supreme Court of Utah by my associate, Beth Kadlec. Also, 4 true and correct copies were hand delivered to The Attorney General's Office, 236 State Capitol, Salt Lake City, Utah, Attorneys for Appellants.


/

APPENDIX A
CASES

THIRD JUDICIAL DISTRICT
County of Salt Lake - State of Utah

FILE NO. C85-6240

TITLE: (✓ PARTIES PRESENT)

COUNSEL: (✓ COUNSEL PRESENT)

RICHARD D. AMBERSON

: David E. Yocum

-vs-

FRED E. LEAMONS, etc.

: David B. Thompson

RECEIVED

NOV 27 1985

HON. James S. Sawaya

JUDGE

OFFICE OF
ATTORNEY GENERAL

DATE: November 25, 1985

The matter of Plaintiff's Petition for Issuance of an Extraordinary writ came on regularly for hearing on the 18th day of November, 1985 with appearances as above indicated. The matter was fully presented, argued and submitted and the decision thereon taken under advisement by the Court. The Court having now fully considered the matter makes its ruling and decision thereon as follows:

The Court is of the opinion that under the uncontroverted facts and the circumstances of this matter the P.O.S.T. Council denial of certification was justified under the provisions of UTAH CODE ANN. 67-15-10.5(1)(d). The clear intent and purpose of the legislature to deny certification under facts as these seems apparent to the Court. The principal issue being the moral character of the applicant. The statutory procedure for subsequent dismissal of charges following entry of a guilty plea, under Colorado law, would not work contrary to the obvious intent of the legislature.

Based upon the foregoing and upon the grounds and reasons stated in the defendants memorandum the Petition of the Plaintiff is denied.

[Signature]

Cite as 322 P.2d 381

7 Utah 2d 221

E. Allen BATEMAN and State Board of
Education, Plaintiffs and Respondents,
v.

BOARD OF EXAMINERS OF the STATE
OF UTAH, Defendants and Appellants.
No. 8457.

Supreme Court of Utah.

Feb. 28, 1958.

Declaratory judgment act by the University of Utah against State Board of Examiners and the State Finance Commission, wherein the State Board of Education intervened. From judgment entered by the Third Judicial District Court, Salt Lake County, Martin M. Larson, J., the State Board of Examiners appealed. The Supreme Court, Crockett, J., held that short of any capricious or arbitrary action, State Board of Examiners and its administrative arm, the Commission of Finance, have authority to examine into and approve or disapprove of proposed expenditures, to adopt regulations pertaining generally to salary schedules and personnel in accordance with statutes conferring such powers upon them, and that Superintendent of Public Instruction and Board of Education are subject thereto in a similar manner to other departments of State government.

Judgment in accordance with opinion.

1. Constitutional Law §50

The fundamental power of government rests in the legislature.¹

1. *Parkinson v. Watson*, 4 Utah 2d 191, 291 P.2d 400.

2. *Thoreson v. State Board of Examiners*, 21 Utah 187, 60 P.2d 982; *Burrows v. Kimball*, 11 Utah 149, 41 P. 719; *Marionaux v. Cutler*, 32 Utah 473, 91 P. 355; *State ex rel. Davis v. Edwards*, 33 Utah 243, 93 P. 720; *State ex rel. Davis v. Cutler*, 34 Utah 99, 95 P. 1071; *Uintah State Bank v. Ajax*, 77 Utah 455, 297 P.

2. States §173

The State Board of Examiners has power beyond mere auditing. Const. art. 7, § 13.²

3. Statutes §223.1

A preference should be given to later statutes over prior ones where there is a conflict.³

4. Statutes §223.4

Where statutes are conflicting, the more specific takes precedence over the general.⁴

5. Constitutional Law §70(3)

Statutes §214

Usually Supreme Court is not concerned with questions of policy nor with wisdom of legislation, but where there is confusion because of conflict between statutes, it is permissible to look to general governmental policies and purposes to interpret the legislative intent.

6. States §173

Short of any capricious or arbitrary actions, State Board of Examiners and its administrative arm, the Commission of Finance, have authority to examine into and approve or disapprove of proposed expenditures, to adopt regulations pertaining generally to salary schedules and personnel in accordance with statutes conferring such powers upon them, and Superintendent of Public Instruction and Board of Education are subject thereto in a similar manner to other departments of state government. U.C.A.1953, 53-2-8, 53-3-7, 53-3-8, 53-3-9, 63-2-13, 63-2-14, 63-2-20, 63-6-8, 63-6-11, 63-6-19, 64-6-1, 64-6-2, 64-7-2, 64-9-1, 67-3-1 et seq., 77-62-2,

434; *State Board of Education v. Commissioner of Finance*, 122 Utah 104, 247 P.2d 435.

3. *Nelden v. Clark*, 20 Utah 382, 59 P. 524; *Pacific International Express Co. v. State Tax Commission*, 7 Utah 2d 15, 816 P.2d 549.

4. *University of Utah v. Richards*, 20 Utah 457, 59 P. 90.

E. R. Callister, Atty. Gen., H. R. Waldo, Jr., Asst. Atty. Gen., for appellants.

Richards & Bird and Dan C. Bushnell, Salt Lake City, for respondents.

CROCKETT, Justice.

This case arose originally as a suit for declaratory judgment by the University of Utah against the State Board of Examiners and the State Finance Commission. The dispute between the University and those defendants was dealt with in a prior opinion.¹ The State Board of Education intervened to determine its rights relating to both the University and the defendants, the issues between the University and the Board of Education have been resolved by stipulation. There is no dissonance between the Board of Examiners and the Commission of Finance in this action. Their interests being parallel, for the purpose of this decision, we will proceed upon the assumption that the Commission of Finance is the statutorily created administrative arm of the Board of Examiners and consider the rights of the Board of Education relative to it. These parties are hereinafter for brevity referred to simply as "Examiners" and "Education."

Reduced to its simplest terms the dispute is this: Education claims authority to administer the State Department of Education and school system without let or hindrance from Examiners; whereas the latter Board claims authority to examine and approve or disapprove of proposed expenditures, and to exercise general super-

visory control of salaries and personnel practices of the Board of Education.²

Both parties advance plausible arguments in support of their claims to authority based on their respective constitutional origins and legislative implementation. Resolution of the problems presented will be facilitated by examining the constitutional foundation and the statutory structure of the authority of each separately.

The constitutional authority of Education is found in Article X which provides for the establishment of a uniform system of public schools within the state, defines of what it shall be comprised, and in Section 8 thereof vests "general control and supervision of the Public School System * * * in a State Board of Education, consisting of the Superintendent of Public Instruction, and such other persons as the Legislature may provide. * * *"

The language of Article X sheds little light as to just how the authority of Education should relate to Examiners or to other state departments, nor can any help be found from the proceedings of the Constitutional Convention, as there is no indication that the matter was ever considered or discussed. However, there was rather extensive discussion as to whether the Superintendent of Public Instruction should be an elective or an appointive position. Considerable sentiment was expressed as to the undesirability of having it directly responsive to political pressures.³ This attitude reflected in the statement of Delegate Carl G. Maeser, who said, "I would like to see that office removed as far as possible away from politics."⁴ The important responsibilities and the necessity of high qualifications of the superintendent were also stressed,⁵ and it is also

true that there was no suggestion or intimation that the superintendent or the Board of Education might be subject to the control of Examiners.

The general purpose thus stated in the Constitution of establishing and maintaining a public school system is implemented in statutes which quite fully set forth the powers and duties of the superintendent and of the Board of Education.

Section 53-3-2 provides in part as follows:

"The state board of education shall be charged with the administration of the system of public instruction, and with general superintendence of the district schools of the state and of the school revenue set apart and appropriated for their support. * * *"

Section 53-3-7 provides:

"The state superintendent with the approval of the state board of education shall prepare and submit to the governor to be included in his budget to be submitted to the legislature, a budget of the requirements of his office including the expenses of the state board of education, for his own and other salaries and wages, office and travel expense, equipment and repairs necessary for carrying out the duties imposed upon the superintendent of public instruction and the state board of education * * *"

Section 53-3-8 provides:

"The state auditor shall transfer to the state general fund from the uniform school fund to the credit of the state board of education the amount designated by the legislature for the operation of the office of the state superintendent and the state board of education, * * *"

of money in preparing * * *. It is not like the * * * office of Governor, which requires little or no preparation, (laughter) and can be filled by a man of ordinary ability."

Section 53-2-8 gives the Superintendent authority to appoint subordinates and fix their salaries:

"The board may appoint such assistant superintendents, directors, supervisors, assistants, clerical workers, and other employees, as in the judgment of the board may be necessary to the proper administration and supervision of the public school system. *The salaries of such assistant superintendents, directors, supervisors, assistants, clerical workers and other employees, shall be fixed by the board and shall be paid from money appropriated for that purpose.*" (Emphasis supplied.)

If the above statutes and constitutional provisions stood alone and could be given literal application, there would be no difficulty in determining the scope of the powers of Education. However, when we look at the over-all picture of our law, difficulty is encountered because, as will be seen, these powers are overlapped by others conferred upon Examiners.⁶

The Board of Examiners was created by and its authority is rooted in Section 13, Article VII of our Constitution which provides:

"Until otherwise provided by law, the Governor, Secretary of State and Attorney-General shall constitute a Board of State Prison Commissioners, * * *. [specifies duties] They shall, also, constitute a Board of Examiners, with power to examine all claims against the State except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law; and no claim against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the Legislature without having been consider-

1. U. of Utah v. Board of Exrs., 4 Utah 2d 408, 295 P.2d 848.

2. Education sets out a list of instances in which it contends that Examiners, Finance or the Governor have interfered with its functions by refusing to make available appropriated funds; approve appointments of employees and proposed salaries.

3. Vol. I Proc.Const.Conv. 650 et seq. (1895).

4. Ibid. p. 661.

5. Ibid. p. 1154. Delegate Kerr urged: "I submit, Mr. President, that the * * * Superintendent of Public Instruction should be a man of learning, * * * who has spent years and a great amount

6. For an excellent article on the powers of Examiners see Article by James W. Rawlings, 5 Utah Law Review 849.

ed and acted upon by the said Board of Examiners."

The question of importance is the extent of the authority conferred by the language, " * * * with power to examine all claims against the state." This phraseology has given rise to much concern over the reciprocal powers and interrelationships of the departments of our state government. In the first place, we think that the word "claim" was used in its broadest connotation and we recognize that it is susceptible of a variety of meanings: ranging from a moral claim; or the seeking of legislative largesse; or asserting a privilege; to asserting rights to compensation for property or materials furnished, or salary for services rendered, to the state. But the pivot of the controversy has devolved upon the term "to examine." On the one hand, Education espouses the view that the power "to examine all claims against the state" merely denotes an auditing function; and on the other, Examiners takes the position that it confers plenary power to examine into the advisability and necessity of any expenditure or proposed obligation of the state.

The first facet of Education's argument against the power claimed by Examiners is that the framers of the Constitution envisioned Section 13, above quoted, as legislative in nature, intended to be subsequently modified and controlled by legislative enactments such as the statutes conferring powers on Education. They emphasize that such was the plain import of its first clause, "Until otherwise provided by law,

" * * * " which they insist modified the entire section. Without going into the detail of the arguments pro and con on this facet of the subject it is readily seen that attempting to give that proviso application to each of the subsequent parts of the section gives rise to some difficulty grammatically. I. e. it would read: "Until otherwise provided by law, * * * [they shall] * * * perform such other duties as may be prescribed by law." Absent knowledge of the facts concerning its adop-

tion, the most natural meaning would be that it applies only to the first sentence dealing with the membership of the Board of State Prison Commissioners, and by parallel reasoning, to the second sentence relating only to the membership of the Board of Examiners.

Education points to the constitutional convention in support of its reasoning that the entire section was intended to be subject to future legislation. Sections 12 through 15 establish various administrative agencies: Section 12, the Board of Pardons; Section 13, the State Prison Commissioners and Board of Examiners; Section 14, Insane Asylum Commissioners; Section 15, Reform School Commissioners. At the Convention, a motion was made to strike all of the sections on the theory that they dealt with legislative matters. During subsequent debates, in which section 12 was most often mentioned, delegate Thurman observed:

"I do not see why this matter cannot be left to the Legislature. Of course, this leaves the matter where it is now, but it gives to the Legislature the right to create a board such as is here named, or any other kind of a board of pardons. * * *

Mr. Varian. Mr. Chairman, taking the propositions in their order, I would suggest, in speaking to the substitute offered by my friend from Utah County, that there is no reason why we should not leave it to the Legislature. * * *"

and at the final reading, first Section 12 and then Sections 13, 14 and 15, were each amended by inserting at the beginning thereof the phrase: "Until otherwise provided by law."⁷ Thus the manner in which the initial proviso of the section was adopted is somewhat persuasive that the whole section was intended to be applied and interpreted in accordance with subsequent legislative enactments.

[1] The idea that the boards themselves were to be subject to change by the Legis-

lature also finds support in the practical construction which has been placed upon it. The membership of all of the other boards provided for in the sections just referred to has now been changed.⁸ A conclusion that the initial clause affects the entire section would not cast the die in favor of Education any more than it would in favor of Examiners, as will appear from our discussion of the statutes relating to the powers of the latter board. Yet it does have an important bearing on the over-all conclusion we reach in this opinion, which is based to a considerable extent upon the concept that the fundamental power of government rests in the legislature.⁹

Another argument of Education against the claim to general supervisory powers asserted by Examiners is that the concluding clause of the section of the Constitution in question, " * * * and no claim against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislature without having been considered and acted upon by the State Board of Examiners" characterizes the entire section, showing an intent that they should pass only upon unliquidated claims against the state. Certain it is that one of the functions of Examiners is to investigate and act as a fact finder and advisor to the legislature on claims of that nature, such as tort claims, or other claims for damages or compensation claimed for property, goods or services, by persons who would not otherwise have legal redress available.

[2] One of the major difficulties with Education's contention that, except as to unliquidated claims against the state, Examiners has no discretionary authority and can perform only an auditing function, is that that would be but a duplication of the duties of the state auditor who is charged

with the responsibility of auditing the records and accounts of all departments of state government.¹¹ The question as to the extent of the power of Examiners has been dealt with by this court in numerous decisions. They clearly demonstrate that Examiners has powers beyond mere auditing.

One of the earliest cases dealing with the problem of the authority of Examiners was *Thoreson v. State Board of Examiners*.¹² Mandamus was sought to direct Examiners to audit and allow an unpaid balance for the lease of school lands. The statute provided:

"The state board of examiners are hereby directed to receive and audit and allow all just claims of persons who have paid monies in pursuance of chapter 76 of the Session Laws of the territory of Utah of eighteen hundred and ninety-two, in relation to the leases of school lands and the state auditor is hereby directed to draw his warrant therefor on the state district school tax fund."

The provision of the 1892 Session Laws which had authorized leasing of school lands had been held unconstitutional¹³ and the statute was purposed to reimburse people for money advanced on such leases. The court took occasion to observe that Examiners is more than a perfunctory body, and may exercise discretion, but held that under the statute the amount paid in was a "just claim" and therefore the only determination for Examiners to make was whether the amount of money claimed had actually been paid in and was under a mandatory duty to authorize payment of the amount.

The next case dealing with the scope of Examiners' authority was *Marionaux v.*

7. II Proceedings Const.Conv.1895 p. 1003.

8. Ibid pp. 1152 et seq.

9. Sections 77-62-2, 77-62-3, U.C.A.1953 modify Article 7, Section 12; Section 64-9-1, U.C.A.1953, modifies Article 7, Section 13 insofar as the Board of Prison Commissioners is concerned. Section 64-7-2, U.C.A.1953 modifies Article 7, Section 14; and Sections 64-6-1 and 64-6-2, U.C.A.1953 modify Article 7, Section 15.

322 P.2d-25

10. See *Parkinson v. Watson*, 4 Utah 2d 191, 291 P.2d 400.

11. Sec. 16, Art. VII, Constitution; Secs. 67-3-1 et seq., U.C.A.1953.

12. 1900, 21 Utah 187, 60 P. 982.

13. *Burrows v. Kimball*, 11 Utah 149, 41 P. 719.

Cutler.¹⁴ A district judge brought mandamus against Examiners for approval of his claim for a mileage which they had rejected. The refusal had been justified on the ground that the law authorizing the same was unconstitutional as containing more than one subject which position was sustained. This case is relied upon as authority for the discretionary power of Examiners but it is to be noted that the holding, if strictly limited to the facts, says only that they are not required to approve the payment of a claim which is not properly grounded under the law. The question of their discretion beyond that was not precisely involved.

This case was followed by State ex rel. Davis v. Edwards¹⁵ wherein a court reporter sought to compel the State Auditor to allow his claim for mileage which the district judge had certified as correct. The statute stated that upon such certification by the judge and presentation of the certificate to the Auditor a warrant should be drawn for payment. In spite of this statute the Auditor refused, relying on Sec. 18, Ch. 35, L. 1896 which required approval of Examiners before he could draw the warrant. The court held that the claim must be presented to Examiners for approval as required by the statute and used some very pointed language pertinent to the instant problem:

"The powers conferred upon the board of examiners, with regard to claims against the state, by the constitutional provision quoted above, are general and sweeping. The power would include all claims against the state, were it not for the exception which excludes salaries or compensation of officers fixed by law. An exception of this character may not be enlarged nor extended by implication. An exception which specifies the things that are excepted from a general provision strengthens the force of the gen-

eral provisions of the law." (Emphasis added.)

While it might be said that the case could have been based upon the express provisions of the statute involved, yet it indicated the conception the court had of the law and the trend of its development in recognizing a discretionary power in the Board of Examiners in passing on claims against the state.

That same year in State ex rel. Davis v. Cutler¹⁶ the question of Examiners' discretionary power was judicially appraised from a slightly different angle. Another court stenographer brought mandamus to compel the Auditor to allow a claim which had been rejected by Examiners. The court again opined that Examiners may exercise discretion in allowance of claims but must not do so arbitrarily and that, if the claim, " * * * is one which is admitted to be just, and is authorized by law, and there is no dispute with regard to any fact involved, and the claim is presented to the board in due form as the law requires, we know of no law nor reason why respondents [Examiners], although acting in a quasi-judicial capacity, should not be required to audit and allow the claim."¹⁷ The actual holding was that Examiners had improperly refused to act, and thus the observations relating to its discretionary powers were by way of dicta. But even so, there was another clear expression of the view the court took of the law respecting the discretionary powers of Examiners.

The landmark case on this subject is that of Uintah State Bank v. Ajax.¹⁸ Action was brought to compel the State Auditor to issue warrants to pay bounty certificates for killing predatory animals (coyotes). The plaintiff contended that inasmuch as the statute fixed the amount to be paid for each animal killed and directed the Auditor to issue the warrant upon the certificate of the County Clerk, and further that nothing in the act required submission of the claims to

Examiners, the Auditor must issue the warrant upon presentation of the certificate. The bank argued that the amount having been thus "fixed by law," there was nothing but the ministerial duty of paying the claim and hence it was unnecessary to present it to Examiners. This contention was rejected by the court, saying:

"The claims here are not fixed by law in the sense that the Legislature has made an appropriation of an amount certain to a definite named person."

and further,

"all claims are subject to action by the board of examiners except only claims for 'salaries and compensation of officers fixed by law.'"

It refused to agree that Examiners should examine only "unliquidated" claims against the state, using the following language:

"If we should adopt petitioner's view, it would follow that the legislature might designate any officer other than the board of examiners as authorized in behalf of the state to settle, fix, or liquidate claims and agree upon the amount to be paid thereon, and thereby exclude the board of examiners from its duty * * *. We cannot agree to any such construction of the constitutional language, nor may we by construction interpolate the word 'unliquidated' into the Constitution [which] * * * has vested in the Board of Examiners the power to examine and pass on all claims except those exempted, and the Legislature is without authority to delegate such power to any other board or officer."

The court went on to state:

"If the view is taken that the Legislature intended to make this claim payable by the auditor without presentation to the board of examiners, then the Legislature attempted to do that which

it had no power or authority to effectuate, and on this question the language in the case of State ex rel. Davis v. Edwards is not only appropriate, but decisive."

Another case which Examiners rely upon is the recent one of State Board of Education v. Comm. of Finance¹⁹ in which Finance refused to approve payment of the salary of the Superintendent of Public Instruction. The reasons urged were that the Board of Education was not legally constituted and was without authority to appoint a superintendent and fix his salary. The holding was for Education as to this particular authority, but in passing the court observed:

"The Board of Examiners * * * which must approve all salary claims against the State, except those fixed by law, approved by a vote of two to one the request of the Board of Education to pay Dr. Bateman a salary of \$10,000 per annum."

again indicating the court's understanding of the law as it has developed in our state under the decisions hereinabove discussed.

This interpretation of the law is also consonant with the legislative conception of the powers of Examiners as manifest in the various statutes implementing the powers of that board. They provide for the presentation of all claims against the state to the Board of Examiners to be passed upon;²⁰ that it has certain supervisory powers over the Auditor;²¹ and the unanimous consent of its members is required before officers of the state may make deficit expenditures.²² It is expressly provided that the Department of Finance, the legislatively created administrative arm of the Board of Examiners, is endowed with authority to approve or disapprove of the hiring of all personnel;²³ and is also charged in broad language with the responsibility of investigating the need for existing positions in all departments of state government, " * * *

14. 1907, 32 Utah 475, 91 P. 355.

15. 1908, 33 Utah 243, 93 P. 720.

16. 1908, 34 Utah 99, 95 P. 1071.

17. Ibid., at page 1074 of 95 P.

18. 1931, 77 Utah 455, 297 P. 434, 438.

19. 1932, 122 Utah 164, 247 P.2d 435, 439.

20. 63-6-11, U.C.A.1953.

21. 63-6-8, U.C.A.1953.

22. 63-6-19, U.C.A.1953.

23. 63-2-14, U.C.A.1953.

with a view to eliminating any unnecessary ones, * * * and * * * no vacancy shall be filled until the commission [finance] has certified to the department requesting the creation of a new position or the filling of the vacancy that the position is necessary to carry on the work."²⁴

Finance is also endowed with a general grant of power as to all departments of state government, to establish salary schedules:

"* * * for the officers, clerks, stenographers and employees of state offices, departments, boards and commissions, except where such salaries are fixed by statute or by appropriation; and such schedule of salaries shall have the force of law in all state offices, departments, boards and commissions, * * *."

The comprehensive nature of the authority granted Finance is further demonstrated by the provision for the appointment of a budget officer with certain supervisory duties with respect to the use of funds in the various departments.²⁵

Further of significance is the statutory interdiction directed to the Board of Education:

"At the end of each month the state superintendent shall file with the state board of examiners an itemized account of his expenses, including those of the state board of education, verified by his oath. The said board shall examine the same, and if the account is found to be correct and the expenditures necessary, shall certify the same to the state auditor. The state auditor shall issue a warrant on the state treasurer for the amount due on such account, and at the end of each month he shall issue his warrant for one-twelfth of the superintendent's annual salary."²⁷ (Emphasis added.)

14. *Ibid.*

15. 63-2-12, U.C.A.1953.

16. 63-2-20, U.C.A.1953.

17. 53-3-9, U.C.A.1953.

The argument of Education, not entirely implausible, is that if this section is construed with the other statutes relating to its powers and duties, the reasonable construction is that the account required to be filed with and approved by Examiners relates only to the personal expenses of himself and the Board, and not to the general costs of operation of the department. The statute admittedly could have been plainer in meaning had the minds of its framers adverted to the possibility of the difficulties here encountered. It is our view that if that section is considered against the background of the law as discussed in this opinion, and particular note is made of the fact that the final clause singles out for mandatory payment the superintendent's salary, (which is actually fixed by statute and thus under the exception from Examiners' authority of "salaries fixed by law,") a rather strong implication arises that all of the other expenses and expenditures of the department are left within the emphasized portion of the statute just quoted and under the discretionary power of Examiners. In fact it seems difficult to reconcile the language, "if the account is found to be correct and the expenditures necessary" in any other way.

[3] Education advances another argument that under the rule giving preference to later statutes over prior ones where there is conflict,²⁸ it is entitled to prevail in this controversy because Section 53-2-8, U.C.A. 1953, quoted in the forepart of this opinion, authorizing the Board of Education to appoint and fix the salaries of the various officers and employees of the department which was re-enacted in 1953 constitutes the most recent pronouncement of the legislature and is thus controlling. Generally speaking we do not disagree with this rule, nor with the reasoning upon which it is based. But like all general rules it must be applied with discernment as to whether it fits the fact

28. *Nelden v. Clark*, 20 Utah 382, 59 P. 524, 526; *Pacific Intermountain Express Co. v. State Tax Comm.*, 7 Utah 2d 15, 316 P.2d 549.

situation at hand and no rule should be given force in application where the facts plainly negative any such intent. The purpose of the re-enactment of the statute just referred to was solely to amend the provision relating to the Superintendent's salary. No change was made in the other portions of the act and it is obvious that the legislature did not intend any significance to the re-enactment in nullifying other existing statutes of the state because it was later in time.

On the point of statutes taking priority because of subsequent enactment, the fact is that the sections hereinabove discussed conferring supervisory powers upon Finance were all enacted in connection with the reorganization of state government in 1941, (and some subsequent amendments thereto,) and thus, as expressions of legislative will as to governmental policy, were later indications thereof than the statutes relied upon by Education. Corollary to this and entirely consistent with the idea that Examiners has rather broad powers in respect to all of the departments of government, including Education, is the further clearly expressed intent in that regard is shown in Sec. 12 of each general appropriation act since the 1949 Session of the Legislature:

"The board of examiners shall promulgate and publish rules and regulations regarding the conduct and employment of state officers and employees covering working hours, overtime, sick leave, vacations and other matters of personnel policy and enforce such rules and regulations uniformly in all state departments * * * shall adopt rules and regulations * * *, with regard to the establishment of salary schedules for all state departments and institutions * * *. No such salary schedule shall be put into effect until

approved by the board of examiners."²⁹

[4] Nor do we see anything persuasive in the rule of statutory construction that as to conflicting statutes, the more specific takes precedence over the general,³⁰ which strangely enough, each party here contends favors its position. While it is true that the statutes purport to give Education specific powers within its own department, other statutes cited above give Examiners and Finance specific authority within the particular area relating to personnel, salaries and expenditures.

[5] Usually we are not concerned with questions of policy, nor with the wisdom of legislation. Yet where there is confusion because of conflict between statutes, it is permissible to look to general governmental policies and purpose to interpret the legislative intent. In that vein there are some considerations which provide a reasonable basis for concluding that the legislature regarded it as desirable and therefore intended that Education should be subject to the same regulations as other departments of state government: It is in keeping with the fundamental policy of checks and balances which characterizes our entire system of government. It also tends to keep control close to the people, which is a touchstone of democracy. Examiners is made up of the three top executive officers of the state, who are directly elected by and responsible to the people. This is contrasted to the superintendent who is now appointed by the members of the Board of Education, whose members are elected from the various districts of the state, and whose terms are staggered so that in practical operation the superintendent could exercise a relatively high degree of control over them and himself be comparatively impervious to responsibility to the public. There are also advantages in

29. Quoted in Sec. 12, Ch. 164, S.L.U.1955; similar Secs. 12 of Ch. 136, S.L.U.1953; Ch. 123, S.L.U.1951; Ch. 98, S.L.U.1949; same duties upon personnel officer Sec. 12, Ch. 177, S.L.U.1957.

30. *Nelden v. Clark*, *l. note* 28 *supra*; *University of Utah v. Richards*, 20 Utah 457, 59 P. 96, 98.

having some common standards in regard to departmental budgets, personnel requirements, salary schedules, vacations, sick leave and other such matters in order to minimize difficulties which may arise because of lack of uniformity, or even competition in the various state departments.³¹

Were we interpreting the statutes and constitutional provisions relating to the Board of Examiners for the first time we might be more impressed by arguments proposed by Education. However, history and experience have always been the very bone and sinew of the law. As stated by the great Justice Holmes: "The life of the law has not been logic; it has been experience."³²

Looking at the problems here presented in broad perspective it is important to realize that our legislature has met biennially and in special sessions for many years with both the statutory and decisional law of this state being so understood and applied that in practical operation the Examiners and Finance have exercised general supervisory powers over the fiscal and budgetary affairs of other departments of state government and no substantial changes have been made in the law in reference thereto.

On the basis of the constitutional provisions, legislative enactments and decisional law of our state as it has developed, we are constrained to reject the contention of Education that it is entirely free from control of or responsibility to Examiners. We do not desire to be understood as saying that Examiners can go so far as to in effect exercise a veto power over legislation by arbitrarily refusing to make funds available which have been appropriated to Education for either general or specific purposes. Insofar as this has been done in certain instances which had considerable bearing upon precipitating this litigation, such actions were wrong. But inasmuch as the funds in question have reverted to the general fund, and the problems are now

moot, there is no point in particularizing them.

Notwithstanding the powers conferred upon Examiners by the statutes hereinabove discussed, which must be recognized, that does not mean that it can by arbitrary actions in budgetary matters intrude into the internal affairs of management or control of the functions of Education within the purview of its purpose as provided by law. The latter alone is given the authority and charged with the duty of the "administration of the system of public instruction" in the schools of the state. In order to discharge that responsibility it is essential, and the law contemplates, that it have full control of the framing of policy and other aspects of the internal management of that department in accordance with such purpose.

[6] It is our conclusion that, short of any such capricious or arbitrary actions, the Board of Examiners and its administrative arm, the Commission of Finance, have the authority to examine into and approve or disapprove of proposed expenditures, to adopt regulations pertaining generally to salary schedules and personnel in accordance with the statutes conferring such powers upon them, and that the Superintendent of Public Instruction and the Board of Education are subject thereto in a similar manner to other departments of state government.

Respective counsel are commended for their able and thorough presentations of the issues involved in this case.

No costs awarded.

McDONOUGH, C. J., and WORTHEN, J., concur.

WADE, Justice (concurring).

I concur with the main opinion, but think it desirable to point out that in certain instances in the past Examiners, Finance and/or the Governor have, by arbitrary

actions, and contrary to the law as set forth in the opinion, infringed upon the prerogatives of the Superintendent of Public Instruction and the Board of Education by unjustifiably interfering in their functions. A long list of such grievances are complained of. I set out but a few by way of example:

(a) Arbitrarily reduced the moneys appropriated to Weber College for fiscal 1953-54 by \$79,027.91.

(b) Refused to make available to U.S. A.C. (now U.S.U.) \$20,000.00 which had been appropriated and designated as a research fund.

(c) In April, 1953, reduced the appropriation to Weber College by \$5,000.00 on the day the fund was expendable.

(d) Arbitrarily refused to approve numerous salary changes proposed by Education for administrative and supervisory personnel.

HENRIOD, Justice.

I concur. However I cannot subscribe to the concurring opinion of Mr. Justice WADE where he says "in certain instances in the past, Examiners, Finance and/or Governor have, by arbitrary actions, and contrary to the law as set forth in the opinion, infringed upon the prerogatives of the Superintendent of Public Instruction and the Board of Education by unjustifiably interfering in their functions. A long list of such grievances are complained of. I set out but a few by way of example."

Such language assumes that each and every one of the grievances complained of by respondent was an unlawful usurpation of power, including the four instances pointed out by Mr. Justice WADE. Such assumption cannot be indulged, since most of the fifteen grievances which were claimed by respondent to have been unlawful usurpations of power represent factual situations giving rise to highly debatable legal questions, and most of which, in similar situations, have been held by this Court *not* to have been any usurpation of power at all, but a proper exercise thereof.

The sweeping statement of Mr. Justice WADE, if taken literally, would dispossess the Board of Examiners and Finance Commission of any control whatsoever as to any and all existing or proposed salaries or personnel irrespective of budgetary control, statutory restriction, necessity, amount of compensation or number of personnel, since most of such grievances had to do with salaries and personnel.



7 Utah 2d 287

Erwin MOTZKUS and Luella Motkus, his wife, Plaintiffs and Respondents,

v.

Marvin CARROLL and Elva Dwoen Carroll, his wife, and Mrs. Ruth Kempton, Defendants and Appellants,

and

Zion's Savings Bank & Trust Company, Trustee for Carl M. Hansen, Defendant and Respondent.

No. 8706.

Supreme Court of Utah.

March 10, 1958.

Proceeding to determine whether boundary line by acquiescence had been established at fence between two tracts of land. The Third Judicial District Court, Salt Lake County, Stewart M. Hanson, J., held that boundary had not been established, and appeal was taken. The Supreme Court, Wade, J., held that where for more than 45 years there was a fence between two tracts, respective owners and occupants of each tract recognized, acquiesced in, and treated such fence as marking boundary line between two tracts and claimed land up to such fence but did not claim any land beyond it, boundary line by acquiescence was established at fence line.

Reversed.

31. See report on State Government to Tax Study Committee by G. Homer Durham, p. 23.

32. Holmes, *The Common Law*, (38th Ed.) p. 1.

COLE v. YOUNG ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 442. Argued March 6, 1956.—Decided June 11, 1956.

The Act of August 26, 1950, gave to the heads of certain departments and agencies of the Government summary suspension and unreviewable dismissal powers over their civilian employees, when deemed necessary "in the interest of the national security," and its provisions were extended to "all other departments and agencies of the Government" by Executive Order No. 10450. Petitioner, a preference-eligible veteran under the Veterans' Preference Act, was summarily suspended from his classified civil service position as a food and drug inspector for the Department of Health, Education and Welfare on charges of close association with alleged Communists and an allegedly subversive organization. Later, he was dismissed on the ground that his continued employment was not "clearly consistent with the interests of national security." His appeal to the Civil Service Commission under the Veterans' Preference Act was denied on the ground that that Act was inapplicable to such discharges. *Held*: His discharge was not authorized by the 1950 Act and hence it violated the Veterans' Preference Act. Pp. 538-558.

1. The 1950 Act authorizes a dismissal only upon a determination that it is "necessary or advisable in the interest of the national security." Such a determination requires an evaluation of the risk to the "national security" that the employee's retention would create, which depends not only upon the character of the employee and the likelihood of his misconducting himself but also upon the nature of the position he occupies and its relationship to the "national security." P. 542.

2. The 1950 Act is not the only, nor even the primary, source of authority to dismiss government employees, and the question in this case is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case. Pp. 543-544.

3. This depends on the meaning of the term "national security," as used in the 1950 Act. Pp. 542-544.

4. The term "national security" is not defined in that Act, but it is clear from the statute as a whole that it was intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare. Pp. 544-548.

5. This conclusion is supported by the legislative history of the Act. Pp. 548-551.

6. A condition precedent to the exercise of the dismissal authority conferred by the 1950 Act is a determination by the agency head that the position occupied is one affected with the "national security," as that term is used in the Act. P. 551.

7. No determination was made that petitioner's position was one in which he could adversely affect the "national security," as that term is used in the Act. Pp. 551-558.

(a) Executive Order No. 10450 treats an adverse determination as to the loyalty of an employee as satisfying the statute, irrespective of the character of his job or the effect his continued employment might have upon the "national security." Pp. 551-556.

(b) The failure of the Executive Order to state explicitly what was meant is the fault of the Government, and any ambiguities should be resolved against the Government. P. 556.

(c) From the Secretary's determination that petitioner's employment was not "clearly consistent with the interests of national security," in the light of the Executive Order, it may be assumed only that the Secretary found the charges to be true and that they created reasonable doubt as to petitioner's loyalty. Pp. 556-557.

96 U. S. App. D. C. 379, 226 F. 2d 337, reversed and remanded.

David I. Shapiro argued the cause for petitioner. With him on the brief were *James H. Heller* and *Osmond K. Fraenkel*.

Donald B. MacGuineas argued the cause for respondents. On the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Burger*, *Samuel D. Slade* and *Benjamin Forman*.

Opinion of the Court by MR. JUSTICE HARLAN,
announced by MR. JUSTICE BURTON.

This case presents the question of the meaning of the term "national security" as used in the Act of August 26, 1950, giving to the heads of certain departments and agencies of the Government summary suspension and unreviewable dismissal powers over their civilian employees, when deemed necessary "in the interest of the national security of the United States."¹

¹ § 1. "Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 U. S. C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided*, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen

Petitioner, a preference-eligible veteran under § 2 of the Veterans' Preference Act of 1944, 58 Stat. 387, as amended, 5 U. S. C. § 851, held a position in the classified civil service as a food and drug inspector for the New York

of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further*, That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further*, That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further*, That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of this Act may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

"Sec. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may,

District of the Food and Drug Administration, Department of Health, Education, and Welfare. In November 1953, he was suspended without pay from his position, pending investigation to determine whether his employment should be terminated. He was given a written statement of charges alleging that he had "a close association with individuals reliably reported to be Communists" and that he had maintained a "sympathetic association" with, had contributed funds and services to, and had attended social gatherings of an allegedly subversive organization.

Although afforded an opportunity to do so, petitioner declined to answer the charges or to request a hearing, as he had the right to do. Thereafter, the Secretary of the Department of Health, Education, and Welfare, after "a study of all the documents in [petitioner's] case," determined that petitioner's continued employment was not "clearly consistent with the interests of national security" and ordered the termination of his employment. Petitioner appealed his discharge to the Civil Service Commission, which declined to accept the appeal on the ground that the Veterans' Preference Act, under which petitioner claimed the right of appeal, was inapplicable to such discharges.

Petitioner thereafter brought an action in the District Court for the District of Columbia seeking a declaratory judgment that his discharge was invalid and that the Civil Service Commission had improperly refused to entertain his appeal, and an order requiring his reinstatement in his former position. The District Court granted the respondents' motion for judgment on the pleadings and dismissed the complaint. 125 F. Supp. 284. The

from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress." 64 Stat. 476, 5 U. S. C. §§ 22-1, 22-3.

Court of Appeals, with one judge dissenting, affirmed. 96 U. S. App. D. C. 379, 226 F. 2d 337. Because of the importance of the questions involved in the field of Government employment, we granted certiorari. 350 U. S. 900.

Section 14 of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U. S. C. § 863, provides that preference eligibles may be discharged only "for such cause as will promote the efficiency of the service" and, among other procedural rights, "shall have the right to appeal to the Civil Service Commission," whose decision is made binding on the employing agency. Respondents concede that petitioner's discharge was invalid if that Act is controlling. They contend, however, as was held by the courts below, that petitioner's discharge was authorized by the Act of August 26, 1950, *supra*, which eliminates the right of appeal to the Civil Service Commission. Thus the sole question for decision is whether petitioner's discharge was authorized by the 1950 Act.

The 1950 Act provides in material part that, notwithstanding any other personnel laws, the head of any agency to which the Act applies

"may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of [his agency] The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final:"

The Act was expressly made applicable only to the Departments of State, Commerce, Justice, Defense, Army,

Navy, and Air Force, the Coast Guard, the Atomic Energy Commission, the National Security Resources Board, and the National Advisory Committee for Aeronautics. Section 3 of the Act provides, however, that the Act may be extended "to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security," and the President has extended the Act under this authority "to all other departments and agencies of the Government."² While the validity of this extension of the Act depends upon questions which are in many respects common to those determining the validity of the Secretary's exercise of the authority thereby extended to her,³ we will restrict our consideration to the latter issue and assume, for purposes of this decision, that the Act has validly been extended to apply to the Department of Health, Education, and Welfare.

The Act authorizes dismissals only upon a determination by the Secretary that the dismissal is "necessary or advisable in the interest of the national security." That determination requires an evaluation of the risk of injury to the "national security" that the employee's retention would create, which in turn would seem necessarily to be a function, not only of the character of the employee and the likelihood of his misconducting himself, but also of the nature of the position he occupies and its relationship to the "national security." That is, it must be determined whether the position is one in which the employee's misconduct would affect the "national security." That, of course, would not be necessary if "national security" were

² § 1, Exec. Order No. 10450, 18 Fed. Reg. 2489, set forth in the Appendix, *post*, p. 558.

³ Secretary Folsom, the present Secretary of the Department of Health, Education, and Welfare, has been substituted as respondent for the former Secretary Hobby.

used in the Act in a sense so broad as to be involved in *all* activities of the Government, for then the relationship to the "national security" would follow from the very fact of employment. For the reasons set forth below, however, we conclude (1) that the term "national security" is used in the Act in a definite and limited sense and relates only to those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare; and (2) that no determination has been made that petitioner's position was affected with the "national security," as that term is used in the Act. It follows that his dismissal was not authorized by the 1950 Act and hence violated the Veterans' Preference Act.

I.

In interpreting the 1950 Act, it is important to note that that Act is not the only, nor even the primary, source of authority to dismiss Government employees. The general personnel laws—the Lloyd-LaFollette⁴ and Veterans' Preference Acts⁵—authorize dismissals for "such cause as will promote the efficiency of the service," and the ground which we conclude was the basis for petitioner's discharge here—a reasonable doubt as to his loyalty—was recognized as a "cause" for dismissal under those procedures as early as 1942.⁶ Indeed, the President's so-called Loyalty Program, Exec. Order No. 9835, 12 Fed. Reg. 1935, which prescribed an absolute standard of loyalty to be met by all employees regardless of position, had been established pursuant to that general authority three years prior to the 1950 Act and remained in

⁴ § 6, 37 Stat. 555, as amended, 5 U. S. C. § 652.

⁵ § 14, 58 Stat. 390, as amended, 5 U. S. C. § 863.

⁶ Civil Service War Regulations, § 18.2 (c) (7), September 26, 1942, 5 CFR, Cum. Supp., § 18.2 (c) (7).

effect for nearly three years after its passage.⁷ Thus there was no want of substantive authority to dismiss employees on loyalty grounds, and the question for decision here is not whether an employee can be dismissed on such grounds but only the extent to which the summary procedures authorized by the 1950 Act are available in such a case.

As noted above, the issue turns on the meaning of "national security," as used in the Act. While that term is not defined in the Act, we think it clear from the statute as a whole that that term was intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare.

Virtually conclusive of this narrow meaning of "national security" is the fact that, had Congress intended the term in a sense broad enough to include all activities of the Government, it would have granted the power to terminate employment "in the interest of the national security" to all agencies of the Government. Instead, Congress specified 11 named agencies to which the Act should apply, the character of which reveals, without doubt, a purpose to single out those agencies which are directly concerned with the national defense and which have custody over information the compromise of which might endanger the country's security, the so-called "sensitive" agencies. Thus, of the 11 named agencies, 8 are concerned with military operations or weapons development, and the other 3, with international

⁷ Employees dismissed under the Loyalty Program were entitled to review by the Civil Service Commission's Loyalty Review Board, thus satisfying the requirements of § 14 of the Veterans' Preference Act. See *Kutcher v. Gray*, 91 U. S. App. D. C. 266, 199 F. 2d 783 (C. A. D. C. Cir.).

relations, internal security, and the stock-piling of strategic materials. Nor is this conclusion vitiated by the grant of authority to the President, in § 3 of the Act, to extend the Act to such other agencies as he "may, from time to time, deem necessary in the best interests of national security." Rather, the character of the named agencies indicates the character of the determination required to be made to effect such an extension. Aware of the difficulties of attempting an exclusive enumeration and of the undesirability of a rigid classification in the face of changing circumstances, Congress simply enumerated those agencies which it determined to be affected with the "national security" and authorized the President, by making a similar determination, to add any other agencies which were, or became, "sensitive." That it was contemplated that this power would be exercised "from time to time" confirms the purpose to allow for changing circumstances and to require a selective judgment, necessarily implying that the standard to be applied is a less than all-inclusive one.

The limitation of the Act to the enumerated agencies is particularly significant in the light of the fact that Exec. Order No. 9835, establishing the Loyalty Program, was in full effect at the time of the consideration and passage of the Act. In that Order, the President had expressed his view that it was of "vital importance" that all employees of the Government be of "complete and unswerving loyalty" and had prescribed a minimum loyalty standard to be applied to all employees under the normal civil service procedures. Had Congress considered the objective of insuring the "unswerving loyalty" of all employees, regardless of position, as a matter of "national security" to be effectuated by the summary procedures authorized by the Act, rather than simply a desirable personnel policy to be implemented under the normal civil service procedures, it surely would not

have limited the Act to selected agencies. Presumably, therefore, Congress meant something more by the "interest of the national security" than the general interest the Nation has in the loyalty of even "non-sensitive" employees.

We can find no justification for rejecting this implication of the limited purpose of the Act or for inferring the unlimited power contended for by the Government. Where applicable, the Act authorizes the agency head summarily to suspend an employee pending investigation and, after charges and a hearing, finally to terminate his employment, such termination not being subject to appeal. There is an obvious justification for the summary suspension power where the employee occupies a "sensitive" position in which he could cause serious damage to the national security during the delay incident to an investigation and the preparation of charges. Likewise, there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information. On the other hand, it is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in "sensitive" positions and who are thus not situated where they could bring about any discernible adverse effects on the Nation's security. In the absence of an immediate threat of harm to the "national security," the normal dismissal procedures seem fully adequate and the justification for summary powers disappears. Indeed, in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of

some overriding necessity, such as exists in the case of employees handling defense secrets.

The 1950 Act itself reflects Congress' concern for the procedural rights of employees and its desire to limit the unreviewable dismissal power to the minimum scope necessary to the purpose of protecting activities affected with the "national security." A proviso to § 1 of the Act provides that a dismissal by one agency under the power granted by the Act "shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government," if the Civil Service Commission determines that the employee is eligible for such other employment. That is, the unreviewable dismissal power was to be used only for the limited purpose of removing the employee from the position in which his presence had been determined to endanger the "national security"; it could affect his right to employment in other agencies only if the Civil Service Commission, after review, refused to clear him for such employment. This effort to preserve the employee's procedural rights to the maximum extent possible hardly seems consistent with an intent to define the scope of the dismissal power in terms of the indefinite and virtually unlimited meaning for which the respondents contend.

Moreover, if Congress intended the term to have such a broad meaning that all positions in the Government could be said to be affected with the "national security," the result would be that the 1950 Act, though in form but an exception to the general personnel laws, could be utilized effectively to supersede those laws. For why could it not be said that national security in that sense requires not merely loyal and trustworthy employees but also those that are industrious and efficient? The relationship of the job to the national security being the same, its demonstrated inadequate performance because

of inefficiency or incompetence would seem to present a surer threat to national security, in the sense of the general welfare, than a mere doubt as to the employee's loyalty.

Finally, the conclusion we draw from the face of the Act that "national security" was used in a limited and definite sense is amply supported by the legislative history of the Act.

In the first place, it was constantly emphasized that the bill, first introduced as S. 1561 in the 80th Congress and passed as H. R. 7439 in the 81st Congress, was intended to apply, or to be extended, only to "sensitive" agencies, a term used to imply a close and immediate concern with the defense of the Nation.⁸ Thus the Senate Committee on Armed Services, in reporting out S. 1561, stated:

"This bill provides authority to terminate employment of indiscreet or disloyal employees who are employed in areas of the Government which are sensitive from the standpoint of national security.

"[Section 3 will permit] the President to determine additional sensitive areas and include such

⁸ Congress' reluctance to extend such powers to all agencies of the Government is also indicated by the prior legislation. At various times since 1942, similar summary dismissal statutes, of limited duration, had been enacted, but these had been limited to the obviously "sensitive" military departments, 56 Stat. 1053, 63 Stat. 1023, and the State Department, 60 Stat. 458. The 1950 Act, introduced at the request of the Department of Defense, was designed to make the authority permanent, include several other "sensitive" agencies, and afford greater flexibility by permitting the President to extend the Act to other agencies which became "sensitive." H. R. Rep. No. 2330, 81st Cong., 2d Sess., p. 3; S. Rep. No. 1155, 80th Cong., 2d Sess., p. 4.

areas in the scope of the authorities contained in this bill.

"Insofar as the [addition of § 3] is concerned, it was recognized by all witnesses that there were other sensitive areas within the various departments of the Government which are now, or might in the future become, deeply involved in national security. . . . In view . . . of the fact that there are now and will be in the future other sensitive areas of equal importance to the national security, it is believed that the President should have authority to make a finding concerning such areas and by Executive action place those areas under the authorities contained in this act." ⁹

The House Committee on Post Office and Civil Service reported that "The provisions of the bill extend only to departments and agencies which are concerned with vital matters affecting the national security of our Nation." ¹⁰ The committee reports on H. R. 7439 in the next Congress similarly referred to the bill as granting the dismissal power only to the heads of the "sensitive" agencies. ¹¹ While these references relate primarily to the agencies to be covered by the Act, rather than to the exercise of the power within an agency, the standard for both is the same—in the "interests of the national security"—and the statements thus clearly indicate the restricted sense in which "national security" was used. In short, "national security" is affected only by "sensitive" activities.

⁹ S. Rep. No. 1155, 80th Cong., 2d Sess., pp. 2-4.

¹⁰ H. R. Rep. No. 2264, 80th Cong., 2d Sess., p. 2.

¹¹ H. R. Rep. No. 2330, 81st Cong., 2d Sess., pp. 2-5; S. Rep. No. 2158, 81st Cong., 2d Sess., p. 2.

Secondly, the history makes clear that the Act was intended to authorize the suspension and dismissal only of persons in sensitive positions. Throughout the hearings, committee reports, and debates, the bill was described as being designed to provide for the dismissal of "security risks."¹² In turn, the examples given of what might be a "security risk" always entailed employees having access to classified materials; they were security risks because of the risk they posed of intentional or inadvertent disclosure of confidential information.¹³ Mr. Larkin, a representative of the Department of Defense, which Department had requested and drafted the bill, made this consideration more explicit:

"They are security risks because of their access to confidential and classified material. . . . But if they do not have classified material, why, there is no notion that they are security risks to the United States. They are security risks to the extent of having access to classified material."¹⁴

"A person is accused of being disloyal, but is cleared by the loyalty board, because there is not

¹² *E. g.*, S. Rep. No. 2158, 81st Cong., 2d Sess., p. 2: "The purpose of the bill is to increase the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks"

¹³ For example, Mr. Murray, the Chairman of the Committee on Post Office and Civil Service, which had reported the bill, gave the following illustration of the purpose of the bill in opening the debate in the House: "For instance, an employee who is working in some highly sensitive agency doing very confidential, secret defense work and who goes out and gets too much liquor may unintentionally or unwittingly, because of his condition, confide to someone who may be a subversive, secret military information about the character of work he is doing in that department. He is, by his conduct, a bad security risk and should be discharged." 96 Cong. Rec. 10017.

¹⁴ Hearings, House Committee on Post Office and Civil Service, on H. R. 7439, 81st Cong., 2d Sess., p. 67.

enough evidence against him. If that person is not in a sensitive job, it is not of any further concern to us. We are willing to take the view, that while we might have misgivings about his loyalty, he cannot prejudice our security because he does not have access to any of the classified or top secret material."¹⁵

It is clear, therefore, both from the face of the Act and the legislative history, that "national security" was not used in the Act in an all-inclusive sense, but was intended to refer only to the protection of "sensitive" activities. It follows that an employee can be dismissed "in the interest of the national security" under the Act only if he occupies a "sensitive" position, and thus that a condition precedent to the exercise of the dismissal authority is a determination by the agency head that the position occupied is one affected with the "national security." We now turn to an examination of the Secretary's action to show that no such determination was made as to the position occupied by petitioner.

II.

The Secretary's action in dismissing the petitioner was expressly taken pursuant to Exec. Order No. 10450, 18 Fed. Reg. 2489,¹⁶ promulgated in April 1953 to provide uniform standards and procedures for the exercise by agency heads of the suspension and dismissal powers under the 1950 Act. That Order prescribes as the standard for dismissal, and the dismissal notice given to petitioner contained, a determination by the Secretary that the employee's retention in employment "is not clearly consistent with the interests of national secu-

¹⁵ *Id.*, at p. 72.

¹⁶ The relevant portions of the Executive Order, as it stood at the time of petitioner's suspension and discharge, are printed in the Appendix, *post*, p. 558.

city.”¹⁷ Despite this verbal formula, however, it is our view that the Executive Order does not in fact require the agency head to make any determination whatever on the relationship of the employee’s retention to the “national security” if the charges against him are within the categories of the charges against petitioner—that is, charges which reflect on the employee’s loyalty. Rather, as we read the Order, it enjoins upon the agency heads the duty of discharging any employee of doubtful loyalty, *irrespective* of the character of his job and its relationship to the “national security.” That is, the Executive Order deems an adverse determination as to loyalty to satisfy the requirements of the statute without more.

The opening preamble to the Order recites, among other things, that “the interests of the national security require” that “all” Government employees be persons “of complete and unswerving loyalty.” It would seem to follow that an employee’s retention cannot be “clearly consistent” with the “interests of the national security” as thus defined unless he is “clearly” loyal—that is, unless there is no doubt as to his loyalty. And § 8 (a) indicates that that is in fact what was intended by the Order. That section provides that the investigation of an employee pursuant to the Order shall be designed to develop information “as to whether . . . [his employment] is

¹⁷ Section 6 of the Order, which formally prescribes the standards for “termination,” in terms adopts the very language of the statute, “necessary or advisable in the interests of the national security.” Section 7, however, provides that a suspended employee “shall not be reinstated” unless the agency head determines that reinstatement is “clearly consistent with the interests of the national security.” Since nonreinstatement of a suspended employee is equivalent to the termination of his employment, it is apparent that the “clearly consistent” standard of § 7 is the controlling one. See also §§ 2, 8, and 3 (a). In the view we take of the case, we need not determine whether the “clearly consistent” standard is, as petitioner contends, a more onerous one than the “necessary or advisable” standard.

clearly consistent with the interests of the national security,” and prescribes certain categories of facts to which “such” information shall relate. The first category, § 8 (a)(1), includes nonloyalty-oriented facts which, in general, might reflect upon the employee’s reliability, trustworthiness, or susceptibility to coercion, such as dishonesty, drunkenness, sexual perversion, mental defects, or other reasons to believe that he is subject to influence or coercion. Section 8 (a)(1) expressly provides, however, that such facts are relevant only “depending on the relation of the Government employment to the national security.” The remaining categories include facts which, in general, reflect upon the employee’s “loyalty,” such as acts of espionage, advocacy of violent overthrow of the Government, sympathetic association with persons who so advocate, or sympathetic association with subversive organizations. § 8 (a)(2)–(8). Significantly, there is wholly absent from these categories—under which the charges against petitioner were expressly framed—any qualification making their relevance dependent upon the relationship of the employee’s position to the national security. The inference we draw is that in such cases the relationship to the national security is irrelevant, and that an adverse “loyalty” determination is sufficient *ex proprio vigore* to require discharge.

Arguably, this inference can be avoided on the ground that § 8 (a) relates only to the scope of information to be developed in the investigation and not to the evaluation of it by the agency head. That is, while loyalty information is to be developed in all cases regardless of the nature of the employment, that does not mean that the agency head should not consider the nature of the employment in determining whether the derogatory information is sufficient to make the employee’s continued employment not “clearly consistent” with the “national security.” No doubt that is true to the extent

that the greater the sensitivity of the position the smaller may be the doubts that would justify termination; the Order undoubtedly leaves it open to an agency head to apply a stricter standard in some cases than in others, depending on the nature of the employment. On the other hand, by making loyalty information relevant in *all* cases, regardless of the nature of the job, § 8 (a) seems strongly to imply that there is a minimum standard of loyalty that must be met by all employees. It would follow that the agency head may terminate employment in cases where that minimum standard is not met without making *any* independent determination of the potential impact of the person's employment on the national security.

Other provisions of the Order confirm the inferences that may be drawn from § 8 (a). Thus § 3 (b) directs each agency head to designate as "sensitive" those positions in his agency "the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security." By definition, therefore, some employees are admittedly not in a position to bring about such an effect. Nevertheless, the Order makes this distinction relevant only for purposes of determining the scope of the investigation to be conducted, not for purposes of limiting the dismissal power to such "sensitive" positions. Section 3 (a) is more explicit. That provides that the appointment of all employees shall be made subject to an investigation the *scope* of which shall depend upon the degree of adverse effect on the national security the occupant of the position could bring about, but which "in no event" is to be less than a prescribed minimum. But the sole purpose of such an investigation is to provide a basis for a "clearly consistent" determination. Thus the requirement of a minimum investigation of all persons appointed implies

that an adverse "clearly consistent" determination may be made as to any such employee, regardless of the potential adverse effect he could cause to the national security. Finally, the second "Whereas" clause of the preamble recites as a justification for the Order that "all persons . . . privileged to be employed . . . [by the Government should] be adjudged by mutually consistent and no less than minimum standards," thus implying that the Order prescribes minimum standards that all employees must meet irrespective of the character of the positions held, one of which is the "complete and unswerving loyalty" standard recited in the first "Whereas" clause of the preamble.

Confirmation of this reading of the Order is found in its history. Exec. Order No. 9835, *supra*, as amended by Exec. Order No. 10241, 16 Fed. Reg. 3690, had established the Loyalty Program under which all employees, regardless of their positions, were made subject to discharge if there was a "reasonable doubt" as to their loyalty. That Order was expressly revoked by § 12 of the present Executive Order. There is no indication, however, that it was intended thereby to limit the scope of the persons subject to a loyalty standard. And any such implication is negated by the remarkable similarity in the preambles to the two Orders and in the kinds of information considered to be relevant to the ultimate determinations.¹⁸ In short, *all* employees were still to be subject to at least a minimum loyalty standard, though under

¹⁸ Executive Order No. 9835 recited that it was "of vital importance" that all employees be of "complete and unswerving loyalty"; Exec. Order No. 10450 recites that "the interests of the national security require" that all employees be of "complete and unswerving loyalty." Executive Order No. 9835 lists six factors to be considered "in connection with the determination of disloyalty" (Pt. V, § 2); these are repeated in substantially identical form in §§ 8 (a) (2),

new procedures which do not afford a right to appeal to the Civil Service Commission.

We therefore interpret the Executive Order as meaning that, when "loyalty" charges are involved, an employee may be dismissed regardless of the character of his position in the Government service, and that the agency head need make no evaluation as to the effect which continuance of his employment might have upon the "national security." We recognize that this interpretation of the Order rests upon a chain of inferences drawn from less than explicit provisions. But the Order was promulgated to guide the agency heads in the exercise of the dismissal power, and its failure to state explicitly what determinations are required leaves no choice to the agency heads but to follow the most reasonable inferences to be drawn. Moreover, whatever the practical reasons that may have dictated the awkward form of the Order, its failure to state explicitly what was meant is the fault of the Government. Any ambiguities should therefore be resolved against the Government, and we will not burden the employee with the assumption that an agency head, in stating no more than the formal conclusion that retention of the employee is not "clearly consistent with the interests of national security," has made any subsidiary determinations not clearly required by the Executive Order.

From the Secretary's determination that petitioner's employment was not "clearly consistent with the interests of national security," therefore, it may be assumed only that the Secretary found the charges to be true and that they created a reasonable doubt as to petitioner's loyalty. No other subsidiary finding may be inferred, however, for, under the Executive Order as we have interpreted it, no

(4), (5), (6), and (7) of Exec. Order No. 10450 as "information as to whether . . . [the employee's retention] is clearly consistent with the interests of the national security."

other finding was required to support the Secretary's action.¹⁹

From our holdings (1) that not all positions in the Government are affected with the "national security" as that term is used in the 1950 Act, and (2) that no determination has been made that petitioner's position was one in which he could adversely affect the "national security," it necessarily follows that petitioner's discharge was not authorized by the 1950 Act. In reaching this conclusion, we are not confronted with the problem of reviewing the Secretary's exercise of discretion, since the basis for our decision is simply that the standard prescribed by the Executive Order and applied by the Secretary is not in conformity with the Act.²⁰ Since petitioner's discharge

¹⁹ That the Secretary similarly interpreted the Executive Order and did not in fact determine that petitioner's job was a "sensitive" one is confirmed by the respondents' concession that petitioner "did not have access to Government secrets or classified material and was not in a position to influence policy against the interests of the Government." Respondents' Brief, pp. 3-4; Record, p. 40.

²⁰ No contention is made that the Executive Order might be sustained under the President's executive power even though in violation of the Veterans' Preference Act. There is no basis for such an argument in any event, for it is clear from the face of the Executive Order that the President did not intend to override statutory limitations on the dismissal of employees, and promulgated the Order solely as an implementation of the 1950 Act. Thus § 6 of the Order purports to authorize dismissals only "in accordance with the said Act of August 26, 1950," and similar references are made in §§ 4, 5, and 7. This explicit limitation in the substantive provisions of the Order is of course not weakened by the inclusion of the "Constitution," as well as the 1950 and other Acts, in the omnibus list of authorities recited in the Preamble to the Order; it is from the Constitution that the President derives any authority to implement the 1950 Act at all. When the President expressly confines his action to the limits of statutory authority, the validity of the action must be determined solely by the congressional limitations which the President sought to respect, whatever might be the result were the President ever to assert his independent power against that of Congress.

was not authorized by the 1950 Act and hence violated the Veterans' Preference Act, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

[For dissenting opinion of MR. JUSTICE CLARK, joined by MR. JUSTICE REED and MR. JUSTICE MINTON, see *post*, p. 565.]

APPENDIX TO OPINION OF THE COURT.

EXECUTIVE ORDER 10450.

(18 Fed. Reg. 2489, as amended by Exec. Order No. 10491, Oct. 13, 1953, 18 Fed. Reg. 6583.)

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

Now, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the

United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less

investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has

been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of de-

partments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.*

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization,

*After the date of petitioner's discharge, this paragraph was amended, by Exec. Order No. 10548, Aug. 2, 1954, 19 Fed. Reg. 4871, to read:

"(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case."

association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. . . .

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date

of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE,
April 27, 1953.

MR. JUSTICE CLARK, with whom MR. JUSTICE REED and MR. JUSTICE MINTON join, dissenting.

Believing that the Court should not strike down the President's Executive Order on employee security by an interpretation that admittedly "rests upon a chain of inferences," we cannot agree to the judgment of reversal. In our opinion, the clear purpose of the Congress in enacting the Summary Suspension Act, 64 Stat. 476, is frustrated, and the Court's opinion raises a serious question of presidential power under Article II of the Constitution which it leaves entirely undecided.

Petitioner, a food and drug inspector employed in the Department of Health, Education and Welfare, was charged with having "established and . . . continued a close association with individuals reliably reported to be Communists." It was further charged that he had "maintained a continued and sympathetic association with the Nature Friends of America, which organization" is on the Attorney General's list; and "by [his] own admission, donated funds" to that group, contributed services to it and attended social gatherings of the same. Petitioner did not answer the charges but replied that they constituted an invasion of his private rights of associa-

tion. Although advised that he could have a hearing, he requested none, and was thereafter dismissed. The Secretary made a formal determination that petitioner's continued employment was not "clearly consistent with the interests of the national security," a determination entrusted to her by the Suspension Act. Although "such determination by the agency head concerned shall be conclusive and final" under the Act, the Court, by its interpretation, finds "that not all positions in the Government are affected with the 'national security' as that term is used . . . and that no determination has been made that petitioner's position was one in which he could adversely affect the 'national security.'" It, therefore, strikes down the President's Executive Order because "the standard prescribed by [it] and applied by the Secretary is not in conformity with the Act." This compels the restoration of the petitioner to Government service. We cannot agree.

We have read the Act over and over again, but find no ground on which to infer such an interpretation. It flies directly in the face of the language of the Act and the legislative history. The plain words of § 1 make the Act applicable to "any civilian officer or employee," not, as the majority would have it, "any civilian officer or employee in a sensitive position." The Court would require not only a finding that a particular person is subversive, but also that he occupies a sensitive job. Obviously this might leave the Government honeycombed with subversive employees.

Although the Court assumes the validity of the President's action under § 3 extending the coverage of the Act to all Government agencies, the reasoning of the opinion makes that extension *a fortiori* unauthorized. The limitation the Court imposes deprives the extension of any force, despite the fact that § 3 has no limiting words whatever. And this is done in the face of legislative history

showing that Congress clearly contemplated that the coverage might be extended without limitation "to such other departments and agencies of the Government" that the President thought advisable. Senator Byrd commented, "Section 3 gives the President the right to classify every agency as a sensitive agency He could take the whole Government." And Senator Chapman remarked, "I do not see why the whole Government is not sensitive as far as that is concerned." Hearings before the Senate Committee on Armed Services, 81st Cong., 2d Sess., on H. R. 7439, pp. 15-16. Also, Congressman Holifield, during debates in the House, stated that the Act "applies potentially to every executive agency, not only the sensitive ones. . . . There is no distinction made in the bill between so-called sensitive employees, that is, employees who have access to confidential and secret information, and the regular employees." 96 Cong. Rec. 10023-10024.

The President believed that the national security required the extension of the coverage of the Act to all employees. That was his judgment, not ours. He was given that power, not us. By this action the Court so interprets the Act as to intrude itself into presidential policy making. The Court should not do this, especially where Congress has ratified the President's action. As required by the Act, the Executive Order was reported to the Congress and soon thereafter it came up for discussion and action in both the House and the Senate. It was the sense of the Congress at that time that the Order properly carried out the standards of the Act and was in all respects an expression of the congressional will. 99 Cong. Rec. 4511-4543, 5818-5990. In addition, Congress has made appropriations each subsequent year for investigations, etc., under its provisions. This in itself "stands as confirmation and ratification of the action of the Chief

Executive." *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116.

The President having extended the coverage of the Act to the Department of Health, Education, and Welfare, it became the duty of the Secretary to dismiss any employee whenever she deemed it "necessary or advisable in the interests of national security." She made such a finding. It is implicit in her order of dismissal. Her "evaluation as to the effect which continuance of [petitioner's] employment might have upon the 'national security'" has been made. She decided that he should be dismissed. Under the Act this determination is "conclusive and final."

There is still another reason why we should sustain the President's Executive Order. By striking it down, the Court raises a question as to the constitutional power of the President to authorize dismissal of executive employees whose further employment he believes to be inconsistent with national security. This power might arise from the grant of executive power in Article II of the Constitution, and not from the Congress. The opinion of the majority avoids this important point which must be faced by any decision holding an Executive Order inoperative.* It is the policy of the Court to avoid constitu-

*The majority excuses its failure to pass on this question by saying that no contention was made that the President's Order might be sustained under his executive powers. We cannot agree. The Government specifically asserted that "if Congress had meant to prohibit the President from acting in this respect under [the Act] a serious question as to the validity of that enactment would arise." It devoted eight pages of its brief to this point. Furthermore, the Court of Appeals noted that if it "thought the President's Order inconsistent with the act . . . [it] would have to decide the constitutional question thus presented." 96 U. S. App. D. C. 379, 382, 226 F. 2d 337, 340. As further justification, the majority contends that the President acted here only under the directions of the Act. In answer, we need quote only the enacting clause of the Presi-

tional questions where possible, *Peters v. Hobby*, 349 U. S. 331, 338, not to create them.

We believe the Court's order has stricken down the most effective weapon against subversive activity available to the Government. It is not realistic to say that the Government can be protected merely by applying the Act to sensitive jobs. One never knows just which job is sensitive. The janitor might prove to be in as important a spot security-wise as the top employee in the building. The Congress decided that the most effective way to protect the Government was through the procedures laid down in the Act. The President implemented its purposes by requiring that Government employment be "clearly consistent" with the national security. The President's standard is "complete and unswerving loyalty" not only in sensitive places but throughout the Government. The President requires, and every employee should give, no less. This is all that the Act and the Order require. They should not be subverted by the technical interpretation the majority places on them today. We would affirm.

dent's Order: "Now, therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States . . . and as President of the United States." Executive Order No. 10450, 18 Fed. Reg. 2489. In issuing the Order, the President invoked all of his powers, and since his Order is voided by the majority as not being in conformity with the Act, the question of the scope of his other constitutional or statutory powers is presented.

22A–23A. Although the instructions left the issue of intent to the jury, the plurality finds that neither we nor the state courts may assess the effect of the presumption on the jury's verdict. It imposes instead an automatic reversal rule that would be applicable even when proof of intent to murder is established beyond any doubt. See n. 6, *supra*. Such a rule is precisely what *Chapman* rejected.

V

For the reasons stated, I think this Court properly could decide the question of harmless error. Normally, however, this is a question more appropriately left to the courts below. The Connecticut Supreme Court did not address the question, nor has it been briefed extensively here. There may be facts and circumstances not apparent from the record before us. I therefore would reverse the judgment and remand the case for consideration of whether the error was harmless beyond a reasonable doubt.

DICKERSON, DIRECTOR, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS *v.* NEW BANNER
INSTITUTE, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 81–1180. Argued November 29, 1982—Decided February 23, 1983

Title IV of the Gun Control Act of 1968, 18 U. S. C. §§ 922(g)(1) and (h)(1), makes it unlawful for any person “who has been convicted . . . of . . . a crime punishable by imprisonment for a term exceeding one year” to ship, transport, or receive any firearm or ammunition in interstate commerce. Title IV also makes it unlawful to engage in the business of importing, manufacturing, or dealing in firearms without a license from the Secretary of the Treasury. One ground for denial of a license is where the applicant is under the prohibitions imposed by §§ 922(g)(1) and (h)(1), and if the applicant is a corporation, a license will be denied if a person with power to direct the management of the corporation is under such prohibitions. One Kennison, the chairman of the board and a shareholder of respondent corporation, after plea negotiations, pleaded guilty in an Iowa state court to the state crime of carrying a concealed handgun. This crime was punishable by a fine or imprisonment for not more than five years, or both. The state court, however, pursuant to an Iowa statute, “deferred” entry of a formal judgment and placed Kennison on probation. At the completion of his probation term he was discharged, also pursuant to a state statute, and his record with respect to the deferred judgment was expunged. Subsequently, respondent applied to the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (Bureau) for licenses as a firearms and ammunition dealer and manufacturer, but did not disclose Kennison's plea of guilty to the Iowa concealed weapon charge. The licenses were issued but were later revoked when the Bureau learned of the Iowa charge. The District Court upheld the revocation, but the Court of Appeals reversed, holding that although Kennison had been “convicted” of an offense that triggered firearms disabilities, that fact could not serve as a predicate for a Gun Control Act violation or license revocation because the conviction had been expunged under the Iowa deferred judgment procedure.

Held: The firearms disabilities imposed by §§ 922(g)(1) and (h)(1) apply to Kennison and were not removed by the expunction of the record of his guilty plea to the concealed weapon charge. Pp. 110–122.

(a) For purposes of the federal gun control laws, a plea of guilty to a disqualifying crime and its notation by a state court, followed by a sentence of probation, is equivalent to being "convicted" within the language of §§ 922(g)(1) and (h)(1). Pp. 111–114.

(b) Iowa's expunction provisions, as carried out in Kennison's case prior to respondent's license applications, did not nullify his conviction for purposes of the federal statute. Expunction under state law does not alter the legality of the previous conviction, does not open the way to a license despite the conviction, and does not signify that the defendant was innocent of the crime to which he pleaded guilty. Expunction in Iowa means no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law. Pp. 114–115.

(c) Provisions of the federal gun control laws other than the provisions in question, as well as related federal statutes, support the conclusion that Congress did not intend expunction of a state conviction automatically to remove the firearms disabilities imposed by §§ 922(g)(1) and (h)(1). Pp. 115–118.

(d) There is nothing in the legislative history of Title IV or related federal statutes to suggest an opposite intent. Title IV's purpose to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, would be frustrated by a ruling that gave effect to state expunctions. In the absence of a plain indication to the contrary, it is assumed that Congress did not intend to make the application of Title IV dependent on state law. Title IV is carefully constructed gun control legislation. Congress knew the significance and meaning of the language it employed. Pp. 118–121.

(e) A rule that would give effect to expunction under varying state statutes would seriously hamper effective enforcement of Title IV. Pp. 121–122.

649 F. 2d 216, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BRENNAN, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 122.

Deputy Solicitor General Geller argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Samuel A. Alito, Jr.*, *William Kanter*, and *Douglas Letter*.

Lewis C. Lanier argued the cause for respondent. With him on the brief was *Jack R. McGuinn*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether firearms disabilities imposed by 18 U. S. C. §§ 922(g) and (h) apply with respect to a person who pleads guilty to a state offense punishable by imprisonment for more than one year, when the record of the proceeding subsequently is expunged under state procedure following a successfully served term of probation.

I

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 226, was amended by the Gun Control Act of 1968, 82 Stat. 1214, and now appears as 18 U. S. C. § 921 *et seq.* (1976 ed. and Supp. V). Title IV makes it unlawful for any person "who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"¹ to ship, transport, or receive any firearm or ammunition in interstate commerce. §§ 922(g) and (h). Title IV also makes it unlawful to engage in the business of importing, manufacturing, or dealing in firearms without a license from the Secretary of the Treasury. §§ 922(a) and 923(a). One ground, specified by the statute, for denial of a license is the fact that the applicant is barred by §§ 922(g) and (h) from transporting, shipping, or receiving firearms or ammunition. § 923(d)(1)(B). The same statute provides that where the applicant is a corporation, partnership, or association, a license will be denied

**David T. Hardy* and *Richard E. Gardiner* filed a brief for the National Rifle Association of America as *amicus curiae* urging affirmance.

¹The Act provides exemptions from its proscriptions for certain business and commercial crimes, such as antitrust violations, punishable by imprisonment for more than one year, and for nonfirearms and nonexplosives state offenses classified by the State as misdemeanors and punishable by imprisonment for two years or less. 18 U. S. C. § 921(a)(20). These exemptions are of no relevance here.

an individual possessing, directly or indirectly, the power to direct the management and policies of the entity is under the prohibitions imposed by §§ 922(g) and (h). Title IV also makes it a crime to violate any of its provisions or to make willful misrepresentation with respect to information required to be furnished. § 924(a).

Although, as noted above, Title IV imposes disabilities on any "person who has been convicted . . . of a crime punishable by imprisonment for a term exceeding one year," it does permit certain persons in that category to apply to the Secretary for relief from those disabilities. Under § 925(c), the Secretary may grant relief "if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." When the Secretary grants relief, he must publish notice of his action promptly in the Federal Register, together with a statement of reasons. *Ibid.*

II

David F. Kennison, a resident of Columbia, S. C., is a director, chairman of the board, and a shareholder of respondent New Banner Institute, Inc., a corporation. In September 1974, when Kennison was in Iowa, he was arrested and charged with kidnaping his estranged wife. After plea negotiation, see Tr. of Oral Arg. 40-41, he pleaded guilty to the crime of carrying a concealed handgun, and the kidnap charge was dismissed. The concealed weapon offense, under then Iowa law, see Iowa Code §§ 695.2 and .3 (1977), is punishable by a fine of not more than \$1,000 or by imprisonment for not more than five years, or both.² In ac-

²The court, however, in its discretion, in the case of a first offense, could impose that punishment. See Iowa Code § 695.3 (1977). Sections 695.2 and .3 were repealed effective January 1, 1978, and are now replaced by Iowa Code §§ 724.4 and 903.1 (1981).

cord with the provisions of Iowa Code § 789A.1 (1977), then in effect,³ the state court entered an order reciting that Kennison had "entered a plea of guilty to the charge of carrying a concealed weapon," that "the defendant has consented to a deferment of sentence in this matter," that "he has stable employment," and that there were "unusual circum-

³Section 789A.1 then read in pertinent part:

"The trial court may, upon a plea of guilty, verdict of guilty, or a special verdict upon which a judgment of conviction may be rendered, exercise either of the options contained in subsections 1 and 2. However, this section shall not apply to the crimes of treason, murder, or violation of [other specified statutes].

"1. With the consent of the defendant, the court may defer judgment and place the defendant on probation upon such terms and conditions as it may require. Upon fulfillment of the terms of probation the defendant shall be discharged without entry of judgment. Upon violation of the terms, the court may enter an adjudication of guilt and proceed as otherwise provided.

"However, this subsection shall not be available if any of the following is true:

"[Here are recited specific exceptions to the availability of the procedure outlined in subsection 1.]

"2. By record entry at time of or after sentencing, the court may suspend the sentence and place the defendant on probation upon such terms and conditions as it may require.

"Before exercising either of the options contained in subsections 1 and 2, the court shall first determine which of them will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others. In making this determination the court shall consider the age of the defendant, his prior record of convictions, if any, his employment circumstances, his family circumstances, the nature of the offense committed, whether a dangerous weapon or force was used in the commission of such offense, and such other factors as shall be appropriate. The court shall file a specific written statement of its reasons for and the facts supporting its decision to defer judgment or to suspend sentence and its decision on the length of probation."

Section 789A.1 was enacted by 1973 Iowa Acts, ch. 295, § 1. It was repealed by 1976 Iowa Acts, ch. 1245, § 526, effective January 1, 1978. The current replacement statutes are Iowa Code §§ 907.3, .4, and .5 (1981).

stances" in the case. The order then stated that the court "deferred" entry of a formal judgment and placed Kennison in probation.

Kennison returned to South Carolina where he completed his probation term. When that term expired in February 1976, he was discharged pursuant to Iowa Code § 789A.6 (1977), then in effect,⁴ and the Iowa court's record with reference to the deferred judgment was expunged.

In May 1976, respondent filed three applications with the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (Bureau), for licenses as a dealer in firearms and ammunition, as a manufacturer of ammunition, and as a collector of curios and relics. On the application forms, respondent listed Kennison as a "responsible person," that is, an individual possessing direct or indirect power to control the management and policies of respondent. See 18 U. S. C. § 923(d)(1)(B). In answering an inquiry on the forms as to whether such person had been convicted of a crime punishable by a prison term exceeding one year, respondent did not disclose the Iowa events or Kennison's plea of guilty in that state. The requested licenses were issued.

The Bureau, however, subsequently learned of the Iowa concealed weapon charge and the plea of guilty. In conformity with the provisions of §§ 923(e) and (f)(1) and of 27 CFR

⁴Section 789A.6 then read in pertinent part:

"At any time that the court determines that the purposes of probation have been fulfilled, the court may order the discharge of any person from probation. . . . A person who has been discharged from probation shall no longer be held to answer for his offense. Upon discharge from probation, judgment has been deferred under section 789A.1, the court's criminal record with reference to the deferred judgment shall be expunged. The record maintained by the supreme court administrator required by section 789A.1 shall not be expunged. . . ."

Section 789A.6 was also enacted in 1973 and was repealed, effective January 1, 1978, by the same Iowa statutes cited in the last paragraph of n. 3, *supra*. The current statute replacing § 789A.6 is Iowa Code § 907.3 (1981).

§ 178.75 (1982), it mailed respondent Notices of Contemplated Revocation of Licenses. After an informal hearing, the Bureau's Regional Regulatory Administrator issued the revocation notices. Respondent, pursuant to § 923(f)(2), then requested and received a formal hearing before an Administrative Law Judge. At that hearing, the Bureau contended that respondent's licenses should be revoked because respondent had failed to reveal that Kennison had been convicted of a felony and also because respondent had not been entitled to the licenses in the first place.

The Administrative Law Judge recommended against revocation. App to Pet. for Cert. 41a. Although he concluded that Kennison's plea of guilty "represented a conviction . . . within the meaning of Section 922(g) and (h)," *id.*, at 47a, he also concluded that respondent's statements in the applications did not justify revocation because its representatives had a good-faith belief that Kennison had not been convicted within the meaning of the federal statute.

On review, the Director of the Bureau, petitioner here, ruled that willful misrepresentation had not been shown; that Kennison, however, possessed the power to direct respondent's management and policies; that Kennison had been convicted in Iowa of an offense that brought him within the prohibitions of §§ 922(g) and (h); and that the licenses should be revoked because respondent was ineligible for them under § 923(d)(1)(B). App. to Pet. for Cert. 23a. The Director ordered the issuance of Final Notices of Revocation. *Id.*, at 40a.

Respondent then filed a timely petition for review in the United States District Court for the District of South Carolina. See § 923(f)(3). On cross-motions for summary judgment, the Director's motion was granted. On respondent's appeal, however, the United States Court of Appeals for the Fourth Circuit reversed. 649 F. 2d 216 (1981). It concluded, *id.*, at 219, that although Kennison indeed had been "convicted" of an offense that triggered firearms disabilities,

t fact could not serve as a predicate for a Gun Control Act
 tion or license revocation because the conviction had
 n expunged under the Iowa deferred judgment proce-
 e. The court acknowledged, *id.*, at 220, that other
 orts of Appeals entertained contrary views.⁵ Because of
 importance of the issue and the obvious need for its reso-
 on, we granted certiorari. 455 U. S. 1015 (1982).

III

his is not the first time the Court has examined firearms
 visions of the Omnibus Crime Control and Safe Streets
 and of the Gun Control Act. See *Lewis v. United States*,
 U. S. 55 (1980); *Scarborough v. United States*, 431 U. S.
 (1977); *Barrett v. United States*, 423 U. S. 212 (1976);
Idleston v. United States, 415 U. S. 814 (1974); *United*
es v. Bass, 404 U. S. 336 (1971).

espite the fact that the slate on which we write is thus
 a clean one, we state once again the obvious when we
 that, in determining the scope of a statute, one is to look
 at its language. *Lewis v. United States*, 445 U. S., at
United States v. Turkette, 452 U. S. 576, 580 (1981). If
 language is unambiguous, ordinarily it is to be regarded
 onclusive unless there is "a clearly expressed legislative
 nt to the contrary." *Ibid.*, quoting *Consumer Product*
ty Comm'n v. GTE Sylvania, Inc., 447 U. S. 102, 108
 0). It would seem, therefore, from the clear words of
 statute ("any person . . . who has been convicted"), that,
 espondent to be deprived of its licenses, Kennison must
 e been "convicted" of the type of crime specified by the
 te, and the Iowa deferred judgment procedure and "ex-

e *United States v. Bergeman*, 592 F. 2d 533 (CA9 1979); *United*
v. Mostad, 485 F. 2d 199 (CA8 1973), cert. denied, 415 U. S. 947
 ; *United States v. Lehmann*, 613 F. 2d 130 (CA5 1980). See also,
United States v. Padia, 584 F. 2d 85 (CA5 1978); *United States v.*
 692 F. 2d 352 (CA5 1982); *United States v. Nord*, 586 F. 2d 1288
 1978); *United States v. Kelly*, 519 F. 2d 794 (CA8), cert. denied, 423
 926 (1975).

punction" must not have operated to nullify that conviction.
 If Kennison was not "convicted" in the first place, or if he was
 and that conviction somehow was rendered a nullity, re-
 spondent should not be ineligible for licenses on the grounds
 asserted by the Bureau.

A

We turn first to the issue of conviction. The salient fact is
 Kennison's plea of guilty to a state charge punishable by
 more than a year's imprisonment. The usual entry of a for-
 mal judgment upon a jury verdict or upon a court's specific
 finding of guilt after a bench trial is absent. Present, how-
 ever, are (a) the charge of a crime of the disqualifying type,
 (b) the plea of guilty to that charge, and (c) the court's placing
 Kennison upon probation.

In *Lewis v. United States*, *supra*, we had under consider-
 ation § 1202(a)(1) of Title VII of the 1968 Act, 18 U. S. C.
 App. § 1202(a)(1), a gun control statute similar to and par-
 tially overlapping §§ 922(g) and (h). The language of § 1202
 (a)(1) that is pertinent for present purposes is familiar, for it
 concerns any person who "has been convicted . . . of a fel-
 ony." The Court there characterized the language of the
 statute as "sweeping." 445 U. S., at 60. Despite the fact
 that Lewis' conviction was subject to collateral attack on con-
 stitutional grounds, the Court held that conviction to be dis-
 abling. What was important to the Court was the presence
 or fact of the conviction. In speaking of Title VII, we said:
 "No modifier is present, and nothing suggests any restriction
 on the scope of the term 'convicted.'" *Ibid.* Still further:
 "Nothing on the face of the statute suggests a congressional
 intent to limit its coverage" *Ibid.*, quoting *United*
States v. Culbert, 435 U. S. 371, 373 (1978). And, finally:
 "Actually, . . . we detect little significant difference between
 Title IV and Title VII." 445 U. S., at 64.

Whether one has been "convicted" within the language of
 the gun control statutes is necessarily, as the Court of Ap-
 peals in the present case correctly recognized, 649 F. 2d, at

219, a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State. *United States v. Benson*, 605 F. 2d 1093, 1094 (CA9 1979). This makes for desirable national uniformity unaffected by varying state laws, procedures, and definitions of "conviction."

In *Lewis*, the possible, and indeed probable, vulnerability of the predicate conviction to collateral attack on constitutional grounds did not affect the disqualification. This followed from the statute's plain language and from a legislative history that, as we have repeatedly observed, makes clear that "Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'"⁷ 445 U. S., at 63, quoting *Scarborough v. United States*, 431 U. S., at 572. Like considerations apply here with respect to whether Kennison was one who was "convicted" within the meaning of the federal statute.⁸ He voluntarily, in negotiation, entered a plea of guilty to a disqualifying crime. In some circumstances, we have considered a guilty plea alone enough to constitute a "conviction": "A plea of guilty differs in purpose and effect from a mere

⁷To be sure, the terms "convicted" or "conviction" do not have the same meaning in every federal statute. In some statutes those terms specifically are made to apply to one whose guilty plea has been accepted whether or not a final judgment has been entered. See, e. g., 15 U. S. C. §§ 80a-2(10) and 80b-2(6). In other federal statutes, however, the term "convicted" is clearly limited to persons against whom a formal judgment has been entered. See, e. g., 18 U. S. C. § 4251(e) and 28 U. S. C. § 2901(f).

The term "convicted" in §§ 922(g) and (h) is not there defined, but we have no reason whatsoever to suppose that Congress meant that term to apply only to one against whom a formal judgment has been entered. Congress' intent in enacting §§ 922(g) and (h) and § 1202 was to keep firearms out of the hands of presumptively risky people. See *United States v. Bass*, 404 U. S. 336, 345 (1971). In this connection, it is significant that §§ 922(g) and (h) apply not only to a person convicted of a disqualifying offense but also to one who is merely under indictment for such a crime.

admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." *Kercheval v. United States*, 274 U. S. 220, 223 (1927). Accord, *Boykin v. Alabama*, 395 U. S. 238, 242 (1969).⁷

Here, we do have more. The state judge who noted Kennison's plea placed him on probation. To be sure, there was no written adjudication of guilt and there was no formal pronouncement of a sentence of imprisonment for a specified term. But that was due to special provisions of Iowa statutory law and procedure. It was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of "a crime punishable by imprisonment for a term exceeding one year." § 922(g) (emphasis supplied). It is also plain that one cannot be placed on probation if the court does not

⁸As noted in n. 6, *supra*, the meaning of the terms "convicted" and "conviction" vary from statute to statute. In *Lott v. United States*, 367 U. S. 421 (1961), for example, the Court had under consideration Federal Rule of Criminal Procedure 34 and a plea of *nolo contendere*, rather than a plea of guilty. The question was whether the time within which certain motions could be made began to run at the time the *nolo* plea was entered or at the time judgment was pronounced and sentence imposed. The Court spoke of the possibility of the plea's being withdrawn before sentence was imposed and therefore said that "it is the judgment of the court—not the plea—that constitutes the 'determination of guilt.'" *Id.*, at 427. In construing Rule 34, of course, the Court had before it no evidence of a congressional intent to rule broadly to protect the public comparable to that animating Title IV. Moreover, in *Lott* the Court did not deal with the situation where probation is imposed on the basis of the plea. Under the Iowa expunction statute, one who has pleaded guilty is treated identically to one who has been found guilty by a jury. See n. 3, *supra*. There is no suggestion in the Iowa statutes, and respondent has not suggested, that once the plea was noted and probation imposed Kennison could withdraw his plea. Indeed, it was a negotiated plea accompanied by the dismissal of the kidnapping charge.

deem him to be guilty of a crime⁸—in this case a crime that Congress considered demonstrative of unreliability with firearms. Thus, for purposes of the federal gun control laws, we equate a plea of guilty and its notation by the state court, followed by a sentence of probation, with being “convicted” within the language of §§ 922(g) and (h). See *United States v. Woods*, 696 F. 2d 566, 570 (CA8 1982) (“once guilt has been established whether by plea or by verdict and nothing remains to be done except pass sentence, the defendant has been convicted within the intendment of Congress”).

B

That, however, is not an end to the matter. We still must determine whether Iowa’s expunction provisions, as carried out in Kennison’s case prior to respondent’s license applications, nullified his conviction for purposes of the federal statute.⁹

We recognized in *Lewis* that a qualifying pardon, see 27 CFR § 178.142 (1982), or a consent from the Secretary of the Treasury would operate to relieve the disability. 445 U. S., at 60–61.¹⁰ So far as the face of the statute is concerned,

⁸ Counsel acknowledged that during the period of Kennison’s probation, respondent was disqualified for a license. Tr. of Oral Arg. 36–37.

⁹ For purposes of Iowa’s own gun control statute, Iowa Code § 724.26 (1981), it might be argued that the conviction was nullified. See *State v. Patton*, 311 N. W. 2d 110, 112 (Iowa 1981). Nevertheless, the Supreme Court of Iowa has observed that the “word ‘conviction’ is of equivocal meaning, and its use in a statute presents a question of legislative intent.” *State v. Hanna*, 179 N. W. 2d 503, 507 (1970). Presumably, therefore, if the Supreme Court of Iowa were called upon to construe the term “convicted” in a statute like §§ 922(g) and (h), that court would look to “legislative intent.”

In any event, Iowa’s law is not federal law, and it does not control our decision here. We therefore look to federal considerations in resolving the present case.

¹⁰ Title VII, which we construed in *Lewis*, explicitly provides that pardons granted by the President of the United States or a state governor, specifying that the recipient is authorized to receive, possess, or transport firearms, lift the disabilities imposed by that Title. 18 U. S. C. App.

however, expunction under state law does not alter the historical fact of the conviction, and does not open the way to a license despite the conviction, as does positive or “affirmative action,” *ibid.*, by way of the Secretary’s consent on the conditions specified by § 925(c). In *Lewis*, it is true, we recognized an obvious exception to the literal language of the statute for one whose predicate conviction had been vacated or reversed on direct appeal. 445 U. S., at 61, n. 5; see Note, Prior Convictions and the Gun Control Act of 1968, 76 Colum. L. Rev. 326, 334, n. 42 (1976). But, in contrast, expunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty. Expunction in Iowa means no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law. Clearly, firearms disabilities may be attached constitutionally to an expunged conviction, see *Lewis v. United States*, 445 U. S., at 65–68, and an exception for such a conviction, unlike one reversed or vacated due to trial error, is far from obvious. In *Lewis* we held that the exception for convictions reversed or vacated on direct appeal did not make ambiguous the statute’s clear application to convictions arguably vulnerable to collateral attack. We perceive no more ambiguity in the statute here than we did in *Lewis*.

IV

Other provisions of the federal gun control laws and related federal statutes fortify our conclusion that expunction of a state conviction was not intended by Congress automatically to remove the federal firearms disability.

1. Even conviction is not necessary for disqualification. The mere existence of an outstanding indictment is sufficient

§ 1203(2). Except § 925(c), permitting the Secretary to remove the disabilities in specified circumstances, there is no comparable provision in Title IV. By regulation, the Secretary has given Presidential pardons, but not gubernatorial pardons, automatic enabling effect under Title IV. 27 CFR § 178.142 (1982).

under §§ 922(g) and (h). Congress was reaching far and was doing so intentionally.

2. Sections 922(g) and (h) impose the same disabilities upon a person who “is under indictment” for certain crimes, or who “is a fugitive from justice,” or who “is” a drug addict or an unlawful user of certain drugs, or who “has been convicted in any court” of certain crimes, or who “has been adjudicated as a mental defective,” or who “has been committed to a mental institution” (emphasis supplied). This use of the respective tenses is significant and demonstrates that Congress carefully distinguished between present status and a past event. We have noted this distinction in tenses in § 922, and its significance, before:

“Congress knew the significance and meaning of the language it employed. It used the present perfect tense elsewhere in the same section . . . , in contrast to its use of the present tense (‘who is’) in §§ 922(h)(1), (2), and (3). The statute’s pattern is consistent and no unintended misuse of language or of tense is apparent.” *Barrett v. United States*, 423 U. S., at 217.

And in *Scarborough v. United States*, 431 U. S., at 570, we observed: “It is obvious that the tenses used throughout Title V were chosen with care.”

3. The imposition, by §§ 922(g)(4) and (h)(4), of continuing disability on a person who “has been” adjudicated a mental defective or committed to a mental institution is particularly instructive. A person adjudicated as a mental defective may later be adjudged competent, and a person committed to a mental institution later may be deemed cured and released. Yet Congress made no exception for subsequent curative events. The past adjudication or commitment disqualifies. Congress obviously felt that such a person, though unfortunate, was too much of a risk to be allowed firearms privileges. See *United States v. Bass*, 404 U. S., at 344–345. In the face of this fact, we cannot believe that Congress in-

tended to have a person convicted of a firearms felony under state law become eligible for firearms automatically because of a state expunction for whatever reason.

4. Section 925(c) empowers the Secretary to grant relief from these disabilities in certain cases. The Secretary may not grant such relief, however, to one convicted of a crime involving the use of a firearm or of a federal firearms offense, and may not grant relief in any event unless specific conditions are met to his satisfaction. Again, it is highly unlikely that Congress intended to permit its own circumscription of the ability of the Secretary to grant relief to be overcome by the vagaries of state law. That would be too easy a route to follow in order to circumvent the federal statute. See S. Rep. No. 666, 89th Cong., 1st Sess., 2 (1965).

5. Provisions of Title VII, enacted simultaneously with Title IV, are helpful to our analysis. We have treated Titles VII and IV as *in pari materia* in construing statutory language identical to that at issue here. *Lewis v. United States*, 445 U. S., at 61–62. Title 18 U. S. C. App. § 1203(2) exempts from Title VII “any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.” Thus, in that statute, even a pardon is not sufficient to remove the firearms disabilities unless there is express authorization to have the firearm. It is inconceivable that Congress could have so provided and yet have intended, as the Court of Appeals concluded, 649 F. 2d, at 220–221, to give a state expunction a contrary and unconditional effect. After all, expunction devices were not unknown or unusual when Title IV came into being in 1968. See Comment, Expungement in California: Legislative Neglect and Judicial Abuse of the Statutory Mitigation of Felony Convictions, 12 U. San Fran. L. Rev. 155, 161 (1977); 1909 Cal. Stats., ch. 232, § 1. And the Federal

Youth Corrections Act, in which Congress itself provided for expunction in certain circumstances, see 18 U. S. C. § 5021, was enacted as far back as 1950. See 64 Stat. 1089.

6. Title 21 U. S. C. § 844(b) is a federal expunction statute providing that a first offender found guilty of simple possession of a controlled substance may be placed on probation without entry of judgment, and that, upon successful completion of the probation, the court shall discharge the defendant and dismiss the proceeding against him. But Congress also specifically provided in § 844(b)(1) that such discharge or dismissal “shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime . . . or for any other purpose.” This provision would be superfluous if Congress had believed that expunction automatically removes the disqualification. Congress obviously knew the plain meaning of the terms it employed in statutes of this kind, and when it wished to create an exception for an expunged conviction, it did so expressly.

V

“As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.” *Chapman v. Houston Welfare Rights Organization*, 441 U. S. 600, 608 (1979). In our previous cases we have recognized and given weight to the Act’s broad prophylactic purpose:

“When Congress enacted [18 U. S. C. § 921 *et seq.*] it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest. . . . The principal purpose of federal gun control legislation, therefore, was to curb crime by keeping ‘firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.’”

Huddleston v. United States, 415 U. S., at 824, quoting S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968).

See also *Barrett v. United States*, 423 U. S., at 220–221.

In order to accomplish this goal, Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them. Such persons are also barred from obtaining licenses to deal in firearms or ammunition. This latter provision is particularly important because Title IV and federal gun laws generally funnel access to firearms almost exclusively through dealers. See *Huddleston v. United States*, 415 U. S., at 825. “The principal agent of federal enforcement is the dealer.” *Id.*, at 824.

Although we have searched diligently, we have found nothing in the legislative history of Title IV or related federal firearms statutes that suggests, even remotely, that a state expunction was intended automatically to remove the disabilities imposed by §§ 922(g)(1) and (h)(1). See, *e. g.*, S. Rep. No. 1501, 90th Cong., 2d Sess. (1968); S. Rep. No. 1097, 90th Cong., 2d Sess. (1968); H. R. Rep. No. 1577, 90th Cong., 2d Sess. (1968); H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. (1968); H. R. Rep. No. 488, 90th Cong., 1st Sess. (1967). This lack of evidence is significant for several reasons. First, the purpose of the statute would be frustrated by a ruling that gave effect to state expunctions; a state expunction typically does not focus upon the question with which Title IV is concerned, namely, whether the convicted person is fit to engage in the firearms business or to possess a firearm. Second, “[i]n the absence of a plain indication to the contrary, . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law.” *NLRB v. Natural Gas Utility Dist.*, 402 U. S. 600, 603 (1971), quoting *NLRB v. Randolph Electric Membership Corp.*, 343 F. 2d 60, 62–63 (CA4 1965). This is because the application of federal legislation is nationwide and

at times the federal program would be impaired if state law were to control. *Jerome v. United States*, 318 U. S. 101, 104 (1943). The legislative history reveals that Congress believed a uniform national program was necessary to assist in curbing the illegal use of firearms. See S. Rep. No. 1097, 90th Cong., 2d Sess., 28, 76-77 (1968). Third, Title IV "is a carefully constructed package of gun control legislation. . . . 'Congress knew the significance and meaning of the language it employed.'" *Scarborough v. United States*, 431 U. S., at 570, quoting *Barrett v. United States*, 423 U. S., at 217. And Congress carefully crafted a procedure for removing those disabilities in appropriate cases. § 925(c).

Congress, of course, did use state convictions to trigger Title IV's disabilities in the first instance. This, however, was not because Congress wanted to tie those disabilities to the intricacies of state law, but because such convictions provide a convenient, although somewhat inexact, way of identifying "especially risky people." *United States v. Bass*, 404 U. S., at 345. There is no inconsistency in the refusal of Congress to be bound by postconviction state actions, such as expunctions, that vary widely from State to State and that provide less than positive assurance that the person in question no longer poses an unacceptable risk of dangerousness. Any potential harshness of the federal rule is alleviated by the power given the Secretary to grant relief where relief is appropriate based on uniform federal standards.

The facts of the present case are illustrative. Because Kennison had "stable employment" at home in South Carolina and no previous conviction, he was placed on probation and allowed to go home. App. to Pet. for Cert. 45a-46a. Although he had no previous conviction, Kennison did have prior arrests for "assault and battery of a high and aggravated nature" and for "child abuse." Record, Govt. Exh. 13. According to him, his supervision during probation consisted of "occasionally report[ing] that [he] had not been arrested." App. to Brief in Opposition 157a. In short, the circum-

stances surrounding the expunction of his conviction provide little, if any, assurance that Kennison is a person who can be trusted with a dangerous weapon.

VI

Finally, a rule that would give effect to expunctions under varying state statutes would seriously hamper effective enforcement of Title IV. Over half the States have enacted one or more statutes that may be classified as expunction provisions that attempt to conceal prior convictions or to remove some of their collateral or residual effects. These statutes differ, however, in almost every particular. Some are applicable only to young offenders, *e. g.*, Mich. Comp. Laws §§ 780.621 and .622 (1982). Some are available only to persons convicted of certain offenses, *e. g.*, N. J. Stat. Ann. § 2C:52-2(b) (West 1982); others, however, permit expunction of a conviction for any crime including murder, *e. g.*, Mass. Gen. Laws Ann., ch. 276, § 100A (West Supp. 1982-1983). Some are confined to first offenders, *e. g.*, Okla. Stat., Tit. 22, § 991c (Supp. 1982-1983). Some are discretionary, *e. g.*, Minn. Stat. § 638.02(2) (Supp. 1982), while others provide for automatic expunction under certain circumstances, *e. g.*, Ariz. Rev. Stat. Ann. § 13-912 (1978). The statutes vary in the language employed to describe what they do. Some speak of expunging the conviction, others of "sealing" the file or of causing the dismissal of the charge. The statutes also differ in their actual effect. Some are absolute; others are limited. Only a minority address questions such as whether the expunged conviction may be considered in sentencing for a subsequent offense or in setting bail on a later charge, or whether the expunged conviction may be used for impeachment purposes, or whether the convict may deny the fact of his conviction. Some statutes, too, clearly were not meant to prevent use of the conviction in a subsequent prosecution. See, *e. g.*, Ariz. Rev. Stat. § 13-907 (1978); *United States v. Herrell*, 588 F. 2d 711 (CA9

1978), cert. denied, 440 U. S. 964 (1979). These and other differences provide nothing less than a national patchwork.

In this case, for example, although the Court of Appeals referred to Iowa's deferred judgment statute as "unconditional and absolute," 649 F. 2d, at 221, it is obvious from the face of the statute that that description is not entirely accurate. At the time of expunction, a separate record is maintained, not destroyed, by the Supreme Court administrator. Iowa Code § 907.4 (1981). See Tr. of Oral Arg. 44. In addition, all "criminal history data" may be released to "criminal justice agencies." Iowa Code §§ 692.1(5) and 692.2 (1981). In short, the record of a conviction expunged under Iowa law is not expunged completely.

Under the decision below, perplexing problems would confront those required to enforce federal gun control laws as well as those bound by their provisions. Because, as we have noted, Title IV "is a carefully constructed package of gun control legislation," *Scarborough v. United States*, 431 U. S., at 570, Congress, in framing it, took pains to avoid the very problems that the Court of Appeals' decision inevitably would create, such as individualized federal treatment of every expunction law. Congress used unambiguous language in attaching gun control disabilities to any person "who has been convicted" of a qualifying offense. We give full effect to that language.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

The Gun Control Act provides that any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" is ineligible for a federal license to ship, transport, or receive any firearm or ammunition in interstate commerce. 18 U. S. C. §§ 922(g) and (h). Thus, as the Court points out, "[i]f Kennison was not

'convicted' in the first place . . . respondent should not be ineligible for licenses on the grounds asserted by the Bureau." *Ante*, at 111. Contrary to the conclusion reached by the Court, I do not believe that Kennison was "convicted." Accordingly, I dissent.

I agree with the Court that whether one has been convicted within the meaning of the Gun Control Act is a question of federal, rather than state, law. *Ante*, at 111-112. Congress did not, however, expressly define the term "conviction" in the Act. Where Congress has defined the term, the Court recognizes that it has given the term different meanings in different statutes. *Ante*, at 112, n. 6. In the Investment Company Act of 1940, Congress expressly provided that the term "convicted" includes "a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed." 15 U. S. C. § 80a-2(a)(10). The same definition was used in the Investment Advisers Act of 1940. 15 U. S. C. § 80b-2(a)(6). Congress used a more narrow definition in two sections of the Narcotic Addict Rehabilitation Act of 1966, providing that "[c]onviction" and 'convicted' mean the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, and do not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory." 18 U. S. C. § 4251(e); 28 U. S. C. § 2901(f). Finally, in the Federal Youth Corrections Act, Congress has provided that the term "'conviction' means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere." 18 U. S. C. § 5006(g).

Thus at the most, Congress has required the entry of a formal judgment as the signpost of a "conviction." At the least, Congress has required the *acceptance* of a plea. In this case, we have neither. The Court relies on *Kercheval v. United States*, 274 U. S. 220 (1927), and *Boykin v. Alabama*, 395

U. S. 238 (1969), for the proposition that “[i]n some circumstances, we have considered a guilty plea alone enough to constitute a ‘conviction.’” *Ante*, at 112. The Court concludes that in this case “we . . . have more,” because the state trial judge “noted” the plea and placed Kennison on probation. *Ante*, at 113. I cannot agree.

Even if *Kercheval* and *Boykin* would otherwise be relevant to our interpretation of the Gun Control Act, both cases spoke of an accepted guilty plea. Whatever a trial court does when it “notes” a plea, it is less, instead of more, than an acceptance of the plea which is preceded by an examination of the defendant to insure that the plea is voluntary.

Where the Iowa deferred judgment statute can be used, “[t]he trial court may, upon a plea of guilty [and] [w]ith the consent of the defendant . . . defer judgment and place the defendant on probation.” Iowa Code § 789A.1 (1977) (emphasis added) (current version at Iowa Code § 907.3 (1981)). Congress has never before considered such circumstances sufficient for a finding of a “conviction”; there is nothing in the Gun Control Act to infer that Congress has adopted such a standard now. It is likely that at the most Congress intended that a “conviction” be represented by a formal entry of judgment, or at the least an acceptance of a guilty plea. But in either case, such criteria are absent where, following a guilty plea, the Iowa deferred judgment statute is invoked.*

*The Court points out that respondent acknowledged in oral argument that during the period of Kennison’s probation, respondent was disqualified for a license. *Ante*, at 114, n. 8. This disqualification, if it existed, however, would be based on the provision of the Gun Control Act applying to any person “who is under indictment,” 18 U. S. C. §§ 922(g) and (h), rather than on a “conviction.”

CITY OF LOCKHART v. UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 81–802. Argued November 3, 1982—Decided February 23, 1983

Prior to 1973, appellant Texas city was a “general law” city governed by a commission consisting of a mayor and two commissioners, all serving the same 2-year terms. These offices were filled in even-numbered years through at-large elections using a “numbered post” system whereby the two commission posts were designated by number, and each candidate specified the post for which he or she sought election. In 1973, appellant became a “home rule” city, and adopted a new charter whereby it would be governed by a mayor and four councilmen serving staggered 2-year terms, with the mayor and two councilmen being elected in even-numbered years through at-large elections using the numbered-post system and the other two councilmen being similarly elected in odd-numbered years. Forty-seven percent of appellant’s population are Mexican-American, but, as of 1977, less than 30% of the registered voters were Mexican-American. A Federal District Court in Texas, in a 1979 suit by the individual appellee and other Mexican-Americans, enjoined further elections under the new plan pending preclearance of electoral changes in the charter under § 5 of the Voting Rights Act of 1965. The Attorney General precleared the changes except to the extent that they incorporate at-large elections, the numbered-post system, and staggered terms for councilmen. Appellant then filed suit under § 5 in the Federal District Court for the District of Columbia, seeking a declaratory judgment that the remaining changes did not have the purpose or effect of denying the voting rights guaranteed by § 5. The District Court compared the new plan to what the old practice would have been without numbered posts on the ground that under Texas law appellant as a general-law city was not entitled to use a numbered-post system. The court held that numbered posts and staggered terms each have the effect of discriminating against protected minorities, particularly in view of the history of racial bloc voting in the city.

Held:

1. Appellant’s entire 1973 election plan is subject to preclearance under § 5. Appellant admits that the addition of two seats to its governing body and the introduction of staggered terms are subject to § 5. Appellant also changed the nature of the “continuing” seats, since council posts one and two are not identical to the old commission posts one and two. Moreover, the discriminatory effect of the new seats cannot be de-

allegations in the complaint, taken as true, unambiguously exclude coverage." Stated previously, National's insurance policy excludes coverage of any bodily injury to employees covered under workmen's compensation. Sears & Singer's complaint, taken as true, specifically denies that Baughman was an employee of Berry. Such allegation, taken as true, is sufficient to raise the issue concerning the duty of National to defend Berry against Sears & Singer's third party demand. Thus, National was under a duty to defend Berry since the allegations in the third party complaint, taken as true did not "unambiguously exclude coverage." This is true, even if it may ultimately be determined that coverage does not exist, since "the duty of an insurer to defend its insured under a policy of liability insurance is of greater scope than the insurer's duty to pay." *Bandy* at 903. In support of this holding, the court adopts the reasoning of the court in *Bandy v. Avondale Shipyards, Inc.*:

The 'failure of an insurer to defend a suit as contemplated by the policy renders the insurer liable for all expenses incurred by an insured in defense of the action, including reasonable attorney's fees.' *Smith v. Insurance Co. of Pennsylvania, supra*, 161 So.2d [903] at 918. The insurer may, if it chooses, refuse to defend the suit, relying on its own assessment of the allegations in the complaint. It does so, however, at the risk of becoming liable to the insured for attorney's fees and expenses incurred by the insured in his defense in the event of an ultimate determination that the duty to defend was present.

The issue of coverage is related to the duty to defend in that . . . the allegations in the initial complaint, unless they unambiguously exclude coverage, determine the duty to defend, thus necessitating a preliminary evaluation of coverage by the insurer or by the court in order to assess the duty to defend. The insurer may, of course, 'deny coverage [and preserve its options on that issue] and yet furnish its insured with a defense [thus fulfilling its duty to defend] without subjecting itself

to liability' . . . '[T]he duty of an insurer to defend its insured under a policy of liability insurance is of greater scope than the insurer's duty to pay . . . Although it may ultimately be determined that coverage does not exist, the duty to defend nevertheless exists if the allegations of the petition taken as true would result in liability which the insurer is obligated to discharge on behalf of the insured.'

458 F.2d at 902-903.

It is hereby decreed that National Surety Company is responsible for all expenses incurred by Berry in defense of Sears & Singer's third party claim, including reasonable attorney's fees. Counsel for both National Surety Company and Berry shall submit to the Court within ten (10) days from the date of this Order Memoranda suggesting what amount would be an appropriate award in this case.



Delmas W. DIXON, Plaintiff,

v.

K. P. McMULLEN, Jr., et al.,
Defendants.

Civ. A. No. 4-80-443.

United States District Court,
N. D. Texas,
Ft. Worth Division.

Nov. 18, 1981.

Convicted ex-felon brought civil rights case alleging abridgement of his constitutional rights when he was denied certification as police officer by State Commission on Law Enforcement Officer Standards and Education. The District Court, Belew, J., held that: (1) pardon granted to plaintiff by Governor removed some, but not all, legal disabilities, and (2) statute automati-

cally excluding ex-felons from certification as police officers was constitutional.

Order accordingly.

1. Municipal Corporations ⇐184(2)

State Commission on Law Enforcement Officer Standards and Education is delegated responsibility by Legislature to establish minimum educational, training, physical, mental and moral standards for admission to employment and certification as reserve police officer. Vernon's Ann.Tex.Civ.St. art. 4418 (29aa).

2. Civil Rights ⇐13.4(1)

Convicted ex-felon who challenged statute which automatically excluded ex-felons from certification as police officers met applicable principles for federal district court to note probable jurisdiction over his civil rights action for denial of his certification.

3. Pardon and Parole ⇐9

Undisputed legal effect of pardon is to restore civil rights to ex-felon.

4. Constitutional Law ⇐79

Governor cannot overrule judgment of court of law; he has no "appellate" jurisdiction.

5. Pardon and Parole ⇐9

Final conviction does not disappear upon grant of pardon.

6. Pardon and Parole ⇐9

Pardon implies guilt.

7. Pardon and Parole ⇐9

Granting of pardon does not in any way indicate defect in process.

8. Pardon and Parole ⇐9

Granting of pardon may remove some disabilities, but does not change common-law principle that conviction of infamous offense is evidence of bad character.

9. Pardon and Parole ⇐9

Prior conviction for which one has received pardon, absent showing that such pardon was granted for subsequent proof of innocence, may be utilized for purposes of

enhancement, impeachment, denial of bail to habitual offender, denial of probation, proving possession of firearm by convicted felon and proving possession of burglary tools by convicted felon.

10. Pardon and Parole ⇐9

Federal laws do not necessarily obey effect of state pardon.

11. Constitutional Law ⇐252.5

When statute affects everyone's rights, it is question of substantive due process under Fifth Amendment. U.S.C.A.Const. Amend. 5.

12. Constitutional Law ⇐211(1)

When statute treats some people differently than others, it is matter of equal protection under Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

13. Constitutional Law ⇐251.3

Fourteenth Amendment stands for proposition that Government must act, when it acts, in manner which is neither arbitrary nor unreasonable. U.S.C.A.Const. Amend. 14.

14. Constitutional Law ⇐213.1(1)

Challenged classification is subject to strict scrutiny only if suspect class is disadvantaged or when it impermissibly interferes with exercise of fundamental rights. U.S.C.A.Const. Amend. 14.

15. Constitutional Law ⇐213.1(1), 224(1)

If gender classification or illegitimacy is involved in governmental classification, there must be fair and substantial relation to important government objectives. U.S.C.A.Const. Amend. 14.

16. Constitutional Law ⇐213.1(2)

Any designation in governmental classification other than gender or illegitimacy requires only rational relation to legitimate governmental interest. U.S.C.A.Const. Amend. 14.

17. Constitutional Law ⇐240(6)

State may regulate professions which affect public interest as long as regulation rationally furthers legitimate state purpose or interest. U.S.C.A.Const. Amend. 14.

18. Constitutional Law ⇐70.3(3)

Courts do not sit as super-legislature to judge considerations of legislative policy made in areas that neither affect fundamental rights nor proceed along suspect lines. U.S.C.A.Const. Amend. 14.

19. Constitutional Law ⇐208(1)

Legislature has great latitude in making statutory classifications involving social or moral legislation.

20. Municipal Corporations ⇐184(1)

Officers and Public Employees ⇐8

There is no constitutional right to public employment, including employment as policeman.

21. Officers and Public Employees ⇐27

Government, as vital part of state's police power, must have authority to scrutinize hiring of personnel based on conduct occurring prior to their employment, so as to insure that persons publicly employed in emergency or dangerous situations are sober and alert and possess qualities such as honesty, integrity, reliability and obedience to the law.

22. States ⇐74

State police are charged with enforcement of law, not for themselves or their clients as in private practice, but for benefit and safety of people at large.

23. Municipal Corporations ⇐184(2)

Integrity and trust are prerequisites for employment as police officer.

24. Municipal Corporations ⇐184(2)

State's legitimate concern for maintaining high standards of professional conduct extends far beyond initial licensing of police officers.

25. Constitutional Law ⇐238.5

Municipal Corporations ⇐176(3)

There was no equal protection violation on grounds of overbreadth or underbreadth in statute prohibiting certification of convicted ex-felons as police officers. Vernon's Ann.Tex.Civ.St. art. 4413(29aa); U.S.C.A. Const. Amend. 14.

26. Constitutional Law ⇐251.3

Fourteenth Amendment provides independent right to demand that government act in nonarbitrary manner at all times. U.S.C.A.Const. Amend. 14.

27. Constitutional Law ⇐278.4(2)

State cannot exclude person from occupation in manner or for reasons which contravene due process clause. U.S.C.A.Const. Amend. 14.

28. Constitutional Law ⇐318(1)

Due process requires that action by state through any of its agencies must be consistent with fundamental principles of liberty and justice. U.S.C.A.Const. Amend. 14.

29. Constitutional Law ⇐274(1)

Even though government purpose be legitimate and substantial, such purpose cannot be pursued by means which broadly stifle fundamental personal liberties when end can be more narrowly achieved. U.S.C.A. Const. Amend. 14.

30. Constitutional Law ⇐251.1

Due process is not technical concept with fixed content unrelated to time or circumstances, and its very nature negates any notion of inflexible procedures universally applicable to every imaginable situation. U.S.C.A.Const. Amend. 14.

31. Constitutional Law ⇐274(1)

Due process does not require hearing in every conceivable case of governmental impairment of private interests. U.S.C.A. Const. Amend. 14.

32. Constitutional Law ⇐251.6

Generally, there is no violation of due process if statute gives person of ordinary intelligence fair notice that his contemplated conduct is prohibited. U.S.C.A.Const. Amend. 14.

33. Licenses ⇐20

State can require high standards of qualification for profession such as good moral character as long as it has rational connection to applicant's fitness or capacity, especially when discussing "true" profession, like law, medicine, or law enforcement,

where ethics should be most minimal of qualifications.

34. Constitutional Law — 252.5

In action alleging deprivation of interest without proper due process of law, it is first necessary to consider nature of interest. U.S.C.A.Const.Amend. 14.

35. Constitutional Law — 254.1, 277(1)

In delineating boundaries of interest alleged to have been deprived without proper due process of law, it is standard for court to ascertain whether interest invaded, if at all, is "liberty" or "property" interest. U.S.C.A.Const.Amend. 14.

36. Constitutional Law — 254.1

Although there is no constitutionally protected right to government employment, there is liberty interest in right to engage in any of common occupations of life. U.S.C.A.Const.Amend. 14.

37. Constitutional Law — 254.1

Due process protection attaches to "general" right to engage in chosen occupation, but not to specific right to particular position. U.S.C.A.Const.Amend. 14.

38. Constitutional Law — 287.2(5)

Where state action denies person license or opportunity to practice his chosen profession, due process may require that he be given hearing and chance to respond to charges against him, particularly where applicant has no procedural due process rights apart from those which agency has chosen to create by its own regulations. U.S.C.A.Const.Amend. 14.

39. Constitutional Law — 46(1)

Before convicted ex-felon could raise question of being denied procedural due process by failure of State Commission on Law Enforcement Officer Standards and Education to grant him hearing on his qualifications to become certified as policeman, he was required to request hearing and have such request denied by Commission. Vernon's Ann.Tex.Civ.St. art. 4413(29aa); U.S.C.A.Const.Amend. 14.

40. Municipal Corporations — 176(3)

Statute which automatically excluded ex-felons from certification as police officers was constitutional. Vernon's Ann.Tex.Civ.St. art. 4413(29aa).

David R. Richards and Mary F. Keller, American Civil Liberties Union, Austin, Tex., for plaintiff.

Mark White, Atty. Gen. of Tex., Ann Kraatz, Asst. Atty. Gen., Gerald C. Caruth, Asst. Atty. Gen., Austin, Tex., for defendants.

MEMORANDUM OPINION

BELEW, District Judge.

This is a civil rights case. Plaintiff, a convicted ex-felon, who was pardoned twenty years later by the Governor of the State of Texas, alleges that his constitutional rights were abridged because he was denied certification as a police officer by the Texas Commission on Law Enforcement Officer Standards and Education. The trial was before this Court and lasted one day. The following findings of fact and conclusions of law are entered according to Federal Rules of Civil Procedure 52(a) and 58.

I. Factual Background

These material facts are not in dispute:

1. Delmas W. Dixon was born on October 13, 1938 in Fort Worth, Texas.
2. In 1957, Plaintiff was honorably discharged from the United States Navy after two years of service.
3. On November 14, 1960, Plaintiff pled guilty to a charge of robbery in Tarrant County, Texas, and was sentenced to confinement in the State Penitentiary for five (5) years. That sentence was probated.
4. On March 10, 1964, Delmas Dixon was discharged from probation. Consequently, Plaintiff's motion for new trial was granted, and his case dismissed in accordance with Tex.Code Crim.Pro.Ann. art. 42-12(7)(Vernon 1979).

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5. In 1975, Plaintiff entered the River Oaks Police Academy, and later completed the training. On either false or incomplete information submitted to the Texas Commission on Law Enforcement Officer Standards and Education [hereinafter "the Commission"] relating to his criminal record, Plaintiff was certified by the Commission. Thereafter, he began his duty with the City of River Oaks, Texas as a reserve police officer.

6. From 1976 until 1979, Plaintiff worked as a full-time officer with the City of Azle, Texas, eventually rising to the rank of Patrol Sergeant. In 1979, Mr. Dixon resigned and re-entered private business.

7. On June 9, 1980, Plaintiff was granted a general pardon by the Governor of the State of Texas. However, the pardon was not granted on the basis of subsequent proof of innocence.

8. In approximately August, 1980, Plaintiff was re-hired by the City of River Oaks, Texas. He worked a couple of weeks and then resigned. On November 17, 1980, Plaintiff was denied a certification to be a reserve police officer for the City of Blue Mound, Texas. The denial was based on Plaintiff's prior felony conviction.

[1] 9. The Commission is delegated the responsibility by the Texas Legislature to establish minimum educational, training, physical, mental, and moral standards for admission to employment and certification as a reserve police officer, pursuant to Tex. Rev.Civ.Stat.Ann. art. 4413(29aa)(Supp.19-80).

10. Article 4413(29aa) provides that no person convicted of a felony may be certified as a police officer.¹ Article 4413(29aa) also provides that once certified, a police officer retains such certification, absent its revocation by the Commission. Should a police officer resign, be fired, or his ap-

1. Sec. 8A. (a) No person who has been convicted of a felony under the laws of this state, or the United States may be certified by the Commission as qualified to be a peace officer, or a jailer or guard at a county jail.

(b) Final conviction of a felony under the laws of this state, another state, or the United

pointment be terminated for whatever reason, his certification automatically would expire. If the officer sought appointment with another law enforcement agency, he would be required to once again seek certification.

II. Parties

Plaintiff Delmas A. Dixon is a citizen of Fort Worth, and Tarrant County, Texas.

Defendant Ken P. McMullen, Jr., is the Chief of Police of Blue Mound, Tarrant County, Texas. He did not hire Plaintiff because he had been denied certification pursuant to the Texas Statute. Defendant McMullen is sued in his official capacity only.

Defendant Fred Toler is the Executive Director of the Texas Commission on Law Enforcement Officer Standards and Education, and as such, is responsible for the enforcement of its rules and regulations. He is sued in his official and individual capacity.

Defendants Dewey Presley, Dan Saunders, Walter Rankin, James Adams, Dr. Kenneth Ashworth, Allan Bowen, David Collier, Henry Gardner, Richard Ingram, Rex Kelly, Emil Peters, Mark White, and Louise Wing are responsible for establishing rules and regulations for the certification of police officers. They are sued in their individual and official capacities.

Defendant State of Texas is sued as the Governmental entity responsible for depriving Plaintiff of his civil rights by enforcing a statute which automatically excludes any and all felons from consideration as police officers.

III. Plaintiff Allegations

Plaintiff asserts he should be certified as a police officer because of the effect of his pardon. As a result of the denial, he alleg-

States disqualifies a person previously certified by the Commission as qualified to be a peace officer, or a jailer or guard at a county jail, and the Commission shall immediately revoke the certification of a person so convicted.

as violations of the equal protection and due process clauses. Under the equal protection argument, Plaintiff contends (1) there is no rational relationship underlying his criminal record and his ability to be an effective police officer; (2) he was rejected solely because of his felon status, and thus arbitrarily and irrationally treated differently; (3) that the statute is simultaneously overbroad (not sufficiently specifically tailored to limit the statute to conform to a legitimate state interest) and underbroad (allowing those with numerous misdemeanors to be police officers, while denying those with one felony); and (4) arbitrarily certifying those ex-felons before 1975, yet excluding those after 1976.

Under the due process argument, Plaintiff asserts his procedural due process rights were violated because no hearing was allowed. Specifically, that such factors as the nature of the offense, recentness of the offense, subsequent dismissal from the court's docket, Plaintiff's involvement in the offense, any rehabilitation, i.e., his unblemished record for twenty years, public service as a police officer for four years, and a full pardon by the Governor of Texas, were not considered in order to provide for an individualized analysis. Thus, Plaintiff alleges there is no possibility of demonstrating that he now satisfies the underlying purposes of the statute.

Plaintiff prays for this Court to assume jurisdiction, to restrain and permanently enjoin Defendants from enforcing the statute, to determine the statute unconstitutional, and to award damages and attorney's fees.

IV. Defendants Response

Defendants assert several contentions: (1) the Court should abstain to first permit Texas courts to consider the issues of state law; (2) the complaint fails to state a cause of action against these Defendants in their individual capacity; (3) the Court lacks jurisdiction to entertain a suit for damages against the State of Texas and the individual Defendants in their official capacity; (4) a pardon based on anything besides subse-

quent proof of innocence is irrelevant; (5) there is no legal support for a right to a hearing and a case-by-case analysis; (6) there is no violation of the equal protection clause as Plaintiff is not a member of a suspect classification, and thus the concern for public health, safety, and morals underscores the rational relationship standard; (7) there is no procedural due process violation, as the statute is not an arbitrary and unreasonable exclusion; and (8) Defendants assert this is a frivolous lawsuit and request attorney's fees.

V. Jurisdiction

[2] This case is brought under 42 U.S.C. §§ 1983, 1988, 28 U.S.C. §§ 1331, 1343, 2201, 2202, and the Fourteenth (14th) Amendment. There was no request made for a three-judge panel, as possible under 28 U.S.C. §§ 2281, 2284. *Connor v. Hutto*, 516 F.2d 853, 855 (8th Cir. 1975); *Mildner v. Gulotta*, 405 F.Supp. 182, 184 (E.D.N.Y. 1975), affirmed, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976). The Court will not abstain, see *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Duncan v. Poynthress*, 657 F.2d 691 (5th Cir. 1981); *High Oil Times v. Busbee*, 621 F.2d 135 (5th Cir. 1980); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *U. S. v. Composite State Bd. of Med. Examiners*, 656 F.2d 131 (5th Cir. 1981), and regarding the exhaustion doctrine, the Court is satisfied Plaintiff has met the applicable principles, see generally: *Patsy v. Florida Eastern University*, 634 F.2d 900 (5th Cir. 1981). This Court, therefore, notes probable jurisdiction.

Issue 1

What is the legal effect, under Texas law, of a pardon granted by the Governor?

VI. Pardon

The Texas Constitution gives the Governor of Texas power to grant pardons in criminal matters. "In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and ad-

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vice of the Board of Pardons and Paroles, ..., to grant ... pardons" Article Four, Section Eleven; see also: *Tex.Code Crim.Pro. Ann.* art. 48.01 (Vernon 1979); *Hankamer v. Templin*, 143 Tex. 572, 187 S.W.2d 549, 550 (1945). The only civil power he possesses is to remit fines and bond forfeitures.

The meaning of a pardon is both interesting and historical. Originally, under English law, there were several kinds of pardons: general, special or particular, conditional, absolute, and statutory. The King of England had the power to set aside orders of the Court. He alone could do so for the Court had no power over its final judgment. As Lord Coke once wrote, "A pardon is a work of mercy, whereby the King, either before attainder, sentence, or conviction, or after, forgiveth any crime, offense, punishment, execution, right title, debt, or duty, temporal, or ecclesiastical." 3 Inst. 233. Prior to the Revolution, the American Colonies, being in effect under the laws of England, were accustomed to the exercise of it in various forms. Hence, when the words "to grant pardons" were used in the United States Constitution, they conveyed to mind the authority as had been exercised by the English Crown. See Article Two, Section Two, Clause One. No effort was made to define or change its meaning. Years passed and differing language in cases caused confusion among the courts as to the American effect of a pardon. Com-

pare: *Ex Parte Garland*, 4 Wall 333, 380, 71 U.S. 333, 380, 18 L.Ed. 366 (1860) ("blots out the existence of guilt") with *Burdick v. United States*, 236 U.S. 79, 91, 35 S.Ct. 267, 269, 59 L.Ed. 476 (1914) ("confession of guilt implied in the acceptance of a pardon"); and *Bennett v. State*, 24 Tex.App. 73, 79, 5 S.W. 527, 529 (1887) (stating a full pardon absolves the party from all legal consequences of his crime) with *Jones v. State*, 141 Tex.Crim. 70, 147 S.W.2d 508, 510 (1941) ("does not obliterate the fact of the commission of the crime").

Today, the offenses for which a pardon is usually requested are burglary, rape, robbery, forgery, drugs, and occasionally even murder. The process generally works this way. After serving sentence (either full, probated, etc.), anyone may make application for a pardon. The applicant forwards his request, along with letters of recommendation, to the Board of Pardons and Paroles. A decision is made; if the Board denies the request, the process is of course over, but the applicant may apply again. If the Board approves the request, it is forwarded to the Governor's Clemency Staff.² The Staff's recommendation is then almost always approved by the Governor.³

[3-8] The undisputed legal effect of a pardon is to restore the civil rights to an ex-felon (suffrage, jury service, and the chance to seek public office). See *Easterwood v. State*, 34 Tex.Crim. 400, 31 S.W.

ons might assert exceptions to the rule. The argument also has been raised that many ex-felons, who might seek a "tough-guy" line of work, now go into the Army. However, if exceptions to this statute were allowed, so goes the thinking, they might apply for police officer work. In fact, the Governor's office contended and strongly suggested that if they knew many of those now seeking pardon status could in fact become police officers, their percentage of approvals would significantly drop. That feeling is mainly based on the belief that while many applicants might list their reasons for wanting a pardon as the right to vote, the desire to clear their family name, etc., at the time of the application; in two years or whenever, after they had been granted a pardon, circumstances might have changed and they would then be eligible for officer certification.

2. In the year September 1, 1978 to August 31, 1979, the Board received 3906 requests, recommended 162, and the Governor's office (Dolph Briscoe and William P. Clements, Jr., after January 1, 1979) approved 90. In the year September 1, 1979 to August 31, 1980, the Board received 3311 requests, recommended 144, and the Governor's office approved 91. In the year September 1, 1980 to August 31, 1981, the Board received 3142 requests, recommended 157, and the Governor's office approved 118. Statistics courtesy of the Office of the Board of Pardons and Paroles, Mrs. Gladys Sommers, Austin, Texas and the Office of the Governor: Mr. John McCollum, Assistant General Counsel, Austin, Texas; October, 1981.

3. In lobbying against a broad interpretation of a pardon, the Governor's office expressed fear that if the door was opened for one group of individuals (pardoned ex-felons), then all ex-fel-

294, 296 (1986); 44 *Tex.Jur.2d Pardon, Reprive, Etc.*, § 12 (1963); *Tex.Att'y Gen.Op.*, No. MW-148 (1980). However, the Governor cannot overrule the judgment of a court of law. He has no "appellate" jurisdiction. *Watkins v. State*, 572 S.W.2d 339, 341 (Tex. Crim.App.1978); *Jones v. State*, *supra*, 141 Tex.Crim. 70, 147 S.W.2d at 511. There can be no doubt but that a final judgment was entered against the ex-felon. Regardless of the post-judgment procedural maneuvering,⁴ a final conviction does not disappear. A pardon implies guilt. Texas Courts may forgive, but they do not forget. The fact is not obliterated⁵ and there is no "wash". *Diaz v. Chasen*, 642 F.2d 764, 765-66 (5th Cir. 1981); *Gurleski v. United States*, 405 F.2d 253, 266 (5th Cir. 1969), *cert. denied*, 396 U.S. 981, 89 S.Ct. 2140, 23 L.Ed.2d 769, *rehearing denied sub nom. Smith v. United States*, 396 U.S. 869, 90 S.Ct. 37, 24 L.Ed.2d 124 (1969); *Watkins v. State*, *supra*, 572 S.W.2d at 341; *Ex Parte Smith*, 548 S.W.2d 410, 414 (Tex.Crim.App.1977). Moreover, the granting of a pardon does not in any way indicate a defect in the process. It may remove some disabilities, but does not change the common-law principle that a

conviction of an infamous offense is evidence of bad character.⁶ *Bennett v. State*, *supra*, 24 Tex.App. 79, 5 S.W. at 529.

[9, 10] The bottom line on the effect of a pardon is that it restores some civil rights, but not all.⁷ The following decisions establish that a prior conviction for which one has received a pardon absent a showing that such pardon was granted for subsequent proof of innocence, may be utilized for purposes of enhancement, *Donald v. Jones*, 445 F.2d 601, 606 (5th Cir.), *cert. denied*, 404 U.S. 992, 92 S.Ct. 537, 30 L.Ed.2d 543 (1971); *Watkins v. State*, *supra*, 572 S.W.2d at 341; impeachment,⁸ *Gurleski v. United States*, *supra*, 405 F.2d at 266; *Sipaneck v. State*, 100 Tex.Crim. 489, 272 S.W. 141, 142 (1925); denial of bail to a habitual offender, *Ex Parte Smith*, *supra*, 548 S.W.2d at 414; denial of probation, *Watkins v. Thomas*, 623 F.2d 387, 388 (5th Cir. 1980); proving possession of a firearm by a convicted felon, *Runo v. State*, 556 S.W.2d 808, 809-10 (Tex.Crim.App.1977); *United States v. Castellana*, 433 F.Supp. 1309, 1316 (M.D.Fla.1977); and proving possession of burglary tools by a convicted felon, *Logan v. State*, 448 S.W.2d 462, 463-

and the *Tex.Att'y Gen.Op.*, No. MW-148 (1980) analysis of it.

5. An employee, for example, could not say to an employer during the hiring process that he had never been convicted of a felony.

6. See also: *Doe v. Webster*, 606 F.2d 1226, 1239 n.51 (D.C.Cir.1979). One must also consider the liability exposure of the State. If it were commanded to clothe an ex-felon with the general authority a police officer carries, and he were to abuse that (i.e. as an example, a pardoned burglar or rapist), a private citizen could turn around and sue the state claiming it knowingly allowed such to occur.

7. Many ex-felons may and should be able to vote, etc.; they just cannot be certified as police officers.

8. One of the most important assets a police officer possesses is his ability to testify about an event. A jury will usually accord his testimony significant credibility. However, an ex-felon police officer loses that testimonial power. Although his pardon may be used to bolster on re-direct, most likely the damaging impression has set in.

64 (Tex.Crim.App.1969). Additionally, federal laws do not necessarily obey the effect of a state pardon. See also: *Diaz v. Chasen*, *supra*, 642 F.2d at 765, *United States v. Padia*, 584 F.2d 85, 86 (5th Cir. 1978); *Yacovone v. Bolger*, 645 F.2d 1028, 1035-36 (D.C. Cir.1981); *United States v. Castellana*, *supra*, 433 F.Supp. at 1317.

The Court cites six cases as consistent with its reasoning, *Baraky v. Board of Regents of N.Y.*, 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829 (1953) (New York statute stated a physician convicted of any crime would have his license suspended); *Diaz v. Chasen*, 642 F.2d 764 (5th Cir. 1981) (A customhouse cartman's license was revoked as a result of his felony conviction of possession of stolen goods, even though a Louisiana statute automatically pardoned a first offender upon completion of his sentence); *Hankamer v. Templin*, 143 Tex. 572, 187 S.W.2d 549 (Tex. 1945) (Where an attorney had been disbarred following his conviction of a felony, a pardon by the Governor did not reinstate his privilege to practice law, nor restore his former office as an attorney); *Cooper v. Texas Board of Medical Examiners*, 489 S.W.2d 129 (Tex.Civ.App.—El Paso 1973, writ *ref'd n.r.e.*), *cert. denied*, 414 U.S. 1072, 94 S.Ct. 585, 38 L.Ed.2d 478 (1974) (Doctor was convicted of a felony offense; the Court found *Tex.Rev.Civ.Stat. Ann.* art. 4505(2) (1976) gave sufficient power to the State Board of Medical Examiners to refuse, cancel, revoke, or suspend a license for such an offense); *Jones v. State*, 141 Tex.Crim. 70, 147 S.W.2d 508 (1941); *Dee Wayne Thompson v. Texas Commission on Law Enforcement Officer Standards and Education*, No. 311, 698 (Dist.Ct. of Travis County, 200th Judicial District of Texas, April 24, 1981) (Plaintiff sought judicial review of an administrative order entered by the Commission revoking his Police Officer Qualification certificate previously issued as a result of his felony conviction for the offense of arson); and one as distinguishable, *Warren v. State*, 127 Tex.Crim. 71, 74

9. Until 1975, the Commission excluded all felons except one who had pled guilty, served his sentence, was in fact innocent, and had received a full pardon. Plaintiff would not have

S.W.2d 1006 (1941) (In *Jones*, the Court of Criminal Appeals analyzed the earlier *Warren* decision and stated if that majority had desired to assert a pardon wiped out the existence of the fact, it easily could have clarified its opinion; undoubtedly, the majority did not disclose such a willingness.).

In conclusion, this Court has to wonder if maybe there should not be categories of pardons. Those might include a conditional pardon (limited to any specific situation), a general pardon (everything but the earlier enumerated exceptions and police officer certification), and an unconditional pardon (i.e. a total elimination of any disability). Such a system would have prevented this problem, but more importantly, any future ones which could be far more delicate.

Issue (2)

Did the Texas Legislature, which automatically excluded any convicted felon⁹ from the possibility of being certified as a police officer, violate Plaintiff's Fourteenth Amendment constitutional rights (equal protection under the laws and procedural due process)?

VII. Equal Protection

[11-13] This case involves the Fourteenth Amendment constitutional rights. When a statute affects everyone's rights, it is a question of substantive due process (Fifth Amendment). When a statute treats some people differently than others, then it is a matter of equal protection. *Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1974); *Uphaw v. McNamara*, 435 F.2d 1188, 1190 n.3 (1st Cir. 1970). The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, "... nor shall any state deprive any person of life, liberty, or property, ...; nor deny to any person within its jurisdiction the equal protection of the laws." It stands for the proposition, therefore, the Government must act, when it acts, in a manner which is neither arbitrary nor unreasonable.

been eligible for the exception as he pled guilty to a charge of robbery, and his sentence was probated, so that he never served any "time". (See Plaintiff's exhibits 14, 15, and 17).

[14-16] There exists three standards of review under traditional Fourteenth Amendment analysis. *Seoane v. Ortho Pharmaceuticals, Inc.*, 600 F.2d 146 (5th Cir. 1981). A challenged classification is subject to strict scrutiny only if a suspect class is disadvantaged, *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (race); *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948) (national origin); or, when it impermissibly interferes with the exercise of a fundamental right, *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1822, 22 L.Ed.2d 600 (1969) (right to travel); *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (right to vote); *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 678, 54 L.Ed.2d 618 (1978) (marriage); *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (freedom of association); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right of privacy). If gender classification or illegitimacy is involved, then there must be a fair and substantial relation to important government objectives, *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), respectively. Any other designation would only require a rational relation to a legitimate governmental interest. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

[17] The Supreme Court's standard of less than strict scrutiny "... has consistently been applied to state legislation restricting the availability of employment opportunities," *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970); *Smith v. Fussenith*, 440 F.Supp. 1077, 1079 (D.C.Mass.1977), as well as to classifications based on a criminal record. *Miller v. Carter*, 547 F.2d 1314, 1321 (7th Cir. 1977) (Campbell, concurring), *affirmed by an equally divided court*, 434 U.S. 356, 98 S.Ct. 786, 54 L.Ed.2d 608 (1978); *Kindem v.*

City of Alameda, 502 F.Supp. 1106, 1111 (N.D.Calif.1980). Thus, in the context of occupational licensing, the Supreme Court has formulated a test which requires that any qualification only "have a rational connection with the applicant's fitness or capacity" to perform the job. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957). In other words, a state may regulate professions which affect the public interest as long as the regulation rationally furthers a legitimate state purpose or interest.

[18, 19] Turning to the facts and applying the minimal rationality standard, the question is: can one uphold the statute in a manner consistent with the equal protection clause? *Reed v. Reed*, 404 U.S. 71, 74, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971); *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611, 614 (5th Cir. 1975), *cert. dismissed*, 425 U.S. 559, 96 S.Ct. 1752, 48 L.Ed.2d 169 (1976). Some cases have struck down various statutes on the ground there was insufficient evidence presented to justify the classification. However, lest one forgets the late 1930's, Courts do not sit as a super-legislature to judge the considerations of legislative policy made in areas that neither affect fundamental rights nor proceed along suspect lines. *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976); *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S.Ct. 1028, 1030, 10 L.Ed.2d 93 (1963); *West Coast Hotel v. Parrish*, 300 U.S. 379, 399, 57 S.Ct. 578, 585, 81 L.Ed. 703 (1937); *Laketon Asphalt and Refining, Inc. v. United States*, 476 F.Supp. 668, 675 (N.D.Ind.1979). A Legislature has great latitude in making statutory classifications involving social or moral legislation. *United States v. Neary*, 552 F.2d 1184, 1189 (7th Cir.), *cert. denied*, 434 U.S. 864, 98 S.Ct. 197, 54 L.Ed.2d 139 (1977); *United States v. Weatherford*, 471 F.2d 47, 51 (7th Cir. 1972), *cert. denied*, 411 U.S. 972, 93 S.Ct. 2144, 36 L.Ed.2d 695 (1973), *Laketon Asphalt and Refining, Inc. v. United States*, *supra*, 476 F.Supp. at 675.

[20-22] There is no constitutional right to public employment.¹⁰ *McGarvey v. District of Columbia*, 468 F.Supp. 687, 690 (D.C. 1979); *Carlyle v. Sitterson*, 438 F.Supp. 956, 959 (D.N.C.1975). A Government must have authority to scrutinize the hiring of personnel based on conduct occurring prior to their employment. *Dew v. Halaby*, 317 F.2d 582, 586 (D.C.Cir.1963); *Carlyle v. Sitterson*, *supra*, 438 F.Supp. at 963. It is a vital part of the state's police power. *Barsky v. Board of Regents of N.Y.*, *supra*, 347 U.S. at 449, 74 S.Ct. at 654 (1953). The rationale is to insure that those persons publicly employed in emergency or dangerous situations are sober and alert, and possess qualities such as honesty, integrity, reliability and obedience to the law.¹¹ After all, state police are charged with the enforcement of the law, not for themselves or their clients as in private practice, but for the benefit and safety of people at large. In *Talent v. City of Abilene*, 508 S.W.2d 592, 597 (Tex.1974), regarding a fireman who was dismissed for failure to submit to a polygraph examination after he had been charged with a criminal offense, Justice Reavley in a five-four dissent said,

"The Fire Chief had a responsibility to Fireman Talent: to respect the rules of job tenure and to treat Talent fairly. He also had a responsibility to the other 127 people in his department when discipline and mutual trust are necessary. He had the people of Abilene to serve. Abilene's ordinances provide that its firemen and policemen must be persons of good moral character ...

[I] would say that the Legislature and City of Abilene recognized that policemen and firemen should be credible and trustworthy."¹²

[23, 24] Policemen are just simply a special category. Integrity and trust are pre-

requisites. The law clothes an officer with authority to handle many critical situations, including those that occur in a lightning moment and which never can be re-enacted or reversed. There are so many far-reaching implications that the Legislature, in order to exclude a majority of undesirable applicants, while acknowledging it might deny a minority of acceptable ones, simply had to draw a line. That line prevents ex-felons from being certified as police officers. It does not prevent them from other work; in fact in other areas, society encourages their rehabilitation. Under the facts of this case, it is especially apparent as Plaintiff's felony conviction (robbery) would directly reflect on his qualifications for the job (investigating robberies, etc.). *Butts v. Nichols*, 381 F.Supp. 573, 580 (S.D. Iowa C.D.1974). A state's legitimate concern for maintaining high standards of professional conduct extends far beyond the initial licensing. *Barsky v. Board of Regents of N.Y.*, *supra*, 347 U.S. at 451, 74 S.Ct. at 655.

The Court cites two examples of cases which are consistent with its reasoning, *Upshaw v. McNamara*, 435 F.2d 1188 (1st Cir. 1970) (action by a rejected ex-felon, who was later pardoned, for a police appointment); *Foley v. Connelie*, 419 F.Supp. 889 (S.D.N.Y.1976) (Irish alien brought a class action for declaration that New York statute was unconstitutional, insofar as it excluded aliens from employment as New York State Troopers); and four which are distinguishable, *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (applicant was excluded from the practice of law; in fact, applicant's past criminal record included only arrests, and he was never tried or convicted for any single offense); *Andrews v. Drew*

Templin, *supra*, 143 Tex. 572, 187 S.W.2d at 551 (1945).

12. See also: *Richardson v. City of Pasadena*, 500 S.W.2d 175, 177 (Tex.Civ.App.—Houston [14th Dist.] 1973), *rev'd on other grounds*, 513 S.W.2d 1 (Tex.1974), *aff'd with orders*, 523 S.W.2d 506 (Tex.Civ.App.—Houston [14th Dist.] 1975).

10. Or, as Judge (later Justice) Holmes once said, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of City of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

11. Compare: *Beller v. Middendorf*, 632 F.2d 788, 812 (9th Cir. 1978); and *Hankamer v.*

Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), cert. dismissed, 425 U.S. 559, 96 S.Ct. 1752, 48 L.Ed.2d 169 (1976) (unwed mothers brought suit seeking to declare unconstitutional a rule determining them ineligible as teacher's aides; the rules involved left no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have no bearing on a parent's present moral worth); *Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1974) (discharged custodian alleged city ordinance barring any municipal employment of any veteran not having an honorable discharge unconstitutional; general category of "persons with other than honorable discharge" unquestionably too broad where automatic dismissal the result and opportunity for any employment foreclosed); *Butts v. Nichols*, 381 F.Supp. 573 (S.D.Iowa C.D.1974) (class action relief seeking to ban state statute prohibiting employment of convicted felons in civil service positions; Iowa statutory scheme had across-the-board prohibition against the employment of all felons in all civil service positions).

Finally, this Court relies on the holding in *United States v. Giles*, 640 F.2d 621 (5th Cir. 1981) regarding Plaintiff's overbreadth-underbreadth argument. In *Giles*, Defendant challenged the constitutionality of a federal statute which made unlawful the receipt of a firearm by a convicted felon. The amended statute had substituted a broader, more precise quantitative standard (conviction of a crime, violent or otherwise, that is punishable by imprisonment for more than one year) for a narrower, somewhat imprecise qualitative standard (conviction of a "crime of violence"). Deciding the issue under the equal protection banner, the panel unanimously concluded the statute bore a rational relationship to the goal Congress sought to promote, i.e. persons

who have been convicted of serious crimes in the past have demonstrated a greater potential for abuse of their right to possess firearms.

[25] The general principles enunciated in *Giles* under its facts bear a significant similarity to the facts and theories of this case. The Court, therefore, concludes there was no equal protection violation.¹³

VIII. Procedural Due Process

Plaintiff contends his due process rights were violated because there was no opportunity for any hearing to allow the Commission to evaluate his individual record. On a more theoretical level, Plaintiff would assert he is now unable to demonstrate to the Commission he can satisfy the underlying purposes of the statute.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law." After closely studying the issue, the following general principles seem applicable.

[26-29] The Fourteenth Amendment provides an independent right to demand that the government act in a nonarbitrary manner at all times. *Thompson v. Gallagher*, supra, 489 F.2d at 446-47; *Kindem v. City of Alameda*, supra, 502 F.Supp. at 1113. A state cannot exclude a person from an occupation in a manner or for reasons which contravene the due process clause. *Schwartz v. Board of Bar Examiners*, supra, 353 U.S. at 238-39, 77 S.Ct. at 755-56. Further, due process requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice. *Buchalter v. New York*, 319 U.S. 427, 429, 63 S.Ct. 1129, 1130, 87 L.Ed. 1492 (1942). Even though the

but concealing the fact and obtaining a license, and still remaining eligible to keep the license), the ordinance violated equal protection. However, those kinds of potential discrepancies are not possible under the Texas Statute as Article 4413(29aa)(8A)(b) states a final conviction of a felony disqualifies any person previously certified.

government purpose be legitimate and substantial, that purpose cannot be pursued by means which broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Police Department v. Mosley*, 408 U.S. 92, 101 n.8, 92 S.Ct. 2286, 2293 n.8, 83 L.Ed.2d 212 (1972).

[30-32] Due Process, unlike some legal rules, is not a technical concept with a fixed content, unrelated to time or circumstances. Its very nature negates any notion of inflexible procedures universally applicable to every imaginable situation. *Cafeteria Workers v. McElroy*, 367 U.S. 896, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961); *McDowell v. State of Texas*, 465 F.2d 1342, 1343 (5th Cir. 1972) (en banc), cert. denied, 410 U.S. 943, 93 S.Ct. 1371, 35 L.Ed.2d 610 (1978). It does not require a hearing in every conceivable case of governmental impairment of private interests. *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); *McDowell v. State of Texas*, supra, 465 F.2d at 1348. For example, generally, there is no violation of due process if a statute gives a person of ordinary intelligence fair notice that his contemplated conduct is prohibited, *United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 2203, 60 L.Ed.2d 755 (1979); *United States v. Giles*, supra, 640 F.2d at 628-29.

[33] A state can require high standards of qualification for a profession such as good moral character, as long as it has a rational connection to the applicant's fitness or capacity (especially when discussing a "true" profession, like law, medicine or law enforcement, where ethics should be the most minimal of qualifications). *Schwartz v. Board of Bar Examiners*, supra, 353 U.S. at 239, 77 S.Ct. at 756. When a state exercises such a right, the question often arises: does due process require any kind of a hearing?¹⁴ In answering that, Courts no longer can rely on a privilege-right distinction, *Board of Regents v. Roth*, supra, 408

U.S. at 571, 92 S.Ct. at 2705; *Thompson v. Gallagher*, supra, 489 F.2d at 446, but rather fall on a "life, liberty, or property" analysis. *Board of Regents v. Roth*, supra, 408 U.S. at 569, 92 S.Ct. at 2705.

[34-38] In an action alleging a deprivation of an interest without proper due process of law, it is first necessary to consider the nature of that interest. *Lindsey v. Normet*, 405 U.S. 56, 74, 92 S.Ct. 862, 874, 31 L.Ed.2d 36 (1972). Delineating those boundaries, it is standard for a Court to ascertain whether the interest invaded, if at all, is a "liberty," or "property" interest? While there is no constitutionally protected right to government employment, *Orr v. Trinter*, 444 F.2d 128, 133 (6th Cir. 1971), cert. denied, 408 U.S. 943, 92 S.Ct. 2847, 33 L.Ed.2d 167 (1973); *Roseboro v. Fayetteville City Bd. of Ed.*, 491 F.Supp. 113, 117 (E.D.Tenn.1978), there is a liberty interest in the right "to engage in any of common occupations of life . . ." *Board of Regents v. Roth*, supra, 408 U.S. at 572, 92 S.Ct. at 2706; *Giordano v. Roubush*, 448 F.Supp. 899, 904 (S.D.Iowa 1977), affirmed, 617 F.2d 511 (8th Cir. 1980). In *Roth*, the court distinguished between a "general" right to engage in a chosen occupation, and a specific right to a particular position, and determined due process protection only attaches to the former interest. See also: *Orr v. Trinter*, supra, 444 F.2d at 133. Therefore, it would seem that where state action denies a person a license or opportunity¹⁵ to practice his chosen profession, due process may require that he be given a hearing and a chance to respond to the charges against him. See, e.g., *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1957); *Schwartz v. Board of Bar Examiners*, supra, 353 U.S. at 232, 77 S.Ct. at 752, 1 L.Ed.2d 796. This may be especially relevant when the applicant "has no procedural due process rights apart from those which the agency has chosen to create by its own regulations." *Schwartz v. Fed. Energy Reg. Com'n.*, 578 F.2d 417, 420 (D.C.Cir.1978).

14. Compare *Occupations, Professions and Licenses—Persons with Criminal Backgrounds*, Vernon's Texas Session Law Service: 1981 Tex.Sess.Law Serv., ch. 267, § 13(c), at 604.

15. See *Gooney v. Sonora Independent School District*, 603 F.2d 522, 525 (5th Cir. 1979); *Thomas v. Bd. of Trustees, Etc.*, 515 F.Supp. 280, 287 (S.D.Tex.1981).

13. In *Miller v. Carter*, supra, 547 F.2d at 1314 (7th Cir. 1977), an ex-offender brought suit challenging a city ordinance permanently barring persons convicted of certain offenses from obtaining a public chauffeur's license. The Court of Appeals held that, because of the irrational distinctions resulting from the statute (including one convicted of a prohibited offense

[39] Under the facts of this case, however, Plaintiff has never requested a hearing, has never alleged that the lost opportunity caused him humiliation or embarrassment, or has never complained of any stigma attached to his reputation.¹⁶ Before Plaintiff can raise the question of being denied procedural due process, he must request a hearing and have such request denied by the Commission.¹⁷

IX. Conclusion

[40] It is this Court's holding that (1) the pardon granted to the Plaintiff by the Governor removes some, but not all, legal disabilities and, (2) the statute automatically excluding ex-felons from certification as police officers is constitutional.

In conclusion the following citation succinctly states this Court's position in regard to cases such as this being filed in federal court.

"... we note that the issues involved in this case might have best been raised in another forum. The rights with which [Plaintiff] is primarily concerned are the rights of pardoned felons under [Texas] law. Federal issues are at best secondary and hinge upon our interpretation of state law. Since there is only one Massachusetts case, [as was the number of Texas cases] which treats this issue and then only briefly, we are handicapped in our interpretation; in future cases [Texas] might expand the rights of pardoned felons. Moreover, [Texas] might seek to afford [Plaintiff] more procedural protection than we think the federal Constitution requires. In the future we would be tempted to abstain from deciding similar cases in which the federal rights were secondary and based on rights granted by

the state, particularly if an alternative state forum were available to the plaintiff."

Upshaw v. McNamara, supra, 435 F.2d at 1192.

IT IS SO ORDERED.



Lloyd MORRIS, Plaintiff,

v.

The CITY OF NEW YORK PARKING VIOLATIONS BUREAU, Defendant.

No. 80 Civ. 0012 (PNL).

United States District Court,
S. D. New York.

Nov. 18, 1981.

Nonresident automobile owner brought action claiming to have been denied due process and equal protection by seizure of his automobile after a default judgment for unpaid parking violations. Cross motions for summary judgment were filed. The District Court, Leval, J., held that (1) plaintiff was not denied due process by failure of parking ticket to warn of possibility of execution after a default judgment had been taken for parking violations, and (2) there was no equal protection violation by virtue of fact that those individuals who reside in a state which does not provide New York with a computer tape identifying the auto-

the statute which once automatically barred a convicted felon from continuing to practice as an attorney has been abolished, Tex.Rev.Civ. Stat. Ann. art 311 (repealed 1979). Thus, it seems any convicted felon who may be an applicant for the bar or an attorney who has been disbarred because of a felony conviction and seeks reinstatement after serving his sentence and being pardoned will probably be given a hearing

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Cite as 527 F.Supp. 724 (1981)

mobile registrants do not receive preexecution notice that default can result in execution.

Defendant's motion granted; plaintiff's motion denied.

1. Automobiles ⇐ 349

Constitutional Law ⇐ 315

Although original summons left on a motor vehicle does not state that default judgment can result in execution on the vehicle for failure to pay parking violations and although no additional notices are sent to residents of states that do not provide New York with a computer tape identifying automobile registrants until seizure is effected, such procedure does not deny due process to a resident of a noncooperating state as at least three parking tickets must be collected before seizure, postseizure notice is given in time to allow a hearing prior to sale and to require earlier notice to registrants of noncooperating states would impose such costs as would exceed revenues from enforcement. 42 U.S.C.A. § 1983; U.S.C.A.Const.Amends. 5, 14; N.Y.Vehicle and Traffic Law § 241.

2. Constitutional Law ⇐ 249(8)

There is no equal protection violation in New York's dividing parking violators into two classes, with one class being New York residents and residents of states which provided New York with computer tapes identifying automobile registrants and second class being residents of ten states which do not provide computer tape, as any difference in treatment, i.e., residents of noncooperating states not receiving preseizure notice that default can result in execution of the vehicle, is rationally related to securing compliance with parking laws and there is no animus toward nonresidents. 42 U.S.C.A. § 1983; U.S.C.A.Const.Amends. 5, 14; N.Y.Vehicle and Traffic Law § 241.

James I. Meyerson, Thomas Hoffman,
New York City, for plaintiff.

Carl Sanders and Judah Harris, Corp.
Counsel, New York City, for defendant.

OPINION AND ORDER

LEVAL, District Judge.

Plaintiff brings this action under 42 U.S.C. § 1983, claiming to have been denied due process and equal protection of the laws by the seizure of his automobile after a default judgment for unpaid parking violations under § 241 of the New York Vehicle and Traffic law and the regulations promulgated thereunder.

Plaintiff claims to be a resident of North Carolina. Although plaintiff's residence is disputed, it is not disputed that his car was registered in North Carolina. North Carolina is one of ten states that do not provide New York with a computer tape identifying their automobile registrants. Plaintiff was issued and did not respond to several parking summonses in New York City. A default judgment was obtained against him. The judgment was executed upon by the Marshal, who seized plaintiff's car. The car was released to him when he paid the amount of the judgment, plus fees and impounding charges.

Plaintiff claims not to have received any of his many original summonses. Plaintiff claims also that the original summonses, even if received, would not provide sufficient notice, because, while they do say Failure to answer this summons within 7 days will be deemed an admission of liability. Additional penalties will be added and may lead to a default judgment they do not mention that a default judgment could result in execution upon property.

Each party moves for summary judgment; plaintiff also moves for class certification.

Section 241 provides as follows: When the operator or owner of a car has failed to plead or appear in response to a parking violation, a default judgment may be entered. If the owner is a New York resident, he or she must be notified, by first-class mail, of the violations charged, of the impending default judgment, where the default would be entered, and that it could be

16. The Supreme Court has stated that a liberty interest would not be infringed where the only loss suffered is a "stigma" or damage to reputation. *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976), see also: *Graves v. Duganne*, 581 F.2d 222, 224 (9th Cir. 1978).

17. Police work is a highly commendable and highly important position. The same may be said for the legal profession. Both are matters of great public concern. This Court notes that

an exception to the rule relied on". Funk v. Campbell, 15 Cal.2d 250, 251, 100 P.2d 762; California Delta Farms v. Chinese American Farms, 201 Cal. 201, 255 P. 1097.

[3, 4] Section 663a provides that a motion under section 663 must be made "within ten days after notice of the entry of judgment, served upon the adverse party". There is no limitation, as suggested by the respondent, that such motion be made within 60 days after entry of judgment. Nor does this rule allow "every unsuccessful litigant to set his own time for appeal", for the prevailing party by serving notice of entry of the judgment may limit the time within which his adversary is entitled to proceed under section 663. An order denying a motion made under that section is appealable, Funk v. Campbell, supra; California Delta Farms v. Chinese American Farms, supra, and the record in the present action shows that the notice of appeal was timely filed.

The motion to dismiss the appeal is denied.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



34 Cal.2d 62

MEYER v. BOARD OF MEDICAL
EXAMINERS et al.

L. A. 20929.

Supreme Court of California, in Bank.
June 15, 1949.

Rehearing Denied July 14, 1949.

I. Physicians and surgeons § 11(2)

An order of State Board of Medical Examiners, suspending physician's license for unprofessional conduct by reason of his conviction of offense involving moral turpitude in unlawfully selling morphine preparation, was not improper as imposing penalty for such offense, in violation of statute, after superior court discharged physician from probation and dismissed accusations

against him. Health and Safety Code, § 11164; Government Code, § 11512; Pen. Code, §§ 1203.3, 1203.4; Business and Professions Code, § 2383.

2. Criminal law § 998

Physicians and surgeons § 11(2)

The trial court's action in setting aside verdict of conviction and dismissing prosecution after discharging convict from probation mitigates his punishment by restoring certain rights and removing certain disabilities, but does not obliterate fact that he was finally adjudged guilty of crime, so that State Board of Medical Examiners is not precluded from suspending license of physician convicted of crime involving moral turpitude and discharged from probation, with such accompanying statutory relief, whether before or after such disciplinary order. Pen. Code, §§ 1203 et seq., 1203.3, 1203.4; Business and Professions Code, § 2383.

CARTER, SHENK and SCHAUER, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Proceeding by Paul Oliver Meyer against the Board of Medical Examiners of the State of California, its secretary and members, for a writ of mandate to review the board's action in ordering suspension of plaintiff's license as a physician and surgeon. From a judgment denying a peremptory writ, plaintiff appeals.

Affirmed.

Prior opinion, Cal.App., 200 P.2d 128.

French & Indovina and F. Walter French, Santa Monica, for appellant.

Fred N. Howser, Attorney General, and Bayard Rhone, Deputy Attorney General, for respondents.

SPENCE, Justice.

This is an appeal from a judgment denying a peremptory writ of mandate in a proceeding brought to review the action of the respondent Board of Medical Examiners of the State of California in ordering the suspension of appellant's license as a

physician and surgeon. Appellant challenges the propriety of the respondent board's order, but his position cannot be sustained in the light of applicable statutory law as construed in relation to the problem at hand.

So far as here material, the facts in chronological order appear as follows: On February 17, 1947, appellant, a licensed physician and surgeon, upon entry of a plea of guilty, was convicted of a violation of section 11164 of the Health and Safety Code (furnishing narcotics "to an addict, or to any person representing himself as such, except as permitted"). A sentence of six months' imprisonment in the county jail was imposed, but the execution thereof was suspended and appellant was placed on probation for a period of two years upon condition that he pay a \$500.00 fine. On August 5, 1947, respondent board filed an accusation against appellant for his criminal dereliction, and on August 22, 1947, the matter was tried before a hearing officer as provided by statute. Gov. Code, sec. 11512. On January 23, 1948, respondent board made an order rejecting the hearing officer's proposed decision of December 4, 1947, and specifying it would consider the matter "upon the record, including the transcript, without taking additional evidence, and upon written argument presented to" it.

Upon completion of one-half of the probationary period theretofore prescribed and in response to appellant's motion made on February 20, 1948, the superior court ordered that his "probation be terminated and [he be] discharged therefrom under Section 1203.3 Penal Code, that plea of 'Guilty' be changed to 'Not Guilty' and that cause be dismissed under Section 1203.4 Penal Code." On March 2, 1948, appellant presented to respondent board at its regularly scheduled meeting a certified copy of the court's order. However, said board concluded that such order "terminating probation and dismissing the information" did not in the disciplinary proceeding before it "remove or wipe out the conviction suffered by" appellant; and upon reciting the facts "resulting in the conviction"—that appellant had made a sale of "two vials containing forty tablets of a preparation of

morphine" to a state narcotic officer for "\$125.00 in marked money"—said board determined that appellant had been convicted of "an offense involving moral turpitude" and by reason of such conviction was "guilty of unprofessional conduct." Accordingly, respondent board as of March 15, 1948, ordered the suspension of appellant's license for ninety days and placed him on probation for three years. Appellant thereupon applied to the superior court for a writ of mandate to compel respondent board to set aside its order and decision. Argument was had upon respondent board's demurrer filed in return to appellant's petition, and it was sustained without leave to amend. The court then entered its judgment denying relief to appellant. From such judgment this appeal is taken.

[1] The sole question to be determined is the effect of section 1203.4 of the Penal Code upon the authority of respondent board to order the suspension of appellant's license. As here material, said section provides: "Every defendant * * * who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; * * * and * * * the court shall thereupon dismiss the accusations or information against such defendant, *who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.*" (Emphasis added.) Appellant concedes that respondent board could have found him guilty of unprofessional conduct without reference to the criminal proceeding, but he contends that inasmuch as said board elected to base its decision wholly upon appellant's prior conviction, its action was an improper imposition of a penalty contrary to the italicized language of the statute, following the dismissal of the criminal charge against him under the prescribed procedure. But such contention cannot be sustained in challenge of respondent board's order as a disciplinary measure reflecting considerations of appropriate punishment by reason of the adjudication of appellant's guilt, and so without the scope of the so-called

"expunging of penalty" premise of the cited statute.

[2] Respondent board has authority to suspend the license of a physician who is found to be guilty of unprofessional conduct, and it is expressly provided by statute that "conviction * * * of any offense involving moral turpitude constitutes unprofessional conduct," with the "record of the conviction" serving as "conclusive evidence" thereof. Bus. & Prof. Code, sec. 2383. There is no question here but that appellant's violation of section 11164 of the Health and Safety Code was an offense involving moral turpitude. So pertinent is the case of *In re Phillips*, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, holding that an attorney disbarred after his conviction of a crime involving moral turpitude was not entitled to have his name restored to the roll of practicing attorneys upon dismissal of the criminal proceeding against him in pursuance of section 1203.4 of the Penal Code. After noting that "the order granting probation is based upon the premise of the defendant's guilt," this court discussed the effect of the probation procedure as follows, 17 Cal.2d at page 61, 109 P.2d at page 347, 132 A.L.R. 644: "The powers possessed by the trial courts under the probation statutes, Penal Code, § 1203 et seq., are concerned with mitigation of punishment and confer discretion upon the courts in dealing with a convicted defendant. The power of the court to reward a convicted defendant who satisfactorily completes his period of probation by setting aside the verdict and dismissing the action operates to mitigate his punishment by restoring certain rights and removing certain disabilities. But it cannot be assumed that the legislature intended that such action by the trial court under section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime. This is made clear by the provision that the fact of the defendant's conviction can be used against him in any later prosecution, despite dismissal of the action under section 1203.4. In brief, action in mitigation of the defendant's punishment should not affect the fact that his guilt has been finally determined according to law. Such a final determina-

tion of guilt is the basis for the order of disbarment in this case. That final judgment of conviction is a fact; and its effect cannot be nullified for the purpose here involved, either by the order of probation or by the later order dismissing the action after judgment."

The rationale of the *Phillips* case is significant in that it was decided at a time when the State Bar Act referable to conviction of a crime involving moral turpitude as cause for suspension or disbarment (Bus. & Prof. Code, secs. 6101-6102, Stats. 1939, ch. 34, sec. 1, p. 357) was essentially the same as the present provisions of the Medical Practice Act (Bus. & Prof. Code, sec. 2383, Stats. 1937, ch. 399, p. 1275), and the plea or verdict of guilty was deemed the "record of the conviction" in "conclusive evidence" of the unprofessional conduct. After the date of the *Phillips* decision, section 6102 of the Business and Professions Code was amended (Stats. 1941, ch. 1183, sec. 1, p. 2942) to provide for the disbarment "irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code." Such amendment served to settle the question of legislative intent in conformity with what this court had held was the proper construction of the probation statute as a nonoperative factor in relation to a disbarment order as the outgrowth of a disciplinary proceeding.

Appellant argues that the *Phillips* case—involving an attorney—does not present parallel considerations to the instant case—involving a physician—because this court in the exercise of its inherent judicial power may discipline its own officers without interference from the legislature, while respondent board as an administrative agency created by the legislature is not likewise free from legislative restraint, so that its suspension of a physician's license could properly be construed as a "penalty" or "disability" released under the probation statute. But such consideration in connection with the *Phillips* case was simply "noticed" as a "preliminary point" of observation, 17 Cal.2d pages 59-60, 109 P.2d 344, 132 A.L.R. 644, citing *In re Lavine*, 2 Cal.2d 324, 41 P.2d 161, 42 P.2d 311, and did not constitute the premise of the decision—that the

discharge from probation and the dismissal of the criminal proceeding could not obliterate the fact of adjudication of guilt in support of a disciplinary order, 17 Cal.2d page 61, 109 P.2d 344, 132 A.L.R. 644. Nor is the Phillips case, as appellant maintains, "invalidated as an authority" in this case in that the disbarment there antedated the dismissal of the criminal proceeding against the attorney under the provisions of the probation statute, while here the reverse situation prevails in that respondent board, though having had the disciplinary action against appellant pending before it for some time, did not make its order of suspension against him until after he had been accorded the statutory relief in question. Such variant course in the chronology of the proceedings is an immaterial consideration, for whether the discharge from probation and the accompanying relief granted by the trial court precede or follow the disciplinary order, its propriety stems from the adjudication of guilt constituting the basis of the "conviction" and, as such, it is not a "penalty" or "disability" within the contemplated release of the probation statute. As so analyzed, the Phillips case in principle of decision is determinative of this case, and appellant's effort to distinguish it allegedly upon "two separate grounds," one legal and the other factual, is of no avail.

Like views have prevailed in other situations limiting the effect of a dismissal after conviction, insofar as the existence of guilt by reason of commission of the criminal act is recognized, despite the benefits accorded by the probation statute. Thus (1) an express proviso in section 1203.4 of the Penal Code makes the conviction count against the defendant under the prior conviction statutes if he is subsequently convicted, *People v. Hainline*, 219 Cal. 532, 535, 28 P.2d 16; *People v. Barwick*, 7 Cal.2d 696, 699, 62 P.2d 590, or if it is offered for impeachment purposes in a subsequent prosecution, *People v. James*, 40 Cal.App.2d 740, 746, 105 P.2d 947; (2) the conviction must be considered for the purpose of suspending or revoking a driver's license. Veh.Code, sec. 309, nullifying the rule of *Sherry v. Ingels*, 34 Cal.App.2d 632, 635, 94 P.2d 77; see *Ellis v. Department of Motor Vehicles*, 51 Cal.App.2d 753,

757-758, 125 P.2d 521); and (3) not only the fact of previous conviction was properly raised in a second prosecution for failure to provide for a minor child (Pen. Code, sec. 270) after dismissal of the first upon satisfactory completion of probation, but all matters inherent in such conviction were admissible in evidence—the adjudication that the defendant was the father of the child as conclusive on the issue of parentage. *People v. Majado*, 22 Cal.App.2d 323, 324, 325, 70 P.2d 1015. As the release of the "penalties and disabilities" clause of the probation statute has been so qualified in its application, it does not appear that it was thereby intended to obliterate the record of conviction against a defendant and purge him of the guilt inherent therein (cf. *Sherry v. Ingels*, supra, 34 Cal.App.2d 632, 94 P.2d 77) or to "wipe out absolutely" and for all purposes the dismissed proceeding as a relevant consideration and "to place the defendant in the position which he would have occupied in all respects as a citizen if no accusation or information had ever been presented against him." *People v. Mackey*, 58 Cal.App. 123, 130, 208 P. 135, 138. From this standpoint, appellant's theory that the import of the probation statute and the dismissal proceeding is to expunge the record of the crime, *Sherry v. Ingels*, supra; *People v. Mackey*, supra, cannot prevail.

Consistent with the foregoing considerations, it is our conclusion that the respondent board was clearly acting in the premises pursuant to its statutory authority, and that appellant's subjection to such disciplinary proceeding and the consequences thereof cannot be construed as a "penalty" or "disability" which was released under the probation statute. In re Phillips, supra, 17 Cal.2d 55, 61, 109 P.2d 344, 132 A.L.R. 644.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concur.

CARTER, Justice (dissenting).
I dissent.

The construction placed upon section 1203.4 of the Penal Code by the majority of

this Court is wholly unwarranted and is, furthermore, directly opposed to the reason for the enactment of the section.

Section 1203.3 of the Penal Code reads, in part: "The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. *It may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation and discharge the person so held * * **" [Emphasis added.]

Section 1203.4 of the Penal Code provides: "Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, *who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.* The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney authorizing [authorized] in writing; provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."

The Superior Court, on February 20, 1948, pursuant to the above provisions, ordered that appellant's probation be terminated and that he be discharged therefrom, that his plea of guilty be changed to one of "not guilty" and that the cause be dismissed. Thereafter, respondent Board, relying solely on the record of conviction, pursuant to Section 2383 of the Business

and Professions Code, ordered the suspension of appellant's license for ninety days, and placed him on probation for three years. Section 2383, Bus. & Prof. Code, provides that: "The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct."

The majority rely heavily on the case of In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644. I did not agree with the majority in that case, and I most certainly am not in favor of extending the harsh rule there laid down so that it may be applied to a factual situation such as is here presented. In the Phillips case, the order of disbursement was made *before* the conviction had been set aside. In the instant case, the Board made the order of suspension and probation *after* the conviction had been set aside. Not only that, but the action was based on a judgment of conviction which was no longer in existence except for the exception made in the statute. That exception has no application here. Appellant concedes that the Board could have taken disciplinary measures against him because of his prior conduct, but contends that all of the counts of the accusation filed against him, with the exception of the one based on the judgment of conviction, were dismissed.

In the Phillips case, the majority opinion stated [17 Cal.2d 55, 109 P.2d 348]: " * * * action in mitigation of the defendant's punishment should not affect the fact that his guilt has been finally determined according to law." This holding, which is approved by the majority in this case, nullifies the effect of the proceeding had in the Superior Court under section 1203.4 of the Penal Code, and, in effect, obliterates the section. In the original action, appellant was fined, sentenced and placed on probation for two years. This conviction was set aside under the section providing that he be *released from all "penalties and disabilities."* Notwithstanding this action, this Court allows the respondent Board to impose even greater penalties and disabilities upon appellant

than those to which he had been subjected by reason of his conviction.

The "Decision" of respondent Board states that it is based upon *"the record, including the transcript, without taking additional evidence, and upon written argument presented to the Board."* [Emphasis added.] Since the accusations or information against the defendant had been dismissed by the Superior Court prior to the decision of the Board, how could the record of the original trial be used as the basis for the Board's decision? The statute (Penal Code, sec. 1203.4) makes one exception, and only one, where the subsequently dismissed conviction may be used against a defendant. This Court has added another.

Mr. Justice Shenk, in his dissenting opinion in the Phillips case, pointed out that the majority had deviated from the rule laid down in a number of previous cases. At the present time, the Business and Professions Code, section 6102, is in line with the decision in that case, but the Code has not been so amended with respect to physicians and surgeons.

The majority point out that the Legislature could not have intended that the proceeding under Section 1203.4 of the Penal Code was to wipe out the defendant's guilt because (1) of the express proviso contained in the section; (2) because the conviction may be used for impeachment purposes, *People v. James*, 40 Cal.App.2d 740, 746, 105 P.2d 947; (3) because it may be used for the purpose of suspending or revoking a driver's license (Vehicle Code, sec. 309); (4) because it may be used in a second prosecution for failure to provide for a minor child, and because all matters inherent in the conviction (that is, the adjudication on the issue of parentage) were admissible in evidence. *People v. Majado*, 22 Cal.App.2d 323, 70 P.2d 1015.

I would like to point out, in this connection, that in *People v. James*, supra, the defendant was charged with the crime of grand theft. The fact that he had been previously convicted and the conviction dismissed pursuant to section 1203.4 of the Penal Code was used to impeach him. This case does not add another exception to the

statute, but falls squarely within the one there contained. The Court in the *James* case said [40 Cal.App.2d 740, 105 P.2d 951]: "It seems highly probable that by the amendment to this section (the exception) after the decision in *People v. Mackey*, supra, the legislature intended to broaden the section in its application and particularly provided that in any subsequent prosecution of the defendant prior convictions may be pleaded and proved." [Emphasis that of the court.] It was also said that "We therefore conclude that where a defendant who has been previously convicted of a felony and granted probation and a dismissal obtained as in the instant case, and is subsequently prosecuted for another offense, in becoming a witness in his own behalf, he subjects himself to impeachment upon the ground that he has been convicted of a felony." [Emphasis that of the Court.]

And in *People v. Majado*, supra, the defendant was found guilty, under section 270 of the Penal Code, of failure to provide for a minor child. The only question raised there was whether the Court erred in admitting in evidence the record of a prior conviction which had been subsequently dismissed pursuant to section 1203.4 of the Penal Code. Note that this case, too, falls squarely within the exception to the section and is not additional thereto. Both *People v. James*, and *People v. Majado*, supra, cite with approval statements made in the case of *People v. Hainline*, 219 Cal. 532, 28 P.2d 16. In that case it was said, 219 Cal. at page 534, 28 P.2d at page 17: "If, prior to the 1927 amendment, any doubt existed in the minds of lawyers, judges, and laymen as to the status of those who committed a second felony, such doubt was removed by said amendment (St.1927, p. 1493), which strips them of all the privileges and rights which were restored to them by the provisions of the original act upon the completion of their probationary term. * * *

"The concluding portion of the act, which provides that if the probationer commits a second offense he shall forfeit all the rights with which he was clothed at the time the court ordered the information dismissed, constitutes the amendment of 1927. * * *

Said amendment simply and justly provides that persons who have refused to profit by the grace extended to them upon the first offense shall, upon conviction of a subsequent felony, suffer the penalty of the law as prescribed for the punishment of all other offenders." [Emphasis added.]

Section 309 of the Vehicle Code is an express additional statutory exception to the Penal Code section under consideration. It reads as follows: "A termination of probation and dismissal of charges pursuant to Section 1203.4 of the Penal Code shall not affect any revocation or suspension of any license of the probationer under the provisions of this chapter. The probationer's prior conviction shall be considered a conviction for the purpose of revoking or suspending any license issued to him on the ground of two or more convictions."

If appellant's suspension and probation is to be based upon the dismissed conviction, it would seem that he had gained no rights and no privileges of which he could be stripped. If the defendant is to be considered guilty for all purposes, despite the fact that there are only two statutory provisions whereby he may be so considered, it would seem that section 1203.4 of the Penal Code makes provision for a useless procedure.

It appears to me to be obvious that the Legislature intended that a person whose conviction has been set aside, and the accusation against him dismissed, should not suffer the stigma usually attached to such a conviction unless he is later prosecuted for another offense. If the Legislature did not so intend, why is the defendant permitted to withdraw his plea of guilty and enter one of not guilty? The section clearly contemplates giving the offender a second chance to take his place in the community. Inherent in this contemplation is the thought that he shall not be branded a pariah, having paid his debt to the satisfaction of the Court. In holding to the contrary, the majority appear to be oblivious to the broad and liberal humanitarian concept embraced within the above quoted sections of our Penal Code.

SHENK and SCHAUER, JJ., concur.

1. Criminal law §=1202(1)

Where conviction in another state was of larceny, and property taken was of value of \$20, and California statute then defined grand larceny as the taking of property of value of more than \$50, the conviction could not be considered as a felony conviction within statute prescribing punishment for habitual criminals. Pen.Code, § 644.

2. Pardon §=6

Statutory provision that persons previously adjudged to be an habitual criminal under section 644 of the Penal Code, as that section read prior to effective date of statutory provision, shall be eligible for release on parole after serving seven years of prison term, is not applicable to a person convicted of primary offenses enumerated in section 644 as it read prior to 1945, and as amended in 1945, Pen.Code, §§ 644, 3048.5.

3. Constitutional law §=285

Since allegation, in information under which defendant was sentenced as an habitual criminal, that defendant was an habitual criminal would have been but the allegation of a conclusion, failure of information to charge defendant with having been an habitual criminal was not a denial to defendant of due process of law. Pen. Code, § 644.

Proceeding in the matter of the application of Eliza Edward Mead for a writ of habeas corpus.

Writ discharged with direction to Adult Authority.

Eliza Edward Mead, Repress, for appellant.

Fred N. Howser, Atty. Gen., Gail A. Strader, Sacramento, for respondent.

OPINION

PER CURIAM:

On the authority of, and for the same reasons stated in, *Sheriff v. Byron*, 93 Nev. —, 571 P.2d 103 (1977 Adv. Opn. No. 179, filed today), the order of the trial court which granted respondent's petition for a writ of habeas corpus is reversed.

Seymour Harold PATT, Appellant,

v.

NEVADA STATE BOARD OF
ACCOUNTANCY, Respondent.

No. 9758.

Supreme Court of Nevada.

Nov. 16, 1977.



SHERIFF, CLARK COUNTY, Appellant,

v.

Betty BYRON, Respondent.

No. 9948.

Supreme Court of Nevada.

Nov. 16, 1977.

Appeal from Eighth Judicial District Court, Clark County; Paul S. Goldman, Judge.

Robert List, Atty. Gen., Carson City, George E. Holt, Dist. Atty., and H. Douglas Clark, Deputy Dist. Atty., Las Vegas, for appellant.

Morgan D. Harris, Public Defender and Robert D. Amundson, Deputy Public Defender, Las Vegas, for respondent.

OPINION

PER CURIAM:

On the authority of, and for the same reasons stated in, *Sheriff v. Byron*, 93 Nev. —, 571 P.2d 103 (1977 Adv. Opn. No. 179, filed today), the order of the trial court which granted respondent's petition for a writ of habeas corpus is reversed.

Appeal was taken from an order of the Second Judicial District Court, Washoe County, William N. Forman, J., dismissing an accountant's petition requesting judicial review of the State Board of Accountancy's revocation of his certified public accountant's certificate based upon his conviction of embezzlement. The Supreme Court held that the propriety of the disciplinary action stemmed from the adjudication of guilt constituting the basis of the conviction and as such was not a "penalty" or "disability" which would be released by the accountant's honorable discharge from probation.

Appeal dismissed.

Licenses ⇐ 38

Propriety of proceedings to suspend or revoke business or professional license stems from adjudication of guilt constituting basis of conviction and as such it is not a "penalty" or "disability" which is released by honorable discharge from probation. N.R.S. 176.225, subd. 1, 628.390, subds. 5, 6.

David Dean, Reno, for appellant.

Laxalt, Berry & Allison, Carson City, for respondent.

OPINION

PER CURIAM:

Appellant was convicted of embezzlement (NRS 205.300) and placed on probation for a term of one year. Upon the satisfactory completion of probation, the district court

set aside the verdict of guilty and dismissed the information against him pursuant to NRS 176.225(1).¹ Based on the embezzlement conviction, the Nevada State Board of Accountancy revoked appellant's certified public accountant's certificate pursuant to NRS 628.390(5) & (6).²

A petition, requesting judicial review of the revocation, was dismissed by the district court and in this appeal the central contention is that the honorable discharge from probation released appellant from "all penalties and disabilities resulting from the offense" and, thus, the Board is precluded from considering the conviction as grounds for disciplinary action. Respondent, arguing the disciplinary proceeding and consequences thereof cannot be construed as a penalty or disability which was released under NRS 176.225(1), has moved to dismiss.

Although we have not had occasion to so construe NRS 176.225(1), sister state decisions involving virtually an identical statute are legion. Those cases, which we find to be well reasoned, hold that proceedings to suspend or revoke business or professional licenses are not included among the penalties and disabilities that are released by an honorable discharge from probation. See, e. g., *Meyer v. Board of Medical Examiners*, 34 Cal.2d 62, 206 P.2d 1085 (1949), and its progeny. See also *In re Phillips*, 17 Cal.2d 55, 109 P.2d 344 (1941).

We elect to adopt, as appropriate and applicable here, that portion of the *Meyer* opinion where the court wrote that the

"propriety [of the disciplinary action] stems from the adjudication of guilt constituting the basis of the 'conviction' and, as such, it is not a 'penalty' or 'disability' within the contemplated release of the probation statute." 206 P.2d at 1088. Accordingly, we grant respondent's motion and

ORDER this appeal dismissed.



Connie SHIELDS, Appellant,

v.

The STATE of Nevada, Respondent.

No. 9856.

Supreme Court of Nevada.

Nov. 16, 1977.

The First Judicial District Court, Carson City, Frank B. Gregory, J., entered judgment of conviction and defendant appealed. The Supreme Court held that sentence was not subject to being disturbed on claim that parole and probation report contained unsubstantiated information so long as record did not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.

Affirmed.

mation against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." (Emphasis added.)

2. NRS 628.390(5) & (6) provide in pertinent part:

"After notice and hearing . . . , the board may revoke . . . any certificate issued . . . for any one or any combination of the following causes:

"5. Conviction of a felony under the laws of any state or of the United States.

"6. Conviction of any crime, an element of which is dishonesty or fraud, under the laws of any state or of the United States."

1. NRS 176.225(1) provides:

"1. Every defendant who:

"(a) Has fulfilled the conditions of his probation for the entire period thereof; or

"(b) Is recommended for earlier discharge by the chief parole and probation officer; or

"(c) Has demonstrated his fitness for honorable discharge but because of economic hardship, verified by a parole and probation officer, has been unable to make restitution as ordered by the court, may at any time thereafter be permitted by the court to withdraw his plea of guilty or nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court may set aside the verdict of guilty; and in either case, the court shall thereupon dismiss the indictment or infor-

STATE of Utah, Plaintiff and
Respondent,

v.

Reggie Lyndon JONES, Defendant
and Appellant.

No. 15450.

Supreme Court of Utah.

June 6, 1978.

Defendant was convicted in the Seventh District Court, Carbon County, Edward Sheya, J., of possession of marijuana and he appealed. The Supreme Court, Skett, J., held that: (1) affidavit in which narcotics enforcement officer swore, based upon information from three separate sources, he had knowledge that defendant was cultivating and/or selling marijuana and which described defendant's residence as white over blue trailer with certain license number, located near designated place gave sufficient facts concerning presence of evidence of crime and described place to be searched with reasonable particularity, and (2) expungement of record of defendant's crime precluded impeaching witness for conviction of the offense.

Affirmed.

Criminal Law § 394.4(6)

Affidavit in which narcotics enforcement officer swore that, based upon information from three separate sources, he had knowledge that defendant was cultivating and/or selling marijuana and which described defendant's residence as white over blue trailer with certain license number, located near designated place, gave sufficient facts concerning presence of evidence of crime and described place to be searched with reasonable particularity; thus defendant was not entitled to suppression of marijuana seized on theory that there had been no justification for issuance of warrant for search of defendant's residence. U.C.A. § 58-37-8(1)(a)(i), 77-54-7.

2. Criminal Law § 5

It is prerogative of Legislature to prescribe what shall be penalties and burdens for commission of crime, as well as for any amelioration thereof.

3. Witnesses § 345(4)

Expungement of record of witness' crime precluded impeaching witness for conviction of the offense. U.C.A. 1953, 77-35-17.5, 77-35-17.5(1)(c), 78-24-9; Rules of Evidence, rule 21.

Marlynn B. Lema, Price, for defendant and appellant.

Robert B. Hansen, Atty. Gen., Craig L. Barlow, Asst. Atty. Gen., Salt Lake City, for plaintiff and respondent.

CROCKETT, Justice:

Defendant Reggie L. Jones appeals from his conviction by a jury of possession of marijuana.¹ He was sentenced to five years in prison, with the sentence to be suspended on condition that he participate in a probation and rehabilitation program at Halfway House in Salt Lake City.

Defendant contends that the trial court committed error in (1) its denial of his motion to suppress the seized marijuana because there had been no justification for the issuance of a warrant for the search of defendant's residence; (2) refusing to allow cross examination of a witness for the state regarding his prior conviction of crime which conviction had been expunged.

On January 21, 1977, Everett Johnson, a narcotics enforcement officer, went to a magistrate to procure a search warrant. He swore to an affidavit stating that based upon information from three separate sources he had knowledge that the defendant was cultivating and/or selling marijuana. It described the defendant's residence as a white over blue trailer with a certain license number, located near the Mountaineer Club in Wellington.

1. Sec. 58-37-8(1)(a)(i), U.C.A., 1953.

[1] That the affidavit met the requirements of giving sufficient facts concerning the presence of evidence of crime and of describing the place with reasonable particularity,³ is so obvious as to hardly justify comment on defendant's contention to the contrary.³

Defendant's other claim of error relates to the court's refusal to permit impeachment of one Barry Becker, who was called as a state's witness at the hearing on the motion to suppress the evidence. On questioning it was brought out that he had previously been a police officer in San Jose, California, and he admitted that he had been discharged and had been convicted of providing false information to the police. But he had served a probationary period, consequent to which the record of his crime had been expunged as permitted by California law.⁴ Thereupon, the trial court sustained the prosecutor's objection and refused to allow further questioning on that matter. We do not deal with the question of the propriety of impeaching a witness for conviction of that particular offense, if it had not been expunged.⁵ The question here confronted is as to the effect of the expungement.

[2, 3] It is the prerogative of the legislature to prescribe what shall be the penalties and burdens for the commission of crime, as well as for any amelioration thereof.⁶ It has provided that under certain circumstances convictions for crime may be expunged;⁷ and it further provides that when that is accomplished:

Upon the entry of the order in those proceedings, the petitioner shall be deemed judicially pardoned and the peti-

2. Sec. 77-54-7, U.C.A., 1953.

3. The affidavit contained sufficient facts such that a neutral and detached magistrate could independently make a determination that probable cause existed to believe that there was marijuana at the defendant's residence.

4. California has an expungement statute similar to our own in parts material here, and we assume that the laws of sister states are the same as our own unless the contrary is shown; See California Penal Code Ann. (West) Sec. 1203.4, 1978.

tioner may thereafter respond to any inquiries relating to convictions of crimes as though that conviction never occurred.⁸

The purpose of that statute is obvious and its intent is clearly stated: that even after a person is convicted of a crime, in appropriate circumstances he may comply with prescribed procedures which shall have the effect of a judicial pardon; and that thereafter he may respond to any inquiry concerning his record as though that conviction had never occurred.⁹ What was done in this case is in conformity with the express provisions of that statute; and therefore no error was committed in that procedure.

Affirmed. No costs awarded.

ELLETT, C. J., and HALL and WILKINS, JJ., concur.

MAUGHAN, J., concurs in result.



STATE of Utah, Plaintiff and
Respondent,

v.

Michael Jeffrey LIMB, Defendant
and Appellant.

No. 15438.

Supreme Court of Utah.

June 12, 1978.

Defendant was convicted before the Fourth District Court, Utah County, J. Rob-

5. Sec. 78-24-9, U.C.A., 1953; Rule 21 Utah Rules of Evidence.

6. 21 Am.Jur.2d, Criminal Law, Section 577.

7. See Sec. 77-35-17.5 which in part states "Any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for the expungement of his record in that court."

8. Sec. 77-35-17.5(1)(c), U.C.A., 1953.

9. Id.

STATE v. SCHREIBER,

No. 7737.

Supreme Court of Utah.

June 6, 1952.

Proceeding to set aside order setting aside conviction for abortion, on the ground that defendant had violated a condition. The Third Judicial District Court, Salt Lake County, Ray Van Cott, Jr., J., revoked the order setting aside conviction and defendant appealed. The Supreme Court, Wade, J., held that evidence was insufficient to support court's finding that a fraud had been practiced on court because the order had been procured on representation that defendant would permanently leave the State on account of his ill health, but that defendant never had any intention of so doing.

Judgment reversed.

1. Criminal Law \S 998

In proceeding to revoke order setting aside conviction for abortion, evidence was insufficient to support finding that a fraud had been practiced on court because the order had been procured on representation that defendant would permanently leave the state on account of his ill health, but that defendant never had any intention of so doing. U.C.A.1943, 105-36-17.

2. Criminal Law \S 998

The court has the power to vacate an order or judgment procured by extrinsic fraud.¹

3. Criminal Law \S 998

In absence of proof of fraud either extrinsic or intrinsic, the court could not properly vacate an order setting aside conviction for abortion merely because of court's belief that fraud had been practiced. U.C.A. 1943, 105-36-17.

Grant Macfarlane, Clifford L. Ashton, Leonard J. Lewis, Salt Lake City, for appellant.

Clinton D. Vernon, Atty. Gen., Mark K. Boyle, Allen B. Sorensen, Asst. Attys. Gen., for respondent.

1. *Cantwell v. Thatcher Bros. Banking Co.*, 47 Utah 150, 151 P. 986; *Anderson*

WADE, Justice.

August Schreiber, appellant herein, who had been for some years a practicing naturopath, was on March 18, 1949, convicted of the crime of abortion on a young woman. On May 14, 1949, he was sentenced to an indeterminate term of not less than two nor more than ten years in the state prison.

This sentence was suspended and appellant placed on probation the same day. In October, 1949, appellant, through his attorney made an application to the court for an order setting aside his conviction, dismissing the action and discharging him from custody. After a hearing on this application at which evidence was introduced to the effect that appellant and his young son were very ill and that a removal to a warmer climate would be beneficial to both and that appellant who was a naturopathic physician licensed to practice in Florida intended to move there permanently and practice there as much as his health would permit, and it also appearing that there was a report from the Utah Adult Probation and Parole Department that appellant had fully complied with the conditions of his probation and that it would support any action the court might take in setting aside the conviction, the court ordered the conviction set aside and the appellant discharged from further supervision of the parole department.

On May 29, 1951, the district attorney for the Third Judicial District Court filed a petition to vacate and set aside this order because the order had been made on the condition that appellant permanently remove from the state of Utah and appellant had violated this condition by returning to reside and practicing in Salt Lake City, Utah.

At the hearing of the district attorney's petition to vacate the order it appeared that appellant had failed to move from Utah immediately as the court had understood he would do and that he actually did not leave until the latter part of December, 1949, after the court had repeatedly told appellant's attorney that it was being advised of his continued presence in the state and finally

v. State, 65 Utah 512, 238 P. 557; *Rice v. Rice*, Utah, 212 P.2d 685.

STATE v. SCHREIBER

Cite as 245 P.2d 222

told the attorney to warn him to get out of the state by Christmas or he would revoke the order. There was no evidence this warning was related to appellant. Appellant testified that his reasons for failing to leave the state sooner was the necessity of disposing of his practice and his illness which caused him to be bedridden during most of that period. After appellant and his family moved to Florida they remained there about eight months but his health failed to improve and they decided to go to California. On his way to California he passed through Salt Lake City and while there he consulted one of the judges of the Third Judicial District on the legality of passing through Utah. This judge advised him that there was nothing in the order of the court which prohibited him from passing through or remaining in Utah, if he so chose. Appellant went to California but finding that his health did not improve there, he came back to Salt Lake where his wife bought a home and he intended to resume his practice.

[1] The court revoked the order on the ground that a fraud had been practiced on it because the order had been procured on the representation that appellant would permanently leave the state on account of his ill health, but that appellant never had any intention of so doing. This may well have been the fact but there is insufficient evidence in the record upon which to base such a finding.

The order of the court was: "That the conviction of the defendant, August Schreiber, * * * be set aside and that the said action against said defendant be dismissed and that the said defendant be discharged from further supervision of the parole department of the State of Utah." This order was final and unconditional. Although the preamble states that it was granted because appellant, on account of ill health, desired to move permanently from the state the order was not conditioned on that premise. The order was not revoked for failure to comply with a condition but because the court found from the facts and circumstances of appellant's late departure and early return to Utah that appellant had never intended to permanently leave Utah

and therefore had practiced a fraud on the court in procuring the order.

[2] It is well established that the court has the power to vacate an order or judgment procured by extrinsic fraud, 31 Am. Jur., Judgments, Sec. 735; *Cantwell v. Thatcher Bros. Banking Co.*, 47 Utah 150, 151 P. 986; *Anderson v. State*, 65 Utah 512, 238 P. 557; and *Rice v. Rice*, Utah, 212 P. 2d 685.

Under the provisions of Sec. 105-36-17, U.C.A.1943, as amended in S.L.'43, c. 24, to terminate appellant's sentence the court was required to find that he had complied with the conditions of his probation and such termination was compatible with the public interest. The probation officer's report indicated that the conditions of his probation had been complied with and the evidence showed that appellant and his young son were both ill and their physician recommended a different climate and appellant expressed a desire to remove from Utah permanently. On this evidence the court concluded that the termination would be compatible with the public interest.

[3] At the hearing to vacate the order which had previously been made setting aside the sentence, the only evidence before the court was that of appellant. It was to the effect that he had not left Utah sooner because of delay in disposing of his practice and the fact that he claimed that he was too ill to travel; and further that the Florida climate had not proved beneficial to his health because of which he had returned to Utah. While the trial court apparently believed that he did not intend to leave Utah permanently at the time the sentence was vacated, so far as the record is concerned, this belief is apparently based upon suspicion rather than an affirmative showing in the evidence. From an examination of the record, taken in the light most favorable to the finding of the trial court, we are compelled to conclude that there is a failure to prove fraud either extrinsic or intrinsic. In the absence of such proof, the court could not properly vacate the order merely because of its belief that fraud had been practiced. The instant case is an example of misuse of Sec. 105-36-17, U.C.A.1943, as

amended in S.L.U. Chap. 24, 1943, which was enacted for the purpose of permitting the court under unusual circumstances and for good cause to expunge the record of crime. It should be observed that the fact that the record was so changed does not in any way gainsay the fact that the accused was convicted of the crime of abortion nor the fact that the crime was actually committed even though by his representations and the procedure above indicated, he succeeded in getting the record expunged. Judgment reversed.

WOLFE, C. J., and McDONOUGH, CROCKETT and HENRIOD, JJ., concur.



MOWER v. MCCARTHY et al.
No. 7478.

Supreme Court of Utah.
June 5, 1952.

Action by Amy M. Mower, Adm'x of the estate of Amasa N. Mower, deceased, against Wilson McCarthy and another, trustees of The Denver and Rio Grande Western Railroad Company, and another. The Third Judicial District Court, Salt Lake County, Roald A. Hogenson, J., granted interlocutory order directing defendant railroad company to produce and to permit plaintiff to inspect and copy a transcript of testimony taken by railroad in its investigation of accident in which plaintiff's decedent was killed, and defendant appealed. The Supreme Court, Wade, J., held that, although plaintiff's showing on motion for discovery was that her case was weak and was not necessarily that she had been unable to obtain evidence of the cause of the accident, yet, in view of the fact that witnesses who knew the facts were employed by defendant and that until recently many of them had been unknown to plaintiff, and that the facilities and equipment involved in the accident had

at all times been under the control of the defendant and not available to plaintiff for inspection, showing was sufficient for granting of motion for discovery.

Case remanded for further proceedings.
Wolfe, C. J., dissented.

1. Trial ¶388(2)

Findings of fact are required in equity as well as in law cases.¹

2. Appeal and Error ¶831(4)

Where findings of facts were not made for interlocutory order which allowed a discovery, Supreme Court was not prohibited from reviewing order but would assume trier of facts found them in accord with its decision and would affirm decision if from evidence it would be reasonable to find facts to support it. Rules of Civil Procedure, rules 49(a), 52(a); Const. art. 8, § 9.²

3. Discovery ¶90

In Rules of Civil Procedure relating to discovery of "any part of the writing" that reflects on attorney's mental impressions, conclusions, opinions or legal theories, the absolute prohibition on discovery of all such matters is clear, positive and without exception. Rules of Civil Procedure, rule 30(b).

4. Discovery ¶90

Railroad's records of conclusions stated by its experts as to cause of railroad accident in which plaintiff's husband was killed were not discoverable even though denial of discovery would cause prejudice, hardship or injustice. Rules of Civil Procedure, rules 26(b), 30(b), 34.

5. Discovery ¶90

In Rules of Civil Procedure which allow discovery of various documents but which prohibit discovery of "any part of the writing" which is attorney's work product, use of the words "the writing" was proper and correct to refer to the writing of which discovery is sought, the reference being to a definite writing, and prohibition would be so construed to be in harmony with the purpose of protecting the work

1. In re Thompson's Estate, 72 Utah 17, 85, 269 P. 103; In re Raleigh's Estate, 48 Utah 128, 141, 158 P. 705.

2. In re Gibbs, 4 Utah 97, 6 P. 525; Wright v. Union P. R. Co., 22 Utah 338, 62 P. 317.

product of the attorney. Rules of Civil Procedure, rules 26(b), 30(b), 34.

6. Discovery ¶90

Under Rules of Civil Procedure, writing which reflects the conclusions of an expert based on assumed facts, but not containing evidence of events, conditions, circumstances and similar matters, is not discoverable. Rules of Civil Procedure, rules 26(b), 30(b), 34.

7. Discovery ¶97(5)

Question whether portions of writings sought by discovery come within prohibitions protecting attorney's work product and expert's conclusions should be determined without permitting opposing counsel to see the questioned matter and, to do this, the parts of the transcript which it is claimed are not discoverable should be submitted to the court for it to decide. Rules of Civil Procedure, rules 26(b), 30(b), 34.

8. Discovery ¶90

Where denial of discovery of document would have caused prejudice, hardship and injustice, document was discoverable without regard to whether it was prepared in anticipation of litigation or in preparation for trial. Rules of Civil Procedure, rules 26(b), 30(b), 34.

9. Discovery ¶97(1)

Elements of prejudice, hardship, or injustice necessary to the discovery of documents prepared in anticipation of litigation or in preparation for trial are sufficiently shown where party seeking discovery is, with due diligence, unable to obtain evidence of some material facts, events, conditions and circumstances which the discovery will probably reveal, and where, because of this situation, the party is unable to adequately prepare the case for trial. Rules of Civil Procedure, rules 26(b), 30(b), 34.

10. Discovery ¶97(1)

On motion for production of transcript of testimony by railroad employees given in railroad's investigation of 1944 accident, although plaintiff's showing on motion was only that her case was weak and was not necessarily that she had been unable to obtain evidence of the cause of the accident, in view of fact that witnesses who knew

facts were employed by defendant and that until recently many of them were unknown to plaintiff and that facilities and equipment involved in the accident had at all times been under control of defendant and had not been available to plaintiff for inspection, showing was sufficient for granting of motion. Rules of Civil Procedure, rules 26(b), 30(b), 34.

11. Discovery ¶28

The objects and purposes of the Rules of Civil Procedure concerning discovery are to develop the truth and prevent surprise. Rules of Civil Procedure, rules 26(b), 30(b), 34.

12. Discovery ¶90

Where transcript of testimony given by railroad employees in railroad's own investigation of railroad accident did not constitute the reports of railroad accidents required by Federal statutes, discovery of transcript under Rules of Civil Procedure was not prohibited by those Federal statutes. Rules of Civil Procedure, rules 26(b), 30(b), 34; 45 U.S.C.A. §§ 38, 40, 41.

Van Cott, Bagley, Cornwall & McCarthy, Clifford L. Ashton, Salt Lake City, for appellant.

Rawlings, Wallace, Black, Roberts & Black, Dwight L. King, King & Anderson, Emmett L. Brown, Salt Lake City, for respondent.

WADE, Justice.

The defendant, The Denver and Rio Grande Western Railroad Company, appeals from an interlocutory order directing it to produce and permit plaintiff to inspect and copy a transcript of the testimony of witnesses taken by it while investigating a derailment accident by which plaintiff's decedent was killed. Because of the importance of the question and once the inspection and copying was made a reversal on appeal would not restore the parties to their present status, we granted the appeal. It involves a construction of the discovery provisions of the Utah Rules of Civil Procedure, especially Rules 26, 30 and 34. Hereafter, the term "Rule" or "Rules" un-

STATE v. ZOLANTAKIS. (No 4458.)

Supreme Court of Utah. Sept. 15, 1927.

1. Criminal law §1001—District courts have inherent power to suspend sentences only for definite period and specific temporary purpose.

In absence of statutory authority, district courts do not have inherent power to suspend sentences except for definite period and for some specific temporary purpose.¹

2. Criminal law §1001—Statute does not authorize suspension of sentence as matter of favor or grace (Laws 1923, c. 74).

Laws 1923, c. 74, gives trial court authority to suspend sentences, not as matter of favor or grace, but only when compatible with public interest.

3. Criminal law §1001—Judgments of courts of competent jurisdiction, including suspensions of sentence, determine parties' rights.

Judgments rendered by courts of competent jurisdiction, including suspensions of sentence, fix and determine rights of parties to proceedings.

4. Criminal law §1001—One whose sentence is suspended during good behavior, without reservations, has vested right to rely thereon during good behavior (Laws 1923, c. 74).

One whose sentence is suspended during good behavior, without reservations, has vested right to rely thereon, so long as such condition is complied with; purpose of Laws 1923, c. 74, permitting suspension of sentence, being reformatory.

5. Constitutional law §83(1)—Personal liberty may not be alternately granted and denied as by granting and revoking suspension of sentence, without just cause.

The right to personal liberty may not be alternately granted and denied, as by granting and revoking suspension of sentence, without just cause.

6. Criminal law §1001—One granted suspended sentence during good behavior, without limitation, is entitled to judicial hearing on question of his compliance with condition before revocation of sentence.

One whose sentence is suspended during good behavior, without any limitation, is entitled to hearing on question whether he has complied with conditions imposed, in accordance with established rules of judicial procedure, after filing of affidavit, motion, or other written pleading, setting forth facts relied on for revocation of suspension, with opportunity to answer or plead to charge made, and right of cross-examination.

7. Witnesses §266, 267—Right of cross-examination is absolute, and becomes discretionary only after it has been substantially and fairly exercised.

In judicial investigation, the right of cross-examination is absolute right, not a mere privilege of party against whom witness is called, and allowance of further cross-examination be-

comes discretionary only after such right has been substantially and fairly exercised.

8. Criminal law §1170½(5)—Refusal to permit cross-examination of state's witnesses, at hearing on question of revoking suspension of sentence, held prejudicial error.

Trial court's refusal to permit defendant to cross-examine state's witnesses, at hearing on question of revoking suspension of sentence during good behavior, held prejudicial error.

9. Criminal law §1177—Overruling of objections that defendant was arrested before service of citation to show cause why suspension of sentence should not be revoked, and was not advised of facts relied on before hearing, held prejudicial error.

Overruling of timely objection to proceedings to revoke suspension of sentence, on grounds that defendant was arrested before citation to show cause was served upon him and was not advised of facts relied on by state until evidence was offered at hearing, held prejudicial error.

Cherry and Gideon, JJ., dissenting.

Appeal from District Court, Salt Lake County; W. S. Marks, Judge.

Peter Zolantakis pleaded guilty of, and was given a suspended sentence for, being a persistent violator of the Prohibition Act. From a judgment vacating the suspension and ordering defendant's commitment to the state prison, he appeals. Reversed, and defendant ordered discharged.

F. W. James, of Salt Lake City, for appellant.

Harvey H. Cluff, Atty. Gen., and L. A. Miner, Asst. Atty. Gen., for the State.

HANSEN, J. The defendant prosecutes this appeal from a judgment of the district court of Salt Lake county whereby a suspension of a sentence was vacated and the defendant ordered committed to the state prison for the crime of being a persistent violator of the prohibition law of the state. The case was heretofore argued and submitted to this court and an opinion rendered by a divided court affirming the judgment. Thereafter defendant filed a petition for rehearing, which was granted. The majority of the court at the time the rehearing was granted, and as now constituted, are not in accord with the conclusions reached by the majority of the court in the original opinion.

On July 23, 1925, Peter Zolantakis pleaded guilty to a charge of being a persistent violator of an act prohibiting the manufacture and use of intoxicating liquors and regulating the sale and traffic therein, and particularly sections 3343, and 3345 of title 54, Comp. Laws Utah 1917, as amended by Laws Utah, 1919, c. 66. Thereupon the court pronounced judgment and sentence "that the

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ People v. Blackburn, 6 Utah, 347, 23 P. 759.

defendant, Peter Zolantakis, be confined and imprisoned in the state prison in and for the state of Utah, for an indeterminate term, as provided by section 9062, Compiled Laws Utah 1917, and that said sentence be, and the same hereby is, suspended during the good behavior of said defendant." The crime to which defendant pleaded guilty is a felony.

The power of trial courts to suspend sentences is expressly granted by the provisions of chapter 74, Laws Utah 1923, which reads as follows:

"Upon conviction of any crime or offense if it appears compatible with the public interest the court having jurisdiction may suspend the imposition or the execution of sentence and may place the defendant on probation for such period of time as the court shall determine. The court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation. While on probation the defendant may be required to pay in one or several sums any fine imposed at the time of being placed on probation; may be required to make restitution or reparation to the aggrieved party or parties for the actual damages or losses caused by the offense for which conviction was had; and may be required to provide for the support of his wife and others for whose support he may be legally liable."

Under date of March 5, 1926, a citation was issued under the seal and signature of the clerk of the district court of Salt Lake county whereby the defendant was cited and required to appear before said district court of Salt Lake county on Saturday, the 6th day of March, A. D. 1926, at 10 o'clock a. m. of that day, then and there to show cause why the suspended sentence dated July 23, 1924, should not be canceled, vacated, and set aside. This citation was returned without having been served because, as stated in the sheriff's return, the defendant was absent from the state. On April 5, 1926, a bench warrant was issued directing the sheriff of Salt Lake county to attach the body of the defendant and bring him before the court forthwith. The bench warrant was served upon the defendant on the date of its issuance and the defendant was arrested. Under date of April 6, 1926, another citation was issued under the seal and signature of the clerk of the district court of Salt Lake county whereby defendant was cited and required to appear before said court "on Saturday, the 10th day of April, A. D. 1926, at 10 o'clock a. m. of that day then and there to show cause, if any you have, why your suspended sentence should not be vacated and set aside." Both of these citations and the bench warrant were issued without any affidavit, complaint, information, motion, or other writing having been made or filed charging the defendant with any lack of good behavior or otherwise, and were made returnable before a judge

other than the judge who passed sentence and suspended the same.

When the case was called for hearing, the following proceedings were had:

D. H. Clayton, a witness called by the state, testified, in substance, that during the month of February, 1926, he went to a point a little south of or opposite the place where Mr. Zolantakis resided, and while there saw Zolantakis come out of the rear door of the house and walk to the back of the lot, then back into the house, and, after remaining in the house for a few minutes, he came out of the side gate into an alley.

Reed Billings, a witness called by the state, testified that he was, and for a number of years had been, a police officer of Salt Lake City; that he was and had been acquainted with Peter Zolantakis for the past 7 or 8 years; that defendant resided at 47 South Fifth West street with his family, consisting of a wife and at least two children; that on March 2, 1926, while crossing the street from the residence of defendant, he saw Mr. Zolantakis come out of the side door of the house and go down towards the garage, then turn around and go back into the house; that about 3 or 4 minutes later defendant came out of the house again and went south on Fifth West street to Second South street, then east on Second South street; that this occurred about 6 or 6:30 o'clock in the morning.

A. A. Reese, called by the state, testified that he has known the defendant, Peter Zolantakis, by sight for about 2 years; that defendant resided at 47 South Fifth West street; that the wife and children of the defendant resided in his house; that on March 2, 1926, witness went to the house of the defendant in company with Officers Neve, O'Brien, and Black; that they had a search and seizure warrant and made a search of defendant's premises; that as a result of such search they found about 80 pints of intoxicating liquors, consisting of moonshine whisky and mestika; that some of the liquor was found in a cupboard in a cache on the side of the wall, and some under the floor; that the wife and daughter of the defendant were at the house at the time of the search; that defendant's wife said that Mr. Zolantakis had gone up town, but would be back again for supper; that the witness told defendant's wife to tell her husband to report at the office of Lieutenant Clayton the next morning at 10 o'clock; and that she said she would so inform her husband.

Two of the bottles which were found by the officers in the home of defendant were received in evidence.

Neither at the time of the hearing nor prior thereto was defendant asked to plead, answer, or admit, or deny any charge made against him. Nor was the defendant advised of any charge against him, nor of what the

court was about to investigate. Soon after the hearing began defendant's counsel moved that the citation be dismissed for the reason no affidavit or complaint had been filed and defendant was not apprised of any fact or facts or charge that he was expected to meet. The objection was overruled. The attorney for the state asked leave to amend the citation, but the request was denied. Defendant, through his attorney, attempted to cross-examine each of the witnesses called by the state, but the court, upon its own motion, denied the right of cross-examination for the reason, as stated by the court, it did not wish the proceedings to "savor of the dignity of a trial."

Peter Zolantakis was sworn and testified that he was not the defendant in this action, and that he did not reside on Fifth West street, in Salt Lake City, on March 2 and 3, 1926. No attempt was made on the part of the attorney for the state to cross-examine the witness Peter Zolantakis.

At the conclusion of the proceedings the court ordered the suspension of sentence vacated and set aside and the defendant, Peter Zolantakis, imprisoned in the state prison as hereinbefore indicated.

The defendant assigns as error, among others (a) the refusal of the trial court to dismiss the citation for the reason that there was no affidavit or other basis apprising defendant of what facts he was to meet or what charge was made against him; (b) that the court erred in denying defendant the right to cross-examine the witnesses called for the state.

That the trial court had power to suspend sentence, under the provisions of chapter 74, Laws Utah 1923, is clear and is not questioned. The statute above quoted, it will be observed, grants to the trial court broad and comprehensive discretionary powers as to the terms and conditions upon which it may suspend sentence. In the instant case, it will further be observed, the sentence was suspended during the good behavior of the defendant without any reservations. In 16 C. J. 1335, § 4141, the law is stated thus:

"A court having power to make an order suspending the execution of its judgment in criminal cases, necessarily, upon violation of such order, has the power to revoke the same and to enforce the original judgment by commitment; and such right is not impaired or limited by the passing of the term in which such suspension is made. Where, however, the suspension is upon conditions expressed in the judgment, the prisoner has the right to rely upon such conditions, and so long as he complies therewith the suspension will stand."

The case of *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472, cited in the footnote, sustains the text.

Similar results are reached in the following cases: *State v. Hamler*, 157 La. 227, 102

So. 816; *Ex parte Selig*, 29 N. M. 430, 223 P. 97; *State v. Miller*, 122 S. O. 468, 115 S. E. 742; *Ex parte Hamm*, 24 N. M. 83, 172 P. 190, L. R. A. 1918D, 694.

Courts of some jurisdictions seem to take the view that the suspension of sentence is a mere favor or matter of grace and may be revoked by the court at will.

[1-3] In the absence of statutory authority, in this jurisdiction, district courts do not have inherent power to suspend sentences except for some definite period and for some specific temporary purpose. *People v. Blackburn*, 6 Utah, 347, 23 P. 759. Under the statute above quoted trial courts are not given authority to suspend sentences as a matter of favor or grace, but only when "it appears compatible with the public interest." Judgments rendered by courts of competent jurisdiction are almost uniformly held to fix and determine the rights of the parties to proceedings. Indeed, that is the very purpose of a judgment. The writer is unable to find any good reason why an exception should be made in the case of a suspension of sentence. It must be assumed that when the trial court stated the sentence should be suspended during good behavior it meant just what was said, when, as in the instant case, nothing in the sentence indicates otherwise.

[4, 5] The purpose of the law permitting the suspension of sentence is clearly reformatory. If those who are to be reformed cannot implicitly rely upon promises or orders contained in the suspension of sentence, then we may well expect the law to fail in its purpose. Reformation can certainly best be accomplished by fair, consistent, and straightforward treatment of the person sought to be reformed. It would therefore seem, both upon authority and principle, that when a sentence is suspended during good behavior, without reservations, the person whose sentence is thus suspended has a vested right to rely thereon so long as such condition is complied with. The right to personal liberty is one of the most sacred and valuable rights of a citizen, and should not be regarded lightly. The right to personal liberty may be as valuable to one convicted of crime as to one not so convicted, and so long as one complies with the conditions upon which such right is assured by judicial declaration, he may not be deprived of the same. Such right may not be alternatively granted and denied without just cause.

The next question presented and to be determined is whether or not the record in the instant case justifies the conclusions reached in the judgment rendered. It is not contended on behalf of appellant that he is entitled to a jury trial, and it is clear that the provisions of chapter 74, supra, do not contemplate a jury trial to determine whether or

not the suspension of a sentence should be vacated. It may well be that where the person sought to be imprisoned denies that he is the defendant in the original action, such person is entitled to a jury trial upon that issue. In this case the person before the court did deny that he was the defendant in the action, but as no point is made upon that ground on this appeal we are not called upon to consider this phase of the case.

[6] In some jurisdictions it is held that a court having jurisdiction is empowered to revoke the suspension of sentence without granting a trial to determine whether or not the condition of the suspension of sentence has been violated. Such, in substance, is the statement of the law in 16 C. J. 1335, § 3142. In the state of New York, where suspension of sentence is regarded as a matter of favor or grace, the court may at will order the suspension of sentence revoked. *People v. Trombly*, 173 App. Div. 497, 160 N. Y. S. 67. In Texas, as stated in the syllabus, which reflects the opinion in *Ex parte Lawson*, 76 Tex. Cr. R. 419, 175 S. W. 698, "it is only on final judgment of conviction in another case that suspension of sentence during good behavior can be set aside, and it cannot be done pending appeal from such conviction." In Louisiana, under the provisions of the statutes of that state, the court reached the same result as was reached in the case of *Ex parte Lawson*, supra, in *State v. Hemler*, 157 La. 227, 102 So. 316. Other courts have reached conclusions between those two extremes. In this state the question here involved is one of first impression. The statute involved does not point out a method of procedure. The majority of this court are of the opinion that a person who has a sentence suspended during good behavior, without any limitation, is entitled to a hearing upon the question of whether or not he has complied with the conditions imposed; that such hearing must be according to some well recognized and established rules of judicial procedure; that defendant is entitled to have filed either an affidavit, motion, or other written pleading setting forth the facts relied upon for a revocation of the suspension of sentence; that the defendant should be given an opportunity to answer or plead to the charge made; that a hearing should be had upon the issues joined; and that the defendant as well as the state be given the right of cross-examination. If we are correct in our conclusion that the defendant has a vested right to his personal liberty during good behavior when so ordered without reservation in the original sentence, any proceeding failing in these essentials is error.

[7, 8] It is contended on behalf of the state that the evidence in this case justifies the revocation of the suspension of sentence. Conceding such to be true upon the record

before us, still how are we to determine, as a matter of law, what the evidence would have been, had defendant, through his attorney, been given an opportunity to cross-examine the witnesses for the state? In a judicial investigation the right of cross-examination is an absolute right and not a mere privilege of the party against whom the witness is called. It is only after such right has been substantially and fairly exercised that the allowance of further cross-examination becomes discretionary. 5 Jones, Comm. Ev. § 821. The reason for the rule is doubtless the fact that the cross-examination of a witness may not only modify and explain, but it may destroy the evidence in chief. A court is unable in advance to determine what will be the result of cross-examination in a given case. Legal procedure requires that the court hears before it condemns, and in such hearing cross-examination is often as enlightening as is the examination in chief. We are therefore of the opinion that the refusal of the trial court to permit cross-examination of the state's witness was prejudicial to the rights of the defendant.

[9] The record in this case shows that defendant was arrested before the citation to show cause why the suspension of his sentence should not be revoked was served upon him. It is not made to appear that defendant was advised of any facts relied upon by the state for such revocation until evidence was offered at the time of the hearing. No issue of any fact was before the court for determination. It is therefore difficult to see how the defendant could have been expected to properly resist the revocation of the suspension of sentence, even though he may have had a good defense to any charge of wrongdoing since the sentence was suspended. Timely objection was made to the proceedings, and we are of the opinion that the failure of the trial court to sustain the objections was prejudicial to the rights of defendant.

We are therefore of the opinion that the judgment appealed from should be and the same is hereby reversed, and the defendant is ordered discharged so far as these proceedings are concerned.

THURMAN, C. J., and STRAUP, J., concur.

CHERRY, J. (dissenting). When the execution of a sentence is suspended, it is not vacated. The judgment itself is not impaired or limited. The time for its execution is merely deferred. While under a suspended sentence, a duly convicted person is not freed from the legal consequences of his guilt. He is merely enjoying a conditional favor, postponing his punishment, which may be withdrawn. When the suspension is revoked the convict is punished for the crime of which

he was convicted, and not for violating the terms of his parole. The suspension of a sentence can never be demanded as a matter of legal right. It is granted at the mere will of the court. When granted, it is not held as a vested right, but as a matter of favor or grace. The statute confers upon courts a discretionary power designed to aid in the reformation and reclamation of convicted persons. By impressing upon the convicted person that he is enjoying a contingent favor, which may be withdrawn or revoked at any time, it is sought to induce or coerce him to amend his ways. The whole force and virtue of the expedient lies in the reserved power of the court to revoke the favor and inflict the penalty. And if this is hedged about with limitations which substantially destroy it, the whole scheme is defeated. The suspension of the sentence is not a fixed and final adjustment amounting to a right to be revoked only upon a violation of the condition upon which it is granted, because the statute expressly declares that "the court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation." Clearly, this precludes the claim that the judgment is unenforceable until, after due process of law, it is adjudged that the condition of probation has been violated. The power of the court to revoke is not limited to when the conditions have been violated, but extends to the modification or revocation of the condition itself.

There is nothing in the statute suggesting that the compliance with any condition, or the proof of any grounds, are necessary to authorize the revocation of an order suspending sentence. From the nature of the subject, the whole matter of granting and revoking suspensions must rest in the discretion of the court. This view of the matter finds support in *People ex rel., etc., v. Court of Sessions, etc.*, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856, where O'Brien, J., speaking for the court, says:

"The power to suspend the judgment during good behavior, if understood as expressing a condition, upon the compliance with which the offender would be absolutely relieved from all punishment and freed from the power of the court to pass sentence, is open to more doubt. The Legislature cannot authorize the courts to abdicate their own powers and duties or to tie their own hands in such a way that after sentence has been suspended they cannot, when deemed proper, and in the interest of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammelled exercise of this power or the right to pass sentence according to the discretion of the court be made dependent upon compliance with some condition that would require the court to try a question of fact before it could render the judgment which the law prescribes. The statute must not be understood as conferring any new power. The court may sus-

pend sentence as before, but it can do nothing to preclude itself or its successor from passing the proper sentence whenever such a course appears to be proper. This, we think, is all that the statute intends, and that was the only effect of the judgment. It is a power which the court should possess in furtherance of justice, to be used wisely and discreetly, and it is perhaps creditable to the administration of justice in such cases that while the power has always existed no complaint has been heard of its abuse."

In 16 C. J. 1235, it is said:

"When sentence has been suspended during good behavior of the defendant, either with or without statutory authority, the court has power to revoke such order and to impose the sentence without granting defendant a trial as to whether or not he has violated such condition."

In *People v. Goodrich* (Sup.) 149 N. Y. S. 406, the court, in dealing with a revocation of a suspended sentence, and after holding that the trial court did not err in not trying as an issue of fact the question whether the defendant has violated the condition of her discharge, said:

"I think the suspension of judgment in this case was a matter of grace, not of right, to the defendant, that she thereby acquired no vested rights, and the court had the right in its discretion to cancel and revoke the same. In any event, all that was required was to call to its attention facts that satisfied the conscience of the court that the defendant had violated the terms of her parole."

In *People v. Trombly*, 173 App. Div. 497, 160 N. Y. S. 67, the suspension of a sentence was revoked when the court "received information" that the conditions of the suspension had not been complied with. In sustaining the revocation the court said:

"It was proper at any time to revoke the order suspending the execution of the sentence, and neither the Legislature nor the courts have ever attempted to limit this power, except to the discretion of the court."

In *State v. Miller*, 122 S. C. 468, 115 S. E. 742, it was decided in a proceeding similar to this that the fact that a rule to show cause was issued without information under oath to support it did not affect the court's jurisdiction to enforce the original sentence, when defendant made formal return and was heard by counsel, and that the order suspending sentence might be revoked without granting the defendant a trial.

In the case before us it is not claimed that the court abused its discretion or acted capriciously or arbitrarily by making the order complained of without sufficient grounds, nor that on the merits the defendant has suffered any substantial injustice. In view of the facts proved, which were not even denied by the appellant, that claim could not be successfully made. The complaint

is merely that the court committed error in its procedure.

In exercising the powers conferred by the statute in question from the nature of the subject, courts must necessarily have a large discretion not only in respect of the grounds upon which they act, but in the method or procedure by which they ascertain facts and arrive at conclusions. They are not dealing with specific legal rights and are not bound by the standards of legal procedure which usually control judicial proceedings. This is comprehended within the very generally approved rule that an order suspending sentence may be revoked without granting the defendant a trial upon the facts. It logically follows that courts may ascertain facts upon which to act in any manner they see fit, and act upon them, provided only that their proceedings and conduct on the whole are not capricious or arbitrary or a manifest abuse of discretion. I think the orders appealed from should be affirmed.

GIDEON, J. I concur in the views expressed by Mr. Justice CHERRY.

GRASTY et al. v. SABIN. (No. 2589.)

Supreme Court of Arizona. Oct. 17, 1927.

1. Master and servant ⇨87—Right of action, under Employers' Liability Law, is not governed by rules of common-law actions for damages or to action as modified by statute.

Right of action, provided in Employers' Liability Law (Civ. Code 1913, pars. 3153-3162, as amended by Laws 1919, c. 15) is not governed by rules applicable to common-law actions for damages or to that action as modified by statute.

2. Master and servant ⇨107(8)—Employer's negligence is not involved in action under Employers' Liability Law (Civ. Code 1913, par. 3154).

In action under Employers' Liability Law (Civ. Code 1913, par. 3154), negligence of employer is not involved, in view of Const. art. 18, § 7.

3. Master and servant ⇨204(1)—Assumed risk is not involved in action under Employers' Liability Law (Civ. Code 1913, par. 3154).

In actions under Employers' Liability Law (Civ. Code 1913, par. 3154), assumed risk is not involved, in view of Const. art. 18, § 7.

4. Master and servant ⇨228(1)—Employee's sole negligence defeats recovery, but contributory negligence is no defense, under Employers' Liability Law (Civ. Code 1913, par. 3154).

Under Employers' Liability Law (Civ. Code 1913, par. 3154), negligence of plaintiff, defeating right of recovery, must be his sole negligence, and contributory negligence is no defense,

and in such action refusal to instruct on contributory negligence was not error.

5. Master and servant ⇨228(1)—Employee injured by accident due to conditions of employment can recover, under Employers' Liability Law, though not free from negligence, and danger was known.

In action under Employers' Liability Law (Civ. Code 1913, pars. 3153-3162, as amended by Laws 1919, c. 15) for accidental injury to employee due to conditions of occupation, whether good or bad, plaintiff is entitled to recover, even if through exposing himself to bad conditions he was not free from negligence, and fact that he knew conditions were dangerous or bad will not defeat right to compensation, in view of Const. art. 18, § 7.

6. Master and servant ⇨228(1)—Employee's negligence, defeating recovery under Employers' Liability Law, must be superimposed on conditions by his positive act but for which he would not have been injured.

Employee's negligence, to defeat action under Employers' Liability Law (Civ. Code 1913, pars. 3153-3162, as amended by Laws 1919, c. 15), must be superimposed on conditions of his occupation by some positive act of his but for which he would not have been injured.

7. Trial ⇨253(9)—Instruction, denying employee's recovery if failing to replace guard covering gears, held properly refused, as ignoring concurring cause of greasy floor on which he slipped.

In action under Employers' Liability Law (Civ. Code 1913, pars. 3153-3162, as amended by Laws 1919, c. 15) for injuries to mechanic when slipping on wet greasy floor and catching hand in gear meshes of pump from which guard had been temporarily removed for purposes of repair, instruction denying recovery, if employee neglected to correct the dangerous condition by replacing the cover before undertaking to do the work, held properly refused, as ignoring concurring cause of greasy floor on which he slipped.

8. Appeal and error ⇨1033(5)—Instruction, denying employee recovery if he failed to replace guard on pump, unless acting under employers' instructions, held favorable to employers.

In action under Employers' Liability Law (Civ. Code 1913, pars. 3153-3162, as amended by Laws 1919, c. 15), when mechanic was injured by slipping on wet greasy floor and catching hand in gear meshes of pump from which guard had been removed for purposes of repair, instruction that, if employee took guard off pump and failed to replace it, he could not recover, unless he was acting under employers' instructions, held more favorable to employers than they were entitled to, since it ignored the concurring cause of the greasy floor which manifestly contributed to the accident.

Appeal from Superior Court, Gila County; C. C. Faires, Judge.

Action under the Employers' Liability Law by Byron Sabin against E. C. Grasty and another, partners doing business under the firm

free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). A claim of denial of equal protection may not be merely another way of stating what has already been put forward as a claim of denial of due process.

Analysis need go no further. Nonetheless, the court notes that, inasmuch as Francini has not alleged an infringement of any fundamental right nor use of a suspect classification, even action by the Commission having an invidiously discriminatory impact would not offend the Fourteenth Amendment so long as that action bore a reasonable relation to a legitimate state interest. *New Orleans v. Duke*, 427 U.S. 297, 308, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511 (1976).

Plaintiff concedes that in November 1979 he filed only an application for a subdivision approval, without seeking a change in the property's wetlands classification. See Deposition of Albert Francini (August 26, 1981) at 9; Plaintiff's Opposition to Summary Judgment at 4. In contrast, Libron sought such a classification change as well as approval of its subdivision application. See Plaintiff's Opposition to Summary Judgment at 4. On the basis of this conceded difference between the two proposals, the Commission could rationally have made an administrative distinction leading to different treatments of the Francini and Libron applications. Since Francini, in his November 1979 application, sought only approval of his subdivision plan, the Commission was bound to consider the plan as one for the use of property within the pre-existing wetlands classification. When Libron filed its application for subdivision approval, and at the same time sought a change in the property's wetlands classification, the Commission was free to consider the plan as one for the use of property within a different wetlands classification. Before this court could condemn the treatment accorded Francini as a violation of equal protection, therefore, the court would have to find that there is no rational basis nor any permissible social purpose for the different wetlands classifications possible under C.G.S. § 22a-42a(a). On the facts of this

case, in which Francini has made no such contention, the court declines to make such a finding.

It cannot be said that the distinction made between Francini's and Libron's applications was irrational, nor that it furthered no reasonable governmental purpose. Equal protection has not been denied merely because a particular discrimination works a hardship on a given individual. See, e.g., *Slavin v. Secretary of Department of Health, Education and Welfare*, 486 F.Supp. 204, 207 (S.D.N.Y.1980).

Accordingly, defendants' motion for summary judgment must be granted.

CONCLUSION

To summarize: defendants' motion to dismiss the Amended Complaint, pursuant to Rule 12(b)(6), Fed.R.Civ.P., insofar as the Amended Complaint states a claim of denial of due process, is granted; defendants' motion to dismiss the Amended Complaint, pursuant to Rule 12(b)(6), Fed.R.Civ.P., insofar as the Amended Complaint states a claim of a taking without just compensation, is granted; and defendants' motion for summary judgment in their favor, pursuant to Rule 56(b), Fed.R.Civ.P., insofar as the Amended Complaint states a claim of denial of equal protection of the laws, is granted.

It is so ordered.



Michael C. THOMPSON, Petitioner,
v.

The DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, Respondent.
No. C-81-0095A.

United States District Court,
D. Utah, C.D.
Dec. 29, 1982.

An action was filed seeking relief from the federal firearms disability. On the peti-

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tioner's motion for summary judgment, the District Court, Aldon J. Anderson, Chief Judge, held that: (1) the district court would exercise subject-matter jurisdiction over the claim; (2) the action was not barred by sovereign immunity; (3) a justiciable controversy was prevented; and (4) a judicial pardon and expungement granted to the petitioner under Utah law did not erase completely the prior convictions so as to relieve the petitioner of the federal firearms disability.

Ordered accordingly.

See also D.C., 533 F.Supp. 90.

1. Weapons ⇐4

District court would exercise jurisdiction over action seeking expungement of federal firearms disability where three years had elapsed since petitioner first sought expungement, petitioner would face choice of either abandoning his business or subjecting himself and perhaps his employees to potential prosecution for violation of federal firearms control statute and further pursuit of remedy through administrative channels would be futile. 18 U.S.C.A. § 922; 18 U.S.C.A.App. § 1202; 28 U.S.C.A. § 1331; 5 U.S.C.A. § 702; 28 U.S.C. (1976 Ed.) § 1331(a).

2. United States ⇐125(9)

An action seeking expungement of federal firearms disability was not barred by sovereign immunity in that Administrative Procedure Act has been amended to waive sovereign immunity over review of agency decision. 5 U.S.C.A. § 551 et seq.; 28 U.S.C.A. § 1331.

3. Federal Courts ⇐13

Action seeking expungement of federal firearms disability presented justiciable controversy in that petitioner was not re-

quired to face risk of prosecution and conviction under federal statutes in order to obtain adjudication of his claim. 18 U.S.C.A. § 922; 18 U.S.C.A.App. § 1202; 28 U.S.C.A. § 1331; 5 U.S.C.A. § 702; 28 U.S.C. (1976 Ed.) § 1331(a).

4. Weapons ⇐4

Judicial pardon and expungement granted to petitioner was not executive pardon and, therefore, did not relieve previously convicted felon of federal firearms disability. 18 U.S.C.A. § 922; 18 U.S.C.A.App. §§ 1202, 1203.

5. Weapons ⇐4

Judicial pardon and expungement granted to petitioner under Utah statutes did not completely erase prior convictions and, therefore, petitioner was not entitled to relief from federal firearms disability. U.C.A.1953, 77-18-2, 77-18-2(3); 18 U.S.C.A. § 922; 18 U.S.C.A.App. §§ 1202, 1203.

Robert B. Sykes, Salt Lake City, Utah, for petitioner.

D. Brent Ward, U.S. Atty., Barbara W. Richman, Charles William Ryan, Asst. U.S. Attys., Salt Lake City, Utah, for respondent.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

ALDON J. ANDERSON, Chief Judge.

In 1968, at the age of 21, petitioner Michael Carty Thompson pled guilty to charges of fraudulent use of credit cards and obtaining merchandise by false pretenses. Under 18 U.S.C. § 922 and 18 U.S.C.A. § 1202, Thompson's conviction made it illegal for him to receive, transport, or possess firearms.¹ Since 1968, he has not been convicted nor arrested on any criminal charges.

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

1. Title 18 U.S.C. § 922(g)-(h) provides as follows:

(g) It shall be unlawful for any person—
(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

Since 1974 Thompson has been the president and majority shareholder of a security guard contracting company which employs many security guards, some of whom carry firearms. As part of his responsibility in his company, Thompson was certified in 1980 by the State of Utah as a firearms trainer for private security guards. He also is often called upon to render "executive protection services" for his clients, which requires his personal use of firearms.

On January 5, 1979, Thompson's attorney secured a judicial pardon and expungement

to ship or transport any firearm or ammunition in interstate or foreign commerce.

(h) it shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marijuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18 U.S.C.App. § 1202(a) provides as follows:

§ 1202. Receipt, Possession, or Transportation of Firearms—Persons liable; penalties for violations

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States, and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

2. Title 18 U.S.C. § 925(c) provides as follows:

of the 1968 misdemeanor criminal charges, but by mistake failed to secure pardon and expungement of the felony charges. This was corrected on April 9, 1982.

On October 2, 1979, Thompson filed an application for relief from his federal firearms disabilities pursuant to 28 U.S.C. § 925(c).² One year later, in October, 1980, respondent Bureau of Alcohol, Tobacco, and Firearms (BATF) denied his application on the grounds that they were "not presently satisfied that the . . . statutory requirements for granting relief have been met." ³ Thompson sought judicial review of that

(c) A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

2. The "statutory requirements" apparently referred to are the requirements that it must be established to the satisfaction of the Secretary of the Treasury "that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). See note 2, *supra*, for the entire text of this subsection.

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decision on the grounds that it was an arbitrary and capricious abuse of discretion.⁴

In April, 1982, Thompson filed a motion to amend the complaint and for summary judgment. The amended complaint adds three new claims to the prior claim of abuse of discretion: (1) a claim for declaratory judgment that, as a result of his judicial pardon and expungement, Thompson is free from any firearms disabilities under federal law; (2) a claim that there has been an impermissible sub-delegation of authority from the Secretary of the Treasury to the chief of investigations with respect to the decision denying Thompson the relief that he requested; (3) a claim for declaratory judgment that Title 18 U.S.C. § 922 and Title 18 U.S.C.App. § 1202 are unconstitutional as applied to Thompson because they violate his rights of due process of law. Upon stipulation by the parties, leave to amend the complaint was granted on May 24, 1982. The motion that is the subject of this order seeks summary judgment on the amended complaint's first additional claim that the judicial pardon and expungement relieve Thompson from any federal firearms disability.

In the course of its consideration of this motion the court advised counsel that it had serious questions about (1) its subject matter jurisdiction to hear the expungement claim and (2) the government's possible sovereign immunity from that claim. Counsel have responded with memoranda addressing these issues and have further presented their arguments in a hearing held October 18, 1982. In addition to the above two procedural issues, respondent has raised the additional one of whether an actual controversy exists between the parties regarding the expungement claim. Having read the memoranda and the authorities cited and having considered fully these procedural issues as well as the merits of the expungement claim, the court is ready to rule on the

Motion for Summary Judgment. In doing so, the court must decide four issues: (I) whether the court has subject matter jurisdiction to hear the expungement claim; (II) whether the government is not protected from that claim by sovereign immunity; (III) whether an actual case and controversy exists, as to this claim, between the petitioner and respondent; and (IV) if the procedural issues are answered affirmatively, whether the judicial pardon and expungement of petitioner's 1968 conviction relieve him of the federal firearms disability under 18 U.S.C. § 922 and 18 U.S.C.App. § 1202.

I. SUBJECT MATTER JURISDICTION

[I] Counsel for respondent has cited many reasons why subject matter jurisdiction over the expungement claim does not exist in this court, and counsel for petitioner has responded with what he believes to be several grounds for appropriate subject matter jurisdiction, all of which has been very helpful. However, the court is not required to reach many of the grounds and arguments of counsel, as it believes that subject matter jurisdiction over the expungement claim exists at the discretion of the court under 5 U.S.C. § 702, 28 U.S.C. § 1331, and *NLRB v. Jones and Laughlin Steel Corp.*, 331 U.S. 416, 67 S.Ct. 1274, 91 L.Ed. 1575 (1947).

Clearly the court has subject matter jurisdiction over the original petition; i.e., it has authority to review the agency action denying relief from federal firearms disability. When Congress amended Title 28 U.S.C. § 1331(a) in 1976 to eliminate the amount in controversy requirement for maintenance of "any [1331] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," Pub.L. 94-574, § 2, 90 Stat. 2721 (1976),⁵ "[t]he obvious effect of this modification, subject only to preclu-

4. Shortly after the petition for review was filed, respondents filed a motion for summary judgment which was denied. *Thompson v. Department of the Treasury*, 533 F.Supp. 90 (D.Utah 1981).

5. In 1980 § 1331 was further amended to eliminate the amount in controversy requirement for all federal question cases. Pub.L. 96-486, § 2(a), 94 Stat. 2369 (1980).

sion-of-review statutes created or retained by Congress, [was] to confer jurisdiction on federal courts to review agency action." *Califano v. Sanders*, 430 U.S. 99, 106, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977). However, the original concern of this court, when it requested counsel to address the jurisdiction question, was whether its subject matter jurisdiction extended to the expungement issue, in light of the fact that the agency below did not consider that issue in making its determination.⁶ Indeed, the expungement of petitioner's felony convictions did not take place until well after the Bureau denied his application for relief.

The court's concern has been answered by *NLRB v. Jones and Laughlin Steel Corp.*, 331 U.S. 416, 67 S.Ct. 1274, 91 L.Ed. 1575 (1947). In that case the Supreme Court held that when circumstances "arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration." 331 U.S. at 428, 67 S.Ct. at 1281. That is a sound rule for review of all administrative decisions.

In this case, petitioner's application for relief from disability was denied in October, 1980. The judicial pardon and expungement of his conviction occurred in April, 1982. Thus, the pardon and expungement comprise a new circumstance arising after the administrative decision, and whether the court will consider the effect of that circumstance on the BATF's decision is left

to the court's discretion. In exercising that discretion, the court concludes that it ought to consider the matter now rather than remand it for another lengthy cycle in the administrative process. There are several factors contributing to this conclusion. First, it has already been three years since Thompson first applied for relief from the federal firearms disability. If the history of this case is any guide, it will be at least another year before he would receive a response from the BATF regarding a renewed application. In the meantime, he must make the choice between either abandoning his business or subjecting himself and perhaps his employees to potential prosecution for violation of the federal firearms control statutes.⁷ Second, the BATF has informed the petitioner that it does not consider the judicial pardon and expungement to affect his disability; hence further pursuit of a remedy through administrative channels would be futile. Third, though petitioner may re-apply for relief two years after the original denial (October, 1980), the Bureau has refused to send him the necessary forms for re-application, citing the pending litigation as a reason. Finally, there is no factual dispute involved in the expungement claim; the sole issue is a question of law, of statutory interpretation, which this court is competent to decide. Under these circumstances, justice is best served by presently considering the effect of the petitioner's judicial pardon and expungement on his federal firearms disability, without waiting for a formal determination by the Bureau.

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States, and who, in the course of such employment, receives, possesses, or transports in commerce or affecting commerce, after the date of the enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

6. Although the expungement issue was not considered in connection with the review of Thompson's application for relief, since then the respondents have steadfastly maintained that the state expungement has no effect on petitioner's firearms disability.

7. Thompson's employees may be subject to liability pursuant to 18 U.S.C.App. § 1202(b), which provides:

(b) Any individual who to his knowledge and while being employed by any person who—
(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
(2) has been discharged from the Armed Forces under dishonorable conditions, or

is not barred by the defense of sovereign immunity.

(Cite as 557 F.Supp. 158 (1982))

II. SOVEREIGN IMMUNITY

[2] In a letter to counsel dated June 25, 1982, the court raised another question of jurisdiction, expressing the view that "the suit may be barred by the doctrine of sovereign immunity." Upon reviewing the memoranda in response to that letter, the statutes and the cases cited, the court is satisfied that the United States has waived its immunity in cases such as this.

The same statute that amended 28 U.S.C. § 1381 to grant federal courts jurisdiction to review agency decisions also amended the Administrative Procedure Act to waive sovereign immunity for such a review:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. Though at least one Court of Appeals has determined, under unique circumstances, that this amendment did not waive the defense of sovereign immunity under Section 1331, *Watson v. Blumenthal*, 586 F.2d 925 (2d Cir.1978), courts from other circuits, including the Tenth Circuit, have recognized that the plain intent of the clear statutory language supported by the legislative history is to waive sovereign immunity in actions brought to review the decisions of administrative agencies. *Warin v. Director, Department of the Treasury*, 872 F.2d 590 (6th Cir.1982); *Carpet, Linoleum and Resilient Tile Layers, Local # 419 v. Brown*, 656 F.2d 564 (10th Cir. 1981); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir.1980), cert. denied, 452 U.S. 905, 101 S.Ct. 8030, 69 L.Ed.2d 405 (1981); *Jaffee v. United States*, 592 F.2d 712 (3rd Cir.1979); *Sheehan v. Army & Air Force Exch. Services*, 619 F.2d 1132 (5th Cir.1979), rev. on other grounds, — U.S. —, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982). On the basis of this authority and the plain wording of the statute, the court concludes that this action

is not barred by the defense of sovereign immunity.

III. CASE OR CONTROVERSY

[3] Respondent's Opposition to Plaintiff's Motion for Summary Judgment asserts that petitioner's claim regarding expungement fails to state an actual controversy, since the amended complaint alleges only that the Bureau "could recommend prosecution," and that "[t]his could apply to any number of individuals in Plaintiff's company." Respondent insists that petitioner has no standing to assert the rights of his employees, and as to both himself and his employees he has not alleged sufficient threatened or actual injury to bring this case within the actual controversy requirement.

This assertion is answered by the holding of the Supreme Court in *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). There physicians who would have been subject to prosecution under the state anti-abortion statute were they to perform an abortion were allowed to challenge the statute in spite of the fact that they had not yet performed an abortion and were not yet even subject to prosecution. The Court noted that the doctors "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." 410 U.S. at 188, 93 S.Ct. at 745. Petitioner's case is stronger for adjudication than *Bolton* was. Thompson is presently subject to prosecution for violation of the federal firearms statutes. Furthermore, here there are none of the federalism issues present in *Bolton*, where the challenged statute was a state statute. To rule that Thompson's expungement claim is not a ripe controversy would force him to face the risks of prosecution and conviction under the federal statutes in order to obtain an adjudication of his claim. It would be manifestly unjust to do so.

Having determined that the court has jurisdiction over the expungement claim, that the claim is not barred by sovereign immunity, and that it presents a justiciable controversy, the court must now address the merits of petitioner's claim.

IV. RELIEF FROM FEDERAL FIREARMS DISABILITY

Absent the judicial pardon and expungement, Thompson's 1968 felony conviction clearly places him under the federal firearms disability imposed by 18 U.S.C. § 922 and 18 U.S.C.App. § 1202. Both § 922 and § 1202 proscribe the receipt of firearms by convicted felons.⁸ Section 1202 reaches possession as well.

Section 922 was enacted as part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, 82 Stat. 197 (hereinafter referred to as "Omnibus Crime Act"), as amended by the Gun Control Act of 1968, Pub.L. 90-618, 82 Stat. 1213. That title also contains a provision, at 18 U.S.C. § 925(c), for administrative relief from the firearms disability.⁹ No other express provision for relief or exemption from the disability is contained in the statute.

8. For the full text of the relevant provisions of § 922 and § 1202, see note 1 *supra*.

9. For the text of § 925(c), see note 2, *supra*.

10. The full text of 18 U.S.C.App. § 1203 is as follows:

§ 1203. Exemptions

This title shall not apply to—

(1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and

(2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

11. The text of the Utah Statute is as follows: 77-18-2. Expungement and sealing of court and arrest records.—

(1)(a) Any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for sealing of his record in that court. At the time the petition is filed and served upon the prosecuting attorney, the court shall set a date for a hearing and notify the prosecuting attorney for the jurisdiction of the date set for hearing. Any person who may have relevant information about the petitioner may testify at the hearing and the court, in its discretion, may request a written evaluation of the adult, parole and probation section of the state division of corrections.

Section 1202 was enacted as part of Title VII of the Omnibus Crime Act, which was added as a floor amendment and enacted without committee consideration. Title VII also contains a provision, at 18 U.S.C.App. § 1203, exempting from the § 1202 disability any person who, *inter alia*, "has been pardoned by the chief executive of a State and has expressly been authorized by . . . such chief executive . . . to receive, possess, or transport in commerce a firearm."¹⁰ In addition to this exemption, it is apparent that the § 925 administrative relief may also be applied to remove the § 1202 disability. *Lewis v. United States*, 445 U.S. 55, 64, 100 S.Ct. 915, 920, 63 L.Ed.2d 198 (1980); *United States v. Kelly*, 519 F.2d 794 (8th Cir.1975).

Petitioner claims that the judicial pardon and expungement granted to him in April, 1982, pursuant to Utah Code Ann. § 77-18-2 (1981 Supp. to Replacement Vol. 8C)¹¹

(b) If the court finds the petitioner for a period of five years in the case of a class A misdemeanor or felony, or for a period of three years in the case of other misdemeanors or infractions, after his release from incarceration, parole or probation whichever occurs last, has not been convicted of a felony or of a misdemeanor involving moral turpitude and that no proceeding involving such a crime is pending or being instituted against the petitioner and further finds that the rehabilitation of petitioner has been attained to the satisfaction of the court, it shall enter an order that all records in petitioner's case in the custody of that court or in the custody of any other court, agency or official be sealed. The provisions of this subsection shall not apply to violations for the operation of motor vehicle under title 41. The court shall also issue to the petitioner a certificate stating the court's finding that he has satisfied the court of his rehabilitation.

(2)(a) In any case in which a person has been arrested with or without a warrant, that individual after 12 months provided there have been no intervening arrests, may petition the court in which the proceeding occurred, or, if there were no court proceedings, any court in the jurisdiction where the arrest occurred, for an order expunging any and all records of arrest and detention which may have been made, if any of the following occurred:

(i) He was released without the filing of formal charges;

(ii) Proceedings against him were dismissed, he was discharged without a conviction

THOMPSON v. DEPARTMENT OF THE TREASURY

Cite as 557 F.Supp. 158 (1982)

fulfill the requirements of § 1203 and, further, erase completely his prior convictions so that he is removed from the strictures of § 922 as well as § 1202. Upon analysis of the statute under which petitioner's conviction was expunged, the court cannot agree.

[4] First, it is clear that the expungement does not meet the requirements of § 1203. That section requires an executive pardon, plus express authorization from the executive to receive, possess, or transport firearms. The specificity of the statute, supported by its legislative history,¹² seems to admit no exceptions or substitutions for these exemption requirements. The courts have been unanimous in holding that state action other than an executive pardon with express authorization to receive, possess, or transport firearms is insufficient to fulfill the requirements of the § 1203 exemption and hence relieve a previously convicted felon of a federal firearms disability under

§ 1202. See, e.g., *United States v. Kelly*, 519 F.2d 794 (8th Cir.1975); *United States v. Matassini*, 565 F.2d 1297 (5th Cir.1978); *United States v. Sutton*, 521 F.2d 1385 (7th Cir.1975); *United States v. Allen*, 699 F.2d 453 (9th Cir.1982). The judicial pardon of Thompson in April, 1982, was not an executive pardon,¹³ and the court has searched both the state expungement statute and the state court's orders of judicial pardon and expungement without finding anything that could be construed as express authorization to receive, possess, or transport firearms. Hence Thompson does not qualify for the § 1203 exemption.

[5] Petitioner's second assertion, that his expungement completely erased his prior conviction so that the conviction can no longer serve as a basis for either a § 922 or a § 1202 disability, is somewhat more difficult. The courts are in disagreement on

consists of remarks on the floor of the Senate and on the floor of the House. A copy of the entire legislative history is published as an appendix in *Stevens v. United States*, 440 F.2d 144 (6th Cir.1971)

(iii) The record of any proceedings against him has been sealed pursuant to subsection (1).

(b) If the court finds that the petitioner is eligible for relief under this subsection, it shall issue its order granting the relief prayed for and further directing the law enforcement agency making the initial arrest to retrieve any record of that arrest which may have been forwarded to the Federal Bureau of Investigation and the Utah Bureau of Criminal Identification.

(c) This subsection shall apply to all arrests and any proceedings which occurred before, as well as those which may occur after, the effective date of this act.

(3) Employers may inquire concerning arrests or convictions only to the extent that the arrests have not been expunged or the record of convictions sealed under this provision. In the event an employer asks concerning arrests which have been expunged or convictions the records of which have been sealed, the person who has received expungement of arrest or judicial pardon may answer as though the arrest or conviction had not occurred.

(4) Inspection of the sealed records shall be permitted by the court only upon petition by the person who is the subject of those records and only to the persons named in the petition.

12. The legislative history of Title VII of the Omnibus Crime Act, which contains § 1203,

13. The State of Utah presents a special circumstance which may distinguish this case from those cited above. Unlike the states in those cases, Utah has no provision for a "pardon by . . . the chief executive" of the State, as required by § 1203. See, Constitution of Utah, Art. VII, § 12. In Utah's unique circumstance, where the governor does not have the power to grant pardons, it is impossible to discern what Congress intended should be the procedure for exempting persons from the § 1202 firearms disability. It may be reasonable to conclude that Congress, had it considered this circumstance, would have intended that the functional equivalent of a governor's pardon, coupled with the express authorization to possess firearms, would be sufficient to exempt a person from the disability. However, since the judicial pardon and expungement, based on an analysis of the Utah expungement statute, could not be considered the functional equivalent of an executive pardon, and since the petitioner has not received express authorization to possess firearms, he would not meet this modified exemption requirement under § 1203. Hence, it is not necessary to determine whether, in Utah, the functional equivalent of an executive pardon is sufficient to meet that requirement of § 1203.

whether a state expungement relieves a former convict of the § 922 disability. On the one hand, the Ninth Circuit and apparently the Seventh Circuit have concluded that state expungement statutes have no effect on the firearms disability. *United States v. Bergeman*, 592 F.2d 533 (9th Cir. 1979); *Thrall v. Wolfe*, 503 F.2d 313 (7th Cir. 1974). On the other hand, the Fourth Circuit and arguably the Fifth Circuit hold that a complete and total expungement erases the prior conviction that would otherwise trigger the federal firearms disability. *New Banner Institute, Inc. v. Dickerson*, 649 F.2d 216 (4th Cir. 1981), cert. granted, 455 U.S. 1018, 102 S.Ct. 1708, 72 L.Ed.2d 132 (1982);¹⁴ *United States v. Matassini*, 565 F.2d 1297, 1309, n. 26 (5th Cir. 1978).¹⁵

There has been no similar disagreement as to the § 1202 disability. To this date no court has held that a state expungement relieves a former convict of this disability. See *United States v. Kelly*, 519 F.2d 794 (8th Cir. 1975); *United States v. Sutton*, 521 F.2d 1385 (7th Cir. 1975); *United States v. Allen*, 699 F.2d 453 (9th Cir. 1982). However, the courts have been unanimous in holding that a federal expungement under the Federal Youth Corrections Act, 18 U.S.C. §§ 5006-5026, provides relief from both § 922 and § 1202. *United States v. Arrington*, 618 F.2d 1119 (5th Cir. 1980), cert. denied, 449 U.S. 1086, 101 S.Ct. 876, 66 L.Ed.2d 812 (1981); *United States v. Purgason*, 565 F.2d 1279 (4th Cir. 1977); *United States v. Fryer*, 545 F.2d 11 (6th Cir. 1976).

The rationale of *New Banner* and the Youth Correction Act cases is persuasive¹⁶;

14. In *New Banner*, the court based its decision in part on language from two Tenth Circuit cases. *United States v. Brzoticky*, 588 F.2d 773 (10th Cir. 1978); *Barker v. United States*, 579 F.2d 1219 (10th Cir. 1978). *Brzoticky* involved a prosecution under § 922 that was predicated on a conviction that had been expunged after the prosecution was commenced. The court implied that if the state conviction had been expunged before the commencement of the federal prosecution, the conviction could not have served as the basis for a federal firearms conviction. In *Barker* the court held that "once one is convicted of a felony he is within the proscription against possession of firearms until that prior conviction is actually overturned

and if Thompson had received his expungement under a statute providing for a complete erasure of the prior conviction, he might have been granted the relief he requests. However, this court need not reach the question of whether an expungement under a statute providing for complete erasure of conviction would furnish relief from the federal firearms disabilities, because the Utah statute in effect at the time of Thompson's expungement, Utah Code Ann. § 77-18-2 (1981 Supp. to Replacement Vol. 8C), did not provide such complete erasure.

Perhaps the predecessor to § 77-18-2 would have furnished Thompson with the relief he seeks. Utah Code Ann. § 77-35-17.5 (1978 Replacement Vol. 8C). It apparently provided a complete erasure of the prior conviction. Subsection 1 provided that upon a petitioner's meeting the requisites of the statute, the court would enter an order sealing all the records of the petitioner's case. It further provided:

(c) Upon the entry of the order in those proceedings, the petitioner shall be deemed judicially pardoned and the petitioner may thereafter respond to any inquiries relating to convictions of crimes as though that conviction never occurred.

Subsection 2 provided that if the record of conviction were expunged pursuant to subsection 1, then all records of arrest and detention may also be expunged. It further provided:

Thereafter, the arrest, detention, and any further proceedings in the case shall be deemed not to have occurred, and a peti-

tioner may answer accordingly any question relating to their existence. (Emphasis added). Subsection 4 provided that once the records were sealed, inspection would be permitted only upon petition by "the person who is the subject of those records."

15. In *Matassini*, the court considered the effect of a governor's pardon on § 922. However, the rationale provided there applies equally well to a judicial pardon and expungement. 565 F.2d at 1309, n. 26.

16. A similar, and likewise persuasive, rationale is set forth in the dissent to *United States v. Bergeman*, 592 F.2d 533, 538-42 (9th Cir. 1979) (Takasugi, J., dissenting).

tioner may answer accordingly any question relating to their existence.

(Emphasis added). Subsection 4 provided that once the records were sealed, inspection would be permitted only upon petition by "the person who is the subject of those records."

A single Utah case construing the predecessor statute exists, which supports the conclusion that the statute provided a full and complete expungement, legally erasing the prior conviction. The Utah Supreme Court, quoting the language of subsection 1(c), above, held that a felon whose conviction had been expunged could not be impeached as a witness on account of his prior conviction. *State v. Jones*, 581 P.2d 141 (Utah 1978).

However, in 1980 the expungement statute was amended as part of the process of recodifying the Utah Code of Criminal Procedure. Eliminated from the new statute is the language stating that "the petitioner shall be deemed judicially pardoned." Eliminated also is the language stating that "the arrest, detention, and any further proceedings shall be deemed not to have occurred." In place of subsection 1(c) giving the petitioner the right to answer "any inquiries relating to convictions of crimes as though that conviction never occurred," (emphasis added) is the following provision:

(8) Employers may inquire concerning arrests or convictions only to the extent that the arrests have not been expunged or the record of the convictions sealed under this provision. In the event an employer asks concerning arrests which have been expunged or convictions the records of which have been sealed, the person who has received expungement of arrest or judicial pardon may answer as though the arrest or conviction had not occurred.

Utah Code Ann. § 77-18-2(3) (1981 Supp. to Replacement Vol. 8C). Still included in

17. The amendment to the expungement statute was enacted on February 1, 1980, as part of House Bill 32, which consisted of the entire code of criminal procedure for the State of Utah. The Bill was hastily enacted in a Budget Session of the Legislature, and consequently

the statute is the provision that the records of the conviction may be sealed and that inspection of the records thereby sealed may be permitted only upon petition of the person who is the subject of the records.

There is no explanation in the legislative history for the changes in the amended statute,¹⁷ nor have there been any cases construing the new statute. The new language, especially when construed in light of the former language, seems to place a limitation on the effect of the judicial pardon and expungement. Though the legislative intent is not entirely clear, the court must conclude that the statute was changed for a purpose; and that purpose, from the substance of the change, evidently was to limit the effect of a judicial pardon and expungement. Hence, since 1980 a judicial pardon and expungement under section 77-18-2 is not a complete and unqualified expungement that erases the prior conviction sufficiently to relieve petitioner Thompson from his firearms disabilities.

In an attempt to resolve the court's concerns about subject matter jurisdiction and sovereign immunity, Thompson filed a second Motion to Amend Complaint on August 6, 1982. Since the jurisdiction and sovereign immunity issues have been resolved in favor of Thompson, the court does not see the necessity of granting the second motion to amend. A pre-trial scheduling conference would be helpful at this point to enable the court to discuss with counsel means of expediting resolution of the remaining claims not disposed of by this order.

Accordingly,

IT IS HEREBY ORDERED that petitioner's Motion for Summary Judgment be denied.

IT IS FURTHER ORDERED that the second Motion to Amend Complaint be presently denied.

Little attention was given to the individual provisions of the Bill. There were no comments on the floor of either house regarding the expungement provision, which was enacted by L. 1980, ch. 15, § 2.

IT IS FURTHER ORDERED that a pre-trial scheduling conference be set for Monday, January 24, 1983, at 11:00 a.m.



**A.L. ADAMS CONSTRUCTION
CO., Plaintiff,**

v.

**GEORGIA POWER COMPANY,
Defendant.**

Civ. A. No. CV 181-31.

United States District Court,
S.D. Georgia,
Augusta Division.

Jan. 3, 1983.

Nonunion contractor brought action against power company, challenging company's refusal to hire contractor for construction of administration building for nuclear-powered generating facility as violation of antitrust laws and breach of contract. On cross-motions for summary judgment, the District Court, Alaimo, Chief Judge, held that: (1) power company was employer engaged in construction industry qualified to negotiate valid prehire agreement in context of collective bargaining relationship and therefore entitled to invoke exemption from antitrust penalties under construction industry proviso of National Labor Relations Act and nonstatutory labor exemption from antitrust sanctions, and (2) genuine issues of material fact precluded summary judgment on breach of contract claim.

Ordered accordingly.

1. Monopolies ⇐12(8)

When agreement with union forms basis of antitrust claim against employer, employer may assert nonstatutory labor exemption from antitrust sanctions if exemp-

tion would have been available to union. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act, § 4, 15 U.S.C.A. § 15.

2. Labor Relations ⇐390

Valid prehire agreement satisfies requirement of collective bargaining relationship as prerequisite to application of construction industry proviso to section of National Labor Relations Act declaring it unfair labor practice for labor organization and employer to enter into agreement to refrain from using products of any other employer or to cease doing business with any other person. National Labor Relations Act, § 8(e, f), as amended, 29 U.S.C.A. § 158(e, f).

3. Monopolies ⇐28(8)

Whether court in antitrust action should consider power company's agreement with trades council, setting terms and conditions of employment for craft workers employed in construction of nuclear-powered generating facility, part of collective bargaining context as prerequisite to application of construction industry proviso to section of National Labor Relations Act declaring it unfair labor practice for labor organization and employer to enter into agreement to refrain from using products of any other employer or to cease doing business with any other person is question of law, and whether parties apply legally correct label to agreement is irrelevant. National Labor Relations Act, § 8(e, f), as amended, 29 U.S.C.A. § 158(e, f).

4. Monopolies ⇐12(9)

Power company, which acted as own construction manager, foregoing employing general contractor in connection with construction of nuclear-powered generating facility, was an "employer engaged in the construction industry," within meaning of section of National Labor Relations Act declaring it not to be unfair labor practice for employer engaged primarily in building and construction industry to make agreement with labor organization despite lack of majority status, qualified to negotiate valid prehire agreement under such provision in context of "collective bargaining relation-

Cite as 557 F.Supp. 168 (1983)

ship" and therefore was entitled to invoke exemption from antitrust penalties under Act's construction industry proviso and nonstatutory labor exemption. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; National Labor Relations Act, § 8(e, f), as amended, 29 U.S.C.A. § 158(e, f).

See publication Words and Phrases for other judicial constructions and definitions.

5. Federal Civil Procedure ⇐2497

On nonunion contractor's breach of contract claim against power company, which acted as own construction manager in connection with construction of nuclear-powered generating facility, challenging refusal to hire contractor for construction of facility's administration building, genuine issues of material fact existed as to whether parties had reached binding agreement on all crucial terms and especially as to whether sufficient agreement had been reached on manner in which contractor would meet power company's requirements regarding union status, precluding summary judgment.

In Count 1 of the complaint, plaintiff contends that defendant's refusal to hire plaintiff was the result of a combination and conspiracy between defendant and others to exclude nonunion contractors from working at the Burke County construction site. Count 1 alleges that such a combination and conspiracy violated § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1; plaintiff, therefore, seeks to recover treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, for injuries to its business and property caused by defendant's antitrust violation. In Count 2, plaintiff contends that the refusal to hire it constituted a breach of contract by defendant.

This case is presently before the Court on plaintiff's motion for summary judgment filed October 12, 1982, and defendant's motion for summary judgment filed October 13, 1982.¹ For the reasons stated below, plaintiff's motion is DENIED, and defendant's motion is GRANTED as to Count 1 (the antitrust claim) but DENIED as to Count 2 (the contract claim).

ANTITRUST CLAIM

A. Agreement with Trades Council

1. Facts

The following facts pertinent to plaintiff's antitrust claim are either undisputed, are disputed without reasonable justification in the record, or may be assumed in plaintiff's favor for purposes of defendant's motion for summary judgment with regard to the antitrust claim:

(a) A.L. Adams Construction Company ("Adams") is a nonunion contractor operating in the building and construction industry.

(b) Georgia Power Company ("Georgia Power") is an investor-owned electric utility

1982). Since plaintiff claims no prejudice to it resulting from the alleged late filing (plaintiff, in fact, admits being served with a copy of defendant's summary judgment motion on October 12) and since the Court finds considerable merit in defendant's motion, the Court believes that the purposes of justice are better served by considering the merits of defendant's motion than by rigidly enforcing a rather complicated series of filing requirements.

1. Plaintiff argues that, under the terms of an Order entered by this Court on May 10, 1982, all motions to dismiss or for summary judgment were required to be filed by October 12, 1982, and that, since defendant's summary judgment motion was not filed until October 13, 1982, the motion was untimely and should be denied. See Plaintiff's Brief in Response to Defendant Georgia Power Company's Motion for Summary Judgment, 1-4 (November 10,

Ira Genberg, Atlanta, Ga., Wiley S. Obenshain, III, Augusta, Ga., for plaintiff.

Michael C. Murphy, Atlanta, Ga., Wyck A. Knox, Jr., Augusta, Ga., for defendant.

ORDER

ALAIMO, Chief Judge.

On February 16, 1981, A.L. Adams Construction Company filed a civil complaint in this Court against Georgia Power Company. The plaintiff alleged that it was refused a job as building contractor at defendant's construction site in Burke County, Georgia, because plaintiff was a nonunion contrac-

WILLIAMS v. HARRIS, Warden.
No. 6689.

Supreme Court of Utah,
June 16, 1944.

1. Criminal law §982

Prior to enactment of statute authorizing courts to suspend the imposition or execution of sentence and to place a defendant on probation, the courts had inherent power to suspend sentence only for some definite period and for some specific temporary purpose.¹ Utah Code 1943, 105—36—17.

2. Criminal law §982

Statute authorizing courts to suspend imposition of sentence and to place defendant on probation gives the trial courts much greater latitude in suspending imposition of sentence than was previously had, but the courts are not thereby given authority to suspend sentences as a matter of grace, but only when it appears compatible with public interest. Utah Code 1943, 105—36—17.

3. Criminal law §982

The right of personal liberty and suspended sentence may not be alternately granted and denied without just cause, and, when a sentence is suspended during good behavior without reservations, the person whose sentence is thus suspended has a vested right to rely thereon so long as such condition is complied with.² Utah Code 1943, 105—36—17.

4. Criminal law §982

The right to suspend imposition of sentence and to place one on probation is a discretionary right, and one placed on probation has a right to be heard as to whether he has violated the conditions upon which suspension was based. Utah Code 1943, 105—36—17.

5. Criminal law §982

Upon a hearing on question whether a defendant has violated conditions upon which suspended sentence was based, the court has discretionary power to continue probation or impose sentence, but to authorize termination of probation there must

be some competent evidence of violation of the terms of probation.³ Utah Code 1943, 105—36—17.

6. Criminal law §982

Violation of the terms and conditions of suspension or probation is usually a ground for revocation and imposition of sentence. Utah Code 1943, 105—36—17.

7. Criminal law §982

Where trial court has exercised discretion in suspending imposition of sentence or in revoking probation and in imposing sentence, after a hearing, the judgment should not be molested. Utah Code 1943, 105—36—17.

8. Criminal law §982

Where trial court's first order suspending imposition of sentence was made for a definite time and defendant was placed on probation for purpose of reformation, and court made further orders suspending sentence from time to time, the court had power to revoke suspension of sentence and impose sentence upon a showing that during the probation period defendant committed another crime in another jurisdiction. Utah Code 1943, 105—36—17.

Appeal from District Court, Third District, Salt Lake County; Clarence E. Baker, Judge.

Habeas corpus proceeding by Gwen Williams against John E. Harris, Warden of Utah State Prison. From a judgment denying the writ and remanding petitioner to defendant's custody, petitioner appeals.

Affirmed.

Duncan & Duncan, of Salt Lake City, for appellant.

Grover A. Giles, Atty. Gen., and Herbert F. Smart, Asst. Atty. Gen., for respondent.

TURNER, District Judge.

This is an appeal from the judgment of the District Court of the Third Judicial District for Salt Lake County. The trial court, after admitting evidence in support of the petition for writ of habeas corpus, denied the writ and remanded the peti-

¹ People v. Blackburn, 6 Utah 347, 23 P. 759; In the Matter of Flint, 25 Utah 338, 71 P. 531, 95 Am.St.Rep. 853; Reese v. Olsen, 44 Utah 318, 139 P. 941.

² State v. Zolantakis, 70 Utah 290, 250 P. 1044, 54 A.L.R. 1463.

³ State v. Zolantakis, 70 Utah 290, 250 P. 1044, 54 A.L.R. 1463; Thompson v. Harris, Warden, Utah, 144 P.2d 761.

tioner, the appellant here, back into the custody of John E. Harris, Warden of the Utah State Prison, defendant in the original action and the respondent here.

The facts with which the court is concerned, as shown by the transcript, are neither complicated nor in dispute. The appellant, with three other young men, was charged with the crime of burglary in the second degree in the District Court of the Second Judicial District in and for Weber County. On the 12th day of December, 1932, plaintiff herein, one of the defendants in the above case, entered a plea of guilty. He waived time for passing of sentence and the court then stated:

"Well, the Court will suspend the imposition of sentence in the case of the four of you, who have entered a plea of guilty, until Monday, February 6th, 1933, at which time you will report back here, or Mr. Childs can report for you, as to your conduct. I will place you in custody of Mr. Childs and it is up to you gentlemen to straighten up. If you don't straighten out you will have to come in and be sent to the penitentiary, where they will straighten you out."

On the 6th day of February, 1933, appellant appeared in court with Mr. Childs and the latter made a favorable report regarding the boy's conduct. At this time the District Attorney stated to the court: "I do not want your Honor to lose jurisdiction of the boys." The court then made another order suspending imposition of sentence until April 24, 1933, and on that date made a similar order. Several of these were made from a definite date to a definite date. From the record it also appears that after making the first report with Mr. Childs, this young man was released upon his own recognizance.

The last time appellant was before the court prior to the revocation of the order of probation was September 25, 1933, at which time the court made a further order of suspension of imposition of sentence until December 18, 1933. On the 22nd of October, 1933, appellant was brought before the court in Weber County and appeared before the judge who had made the previous orders. Then the court asked appellant regarding his plea to the charge of burglary and if he had not been sentenced to the Utah State Prison recently for a crime committed in Utah County while under the court's order of probation. Ap-

pellant admitted that this was correct. The judge then sentenced appellant to be imprisoned for a term of not less than one nor more than twenty years.

In this action appellant contends that the trial court in Salt Lake County which refused to release him upon the hearing on the writ of habeas corpus erred for the reason that the court in Weber County was without jurisdiction when it imposed the sentence of imprisonment as stated above; that the trial court was without jurisdiction, it having suspended imposition of sentence and having placed the appellant on probation for a definite period, and appellant having complied with all the conditions of this probation, was entitled to his discharge, and that orders of the court of Weber County were made after the expiration of the term of appellant's probation, and were without any specific purpose or object and without any reference or relation to appellant's further probation, and void.

We readily accept the proposition that if the District Court of Weber County had no jurisdiction to pronounce sentence, the Court of Salt Lake County entertaining the writ of habeas corpus should have sustained the writ and released appellant from the State Prison.

The statute, which was in force and effect, and which is now controlling in 105—36—17, U.C.A. 1943, is as follows:

"Upon conviction of any crime or offense, if it appears compatible with the public interest, the court having jurisdiction may suspend the imposition or the execution of sentence and may place the defendant on probation for such period of time as the court shall determine. The court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation. While on probation the defendant may be required to pay, in one or several sums, any fine imposed at the time of being placed on probation; may be required to make restitution or reparation to the aggrieved party or parties for the actual damages or losses caused by the offense for which conviction was had; and may be required to provide for the support of his wife or others for whose support he may be legally liable."

[1] This statute was enacted by the Legislature in 1923. Prior to the enactment of this statute, the courts in this jurisdiction had inherent power to suspend sen-

tences only for some definite period and for some specific temporary purpose. Long before the passage of the present statute, this court held that trial courts could suspend sentence temporarily for stated period from time to time. See *People v. Blackburn*, 6 Utah 347, 23 P. 759. In this latter case the court held that trial courts have no power wholly to relieve convicted persons from sentence; that only the pardoning power can do that. In the *Matter of Flint*, 25 Utah 338, 71 P. 531, 95 Am.St.Rep. 853, this court held that a suspension of sentence for an indefinite period is in effect an exercise of the functions of the pardoning power which belongs exclusively to the Board of Pardons, a separate and distinct department of the State government. This principle of law was again stated in the case of *Reese v. Olsen*, 44 Utah 318, 139 P. 941.

[2,3] It is apparent that 105—36—17, supra, gives the court much greater latitude and power in suspending imposition of sentence than was previously had. Notice the following provision of the statute, "The court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation." The purpose of this section is clearly reformatory. Since the enactment of the statute this court has held that "trial courts are not given authority to suspend sentences as a matter of favor or grace, but only 'when it appears compatible with public interest.'" Also, it announced that the right of personal liberty and suspended sentence "may not be alternatively granted and denied without just cause." Also, that "when a sentence is suspended during good behavior, *without reservations*, the person whose sentence is thus suspended has a vested right to rely thereon so long as such condition is complied with." *State v. Zolantakis*, 70 Utah 296, 259 P. 1044, 1046, 54 A.L.R. 1463.

[4-7] We think it advisable to analyze the present matter, bearing in mind the holdings of this court in the *Zolantakis* case, supra. From the construction of the statute it is evident that the legislature intended trial courts should have considerable authority to reform wrongdoers. It never intended that trial courts should implant hope and faith into one with the right to destroy this as a whim, without just cause. The right to suspend imposition of sentence and the right to place one on probation is

a discretionary right. One placed upon probation has a right to be heard as to whether he has violated the conditions upon which suspended sentence was based. *State v. Zolantakis*, supra; *Thompson v. Harris*, Warden, Utah, 144 P.2d 761, at page 767. Upon such a hearing, the trial court has discretionary power to continue probation or impose sentence, but to authorize termination of probation there must be some competent evidence of violation of the terms of probation. Violation of the terms and conditions of suspension or probation is usually a ground for revocation and the imposition of sentence. 24 C.J.S., Criminal Law, § 1572, p. 72; *People v. Lippner*, 219 Cal. 395, 26 P.2d 457. When it appears that a trial judge has exercised discretion in suspending imposition of sentence or in revoking probation and imposing sentence, after a hearing as heretofore mentioned, the judgment of the trial court should not be molested.

[8] The record discloses that when the first order of suspension of sentence was made it was made for a definite time. The boys, including appellant, were told to straighten up, that if they did not straighten up they would be sent to the penitentiary. From the record we believe the boys were placed on probation for the purpose of reformation. The trial judge was a man of experience. He knew he was dealing with boys, guilty of a serious offense, who had previously been in the reformatory. We do not believe that the judge when he placed the boys in the custody of Mr. Childs expected the time fixed then to be a full period of probation. The trial judge was carefully feeling his way with these boys. He was endeavoring to save the youths from the stigma of prison. From what was said and done, we must conclude that this appellant and the other boys were released from time to time under the condition that they straighten up, that they do not violate the law. Experience tells us that we cannot expect to change a youth from bad habits and lawlessness to one of good conduct and dependable worthiness in a few days or a few weeks. Youth when badly damaged by disease or bad influence must have time to recover. That often there can be recovery is justification for suspension of sentence and probation.

We are of the opinion that the court purposefully continued suspension of sentence from a day certain to a day certain. It was dealing with juveniles; boys the

court hoped to keep out of the penitentiary; doubtful cases, but worthy of care and consideration in the opinion of the trial judge. Before the time last fixed for him to appear, this appellant committed another crime in another jurisdiction. He had already admitted his guilt and had been sentenced to the State Prison when brought before the court in Weber County for revocation of suspension. He had failed to straighten up and was brought back, just as he had been told, for sentence in the event he did not straighten up.

We are of the opinion the trial court acted within the powers granted by the statute, and that it had jurisdiction to pronounce sentence to the State Prison as was done.

The judgment of the lower court in this case is affirmed.

WOLFE, C. J., and LARSON, McDONOUGH, and WADE, JJ., concur.

MOFFAT, J., deceased.



UTAH POULTRY PRODUCERS COOPERATIVE ASS'N v. UTAH LABOR RELATIONS BOARD et al.

No. 6659.

Supreme Court of Utah.

June 16, 1944.

1. Master and servant ¶15(122)

The State Labor Relations Board's finding that independent union was dominated and controlled by employer was not sustained by substantial evidence. Laws 1937, c. 55.

2. Master and servant ¶15(88)

The function of State Labor Relations Board is not to provide leadership for a union, and unless there is evidence of employer interference in selection of union leadership, action of union membership in making choice of their officers and direct-

ing their activity is no concern of the Board. Laws 1937, c. 55.

3. Master and servant ¶15(122)

If State Labor Relations Board's finding that employee was discharged because of union activity was supported by substantial evidence, finding must be upheld. Laws 1937, c. 55.¹

4. Master and servant ¶15(122)

The Utah Labor Relations Board's finding that an employee was discharged because of union activity was not sustained by substantial evidence, so that order requiring his reinstatement was not warranted. Laws 1937, c. 55.

Original proceeding by the Utah Poultry Producers Cooperative Association to vacate and set aside the order of the Utah Labor Relations Board which found that the petitioner was guilty of unfair labor practice under Laws 1937, c. 55, by discharging from its employment the complainant Willis L. Jacobson. The Board sought enforcement of its order.

Order of Board set aside, and application of Board for enforcement thereof denied.

Harry Pugsley and Elias Hansen, both of Salt Lake City, for plaintiff.

Grover A. Giles, Atty. Gen., Herbert F. Smart, Asst. Atty. Gen., and Clarence M. Beck, of Salt Lake City, for defendants.

McDONOUGH, Justice.

By writ of review, petitioner seeks to vacate and set aside the order of the Utah Labor Relations Board dated September 8, 1943. A petition of the Labor Board for an order of enforcement is also before us. The Board found that petitioner Utah Poultry Producers Cooperative Association, hereinafter referred to as the Association, was guilty of an unfair labor practice by discharging from its employment the complainant Willis L. Jacobson. It concluded that his dismissal was due to his activity in behalf of the Independent Union of Poultry Employees; that the Association was guilty of interfering with and restraining employees in the exercise of their rights, and of dominating and interfering with the administration of said

¹ *Building Service Employees v. Newhouse Realty Co.* et al., 87 Utah 562, 95 P.2d 507; *American Foundry & Ma-*

chine Co. v. Utah Labor Relations Board, 141 P.2d 390.

APPENDIX B
STATUTES

Colorado Revised Statutes

1985 CUMULATIVE SUPPLEMENT

VOLUME 8
1978 REPLACEMENT VOLUME

CRIMINAL JUSTICE AND

CHILDREN'S CODE

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as the Statutory Law of Colorado of a General and Permanent
Nature in the 1986 Session*

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Law reviews. For article, "New Legislation Relating to the Mentally Disabled", see 11 Colo. Law. 2131 (1982). For article, "Review

of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

16-7-403. Deferred sentencing of defendant. (1) In any case in which the defendant has entered a plea of guilty, the court accepting the plea has the power, with the written consent of the defendant and his attorney of record and the district attorney, to continue the case for a period not to exceed two years from the date of entry of such plea for the purpose of entering judgment and sentence upon such plea of guilty; except that such two-year period may be extended for an additional time up to one hundred eighty days if the failure to pay restitution is the sole condition of supervision which has not been fulfilled, because of inability to pay, and the defendant has no own a future ability to pay. During such time, the court may place the defendant under the supervision of the probation department.

(2) Prior to entry of a plea of guilty to be followed by deferred judgment and sentence, the district attorney, in the course of plea discussion as provided in sections 16-7-301 and 16-7-302, is authorized to enter into a written stipulation, to be signed by the defendant, his attorney of record, and the district attorney, under which the defendant obligates himself to adhere to each stipulation. The conditions imposed in the stipulation shall be similar in all respects to conditions permitted as part of probation. In addition, the stipulation may require the defendant to perform community or charitable work service projects or make donations thereto. Upon full compliance with each condition by the defendant, the plea of guilty previously entered shall be withdrawn and the action against the defendant dismissed with prejudice. Each stipulation shall specifically provide that, upon a breach by the defendant of any condition regulating the conduct of the defendant, the court shall enter judgment and impose sentence upon such guilty plea. When, as a condition of the deferred sentence, the court orders the defendant to make restitution and finds that he has the ability to pay, evidence of failure to pay the unpaid restitution shall constitute prima facie evidence of a violation. Whether a breach of condition has occurred shall be determined by the court without a jury upon application of the district attorney and upon notice of hearing hereon of not less than five days to the defendant or his attorney of record. Application for entry of judgment and imposition of sentence may be made by the district attorney at any time within the term of the deferred judgment or within thirty days thereafter. The burden of proof at such hearing shall be by a preponderance of the evidence, and the procedural safeguards required in a revocation of probation hearing shall apply.

Source: (2) amended, L. 83, p. 664, § 4; (1) amended, L. 85, pp. 617, 1371; § 8, 50.

Editor's note: Subsection (1) is amended by chapters 135 and 342, Session Laws of Colorado 1985. Section 56 of chapter 342 provides that section 50 of the act set out in that chapter is effective July 1, 1985, and section 14 of chapter 135 provides that section 8 of the act set out in that chapter is effective July 1, 1985, and applies to acts committed on or after said date.

Law reviews. For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982).

Purpose of the written stipulation is to ensure that the defendant knows prior to the entry of a guilty plea the consequences of violating the

section shall be construed to relieve the state or the political subdivision thereof in which such property or any part thereof is situated from its duty to furnish for such property or part thereof such normal police protection as it ordinarily and customarily provides for other property situated therein.

1963

Chapter 13. Merit Systems

67-13-1 through 67-13-15. Repealed.

1979

Chapter 14. Operator and Chauffeur License Examiners Civil Service Act

67-14-1 through 67-14-21. Repealed.

1979

Chapter 15. Peace Officer Training

67-15-1. Division of peace officer standards and training.

Creation - Purpose.

67-15-2. Director of division - Appointment - Term of office.

67-15-3. Director to be full-time state officer - Director's staff.

67-15-4. Powers and duties of director.

67-15-5. Basic training course - Subject material - Instructors - Schedules - Minimum length - Completion required - Annual training - Prohibition from exercising powers - Reinstatement.

67-15-6. Applicants for admission to training program or for waiver examination - Qualifications.

67-15-6.5. Time for application for admission to training program.

67-15-7. Completion of training course or passing of waiver examination required - Persons affected.

67-15-8. Waiver of training course requirement.

67-15-9. Municipalities may set higher minimum standards.

67-15-10. Lapse of certificate - Reinstatement.

67-15-10.5. Revocation, suspension or refusal of certification - Grounds - Notice to employer.

67-15-11. Council on peace officer standards and training - Creation - Purpose - Membership.

67-15-12. Council - Terms of office of members - Vacancies.

67-15-13. Council - Termination of certain members - Filling vacancies.

67-15-14. Council - Officers - Quorum - Meetings.

67-15-15. Council - Compensation of members.

67-15-16. Council - Members may hold other public office or employment.

67-15-17. Council - Duties.

67-15-17.5. Council - Recommendations and reports.

67-15-18. Council - Additional powers.

67-15-19. Repealed.

67-15-20. Donations, contributions, grants, gifts, bequests, devises or endowments - Authority to accept - Disposition.

67-15-21. Penalty assessment - Amount of training fee - Deposit with bail - Suspension of fine or forfeiture - Waiver of assessment - Deposit to state general fund.

67-15-1. Division of peace officer standards and training - Creation - Purpose.

To better promote and insure the safety and welfare of the citizens of this state in their respective communities and to provide for more efficient and professional law enforcement by establishing minimum standards and training for peace officers throughout the state, there is hereby created a division of the state department of public safety to be known as the division of peace officer standards and training which shall be administered by a director appointed by and acting under the supervision and control of the commissioner of public safety.

67-15-2. Director of division - Appointment - Term of office.

The commissioner of public safety, upon recommendation of the council on peace officer standards and training and with the approval of the governor shall appoint a director of the state division of peace officer standards and training who shall serve at the pleasure of the commissioner.

67-15-3. Director to be full-time state officer - Director's staff.

The director shall be a full-time officer of the state and shall have the authority to appoint such deputies, consultants, clerks and other employees as may be authorized from eligible lists supplied by the state office of personnel management.

67-15-4. Powers and duties of director.

The powers and duties of the director of the division of peace officer standards and training, which shall be exercised with the advice of the council on peace officer standards and training, shall include the following:

(1) To promulgate standards for the certification of a peace officer training academy; to certify an academy meeting the prescribed requirements; and to subsequently revoke certification for cause.

(2) To prescribe minimum qualifications for certification of peace officers appointed or elected to enforce the law of this state and the subdivisions thereof and prescribe standards for revocation of certification for cause.

(3) To establish minimum requirements for the certification of training instructors and standards for revocation of certification.

(4) To provide for the issuance of appropriate certificates to those peace officers completing the basic training programs offered by a certified academy or to those persons who pass a "waiver" examination as provided for in this chapter.

(5) To consult and co-operate with academy administrators and instructors for the continued development and improvement of the basic training programs provided by the academy and for the further development and implementation of advanced in-service training programs.

(6) To consult and co-operate with state institutions of higher learning to develop specialized courses of study for peace officers in the areas of criminal justice, police administration, criminology, social sciences and other related disciplines.

(7) To consult and co-operate with other departments, agencies and local governments concerned with peace officer training, and in his discretion, make training aids and materials available to local law enforcement agencies.

(8) To perform such other acts as may be necessary or appropriate to develop peace officer training programs within the state.

(9) To report to the council on peace officer standards and training at regular meetings of the council and at such other times as he may be required.

(10) To make recommendations to the commissioner, governor and the legislature from time to time concerning peace officer standards and training.

(11) With the permission of the commissioner of public safety, to contract on behalf of the division with criminal justice agencies to provide training for employees of those agencies on condition that the employees or their employing agency pay a registration fee equivalent to the cost of the training and on condition that the contract does not reduce the

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(1) To promulgate standards for the certification of a peace officer training academy; to certify an academy meeting the prescribed requirements; and to subsequently revoke certification for cause.

(2) To prescribe minimum qualifications for certification of peace officers appointed or elected to enforce the law of this state and the subdivisions thereof and prescribe standards for revocation of certification for cause.

(3) To establish minimum requirements for the certification of training instructors and standards for revocation of certification.

(4) To provide for the issuance of appropriate certificates to those peace officers completing the basic training programs offered by a certified academy or to those persons who pass a "waiver" examination as provided for in this chapter.

(5) To consult and co-operate with academy administrators and instructors for the continued development and improvement of the basic training programs provided by the academy and for the further development and implementation of advanced in-service training programs.

(6) To consult and co-operate with state institutions of higher learning to develop specialized courses of study for peace officers in the areas of criminal justice, police administration, criminology, social sciences and other related disciplines.

(7) To consult and co-operate with other departments, agencies and local governments concerned with peace officer training, and in his discretion, make training aids and materials available to local law enforcement agencies.

(8) To perform such other acts as may be necessary or appropriate to develop peace officer training programs within the state.

(9) To report to the council on peace officer standards and training at regular meetings of the council and at such other times as he may be required.

(10) To make recommendations to the commissioner, governor and the legislature from time to time concerning peace officer standards and training.

(11) With the permission of the commissioner of public safety, to contract on behalf of the division with criminal justice agencies to provide training for employees of those agencies on condition that the employees or their employing agency pay a registration fee equivalent to the cost of the training and on condition that the contract does not reduce the

established by the director. The director may, in his discretion, require such a reemployed or reengaged peace officer to successfully complete the basic training course before reissuing or reinstating certification.

67-15-10.5. Revocation, suspension or refusal of certification - Grounds - Notice to employer.

(1) The director may, upon the concurrence of the majority of the council, and after the person or peace officer involved has been afforded prior notice and an opportunity for a full hearing before the council, revoke, refuse, or suspend certification of a person as a peace officer for cause. Any of the following shall constitute cause for such action:

(a) Willful falsification of any information to obtain certified status;

(b) Physical or mental disability affecting the employee's ability to perform his or her duties;

(c) Addiction to or the unlawful use of narcotics or drugs;

(d) Conviction of a felony or any crime involving dishonesty, unlawful sexual conduct, or physical violence; or

(e) Any conduct or pattern of conduct that would tend to disrupt, diminish or otherwise jeopardize public trust and fidelity with regard to law enforcement.

(2) The director shall not suspend or revoke certification of any peace officer prior to sending notice to the governing body of the political subdivision employing the peace officer and receiving information or comments concerning the peace officer from such governing body or the agency employing such officer.

(3) Denial, suspension, or revocation procedures shall not be initiated by the council in cases in which an officer is terminated for infraction of his agency's policies, general orders, or similar guidelines of operation which do not amount to any of the causes for denial, suspension, or revocation enumerated in subsection (1).

(4) Termination of a peace officer, whether voluntary or involuntary, does not preclude revocation or subsequent denial of peace officer certification status by the council if termination was for any of the reasons enumerated in subsection (1). Employment by another agency or reinstatement of a peace officer by his parent agency after termination, whether the termination was voluntary or involuntary, does not preclude revocation or subsequent denial of peace officer certification status by the council, if termination was for any of the reasons enumerated in subsection (1).

67-15-11. Council on peace officer standards and training - Creation - Purpose - Membership.

A council on peace officer standards and training is hereby established to serve as an advisory board to the director of the division of peace officer training on matters relating to peace officer standards and training. The council shall include the attorney general or his designated representative, the superintendent of the highway patrol, and 14 additional members appointed by the governor having qualifications, experience, or education in the field of law enforcement as follows:

(a) One incumbent mayor;

(b) One incumbent county commissioner;

(c) Three incumbent sheriffs, one of whom shall be a representative of the Utah Sheriffs Association, one of whom shall be from a county having a population of 100,000 or more and one of whom shall

be from a county having a population of less than 100,000;

(d) Three incumbent police chiefs, one of whom shall be a representative of the Utah Chiefs of Police Association, one of whom shall be from a city of the first or second class, and one of whom shall be from a city of the third class or town;

(e) One officer from the Federal Bureau of Investigation appointed by the governor upon the recommendation of said agency;

(f) A representative of the Utah Peace Officers Association;

(g) An educator in the field of public administration, criminal justice, or related area; and

(h) Three persons selected at large by the governor.

67-15-12. Council - Terms of office of members - Vacancies.

The 14 members of the council appointed by the governor shall be appointed for terms of four years. Any member may be reappointed for additional terms. A vacancy in any of these categories caused by the expiration of a term of office or otherwise shall be filled by the governor from the same category in which the vacancy occurs.

67-15-13. Council - Termination of certain members - Filling vacancies.

Any member of the council shall, immediately upon the termination of his holding the office of employment specified in section 67-15-11 which was the basis for his eligibility to membership on the council, or upon two unexcused absences in one year from regularly scheduled council meetings, cease to be a member of the council. A vacancy created in one of these ways shall be filled by the governor from the category in which the vacancy occurs. The council shall remain as it is composed upon the effective date of this act of the 1963 general session until the expiration of any individual member's term. If a vacancy occurs in the council, appointment to fill that vacancy shall be accomplished as is provided for in section 67-15-12.

67-15-14. Council - Officers - Quorum - Meetings.

The council shall select a chairman and vice chairman from among its members. Nine members of the advisory council shall constitute a quorum. Meetings may be called by the chairman or the commissioner of public safety or the director, and shall be called by the chairman upon the written request of nine members, but in no event shall there be less than two meetings per year. Meetings shall be held at such times and places as are determined by the director.

67-15-15. Council - Compensation of members.

Members of the council shall receive per diem allowance as approved by the department of administrative services. All members shall be reimbursed for their actual and necessary travel expenses incurred in the performance of their official duties.

67-15-16. Council - Members may hold other public office or employment.

Membership on the council shall not disqualify any member from holding any public office or employment nor shall he forfeit any such office or employment by reason of his appointment hereunder notwithstanding the provisions of any general, special or local law, ordinance or charter.

68-3-9. Effect on suits and prosecutions pending.

No suit or prosecution, pending when this repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by the repeal, but the proceedings may be conformed to the provisions of these revised statutes as far as consistent. 1953

68-3-10. "Heretofore" and "hereafter" defined.

The terms "heretofore" and "hereafter" as used in these revised statutes, have relation to the time when the same take effect. 1953

Chapter 3. Construction

68-3-1. Common law adopted.

68-3-2. Statutes in derogation of common law liberally construed - Rules of equity prevail.

68-3-3. Revised statutes not retroactive.

68-3-4. Civil and criminal remedies not merged.

68-3-5. Effect of repealing a statute.

68-3-6. Identical provisions deemed a continuation, not new enactment.

68-3-7. Time, how computed.

68-3-8. When a day appointed is a holiday.

68-3-9. Seal, how affixed.

68-3-10. Joint authority is authority to majority.

68-3-11. Rules of construction as to words and phrases.

68-3-12. Rules of construction as to these statutes.

68-3-1. Common law adopted.

The common law of England so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States, or the Constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state. 1953

68-3-2. Statutes in derogation of common law liberally construed - Rules of equity prevail.

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail. 1953

68-3-3. Revised statutes not retroactive.

No part of these revised statutes is retroactive, unless expressly so declared. 1953

68-3-4. Civil and criminal remedies not merged.

When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. 1953

68-3-5. Effect of repealing a statute.

The repeal of a statute does not revive a statute previously repealed, or affect any right which has accrued, any duty imposed, any penalty incurred, or any action or proceeding commenced under or by virtue of the statute repealed. 1953

68-3-6. Identical provisions deemed a continuation, not new enactment.

The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment. 1953

68-3-7. Time, how computed.

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded. 1953

68-3-8. When a day appointed is a holiday.

Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next succeeding business day with the same effect as if it had been performed upon the day appointed. 1953

68-3-9. Seal, how affixed.

When the seal of a court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto. In all other cases the word "seal" may include a scroll printed or written. 1953

68-3-10. Joint authority is authority to majority.

Words giving a joint authority to three or more public officers, or other persons, are to be construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority. 1953

68-3-11. Rules of construction as to words and phrases.

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar, and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition. 1953

68-3-12. Rules of construction as to these statutes.

In the construction of these statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the statute:

(1) "Month" means a calendar month, unless otherwise expressed, and the word "year," or the abbreviation "A.D." is equivalent to the expression "year of our Lord."

(2) "Oath" includes "affirmation," and the word "swear" includes "affirm." Every oral statement under oath or affirmation is embraced in the term "testify," and every written one, in the term "depose."

(3) "Signature" includes any name, mark, or sign written with the intent to authenticate any instrument or writing.

(4) "Writing" includes printing, handwriting, and typewriting.

(5) "Person" includes individuals, bodies politic and corporate, partnerships, associations, and companies.

(6) The singular number includes the plural, and the plural the singular.

(7) Words used in one gender comprehend the other.

(8) Words used in the present tense include the future.

(9) "Property" includes both real and personal property.

(10) "Land," "real estate," and "real property" include land, tenements, hereditaments, water rights, possessory rights, and claims.

ant's probation or refuse to grant a further stay of execution when he had abided by the terms of his agreement with the court and the probation department. *Ex parte Follett* (1950) 119 U 98, 225 P 2d 16.

In the absence of proof of fraud, a court could not properly vacate an order setting aside a conviction, merely because of its belief that fraud was practiced. *State v. Schreiber* (1952) 121 U 653, 245 P 2d 222.

Where the probation order imposed conditions upon the defendant which were that he

remain in custody and supervision of his bondsman, that he remain outside a certain county, that he report to the court on a certain date and that he "make every effort to make entirely good," the order contained terms somewhat at variance with usual orders, but it was not so indefinite and uncertain as to be unenforceable and the trial judge, after a hearing, could terminate the probation. *State v. Chesnut* (1960) 11 U 2d 142, 356 P 2d 36.

77-18-2. Expungement and sealing of records. (1) (a) Any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for sealing of his record in that court. At the time the petition is filed and served upon the prosecuting attorney, the court shall set a date for a hearing and notify the prosecuting attorney for the jurisdiction of the date set for hearing. Any person who may have relevant information about the petitioner may testify at the hearing and the court, in its discretion, may request a written evaluation of the adult parole and probation section of the state division of corrections.

(b) If the court finds the petitioner for a period of five years in the case of a class A misdemeanor or felony, or for a period of three years in the case of other misdemeanors or infractions, after his release from incarceration, parole or probation whichever occurs last, has not been convicted of a felony or of a misdemeanor involving moral turpitude and that no proceeding involving such a crime is pending or being instituted against the petitioner and further finds that the rehabilitation of petitioner has been attained to the satisfaction of the court, it shall enter an order that all records in petitioner's case in the custody of that court or in the custody of any other court, agency or official be sealed. The provisions of this subsection shall not apply to violations for the operation of motor vehicle under title 41. The court shall also issue to the petitioner a certificate stating the court's finding that he has satisfied the court of his rehabilitation.

(2) (a) In any case in which a person has been arrested with or without a warrant, that individual after 12 months, provided there have been no intervening arrests, may petition the court in which the proceeding occurred, or, if there were no court proceedings, any court in the jurisdiction where the arrest occurred, for an order expunging any and all records of arrest and detention which may have been made, if any of the following occurred:

- (i) He was released without the filing of formal charges;
- (ii) Proceedings against him were dismissed, he was discharged without a conviction and no charges were refiled against him within 30 days thereafter, or he was acquitted at trial; or
- (iii) The record of any proceedings against him has been sealed pursuant to subsection (1).

(b) If the court finds that the petitioner is eligible for relief under this subsection, it shall issue its order granting the relief prayed for and further directing the law enforcement agency making the initial arrest to retrieve any record of that arrest which may have been forwarded to the Federal Bureau of Investigation and the Utah Bureau of Criminal Identification.

(c) This subsection shall apply to all arrests and any proceedings which occurred before, as well as those which may occur after, the effective date of this act.

(3) Employers may inquire concerning arrests or convictions only to the extent that the arrests have not been expunged or the record of convictions sealed under this provision. In the event an employer asks concerning arrests which have been expunged or convictions the records of which have been sealed, the person who has received expungement of arrest or judicial pardon may answer as though the arrest or conviction had not occurred.

(4) Inspection of the sealed records shall be permitted by the court only upon petition by the person who is the subject of those records and only to the persons named in the petition.

History: C. 1953, 77-18-2, enacted by L. 1980, ch. 15, § 2.

Cross-References.

Criminal identification, 77-26.

Expungement of juvenile court record, 78-3a-56.

Collateral References.

21A AmJur 2d 561, Criminal Law § 1020; 62 AmJur 2d 701, Privacy § 17.

Judicial expunction of criminal record of convicted adult, 11 ALR 4th 956.

Right of exonerated arrestee to have fingerprints, photographs or other criminal identification or arrest records expunged or restricted, 46 ALR 3d 900.

Law Reviews.

Comment, Arrest Record Expungement — A Function of the Criminal Court, 1971 Utah L. Rev. 381.

DECISIONS UNDER FORMER LAW

Effect of expungement.

Witness may not be impeached on a prior

conviction of a crime where the record of the conviction has been expunged. *State v. Jones* (1978) 581 P 2d 141.

77-18-3. Disposition of fines. (1) Fines imposed by the district court shall be turned into the county treasury, except such fines as are imposed by the district court in cases appealed from a municipal justice's court, which fines, when collected, shall be by the county clerk covered, one-half into the county treasury and one-half into the treasury of the city or town from which the case was appealed; and except further, such fines as are imposed by the district court in cases appealed from precinct justices' courts, which fines, when collected, shall be covered by the county clerk into the county treasury, and except further as otherwise specifically provided by law.

(2) Fines imposed by the district court in cases appealed from a circuit court shall be paid in their entirety to the state treasury.

History: C. 1953, 77-18-3, enacted by L. 1980, ch. 15, § 2; L. 1981, ch. 90, § 4.

Compiler's Notes.

The 1981 amendment inserted the subsec. (1) designation; deleted "a circuit court or"

date set for the hearing. Any person who may have relevant information about the petitioner may testify at the hearing and the court, in its discretion, may request a written evaluation of the adult parole and probation section of the Utah division of corrections.

(2) If the court finds that the petitioner, for a period of five years in the case of an indictable misdemeanor or felony, or for a period of one year in the case of a misdemeanor, since his release from incarceration or probation, has not been convicted of a felony or of a misdemeanor involving moral turpitude and that no proceeding involving such a crime is pending or being instituted against the petitioner and, further, finds that the rehabilitation of the petitioner has been attained to the satisfaction of the court, it shall enter an order that all records in the petitioner's case in the custody of that court or in the custody of any other court, agency or official, be sealed.

(3) Upon the entry of the order in those proceedings, the petitioner shall be deemed judicially pardoned and the petitioner may thereafter respond to any inquiries relating to convictions of crimes as though that conviction never occurred.

(4) Copies of that order shall be sent to each court, agency or official named in the order.

(5) Inspection of the records shall thereafter be permitted by the court only upon petition by the person who is the subject of those records and only to the persons named in that petition.

Approved March 6, 1973.

CHAPTER 199

H. B. No. 69

(Passed February 2, 1973. In effect February 22, 1973)

POWERS OF BOARDS OF PARDONS

An Act Amending Section 77-45-1, Utah Code Annotated 1953, As Amended By Chapter 197, Laws of Utah 1971, Relating to the Powers of the Board of Pardons; Providing That It Shall Have the Power to Issue Subpoenas, Compel the Attendance of Witnesses and the Production of Books, Papers and Other Documents, and Take the Testimony of Witnesses Under Oath; Providing That the Board of Pardons Shall Appoint A Certified Shorthand Reporter, Establishing That Reporter's Duties and the Manner and Extent of His Compensation; Providing That the Act Shall Not Be Applied Retroactively; Providing a Severability Clause; and Providing That the Act Shall Take Effect Upon Approval.

Be it enacted by the Legislature of the State of Utah:

Section 14. Section amended.

Section 77-15-13, Utah Code Annotated 1953, is amended to read:

77-15-13. Closed examinations.

The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney general, the county attorney, the defendant and his counsel, and the officer having the defendant in custody.

Section 15. Effective date.

This act shall take effect upon approval.

Approved March 19, 1973.

CHAPTER 198

H. B. No. 129

(Passed March 2, 1973. In effect May 8, 1973)

EXPUNGEMENT

An Act Enacting Section 77-35-17.5, Utah Code Annotated 1953; Providing for the Expungement of Court Records After a Hearing in the District Court Under Certain Circumstances; Providing for Notification to other Courts, Agencies and Officials; Providing that After the Expungement, that Person May Respond to Inquiries as Though the Conviction had not Occurred; and Providing that, After that Expungement, Records May Be Inspected Only Upon That Person's Petition.

Be it enacted by the Legislature of the State of Utah:

Section 1. Section enacted.

Section 77-35-17.5, Utah Code Annotated 1953, is enacted to read:

77-35-17.5. Petition for judicial pardon and expungement—Hearing—Requirement of expungement—Copy of order—Inspection of records.

(1) Any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for the expungement of his record in that court. At the time the petition is filed, the court shall set a date for a hearing and notify the prosecuting attorney for the jurisdiction of the pendency of the petition and of the

CHAPTER 23

H. B. No. 64.

(Passed March 11, 1943. In effect May 11, 1943.)

CODE OF CRIMINAL PROCEDURE

An Act Amending Sections 103-22-1 and 103-22-2, Utah Code Annotated 1943, Relating to Exposing to Fire or the Firing of Trees, Shrubs, Brush, Grass, Undergrowth or Crops on Another's Land, Including Livestock and Livestock Products, and Providing That it is a Felony to Intentionally or Maliciously Set Fire to Trees, Shrubs, Brush, Grass, Undergrowth, Livestock, Livestock Products or Crops; Penalties.

Be it enacted by the Legislature of the State of Utah:

Section 1. Section Amended.

Sections 103-22-1 and 103-22-2, Utah Code Annotated 1943, are amended to read as follows:

103-22-1. Exposing Trees, Grass or Crops to Danger by Fire—Penalty.

Any person who negligently or willfully exposes any growing trees, shrubs, brush, grass, undergrowth, cultivated crops, livestock, or livestock products on any lands, public or private, not his own property, to danger of destruction by fire is guilty of a misdemeanor.

103-22-2. Firing Trees, Grass or Crops on Another's Land—Penalty.

Any person who negligently or willfully sets on fire, or causes or procures to be set on fire, any growing trees, shrubs, brush, grass, undergrowth, cultivated crops, livestock or livestock products on any land, public or private, not his own property, is guilty of a misdemeanor. *Provided, however,* that any person who willfully or maliciously commits the aforesaid acts as contained and described in this section, is guilty of a felony.

Approved March 17, 1943.

CHAPTER 24

S. B. No. 47.

(Passed March 11, 1943. In effect March 17, 1943.)

CODE OF CRIMINAL PROCEDURE

An Act Amending Section 105-36-17, Utah Code Annotated 1943, Providing for the Suspension of Sentences and the Suspension of the Imposition of Execution of Sentences, and the Placing of Defendants in Criminal Cases on Probation, and Providing for the Manner of Terminating Such Suspension or Probation.

Be it enacted by the Legislature of the State of Utah:

Section 1. Section Amended.

Section 105-36-17, Utah Code Annotated 1943, is amended to read:

105-36-17. Suspension of Sentence—Vacate Plea—Dismissal.

Upon a plea of guilty or conviction of any crime or offense, if it appears compatible with the public interest, the court having jurisdiction may suspend the imposition or the execution of sentence and may place

the defendant on probation for such period of time as the court shall determine.

The court may subsequently increase or decrease the probation period, and may revoke or modify any condition of probation. While on probation, the defendant may be required to pay, in one or several sums, any fine imposed at the time of being placed on probation; may be required to make restitution or reparation to the aggrieved party or parties for the actual damages or losses caused by the offense to which the defendant has pleaded guilty or for which conviction was had; and may be required to provide for the support of his wife or others for whose support he may be legally liable. Where it appears to the court from the report of the probation agent in charge of the defendant, or otherwise, that the defendant has complied with the conditions of such probation, the court may if it be compatible with the public interest either upon motion of the district attorney or of its own motion terminate the sentence or set aside the plea of guilty or conviction of the defendant, and dismiss the action and discharge the defendant.

Section 2. Effective Date of Act.

This act shall take effect upon approval.

Approved March 17, 1943.

CHAPTER 25

H. B. No. 106.

(Passed March 11, 1943. In effect March 17, 1943.)

CODE OF CRIMINAL PROCEDURE

An Act Amending Section 103-51-18, Utah Code Annotated 1943, Relating to the Crime of Rape and Prescribing the Penalty Thereof.

Be it enacted by the Legislature of the State of Utah:

Section 1. Section Amended.

Section 103-51-18, Utah Code Annotated 1943, is amended to read:

103-51-18. Penalty for Rape.

Rape is punishable as follows:

(a) When the female upon whom the act is committed is under the age of thirteen years, by imprisonment in the state prison, for a term which shall not be less than twenty years and which may be for life.

(b) In all other cases by imprisonment in the state prison not less than ten years.

Section 2. Effective Date of Act.

This act shall take effect upon approval.

Approved March 17, 1943.

CHAPTER 26

S. B. No. 9.

(Passed February 24, 1943. In effect May 11, 1943.)

CORPORATIONS

An Act Amending Section 18-2-17, Utah Code Annotated 1943, Relating to Redemption and Purchase of Preferred Stock of Corporations.

APPENDIX C
OTHER AUTHORITIES

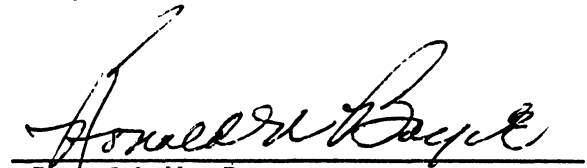
AFFIDAVIT OF RONALD N. BOYCE

PROFESSOR OF LAW

I, Ronald N. Boyce, member of the Supreme Court and Utah State Bar Code of Criminal Procedure Committee, hereby declare and affirm that the following is a true and accurate statement of my opinion and recollection of the intent of the Committee which drafted the present Utah Statute on "Expungement and sealing of records", U.C.A. Section 77-18-2 (1980):

The Committee fully intended to overrule State v. Chambers, 533 P. 2d 876 (Utah 1975), which limited the scope of the expungement statute by its somewhat confusing discussion. Our major concern was with the past offenders' ability to rehabilitate and assimilate back into society by providing employment opportunities for them. Using the Model Rules as a reference, we wanted to remove the attendant disabilities associated with a past conviction, to a certain extent. While we recognized the state's interest in providing security in sensitive government positions, we felt that the decision to re-open sealed records should be made on the basis of what the interest was that motivated the inquiry concerning the prior expunged convictions.

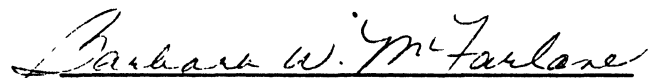
DATED this 30th day of July, 1986.



Ronald M. Boyce

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

SUBSCRIBED AND SWORN to before me this 30th day of
July, 1986.



Notary Public

Residing at:

Salt Lake City, Utah

My Commission Expires:

June 21, 1988

and an attempt to revive an act is invalid in the absence of compliance with such requirements.⁶⁴ Such provisions are not violated by statutes which do not fall within the scope of the evil intended to be prevented,⁶⁵ and are not violated by a separate, distinct, original, and complete legislative enactment,⁶⁶ which does not revive, or attempt or purport to revive, another act.⁶⁷ It has been held that such constitutional provisions apply only to express statutory revivals and not to revivals by operation of law,⁶⁸ or by implication only;⁶⁹ but other authorities take the view that such a provision is effective to prohibit the revival of a statute by the repeal of a statute repealing it.⁷⁰

§ 310. — Effect

A statute revived by a subsequent act is revived in that form and with that effect which it had when it expired.

Where an act is revived by a subsequent act, it is revived precisely in that form and with that effect which it had at the time when it expired.⁷¹ Where a statute, reviving a statute which has been repealed, is itself repealed, the statute which was revived stands as it did before the revival.⁷² The effect of repeal of a proviso in a statute and the enactment of a new proviso in a later statute is a clear expression of a legislative intention that the proviso in the later statute shall remain in force.⁷³

IX. CONSTRUCTION AND OPERATION

A. RULES OF CONSTRUCTION

1. IN GENERAL

§ 311. In General

The purpose of all rules as to the construction of statutes is to discover the true intention of the law. Such rules are useful only in case of doubt, and are never to be used to create doubt but only to remove it.

The purpose of all rules or maxims as to the construction or interpretation of statutes is to discover the true intention of the law,⁷⁴ and the rules or canons of construction are merely aids for as-

64. *Tex.—Thomas v. Groehl*, 222 S. W.2d 625, 147 Tex. 70.
59 C.J. p 943 notes 19-21.

Revival by reference

A repealed law cannot be revived by reference.—*Airey v. Tugwell*, 3 So.2d 99, 197 La. 982.

65. *Ark.—Hollis & Co. v. McCarroll*, 140 S.W.2d 420, 200 Ark. 523—*Taylor v. J. A. Riggs Tractor Co.*, 122 S.W.2d 608, 197 Ark. 383.

Mo.—State ex rel. and to Use of Bair v. Producers Gravel Co., 111 S.W.2d 521, 341 Mo. 1106.

Pa.—In re Hadley, 6 A.2d 874, 336 Pa. 100.

Tex.—Thompson v. United Gas Corp., Civ.App., 190 S.W.2d 504, error refused—*Teal v. State*, Civ.App., 90 S.W.2d 651.

Va.—Town of Falls Church v. Arlington County Board, 184 S.E. 459, 166 Va. 192.

Purpose of provision

(1) Constitutional prohibition against a statute being revived by reference to its title only, and requiring that the statute revived be inserted at length, is intended to prevent covert, incautious, and fraudulent legislation.

Ark.—Taylor v. J. A. Riggs Tractor Co., 122 S.W.2d 608, 197 Ark. 383.
N.J.—Baldwin Lumber-Junction Milling v. Moskowitz, 192 A. 229, 15 N.J.Misc. 438.

(2) Purpose of provision is to give notice to members of the legislature of the subject to be affected by the

proposed act.—*Ex parte Erck*, 128 S. W.2d 1174, 137 Tex.Cr. 67.

(3) Such provision is designed to forbid the joining of diverse or unconnected subjects in one and the same act.—*State ex rel. Oklahoma State Highway Commission v. Horn*, 105 P.2d 234, 187 Okl. 605.

(4) Purpose of provision is to prevent blind legislation.—*Hollis & Co. v. McCarroll*, 140 S.W.2d 420, 200 Ark. 523.

(5) Provision does not require that every act which amends the statutory law shall set out at length the entire law as amended, but was intended to prohibit practice of amending a statute by referring to its title, and by providing that it should be amended by adding to or striking out certain words, or by omitting certain language and inserting in lieu thereof certain other words.—*Ellison v. Texas Liquor Control Board*, Tex.Civ.App., 154 S.W.2d 322, error refused.

(6) Provision was not designed to embarrass legislation or defeat beneficial purpose for which it was adopted.—*Chumbley v. People's Bank & Trust Co.*, 60 S.W.2d 164, 166 Tenn. 35.

66. *Ark.—Grable v. Blackwood*, 22 S.W.2d 41, 180 Ark. 311.

59 C.J. p 943 note 25.

Statute imposing death penalty for robbery with dangerous weapon under certain conditions not only increased the penalty for robbery but also created a new and distinct crime

of robbery with a dangerous weapon and, therefore, it did not fall within the constitutional prohibition against reviving a statute by reference to its title only.—*Hall v. State*, 148 So. 793, 166 Miss. 331.

67. *La.—Campagna v. City of Baton Rouge*, 116 So. 403, 165 La. 974.

59 C.J. p 943 note 26.

Leaving terms of original act intact
The constitutional provision does not apply to statute repealing existing act or definite portion or section thereof or to statute leaving terms of original act intact and merely adding sections thereto or extending, restricting, or postponing its operation.—*Thompson v. United Gas Corp.*, Tex Civ.App., 190 S.W.2d 504, error refused.

68. *Pa.—In re Hadley*, 6 A.2d 874, 336 Pa. 100.

59 C.J. p 943 note 23.

69. *Ark.—Faucette v. Patterson*, 21 S.W. 300, 140 Ark. 628.

70. *Kan.—Renter v. Bauer*, 3 Kan. 503.

Tex.—State Bank of Barksdale v. Cloude, Civ.App., 258 S.W. 248.

71. *U.S.—The Aurora, La.*, 7 Cranc 382, 3 L.Ed. 378.

59 C.J. p 943 note 27.

72. *Ind.—Calvert v. Makepeace Smith* 86.

73. *Md.—Department of Tidewater Fisheries v. Catlin*, 77 A.2d 131.

74. *U.S.—Utah Junk Co. v. Porter*, 66 S.Ct. 889, 328 U.S. 3

certaining legislative intent.⁷⁵ The rules of construction are neither ironclad⁷⁶ nor inflexible,⁷⁷ and must yield to manifestations of a contrary intent.⁷⁸ Such rules are useful only in cases of doubt;⁷⁹ they are never to be used to create doubt, but only to remove it.⁸⁰

90 L.Ed. 1071—*Lambur v. Yates*, C. C.A.Mo., 148 F.2d 137.

Cal.—*Bodinson Mfg. Co. v. California Employment Commission*, 109 P.2d 935, 17 Cal.2d 321.

Del.—*Potter v. Potter*, 2 A.2d 93, 9 W.W.Harr. 487.

Fla.—*American Bakeries Co. v. Haines City*, 180 So. 524, 131 Fla. 790—*Corpus Juris* quoted in *State ex rel. Andrews v. Gray*, 169 So. 501, 518, 125 Fla. 1—*State ex rel. Landis v. De Witt C. Jones*, 147 So. 230, 108 Fla. 613.

Idaho.—*Corpus Juris* cited in *Lebrecht v. Union Indemnity Co.*, 22 P.2d 1066, 1069, 53 Idaho 228.

Ill.—*Corpus Juris* cited in *Illinois Cent. R. Co. v. Franklin County*, 56 N.E.2d 775, 781, 387 Ill. 301.

Ky.—*Barnes v. Anderson Nat. Bank of Lawrenceburg*, 169 S.W.2d 833, 293 Ky. 592, 145 A.L.R. 1066.

Md.—*Corpus Juris* cited in *Powell v. State*, 18 A.2d 587, 589, 175 Md. 399.

Minn.—*Arlandson v. Humphrey*, 27 N.W.2d 819, 224 Minn. 49.

Mo.—*State ex rel. Crutcher v. Koeln*, 61 S.W.2d 750, 332 Mo. 1229.

N.Y.—*Higbee v. Schwartz*, 56 N.Y.S.2d 150, 185 Misc. 28.

Pa.—*Rich v. Meadville Park Theatre Corp.*, 62 A.2d 1, 360 Pa. 338.

59 C.J. p 943 note 29—32 C.J. p 814 note 2—60 C.J. p 1038 note 89—p 1040 note 17.

Purpose of statutory construction is:
(1) To ascertain the sense of statutory language and not to put sense into it.

U.S.—*E. C. Schroeder Co. v. Clifton*, C.C.A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351 and 66 S.Ct. 1353, 328 U.S. 858, 90 L.Ed. 1629, rehearing denied 67 S.Ct. 33, 329 U.S. 821, 91 L.Ed. 699.

N.Y.—*Meltzer v. Koenigsberg*, 99 N.E.2d 679, 302 N.Y. 523.

Okl.—*In re Assessment of Champlin Refining Co.*, 99 P.2d 880, 186 Okl. 625.

(3) To expound and not to improve the statute.—*Gibbs v. State*, 192 So. 514, 29 Ala.App. 113, certiorari denied 193 So. 515, 238 Ala. 592.

75. U.S.—*Polson Logging Co. v. U. S.*, C.C.A.Wash., 160 F.2d 712—*U. S. v. McMenamin*, D.C.Pa., 58 F.Supp. 478.

Ind.—*State ex rel. Milligan v. Ritter's Estate*, 48 N.E.2d 993, 221 Ind. 456.

Minn.—*Arlandson v. Humphrey*, 27 N.W.2d 819, 224 Minn. 49—*Romanchuk v. Plotkin*, 9 N.W.2d 421, 215 Minn. 156—*Board of Education of City of Duluth v. Borgen*, 256 N.W. 894, 192 Minn. 367.

Miss.—*Craig v. Walker*, 2 So.3d 806, 191 Miss. 424.

Mo.—*Noberg v. Montgomery*, 173 S.W.2d 387, 351 Mo. 180.

Nev.—*Ronnow v. City of Las Vegas*, 65 P.2d 133, 57 Nev. 332.

N.M.—*Jannet v. Fullrose, Inc.*, 144 P.2d 145, 47 N.M. 423.

N.Y.—*People v. Koch*, 294 N.Y.S. 987, 250 App.Div. 623.

Or.—*Holman Transfer Co. v. City of Portland*, 249 P.2d 175, rehearing denied 250 P.2d 929.

Pa.—*Rich v. Meadville Park Theatre Corp.*, 62 A.2d 1, 360 Pa. 338.

Ascertainment of legislative intent see *infra* § 322.

"General guide"

"General rules of statutory construction are at best but a very general guide to be used in attempting to ascertain that intent."—*Kenney v. Wolff*, 227 P.2d 285, 290, 102 Cal.App. 2d 132.

"Proliferating a purpose"

Interpretation of a statute has been said to be "the art of proliferating a purpose."—*Universal Camera Corp. v. N. L. R. B.*, 71 S.Ct. 456, 465, 340 U.S. 474, 95 L.Ed. 456—*Brooklyn Nat. Corp. v. C. I. R.*, C.C.A.2, 157 F.2d 450, 451, certiorari denied 67 S.Ct. 96, 329 U.S. 733, 91 L.Ed. 634.

76. Minn.—*Romanchuk v. Plotkin*, 9 N.W.2d 421, 215 Minn. 156.

77. Minn.—*Romanchuk v. Plotkin*, supra—*Board of Education of City of Duluth v. Borgen*, 256 N.W. 894, 192 Minn. 367.

78. Minn.—*Romanchuk v. Plotkin*, 9 N.W.2d 421, 215 Minn. 156.

79. U.S.—*Helvering v. Northwestern Nat. Bank & Trust Co. v. Minneapolis*, C.C.A.8, 89 F.2d 553—*In re Boggs-Rice Co.*, C.C.A.Va., 66 F.2d 855—*U. S. v. McMenamin*, D.C.Pa., 58 F.Supp. 478.

Del.—*Delaware Steeplechase & Race Ass'n v. Wise*, 27 A.2d 357, 2 Terry 587—*Potter v. Potter*, 2 A.2d 93, 9 W.W.Harr. 487.

Fla.—*Corpus Juris* quoted in *State ex rel. Andrews v. Gray*, 169 So. 501, 518, 125 Fla. 1.

Ill.—*Illinois Cent. R. Co. v. Franklin County*, 56 N.E.2d 775, 387 Ill. 301.

Mo.—*Zinn v. City of Steelville*, 173 S.W.2d 398, 351 Mo. 413.

59 C.J. p 944 note 30.

"It is fundamental that the province of construction of statutes lies wholly within the domain of ambiguity."—*Santa Monica Mountain Park Co. v. U. S.*, C.C.A.Cal., 99 F.2d 450, 455, certiorari dismissed 59 S.Ct. 647, 306 U.S. 666, 83 L.Ed. 1062.

"An ambiguous statute calls for every source of interpretative assist-

ance."—*Santa Monica Mountain Park Co. v. U. S.*, supra.

Meaning of words

(1) A court will not refuse to consider persuasive evidence of legislative intention on the ground that reasonable men could not differ as to the meaning of the words used in the statute.—*U. S. v. Dickerson*, Ct.Cl., 60 S.Ct. 1034, 310 U.S. 554, 84 L.Ed. 1356, rehearing denied 61 S.Ct. 53, 311 U.S. 724, 85 L.Ed. 472.

(2) When aid to construction of meaning of words is available, there can be no rule of law which forbids its use, however clear the words may appear on superficial examination.—*U. S. v. American Trucking Ass'n*, App.D.C., 60 S.Ct. 1059, 310 U.S. 534, 84 L.Ed. 1345, rehearing denied 61 S.Ct. 53, 311 U.S. 724, 85 L.Ed. 472.

(3) Danger that courts' conclusion concerning legislative purpose will be unconsciously influenced by judges' own views or by factors not considered by enacting body does not justify acceptance of literal interpretation dogma which withholds from courts available information for reaching correct conclusion.—*U. S. v. American Trucking Ass'n*, supra.

80. U.S.—*U. S. v. Rice*, Okl., 66 S.Ct. 835, 327 U.S. 742, 90 L.Ed. 982—*Mead Corporation v. C. I. R.*, C.C.A.3, 116 F.2d 187—*Santa Monica Mountain Park Co. v. U. S.*, C.C.A.Cal., 99 F.2d 450, certiorari dismissed 59 S.Ct. 647, 306 U.S. 666, 83 L.Ed. 1062—*Helvering v. Northwestern Nat. Bank & Trust Co. of Minneapolis*, C.C.A.8, 89 F.2d 553—*In re Boggs-Rice Co.*, C.C.A.Va., 66 F.2d 855.

Del.—*Delaware Steeplechase & Race Ass'n v. Wise*, 27 A.2d 357, 2 Terry 587—*Potter v. Potter*, 2 A.2d 93, 9 W.W.Harr. 487.

D.C.—*Potomac Electric Power Co. v. Hazen*, 90 F.2d 406, 67 App.D.C. 161, certiorari denied 58 S.Ct. 11, 302 U.S. 692, 82 L.Ed. 535—*Willbur v. U. S. ex rel. C. L. Wold Co.*, 30 F.2d 871, 58 App.D.C. 347.

Fla.—*State ex rel. Ble v. Swope*, 30 So.2d 748, 159 Fla. 18—*Corpus Juris* quoted in *State ex rel. Andrews v. Gray*, 169 So. 501, 518, 125 Fla. 1.

Ill.—*Corpus Juris* cited in *Illinois Cent. R. Co. v. Franklin County*, 56 N.E.2d 775, 387 Ill. 301—*People's Gas Light & Coke Co. v. Ames*, 194 N.E. 260, 359 Ill. 152.

Mo.—*Corpus Juris* cited in *State v. Hallenberg-Wagner Motor Co.*, 108 S.W.2d 398, 400, 341 Mo. 771.

Okl.—*Smith v. Langston*, 230 P.2d 736, 204 Okl. 444.

Importing ambiguity

They cannot be employed for the

Rules as to the construction of statutes cannot be invoked to defeat or destroy natural justice or substantial equities,⁸¹ to impair an existing right,⁸² to work a fraud,⁸³ or to leave a party without a remedy.⁸⁴ A rational, rather than an arbitrary, construction is to be accorded all statutes;⁸⁵ they are not to be given a tortuous or illogical construction,⁸⁶ and the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or hidden sense.⁸⁷ Statutes should be given a practical,⁸⁸ and not a technical,⁸⁹ con-

struction. All statutes are to be construed as intending to favor the public interest.⁹⁰ An intricate and complicated statute should be construed with caution,⁹¹ and nothing decided beyond what necessary to a determination of the particular case.⁹² Generally a statute will not be construed unless its proper construction is involved in the case.⁹³

All the rules should be considered when it is necessary to construe a statute,⁹⁴ and no particular ru-

purpose of importing ambiguity into language where no ambiguity exists.—*Inwall v. Transpacific Lumber Co.*, 108 P.2d 522, 165 Or. 560.

81. Fla.—*Corpus Juris* quoted in *State ex rel. Andrews v. Gray*, 169 So. 501, 518, 125 Fla. 1.

Ind.—*Crowe v. Board of Com'rs of St. Joseph County*, 3 N.E.2d 76, 210 Ind. 404.

Ohio.—*State v. Stone*, 110 N.E. 627, 92 Ohio St. 63.

Effect and consequences of statute as element in determining intention see *infra* § 326.

82. Cal.—*In re Jacobs' Estate*, 223 P. 2d 898, 100 Cal.App.2d 452.

N.Y.—*Federal Land Bank of Springfield v. Pickard*, 9 N.Y.S.2d 636, 169 Misc. 753.

S.D.—*Messersmith v. Stanga*, 21 N.W. 2d 321, 71 S.D. 88.

Technicality in form should not be used to avoid a substantive right.—*Dillard v. Kern County*, 144 P.2d 365, 23 Cal.2d 271, 150 A.L.R. 1048.

Legal or constitutional rights of accused

Statutes should be interpreted so as not to sacrifice the legal or constitutional rights of accused.—*U. S. v. Ganapolski*, D.C.Pa., 72 F.Supp. 982.

83. Wis.—*Jones v. Preferred Accident Ins. Co. of New York*, 286 N.W. 598, 232 Wis. 102.

84. N.Y.—*Hay v. Town of Onondaga*, 87 N.Y.S.2d 473, 194 Misc. 773.

85. Ark.—*Corpus Juris* quoted in *Ledbetter v. Hall*, 87 S.W.2d 996, 998, 191 Ark. 791.

Fla.—*Corpus Juris* quoted in *State ex rel. Andrews v. Gray*, 169 So. 501, 518, 125 Fla. 1.

Mo.—*State ex rel. Spriggs v. Robinson*, 161 S.W. 1169, 253 Mo. 271.

86. N.Y.—*Neddo v. State*, 85 N.Y.S. 2d 54, 194 Misc. 379, affirmed 90 N.Y.S.2d 650, 275 App.Div. 492, affirmed 91 N.Y.S.2d 515, 275 App.Div. 982, affirmed 89 N.E.2d 253, 300 N.Y. 533.

87. U.S.—*Payne v. Ostrus*, C.C.A. Iowa, 50 F.2d 1039, 77 A.L.R. 531.—*Lynch v. Alworth-Stephens Co.*, C.C.A.8, 294 F. 190.

Ind.—*State v. Griffin*, 79 N.E.2d 537, 226 Ind. 279, followed in *State v.*

Harvey, 79 N.E.2d 544, 226 Ind. 292, and *State v. Beavers*, 79 N.E.2d 544, 226 Ind. 293.

Mo.—*Norberg v. Montgomery*, 173 S.W.2d 387, 351 Mo. 180, 60 C.J. p 1038 note 96.

88. Cal.—*California Employment Stabilization Commission v. Municipal Court of City and County of San Francisco*, 145 P.2d 361, 62 Cal.App.2d 781.

Ill.—*People ex rel. Schaefer v. New York, C. & St. L. R. Co.*, 187 N.E. 443, 353 Ill. 518.

Ky.—*Gillis v. Anderson*, 76 S.W.2d 279, 256 Ky. 472.

89. Cal.—*California Employment Stabilization Commission v. Municipal Court of City and County of San Francisco*, 145 P.2d 361, 62 Cal.App.2d 781.

N.Y.—*Astor v. Watson*, 71 N.Y.S.2d 332, affirmed 75 N.Y.S.2d 291, 272 App.Div. 1052, and 75 N.Y.S.2d 296, 272 App.Div. 1052.

Okl.—*Vandeventer v. State*, 79 P.2d 1032, 64 Okl.Cr. 317, reheard 84 P. 2d 819, 65 Okl.Cr. 239—*Staley v. State*, 79 P.2d 818, 64 Okl.Cr. 302, reheard 84 P.2d 813, 65 Okl.Cr. 227.

Where statute is susceptible of two interpretations, particularly in respect to directory or administrative features, less technical construction should be adopted to end of making it possible to obviate unnecessary hardships.—*In re Tartaglione*, D.C.R. I., 8 F.Supp. 212.

90. Ind.—*Miller v. Barton School Tp. of Gibson County*, 30 N.E.2d 967, 215 Ind. 510.

Pa.—*Commonwealth ex rel. Shumaker v. New York & Pennsylvania Co.*, 79 A.2d 439, 367 Pa. 40.

S.D.—*Messersmith v. Stanga*, 21 N.W. 2d 321, 71 S.D. 88.

91. Mo.—*State v. Public Service Commission*, 168 S.W. 1156, 259 Mo. 704.

An unscientific and bungling statute cannot be construed and interpreted by the same strict scientific rules as a consistent and scientific one.—*Reynolds v. Bingham*, 86 N.E. 1131, 193 N.Y. 601—59 C.J. p 944 note 48.

92. Mo.—*State v. Public Service*

Commission, 168 S.W. 1156, 259 Mo. 704.

93. Tenn.—*Saylor v. Trotter*, 255 W. 590, 257 S.W. 93, 148 Tenn. 35, 59 C.J. p 944 note 35.

94. Ark.—*Corpus Juris* cited in *Holt v. Howard*, 175 S.W.2d 38, 385, 206 Ark. 337.

Tenn.—*O. H. May Co. v. Anderson*, 300 S.W. 12, 156 Tenn. 216.

Wash.—*Corpus Juris* quoted in *In re Horse Heaven Irr. Dist.*, 118 P.2 972, 976, 11 Wash.2d 218—*Corpus Juris* cited in *Procter & Gamb' Co. v. King County*, 115 P.2d 96, 966, 9 Wash.2d 655—*Corpus Juris* quoted in *State ex rel. Adjustment Department of Olympia Credit Bureau v. Ayer*, 114 P.2d 168, 9 Wash. 2d 188.

Rules of evidence relating to burden of proof are inapplicable to the interpretation of statutes.—*Wallin v. California Conserving Co.*, D.C. Cal., 74 F.Supp. 182, affirmed, C.C.A. McComb v. Hunt Foods, 167 F.2d 905, certiorari denied 69 S.Ct. 69, 33 U.S. 845, 93 L.Ed. 395.

Rules existing at time of enactment

Statute will be interpreted to accord as nearly as possible with rule existing at time of enactment.—*Heaney v. Borough of Mauch Chunk*, 185 A. 732, 322 Pa. 487.

Act of congress

(1) The meaning to be ascribed to an act of congress can only be derived from a considered weighing of every relevant aid to construction.—*U. S. v. Dickerson*, Ct.Cl., 60 S.Ct. 1034, 310 U.S. 554, 84 L.Ed. 1366, rehearing denied 61 S.Ct. 53, 311 U.S. 724, 85 L.Ed. 472—*U. S. v. Tot*, D.C. N.J., 42 F.Supp. 252, affirmed, C.C.A. 131 F.2d 361, reversed on other grounds 63 S.Ct. 1241, 319 U.S. 463, 87 L.Ed. 1519.

(2) The custom of resorting to state statutes and decisions to give meaning and content to federal statutes is too old, and its use too diversified, to permit the court to say that considerations of nation-wide uniformity must prevail in a particular case over the court's judgment that it is out of harmony with other objectives more important to the legislative purpose.—*Davies Ware-*

shall be approved by the Secretary of Defense. The regulations prescribed by the Secretary of the Treasury pursuant to paragraph 1 hereof shall, so far as practicable, be uniform with the regulations prescribed for the other armed forces.

3. No person shall be entitled to more than one award of the National Defense Service Medal.

4. The National Defense Service Medal may be awarded posthumously.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
April 22, 1953.

EXECUTIVE ORDER 10449

CREATING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE BETWEEN THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY AND CERTAIN OF ITS EMPLOYEES

WHEREAS a dispute exists between the New York, Chicago & St. Louis Railroad Company, a carrier, and certain of its employees represented by the Brotherhood of Railroad Trainmen, a labor organization; and

WHEREAS this dispute has not heretofore been adjusted under the provisions of the Railway Labor Act, as amended; and

WHEREAS this dispute, in the judgment of the National Mediation Board, threatens substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service:

NOW, THEREFORE, by virtue of the authority vested in me by section 10 of the Railway Labor Act, as amended (45 U. S. C. 160), I hereby create a board of three members, to be appointed by me, to investigate the said dispute. No member of the said board shall be pecuniarily or otherwise interested in any organization of employees or any carrier.

The board shall report its findings to the President with respect to the said dispute within thirty days from the date of this order.

As provided by section 10 of the Railway Labor Act, as amended, from this date and for thirty days after the board has made its report to the President, no change, except by agreement, shall be made by the New York, Chicago & St. Louis Railroad Company or its employees

in the conditions out of which the said dispute arose.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
April 24, 1953.

EXECUTIVE ORDER 10450

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States, and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1 In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237¹ of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the

¹ 3 CFR, 1951 Supp., p. 630.

employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order:

And provided further, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field pre-appointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835¹ of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or

¹ 5 CFR, 1947 Supp.

advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion, or financial irresponsibility.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure

which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Com-

mission shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (7) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

Sec. 9. (a) There shall be established and maintained in the Civil Service Commission a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed

by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

Sec. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

Sec. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service

Commission on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least semiannually, on the results of such study, and shall recommend means to correct any such deficiencies or tendencies.

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the

responsibilities assigned to it by subsection (a) of this section.

SEC. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,

April 27, 1953.

EXECUTIVE ORDER 10451

INSPECTION OF CERTAIN RETURNS BY THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES

By virtue of the authority vested in me by sections 55 (a), 508, 603, 729 (a), and 1204 of the Internal Revenue Code (53 Stat. 29, 111, 171, 54 Stat. 989, 1008, 55 Stat. 722; 26 U. S. C. 55 (a), 508, 603, 729 (a), and 1204), it is hereby ordered that until June 30, 1953, any income, excess-profits, declared value excess-profits, capital stock, estate, or gift tax return for any period to and including 1952 shall be open to inspection by the Committee on the Judiciary, House of Representatives, or any duly authorized subcommittee thereof, in connection with the inquiry authorized by the resolution of the Committee adopted January 27, 1953, with reference to the administration of the Department of Justice and the Office of the Attorney General of the United States, subject to the conditions stated in the Treasury decision¹ relating to the inspection of such returns by that Committee, approved by me this date.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,

April 28, 1953.

EXECUTIVE ORDER 10452

PROVIDING FOR THE PERFORMANCE BY THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION OF CERTAIN FUNCTIONS RELATING TO PERSONNEL MANAGEMENT

By virtue of the authority vested in me by the laws of the United States, including section 1753 of the Revised Statutes (5 U. S. C. 631) and the Civil Service Act of January 16, 1883 (22 Stat. 403), and as President of the United States, it is hereby ordered as follows:

SECTION 1. The Chairman of the United States Civil Service Commission shall, in addition to the functions conferred upon him by statute and by

¹ 26 CFR, Part 458.

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

AIDAN R. GOUGH**

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

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

* The author is indebted to Professor Lloyd L. Weinreb of the Harvard Law School for his helpful commentary on this article.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14. IND. ANN. STAT. § 9-3215a (1956).

15. *Ibid.*

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

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

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

I. AN EXAMINATION OF NEED

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

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

18. State of N.Y. Ass'y Bill, Int. No. 235 (3d Rdg. 547, Print. 5363, Rec. 703) (1965).

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

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

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

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

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

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

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

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

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

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

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

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

27. *E.g.*, N.C. GEN. STAT. §§ 13-1 to -10 (1953); TENN. CODE ANN. §§ 16-304, 40-3701 (1955).

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

29. See authorities cited note 23 *supra*.

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

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

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

CAL. WELFARE & INST'NS CODE §§ 1179, 1772 provide that a person honorably discharged from the control of the Youth Authority shall be released from all penalties and disabilities resulting from the offense. Section 1179 operates automatically, while § 1772 requires the discharged offender to petition the court for relief, which may be denied. The apparent overlap of the two sections is not clarified by the statutory language, but it is the interpretation of the Youth Authority that § 1179 applies only to juvenile court commitments and § 1772 only to commitments from criminal courts. Baum, *Wiping Out a Criminal or Juvenile Record*, 40 CAL. S.B.J. 816, 821 (1965). MODEL PENAL CODE § 6.05(3) allows vacation of the conviction of a young adult offender as an alternative to providing that his conviction shall not constitute a disability. 31. 18 U.S.C. § 5021 (1964).

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

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

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

Contra, in the *Matter of Phillips*, 17 Cal. 2d 55, 61, 109 P.2d 344, 348 (1941). [I]t cannot be assumed that the legislature intended that such action by the trial court under [Penal Code] section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42. RUBIN *et al.* at 623, 628.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

60. *Id.* at 1021.

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

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

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

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

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

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

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

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

totals may be faulted for assuming too high a recidivism rate,⁶⁶ yet one study being conducted by the Federal Bureau of Investigation indicates that the rate may be as high as 76% in the case of persons who commit major crimes.⁶⁷ Further, it is apparent that the Federal Bureau of Investigation's base figures are not accurate indices of the incidence of crime and arrest; many police agencies do not report at all, or do so sparsely.⁶⁸ The totals commonly exclude vagrancy, drunkenness, peace disturbance, and other low-order offenses, and they generally do not include arrests of juvenile offenders. The imprecision of our count is obvious, but however imprecise it may be, the conclusion is surely apt that there are millions of persons in the United States who bear the opprobrium of a criminal record despite their reformation and avoidance of further crime.

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

When he is effectively ostracized, the criminal has only two alternatives: he may associate with other criminals, among whom he can find recognition, prestige, and means of further criminality; or he may become disorganized, psychopathic, or unstable. Our actual practice is to permit almost all criminals to return to society, in a physical sense, but to hold them off, make them keep their distance, segregate them in the midst of the ordinary community.⁶⁹

If the offender is to be rehabilitated, two things must be done: he must be made a part of groups emphasizing values conducive to reform and law-abiding conduct, and he must concurrently be alienated from groups whose values are conducive to criminality.⁷⁰ Neither of these goals is furthered by the failure of the law to provide means of restoring status.

66. Note 65 *supra*.

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

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

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

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

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

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

II. THE ANNULMENT OF ADULT CONVICTIONS

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

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

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

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

Interestingly, among the most comprehensive provisions for the cancellation of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

83. Note 16 *supra*.

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

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

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

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

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

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

85. See note 76 *supra*.

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

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

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

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

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

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

89. *Id.* at 206.

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

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

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

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

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

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

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

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

III. EXPUNGEMENT AND THE JUVENILE COURT

A. The Need

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

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

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

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

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

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

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

99. ILL. REV. STAT. ch. 37, 702-8(3) (1965); MINN. STAT. ANN. § 260.161 (Supp. 1965); and N.Y. FAMILY CT. ACT § 784 are typical statutes requiring police department segregation of juvenile files and prohibiting public disclosure. The Minnesota statute has been interpreted as forbidding the furnishing of police records to governmental agencies, at least without court order. 1965 MINN. OPS. ATT'Y GEN. 263-L. A number of states have statutes regulating the taking and transmission of fingerprints and identification photographs in juvenile cases. See MYREN & SWANSON, *POLICE WORK WITH CHILDREN* 77-80 (1962).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

109. Note 98 *supra* and accompanying text.

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

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

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

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

111. Note 35 *supra* and accompanying text.

112. Authority cited note 110 *supra*.

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

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

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

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

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

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

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

116. CAL. PEN. CODE § 459.

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

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

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

B. The Existing Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

123. See note 81 *supra*.

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

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

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

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

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

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

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

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

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

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

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

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

IV. TWO PROPOSED LAWS AND SOME THOUGHTS FOR THE FUTURE

Two recently proposed acts represent especially significant attempts to readjust the status of the reformed first offender: the New York "Amnesty Law for First Offenders" proposed in 1965¹³² and the National Council on Crime and Delinquency's Model Act for the Annulment of a Conviction¹³³.

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

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

130. *Ibid.*

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

132. State of N.Y. Am'y Bill, Int. No. 233 (3d Rdg. 547, Print. 5363, Rec. 705) (1965).

*of Crime.*¹³⁴ The two proposals adopt different means of achieving roughly the same end. Taken in comparison, they point up three of the most pressing considerations of policy that must be met in constructing an expungement law: whether the relief should be automatic or a matter of discretion; whether the record should be required to be revealed in some circumstances; and by what means the purpose of the statute is best achieved.

The New York bill very nearly became law. After passage by both the Assembly and Senate of New York, the act was vetoed by Governor Rockefeller on the ground that it was "unsound" because "too broadly conceived."¹³⁵ The enactment provided for the automatic amnesty of all first offenders—adult, youthful, or juvenile—who had not been convicted of a felony or misdemeanor involving moral turpitude during a "probationary interval" immediately following completion of sentence. Before amnesty could be granted, the offender was to file an affidavit of eligibility in the court of original conviction.¹³⁶ The probationary period was established as five years in the case of felony, three years in the case of misdemeanor, and one year in the case of an adjudication as a youthful offender, wayward minor, or juvenile delinquent.¹³⁷

The act specifically restored to the amnestied first offender his accreditation as a witness, his right of franchise, his right to hold public office, and his right to have issued or reinstated any license granted by federal, state, or municipal authority (provided, of course, that he were otherwise qualified).¹³⁸ The amnestied offender was granted the "absolute right to negate" the fact of his arrest or conviction whenever inquiry was made by either private persons or public authority.¹³⁹ All records including fingerprints, photographs, and the like would be sealed against disclosure by the grant

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

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

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

136. *Id.* at § 90(6).

137. *Id.* at §§ 92(3)-(6).

138. *Id.* at § 92(2).

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

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

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

139. *Id.* at § 93.

140. *Id.* at § 99.

141. *Id.* at §§ 97, 98.

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

143. 8 CRIME & DELINQUENCY 100 (1962).

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

145. *Ibid.*

146. See p. 183 *infra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

150. 8 CRIME & DELINQUENCY 99 (1962).

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

152. *Id.* at 249.

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

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

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

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

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

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

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

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

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

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

V. A SUMMING-UP

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

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

156. Cf. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 545, 590-92 (1960).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We would do well to bear in mind that

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

167. RUBIN *et al.* at 694.

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**MODEL RULES
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authorization to do so shall be obtained from the department's legal advisor or (insert name of other appropriate police or prosecution official).

Model Rules with Commentary

Introduction

These Model Rules set forth guidelines governing the dissemination and retention of arrest and conviction records and record information by law enforcement agencies. Unlike other Model Rules prepared by the Project on Law Enforcement Policy and Rulemaking, they are not aimed principally at the street police officer. They are intended to provide guidance for law enforcement administrators and recordkeeping personnel. They cover an area where law enforcement discretion has, in the past, been virtually unguided by legislative or judicial pronouncement. To the extent practicable they draw upon existing statutes, judicial decisions and agency policies. For the most part, however, no such sources exist and a variety of other material have been relied upon.¹

These Rules have been drafted to provide for the legitimate need of law enforcement agencies to have access to information without violating the rights of privacy of individual citizens. Their major

1. The basic sources employed in formulating these Rules include:

(i) MODEL ADMINISTRATIVE REGULATIONS FOR CRIMINAL OFFENDER RECORD INFORMATION, Technical Memorandum No. 4, March 1972, prepared by Project SEARCH—System for Electronic Analysis and Retrieval of Criminal Histories (hereinafter referred to as SEARCH MODEL REGULATIONS);

(ii) Uniform Juvenile Court Act, approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1968;

(iii) Policies and practices of the police departments of Cincinnati; Dallas; Dayton; District of Columbia; Kansas City, Missouri; Oakland; Phoenix; San Antonio; and San Diego;

(iv) REPORT OF THE COMMITTEE TO INVESTIGATE THE EFFECT OF POLICE ARREST RECORDS ON EMPLOYMENT OPPORTUNITIES IN THE DISTRICT OF COLUMBIA (1967) (commonly and hereinafter referred to as the DUNCAN REPORT) adopted by the District of Columbia Board of Commissioners to govern dissemination of arrest and conviction records;

(v) NATIONAL STRATEGY TO REDUCE CRIME (1973), a summary report of the National Advisory Commission on Criminal Justice Standards and Goals; and

(vi) CRIMINAL JUSTICE SYSTEM (1973), prepared by the National Advisory Commission on Criminal Justice Standards and Goals (hereinafter referred to as the NAC REPORT).

feature is the limitation on dissemination of arrest and conviction record information to prospective employers. This reflects the view that a strong law enforcement interest exists in preserving the confidentiality of such records, particularly when easy access for prospective employers serves to make persons with a criminal history virtually unemployable, and, as such, more likely to continue or resume their criminal activities. Furthermore, it now seems likely that unless law enforcement agencies take positive steps to control the dissemination of arrest and conviction records legislatures and the courts will do so in ways that might harm legitimate law enforcement needs.²

2. Since the publication of the original approved draft of these Rules in May 1973, there have been significant developments in efforts by the Federal government to regulate the dissemination and retention of arrest and conviction records. Although these efforts have not yet reached fruition, they are likely to have a substantial impact on the practices of law enforcement agencies.

Of greatest long-term importance is the legislation now under consideration by the 93d Congress. Two principal bills are Senate Bills 2964 introduced during the administration of then-President Richard M. Nixon (hereinafter referred to as the administration bill) and 2963 (hereinafter referred to as the Ervin bill). The sponsors of this legislation have made it clear that they are not committed to the present language of the bills, but are more concerned with eliciting comments regarding the problems of criminal justice data collection and dissemination and the right to privacy. However, considering the widespread support in the Congress for some kind of legislation to regulate the use of criminal justice data, it is probable that legislation will be forthcoming.

Both bills provide for the *sealing* of a person's criminal record after the person has been free from the supervision of any criminal justice agency for seven years (if convicted of a misdemeanor). In addition, both bills would require *sealing* of a person's records five years from the date of an arrest if no conviction occurs during that period, no prosecution is pending at the end of that period, and the person is not a fugitive. The term *sealing*, as used in both bills, means that the record is to be closed and thereafter made available only for strictly limited purposes (e.g., research, review by the individual), or pursuant to a court order. The administration bill requires a specific determination by the U.S. Attorney General.

Both bills generally limit access to and dissemination of criminal justice record information to criminal justice agencies only, and then only for criminal justice purposes. Exceptions are provided for bona fide research projects, for the individual himself (and his counsel, in the Ervin bill) for the purpose of determining the accuracy of the record, and where required by state or federal statute (or federal executive order, in the administration bill). Both bills also provide procedures for ensuring that record information is secure and accurate. Arrest records must contain the ultimate disposition or current status of the case.

The bills differ in their implementation and control schemes, in the limits placed on the use and dissemination of arrest records, and in provisions permitting the actual destruction of records as opposed to only their sealing. The administration bill places most of the burden of implementation and control on the U.S. Attorney General, while the Ervin bill would establish a new federal agency, the Federal Information Systems Board, to oversee the implementation and functioning of the legislation.

The more objectionable features of the legislation from a law enforcement standpoint are the provisions in the Ervin bill calling for prompt sealing or purging of criminal history record information when the police do not refer the case to the prosecutor or the prosecutor

SECTION I. PRELIMINARY CONSIDERATIONS

For the purposes of these Model Rules, the following definitions are operative.

Rule 101 Definitions.

Arrest Record: A compilation of information, centrally maintained in law enforcement custody, of any arrest or temporary detention of an individual. It also is known as a rap sheet and includes the identity of the person arrested or detained, the

elects not to initiate formal criminal proceedings, strict limitations on the dissemination of arrest record information even to other criminal justice agencies, purging and sealing criminal history records.

However, the set of security and privacy guidelines designed to regulate the dissemination of criminal record and history information which were issued by the U.S. Department of Justice on February 8, 1974 is viewed as the most significant development to date (Federal Register, Volume 39, No. 32, Feb. 14, 1974, pp. 5636 *et seq.*) (hereinafter referred to as the Proposed Rules.) The Law Enforcement Assistance Administration subsequently held public hearings and solicited written comments on the rules. The final regulations are expected to differ in some respects from those proposed, although the substance of the proposed rules will remain largely unchanged.

The Proposed Rules are divided into three parts. Part A consists of general provisions; Part B covers state and local criminal justice information systems; and Part C deals with the federal system and the interstate exchange of criminal justice information.

Part A states that the purpose of the regulations is: to assure that criminal justice information systems are operated in a manner to ensure that adequate provisions are made for: The completeness, integrity, accuracy, system security, and the protection of individual privacy. Proposed Rules § 20.1.

A criminal justice information system involves the equipment, facilities, procedures, etc. for the collection, processing, preservation or dissemination of criminal justice information. *Criminal justice information* includes criminal intelligence information plus information compiled by a criminal justice agency consisting of identification data, notations of arrests, nature and disposition of criminal charges, sentencing, confinement, rehabilitation, pardon and release. Proposed Rules § 20.2(a) (b) (c).

Part B provides that the regulations contained therein apply to manual and automated systems if any part of the system is "funded in whole or in part either directly or indirectly" by the Law Enforcement Assistance Administration under Title I of the Omnibus Crime Control and Safe Streets Act, and to state and local systems which exchange information with any information system operated by the U.S. Department of Justice to the extent that the state or local system participates. Proposed Rules § 20.20(a). Excluded from the operation of Part B are systems employed to identify or apprehend fugitives or wanted persons. Proposed Rules § 20.20(b). (The regulations do not attempt to define such systems.)

Part C applies to all U.S. Department of Justice (e.g., Federal Bureau of Investigation) criminal justice information systems that serve two or more states and to all state and local criminal justice agencies to the extent that they utilize the Department's systems. Part C also applies to both manual and automated systems.

nature of the police contact (*e.g.*, arrest or detention), the charge (if any), and the final disposition or present status of each charge or arrest included in the record. Compilations of general or investigative information (often referred to as *investigative reports* or *statements of facts*), and arrest books, if public records according to state or federal law, are not included within the definition of *arrest record*.

Conviction Record: Any record maintained in law enforcement custody which indicates that the individual who is the subject of the record has been convicted of committing a criminal offense.

Criminal Justice Personnel: Judges, clerks of courts, prosecutors, correctional officers (including officers in juvenile institutions), parole boards and officers, and probation officers.

Juvenile Record: An arrest or conviction record of any person who is defined as a juvenile according to state or federal law.

Law Enforcement Agencies: All local and municipal police departments, sheriffs' departments, and states and federal agencies with criminal law enforcement responsibilities.

Law Enforcement Purposes: The prevention, detection and control of crime, and the identification, location, and apprehension of criminal offenders.

Temporary Detention: A restraint on liberty (such as a *stop*) not resulting in a full-custody arrest and booking.

Commentary

The term *arrest record* includes records of all full-custody arrests and temporary detentions of juveniles as well as of adults. It refers to centrally maintained records which list an arrestee's identity,

Given the expansive nature of the definitions and the broad applicability of the regulations, it is clear that the effects of the rules will be pervasive throughout the criminal justice system. In particular, the effects on law enforcement agencies will be substantial.

Throughout these Model Rules both the Proposed Rules and the pending legislation have been considered. In some instances the language of the Rules has been modified as a result. Occasionally, disagreement has occurred with either the Proposed Rules or the pending legislation. Where this is so, it has been noted in the Commentary. *Agencies are advised to watch for the promulgation of the Proposed Rules in final form and for the possible enactment of federal legislation.*

the date and place of the arrest, the offense(s) and the status or position of the charge(s). The SEARCH Model Regulations similarly limit the definition of arrest record, and California has taken same approach through legislation. Cal. Penal Code § 11120 (1971). Investigative reports are not included in this term and are not covered by these Rules.³

Arrest books are chronological records of all persons incarcerated by law enforcement personnel. If they are public records according to state or federal law (see, *e.g.*, District of Columbia Code § 4-135) and are, therefore, open to inspection by the public or the press, they are outside the scope of these Rules. If they are not public records, they are included within the definition of an *arrest record* and are subject to the Rules.

The term *conviction record* refers to any record which indicates that a person has been convicted of any crime. Often conviction records are the same as updated arrest records, but they also include conviction data on persons summoned to appear to answer criminal charges and never subject to arrest. Originally, the Rules attempted to combine *arrest* and *conviction* records, but it was found that in certain instances agencies may want to distinguish between *arrest records* and *conviction records* for purposes of dissemination outside recipients.

The term *detention* includes, along with *stops*, those full-custody arrests which are promptly followed by release.⁴

3. Law Enforcement agencies need little encouragement to strive for minimal public access to records of this nature. See Kartz, *The Files: Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW. & CONTEMP. PROB. 342, 365 (1966).

See Also, *e.g.*, Dallas, *Guide for the Release of Information Contained in the Files of the Dallas Police Department*, May 1, 1971. Courts have supported these efforts, holding that confidentiality is necessary to protect sources of information and to promote thoroughness of investigations. See, *United States v. Mackey*, 36 F.R.D. 431 (D.D.C. 1965), *aff'd*, 351 F.2d 794 (D. C. Cir. 1965); *People v. Pearson*, 244 P. 2d 35 (Cal. App. 1952); *Public Serv. Mut. Ins. Co. v. Nassau County Fire Marshal*, 55 Misc. 2d 951, 287 N.Y.S. 2d 104 (Sup. Ct. 1967).

4. In some jurisdictions, certain full-custody arrests by statute must be classified as detentions. See, CAL. PENAL CODE § 851.6 which requires that any arrest followed by release because the charge was found to be groundless shall thereafter be termed a "detention."

A *juvenile record* is to be distinguished from records of court proceedings involving juveniles; the latter frequently are treated in statutes providing for eventual sealing or expungement. Few states, however, have similar provisions pertaining to juvenile records maintained by law enforcement agencies, although some states require police to keep juvenile and adult records separate (see, e.g., Missouri Health and Welfare Code § 211.321) and a few provide for return of police records relating to juveniles when the record of court proceedings has been expunged.

Law enforcement agencies include (those) various public agencies which exercise the police function. Excluded are (persons acting as) private detectives, personnel investigators and private security agents.

Law enforcement purposes is a term frequently used by courts to discuss the permissible scope of release of records. It includes those duties normally performed by law enforcement agencies in carrying out the police function.

Criminal justice personnel denotes public officers—other than law enforcement officers—who are part of the system of criminal justice.

SECTION II. SCOPE OF THE RULES

Rule 201 General Rule.

Arrest or conviction records and information contained therein may not be released except as authorized by these Rules.

Commentary

This Rule expressly limits authority to disseminate arrest or conviction records and information contained therein to that provided by the Model Rules.

SECTION III. PERSONS AUTHORIZED TO RELEASE RECORDS AND RECORD INFORMATION

Rule 301 General Rule.

Only departmental personnel expressly authorized by law or by the (insert title of head of agency) pursuant to his authority, may release arrest or conviction records or information contained therein.

Commentary

This Rule requires that authority to release record information be delegated to a specific person or persons. In some cases, authority is provided specifically by law (as in the District of Columbia). In other cases, the head of the agency provides the authorization (as in Dallas). Confidentiality and accountability are more easily ensured by restricting and clearly defining the authority of Department personnel to release records. Cf. SEARCH Model Regulations, Regulation 6.

SECTION IV. PERSONS TO WHOM AND PURPOSES FOR WHICH DISSEMINATION OF ARREST AND CONVICTION RECORD INFORMATION IS AUTHORIZED

Historically, the decision to collect, retain, and release arrest and conviction records has been regarded as being almost exclusively within the scope of law enforcement discretion. Courts generally have recognized that where such records are compiled following a lawful arrest, their retention in confidential files for use as an investigative tool, including dissemination to other law enforcement agencies for such (purposes), is justified in the interest of promoting effective law enforcement. See *Walker v. Lamb*, 259 A.2d 663 (Del. 1969); *Cissell v. Brostron*, 395 S.W.2d 322 (Mo. App. 1965); and *Fernicola v. Keenan*, 39 A.2d 851 (N.J. Chan. 1944). Further, the courts traditionally have refused to interfere with the practice of limiting access to such records to certain persons. See cases cited, Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U.

Chi. L. Rev. 850 (1971). Although records are freely exchanged among law enforcement agencies, certain limits have often been placed on public inspection on the grounds that the public has no right to inspect criminal records maintained by law enforcement agencies. See Cal. Gov't. Code § 6254 (f) (1968); *People v. Wilkins*, 287 P.2d 555 (Cal. App. 1955); Cal. Ops. Att'y Gen. 1 (1960). Recent Congressional legislation has similarly limited the right of public inspection, specifically exempting law enforcement records from the Freedom of Information Act. On the other hand, when release of such records to the public has been challenged as an improper invasion of individual privacy, the majority view has been to reject the contention. See *Purdy v. Mulkey*, 228 So.2d 132 (Fla. App. 1969); *Kolb v. O'Connor*, 142 N.E.2d 818 (Ill. App. 1957); *Voelker v. Tyndall*, 75 N.E.2d 548 (1947).

The retention of arrest and conviction records, and the release of information they contain, only lately have been subject to successful challenge, and then only in a handful of cases generally involving unusual facts. See *United States v. Kalish*, 271 F. Supp. 968 (D.P.R. 1967); *United States v. Jones*, Crim. No. 36388-69 (D.C. Gen. Sess., April 1970) (return of record required after dismissal of charge because of a case of mistaken identity); *Irani v. District of Columbia*, 272 A.2d 849 (D.C. App. 1971) (court may order some relief on affirmative showing of innocence including, perhaps, expungement of arrest record; case remanded to lower court for determination of appropriate relief); *In re Alexander*,⁵ 259 A.2d 592 (D.C. App. 1969) (return of arrest record might be justified in rare cases involving unusual facts); *Henry v. Looney*, 317 N.Y.S.2d 848 (Sup. Ct. Nassau Co. 1971) (arrest record ordered expunged on affirmative

showing of innocence); and *Wheeler v. Goodman*, 306 F. Supp. (W.D. N.C. 1969) (youth of "hippies" arrested under vagrancy statutes and extreme misbehavior of police justified order expunging arrest records), vacated and remanded for reconsideration in light of *Younger v. Harris*, 401 U.S. 987 (1971).

More recent cases, however, have expanded the relatively narrow principles of these decisions. In *Sullivan v. Murphy*, 478 F. 938 (D.C. Cir. 1973), a class action on behalf of persons arrested in connection with May Day demonstrations in the District of Columbia during the week of May 3, 1971, the Court stated that in an act brought to remedy the denial of a federal constitutional right, the Federal Court's "broad and flexible equitable powers call for an order that limits the maintenance and dissemination of the arrest records, and of all materials obtained from persons taken into custody..., in the absence of affirmative evidence produced by the Defendants to demonstrate the existence of probable cause either at the time of the arrest or subsequent thereto." *Id.* at 971. Furthermore, the Court held that when an infringement of constitutional rights is involved the need for an effective remedy is paramount, and a federal court in fashioning such a remedy need not be bound by the law of the jurisdiction where the acts took place (*i.e.*, District of Columbia Code § 4-137, *supra*, note 5.) See also *Davidson v. Dill*, 50 P.2d 157 (Colo. 1972); *Eddy v. Moore*, 487 P.2d 211 (Wash. App. 1971) (requiring return of photos and fingerprints after dismissal of criminal charges in the absence of a compelling showing of necessity to justify retention); and *Gregory v. Litton Systems, Inc.*, 316 F.Supp. 401 (C.D. Cal. 1970) (employer found in violation of Civil Rights Act of 1964 when use of arrest records resulted in discrimination against black job applicant and no business necessity was shown; Court ordered payment of damages and fees, and enjoined defendant from denying employment to job applicants on the basis of arrest not resulting in convictions unless required by national security clearance regulations), *modified*, 472 F.2d 631 (9 Cir. 1972) (injunction vacated as being neither incidental nor necessary to the resolution of the litigation; otherwise judgment affirmed).

There are three principal reasons for this judicial trend

(i) Increasing public concern about the loss of privacy as a "natural by-product of our modern technology," *Davidson v. Dill*, *supra*, at 158;

5. Later is *Spock v. District of Columbia*, 283 A.2d 14 (D. C. App. 1971), and *District of Columbia v. Sophia*, 306 A.2d 652 (D. C. App. 1973). The District of Columbia Court of Appeals held that where an arrest was mistaken and a lack of culpability was affirmatively shown, the proper remedy is not to destroy or seal the record of arrest, but to clarify the record by a notation reflecting the fact that no culpability existed. Furthermore, records already distributed need not be returned provided a suitable exculpatory explanation is sent to all persons and agencies that have received the record or information contained therein. For this latter point see *Sophia*, *id.*, at 654. The Court's rulings are based on § 4-137 of the District of Columbia Code which provides that all records of the Metropolitan Police should be preserved, except that the Board of Commissioners might cause obsolete or useless records to be destroyed.

(ii) The belief that a person with a criminal record is more likely to be subject to police scrutiny and other governmental disadvantages. See cases cited *id.* at 159;

(iii) The economic harm that might inure if the arrest of a person becomes known to present or prospective employers and credit reporting agencies.

Primary concern has focused on the harmful effects of a criminal record upon employment, whether with government or private employers. Documentation of the use of such records to assist in employment decisions is extensive. Perhaps the best known example is the Duncan Report, which examined employment practices in the District of Columbia and found that information on arrest records was supplied to 350 to 400 persons daily by the D.C. Metropolitan Police Department, and that the use of such records very often resulted in denial of employment. See Duncan Report at 6; *cf. Morrow v. District of Columbia*, 417 F.2d 728 (D.C. Cir. 1969). Another study indicated that 75 percent of New York employment agencies surveyed would not even refer someone with an arrest record to a prospective employer. See President's Commission on Law Enforcement & Administration of Justice Report: *The Challenge of Crime in a Free Society* 75 (1967). In still another report it was found that many employers ask a job applicant whether he has ever been "arrested," "detained," or "taken into custody." See Karabian, *Record of Arrest: The Indelible Stain*, 3 Pacific L.J. 20, 32 (1972); *cf. Note, Civil Liability for Illegal Arrests and Confinements in California*, 19 Hastings L.J. 974, n. 17 (1968).

Conviction records also lead to difficulties in obtaining employment. See Schwartz and Skolnick, *Two Studies of Legal Stigma*, 10 Soc. Probs. 133 (1962); *Special Project—The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929, 1001 *et seq.* (1970). See also *The Closed Door: The Effect of a Criminal Record on Employment with State and Local Agencies* (1972) for a recent, comprehensive study on the effect that release of arrest and conviction records has on employment opportunities. (This study is reproduced in *Hearings on H.R. 13315 Before a Subcommittee of the House Comm. on the Judiciary*, 92nd Cong., 2d Sess. (1971).)

Evidence of this concern is found in the summary report of of the National Advisory Commission on Criminal Justice Standards and Goals, *supra*, which contains several recommendations concerning retention and dissemination of criminal offender record information

(including arrest and conviction records as defined herein). The major recommendations of the National Advisory Commission were:

(i) That each state establish through legislation a Security and Privacy Council having the authority to adopt and administer security and privacy standards for criminal justice information systems;

(ii) That strict security and privacy procedures be established to insure that no dissemination of criminal history files occurs outside of government, except in very limited circumstances;

(iii) That all copies of information filed as a result of an arrest which is legally terminated in favor of the individual shall be returned to that individual within sixty days of final disposition, upon order of a court or if requested by the agency which disposed of the case. *Id.* at 58,59.

See the NAC Report for elaboration and explanation of these and additional recommendations.

Clearly developing is the belief that dissemination and retention of arrest record information should be limited and yet consistent with valid law enforcement interests. Some police departments already have acted on their own to restrict the scope of record dissemination, *viz.*, Dallas; the District of Columbia; Kansas City, Missouri; and San Antonio. The Rules in Section IV provide for modernizing record retention and release practices.

Rule 401 General Rule.

Unless otherwise specified by state or federal statute or federal executive order, arrest and conviction records or information contained therein may be released only under the following circumstances:

(i) To law enforcement agencies of any jurisdiction for law enforcement purposes;

(ii) To criminal justice personnel for purposes of executing the responsibilities of their position in a matter relating to the individual whose record is requested;

(iii) To defense counsel for purposes of providing representation in a criminal or juvenile proceeding to the person whose record is requested, upon acceptable proof of that representation;

(iv) To the individual who is the subject of the record requested for purposes of his representing himself in any criminal or juvenile proceeding, or for assisting his counsel in such representation;

(v) To prospective employers, governmental or private, to the extent expressly and specifically required by state or federal statute or federal executive order.

Commentary

This Rule lists those agencies and persons who are permitted access to arrest and conviction records and information contained therein. It also limits the purposes for which access is allowed. The compilation, retention and dissemination of such records is still, in general, recognized as a proper law enforcement function. See *Davidson v. Dill*, *supra*; *Spock v. District of Columbia*, *supra*, note 5; *Morrow v. District of Columbia*, *supra*. Only by curtailing access to such records and record information, however, will this recognition continue to be ensured.

Rule 401 (i) permits the release of records and record information to law enforcement agencies for law enforcement purposes. The Rule agrees with the SEARCH Model Regulations, the Duncan Report, provisions of statutes which apply to the records of various state Bureaus of Criminal Identification, (See Ariz. Rev. Stat. Ann. § 41-1750); the Proposed Rules; the NAC Report, Standard 8.3(4) (to the extent that the record has not been "purged" from the files); and the administration bill. The Ervin bill, however, would limit the dissemination of arrest record data to other law enforcement agencies to certain enumerated purposes, e.g., the individual who is the subject of the record has applied for employment at the requesting agency and the information sought is to be used solely to screen the application. The Rule is substantially similar to the existing policies and practices of Cincinnati; Dallas; Dayton; Kansas City, Missouri; the District of Columbia; Oakland; Phoenix; San Antonio; and San Diego.

Rule 401 (ii) authorizes the release of records and record information to criminal justice personnel and agencies for use in the performance of their official functions while dealing with the individual who is the subject of the record requested. Release to these persons and agencies is generally in accord with the existing policies of the Police Departments on the Project's Advisory Board, although, unlike the Model Rules, *criminal justice personnel* are usually placed

together in one category with *law enforcement agencies*, e.g., as *law enforcement agents* in the Duncan Report, or *criminal justice agencies* in the SEARCH Model Regulations and the Proposed Rules, and in the Dallas and Kansas City, Missouri, Police Departments. The Model Rules have adopted separate categories of *law enforcement agencies* and *criminal justice personnel* (see Section 1(c) and (e)), to permit distinction to be made between the information which may be released to each and the circumstances under which release is authorized. This distinction also gives *law enforcement agencies* its more common meaning.

Some of the purposes for which release of arrest and conviction information may be made to criminal justice personnel are

(i) in deciding whether to charge an individual with an offense;

(ii) in determining the severity of the offense to be charged;

(iii) in deciding whether to arrest or to summon

(iv) in determining whether to release the accused prior to trial or appeal (see, e.g., *Russell v. United States* 402 F.2d 185, 186 (D.C. Cir. 1968));

(v) in impeaching a witness with a prior conviction (see, e.g., *Suggs v. United States*, 407 F.2d 1272 (D.C. Cir. 1969) and *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967));

(vi) in sentencing⁶ (see e.g., *Powell v. State*, 225 P.2d (Ok. App. 1951) and *Murphy v. State*, 40 A.2d 235 (Md. App. 1944); and

(vii) in determining whether to grant parole (see Duncan Report at 16. See also, Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, *supra*, at 855.)

Rule 401 (iii) provides for the release of records or record information to defense counsel upon presentation of proof that the attorney-client relationship exists. Release is limited to the purpose of providing representation in any criminal or juvenile proceeding. This provision is largely in accord with the practice in the District of Columbia. The Kansas City, Missouri, Police Department permits a defense

6. The Administrative Office of the United States Courts has recommended the inclusion of previous arrests not resulting in convictions in presentence reports. *The Presentence Report* at 11 (1965).

attorney to have access to record information if the request is approved by the department's legal advisor. The Dallas Police Department permits a defense attorney to have access to conviction records, but not to arrest records. The SEARCH Model Regulations exclude a defense attorney and legal aid societies from having access to record information. The Ervin bill permits a defense attorney to have access to record information for the purpose of reviewing it for accuracy and compliance with the bill's provisions. The administration bill is silent regarding access to record information by defense counsel, as are the Proposed Rules. Finally, the NAC Report, in Standard 8.4, recommends permitting a defense attorney to examine his client's record upon presentation of a sworn authorization from the client together with proof of identity.

The Model Rules permit a defense attorney to have access to record information because it may be relevant in preparing a defense or in plea bargaining. Moreover, it does not seem necessary to require a defense attorney to seek a court order before being permitted access to the record.

Rule 401 (iv) provides access to record information to the individual who is the subject of the record in cases in which he appears *pro se* in a criminal or juvenile proceeding. No comparable specific provision was found, although several departments seem to follow the Rule under more broadly phrased provisions, e.g., San Antonio; Dayton; and the District of Columbia. In any event access would be permitted pursuant to Rule 402.

As a result of developments occurring since May of 1973, the text of Rule 401 (v) has been altered, and an alternative subsection 401 (v) has been eliminated altogether.

The subsection now permits the dissemination of record information for employment purposes only to the extent that the release is required by state or federal law or by a federal executive order. Previously the subsection permitted release when, in the judgment of an agency head, reasons of national security so required. In the alternate version, it allowed the release of conviction record information for a limited number of years following the conviction.

However, the best policy is for law enforcement agencies to eliminate altogether the voluntary dissemination of record information for employment related purposes. First, the national security situation usually will be covered by statute or executive order; see Exec. Order No. 10, 450, 3 C.F.R. 936 (1953) and *Cole*

v. Young, 351 U.S. 536 (1956). See also Booth, *The Expungement Myth*, 38 L.A.B. Bull. 161, 163 (1963), pointing out that even the sealing of records probably will not prevent the obtaining of record information when a top security clearance is required, and *Gregory v. Litton Systems, Inc.*, *supra*, where the Court made clear its intention not to prohibit the defendant employer from complying with any requirements of national security regulations. Second, all the current and recent efforts at regulating the dissemination of record information severely restrict the use of such information for employment related purposes, including information contained in conviction records. See the Ervin bill, §§ 201(a)(c), 202(a)(b)(1)(c)(1), 204, 207(5)(B)(c); the administration bill, §§ 5(d)(4)(e), 6(d), 8(d); The Proposed Rules, §§ 20.22, 20.33; and the NAC Report, Standard 8.3. Where record information is permitted to be used for employment related purposes, it is (with a few limited exceptions) only pursuant to statutory provisions—state or federal, or both—or federal executive order. Sometimes release would not be permitted at all for employment purposes, notwithstanding contrary statutory provisions, e.g., sealed records under the Proposed Rules § 20.22(b).

The alternative of giving government employers access to records while barring private industry was considered by the Project Advisory Board, but it was felt that the government should not ask private industry to do what it is unwilling to risk doing itself. Except in cases of national security, government, when acting as an employer, is really no different from a private employer. Indeed, it can be argued that government agencies should take a leadership role in hiring selected individuals with a (prior) criminal history, in the hope that private industry will follow suit.

Rule 402 Inspection By the Subject of a Record.

Any person desiring to inspect his own arrest or conviction record shall be allowed to do so for a period of up to (one hour) at the place where the record is kept, provided that he conforms to (insert appropriate application, fee, and identification procedures).

The person may obtain a copy of his record upon payment of (insert a reasonable fee) or may take notes or make a written summary in his own handwriting. If a copy is obtained it shall be clearly identified as such. If a person is unable to inspect his

own record because of illiteracy, he may select a person to provide assistance to him.

[If a person is unable to inspect his own record because he is incarcerated, appropriate arrangements shall be made either to allow him to inspect the record at the place of detention or to allow another person to inspect the record on his behalf.]

Commentary

The right to personal inspection on one's own arrest or conviction records exists now in California, where recently enacted legislation specifically affords this opportunity. Cal. Penal Code §§ 11120-11127 (1971). Similar provisions allowing individual inspection are contained in the SEARCH Model Regulations, Regulation 13; the Ervin bill, § 207; the administration bill, § 6; the Proposed Rules, §§ 20.22(d), 20.34; and the NAC Report, Standard 8.4.

The Model Rule is designed to permit an individual to ascertain if an agency maintains an arrest or conviction record pertaining to him and, if so, to inspect the record for accuracy and completeness. The Rule has been modified to permit an individual to obtain an actual copy of his record, which was not permitted in the original approved draft. This change has been made to bring the Rule into greater compliance with the provisions of the Ervin and administration bills, the Proposed Rules, and the NAC Standards. Also, the revision makes the Rule similar to the policies of San Antonio; Dayton; the District of Columbia; and Kansas City, Missouri,⁷ Police Departments.

A potential problem with permitting an individual to obtain a copy of his record is the possible abuse by prospective employers. They may require the furnishing of a copy of the record as a condition of employment. It was to protect against this possibility that the Rule as previously drafted did not permit an individual to obtain an actual copy of his record. Subsequent developments and reflection have effected modification. There is nothing to prevent a prospective employer from requiring a person to turn over his handwritten notes, and a copy is a more accurate and an easier method for

an individual to obtain record information about himself. The effective protection that can be offered an individual would be enactment of legislation prohibiting or limiting potential employers from seeking arrest or conviction record information from prospective employees. Agency regulation alone can only be of limited effectiveness.

Rule 403 Release to Bona Fide Researchers.

Upon written application and approval thereof by (in title of head of agency or his designee), information contained in arrest or conviction records may be released to bona fide researchers for research purposes, provided they agree not to make public or otherwise to disseminate information that identifies particular individuals or to attempt to contact such individuals.

Commentary

Rule 403 permits the release of record information for bona fide research uses. What is or is not bona fide is, of necessity, left to the judgment of the appropriate agency officials. Presumably they act in good faith in making the determination and will carefully scrutinize the credentials of those seeking access to record data for research purposes.

Affording access to record information can provide an opportunity for important research. See Kogan and Loughery, *Search and Expungement of Criminal Records—The Big Lie*, 61 J. C. L.L. and P.S. 378 (1970). The SEARCH Model Regulations, Ervin bill, the administration bill, the Proposed Rules, and the Report all contain provisions permitting the release of record information for bona fide research purposes.

In many cases aggregate data that does not identify individuals by name will suffice. Where this is true, anonymity of records should be preserved. The Proposed Rules § 20.22(e)(1) prohibit release of record information for research purposes which identify an individual except as authorized by state or federal statute or federal executive order. This approach is rejected by the Model Rules as being too restrictive on research activities. Suppose, for example, that the purpose of the research is to compile aggregate data regarding a particular aspect of arrests made by a law enforcement agency.

7. These are policies that were in effect at the time of the publication of the original approved draft and do not reflect subsequent changes.

being investigated is not one concerning which the law enforcement agency compiles aggregate data, then, if no statute or executive order authorizes the agency to release record information which identifies an individual, the researcher's request must be turned down. Alternatively, the agency must block personal identification data out of its records before permitting the researcher access, or must compile the data itself. Either procedure would be so time consuming of agency resources that refusal of access to the data would be the most likely result.

Rule 404 Release of Juvenile Records.

Juvenile records may be released pursuant to the general provisions of Rule 401, unless otherwise prohibited by law. In addition, the juvenile record of a person who has not reached the age of (eighteen) at the time the record is requested may be released to his parents, guardian, or other duly authorized custodian.

Commentary

Although the emphasis of these Rules is on adult arrest and conviction records, some standards were considered necessary for juvenile records, particularly since most states do not have specific statutes governing dissemination of such records.

Rule 404 allows dissemination of juvenile records to persons authorized to receive records under Rule 401. In addition, custodians of the child, whether parents or institutions, are allowed access—since their custody of the juvenile is for the juvenile's benefit and the information may be helpful to them.

This formulation is taken largely from the Uniform Juvenile Court Act (adopted by the National Conference of Commissioners on Uniform State Laws in July, 1968, and approved by the American Bar Association in August, 1968); from the District of Columbia Code §§ 16.2330 to 2335 (1970), which provides specific rules for the release of law enforcement records relating to juveniles; and from the Duncan Report.

SECTION V. PROCEDURES FOR RELEASE OF RECORDS AND RECORD INFORMATION

Rule 501 Statement of Disposition or Present Status.

No information concerning an arrest or conviction that occurs after (insert effective date of adoption of the Model Rules) shall be released unless it includes a statement of either the final disposition of the matter or the present status of the case if no final disposition has yet been made.

Commentary

Rule 501 provides that information concerning an arrest or conviction may not be released unless the information is complete, i.e., it shows not only that an arrest occurred but also what happened or is happening as a result of the arrest.

It has been estimated that 8.7 million arrests⁸ were made in the United States in 1972, a rate of 43 arrests per 1,000 population. 1972 FBI Uniform Crime Reports, at 31 (hereinafter referred to as UCR). While the UCR makes no estimate of the percentage of arrests followed by formal charging, it does state that 83 percent of those arrested for crime index type offenses⁹ were prosecuted. It is likely that the percentage is less for offenses of a minor nature, i.e., that more persons arrested for felonies are formally charged than those arrested for misdemeanors. Of those who are formally charged many are not convicted. The UCR estimates in one table that out of 1,896,936 persons formally charged, 60.8 percent were found guilty as charged, 4.4 percent were found guilty of a lesser offense, 17.7 percent were referred to juvenile court, and 17.1 percent were acquitted or the charge was dismissed. UCR at 113. One author has estimated that half of the 1,340,000 arrests made in California in 1971 resulted in release without formal charging, dismissal or acquittal. Karabian, *supra*, at 21, n. 1.

8. The term arrest as used in the UCR includes taking into custody, summoning or citing. The 8.7 million arrest figure includes arrests for all offenses except traffic violations.

9. These offenses are: murder, forcible rape, robbery, aggravated assault, burglary, larceny \$50 or over in value, and auto theft, UCR at 1.

In spite of the large number of arrests that do not result in formal charging—much less conviction—it has been suggested that 35 percent of all arrest records do not include any information concerning the final disposition of the case. See President's Commission on Law Enforcement and Administration of Justice: *The Challenge of Crime in a Free Society* 268 (1967). It is not surprising that the widespread release of incomplete records has led to criticism of law enforcement agencies (and efforts to correct the problem). See Hess and LePoole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 *Crime and Delinquency* 494 (1967); Karst, *The Files: Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 *Law and Contemp. Prob.* 342 (1966).

The FBI has recently become concerned with assuring that records submitted to it are kept complete. In a letter dated June 2, 1971, from then-FBI Director J. Edgar Hoover to all law enforcement agencies, the Director asked that "special attention" be given "to the urgent need to report a final disposition for each charge submitted to the FBI . . ." Citing *Gregory v. Litton Systems, Inc.*, *supra*, and *Menard v. Mitchell*, 430 F.2d 486 (D.C. Cir. 1970), *on remand*, 328 F. Supp. 718 (D.D.C. 1971),¹⁰ Mr. Hoover noted that:

[T]here is an answer to this problem, one answer and one only. Report the final disposition in each case at whatever level . . . the public interest in safety from criminal attack demands it, as well as our own interest, and the interests of other elements in the criminal justice system in performing professionally and efficiently toward that same objective.

10. Recently, *Menard* was again the subject of a decision by the District of Columbia Circuit Court of Appeals, *Menard v. Saxbe*, 15 Cr.L. 2105 (Apr. 23, 1974).

On remand, the District Court had refused to order the FBI to remove *Menard's* fingerprint arrest record from its criminal identification files. The Circuit Court, in again remanding the case, directed the District Court to issue an order instructing the Bureau to remove *Menard's* record from its criminal files.

While not determinative of the outcome of the case, it is of interest to note that the Court mentioned the lack of any effort by the Bureau's Identification Division to assure that the information it receives is accurate and complete, or to follow up on the information and amend its records to show the final disposition. The Court did state that this was due primarily to a lack of resources within the Bureau, which emphasizes the dependence of the FBI on local agencies for the accuracy and completeness of its records.

Concern with the problem of inaccurate and incomplete criminal record information is reflected in provisions of the NAIP, Standard 7.5; the Proposed Rules, §§ 20.21, 20.37; the bill, § 206; and, the administration bill, § 7.

Rule 501 is given prospective application only because of the immense administrative burden that would be involved in searching out the final disposition of thousands of old cases. In some instances such information may not be available or, if available, may be difficult to discover. Limiting the Rule to prospective application similar to the approach taken in California where the Cal. Penal §§ 1115 to 1117 (1961) was held to apply only to post-1961 arrests, 53 Cal. Ops. Atty. Gen. 109 (1970). Also prospective in application are the provisions of the Proposed Rules § 20.21 relating to completeness of record information.

The fact that the Rule is prospective does not mean law enforcement agencies should not make every effort to bring records up to date. There is little difference between old and records insofar as the reasons for requiring completeness are concerned, and except for the administrative burden involved, Rule would have been retroactive instead of prospective.

Rule 502 Certification of Purpose; Indemnification.

Any nongovernmental person or agency authorized by Rules to receive information contained in arrest or conviction records shall be furnished such information upon application in writing accompanied by a certification stating:

(i) That the requesting person or agency is familiar with the limited purposes set forth in the policies of (insert name of the releasing agency) for which arrest conviction record information may be used;

(ii) That the information requested will be used solely for these limited purposes and not to harass, degrade, humiliate any person, (nor shall the information be for any employment or related purpose);

(iii) The specific purpose for which the information sought is to be used; and,

(iv) That the requesting person or agency will indemnify the (insert name of the releasing agency) for any liability arising out of the improper use of the information provided.

Commentary

The purpose of requiring a formal certification is threefold. First, it reduces the burden of verifying proper purpose by requiring the agency or person requesting the information to state, in writing, the purpose for which it will be used. Second, it places the onus of demonstrating the propriety of the purpose, and the liability for any improper use of the information, on the requesting agency or person. Third, it creates a written official record—thereby protecting the integrity of the parties involved.

The language of certification is a revision of that contained in the San Diego Police Department's Instruction on Official Department Correspondence. It is very similar to the certification required by Cal. Penal Code § 11105. The indemnification provision was largely taken from a notarized request form used by the City of Spokane, Washington (see Winner, *Police Court Records—Problems Now Confronting Cities in Light of Eddy v. Moore, Municipal Research and Service Center of Washington*) which was in keeping with a unique statutory provision. Wash. Rev. Code Ann. § 72.50.170 established a cause of action to anyone whose record was released in violation of the release statutes. (The statute was repealed in 1972.) In addition to protecting the releasing agency from potential liability, the indemnification provision should assist in assuring that the information is used properly by the requesting person or agency.

Rule 503 Maintaining Records of Persons and Organizations Receiving Information.

A record shall be kept of all persons and organizations receiving information contained in arrest or conviction records, and of the purposes for which such release is authorized. If applicable, the statutory authority under which the information is released shall be indicated.

Commentary

A complete record shall be kept of all persons and agencies to whom arrest and conviction records are released—so that these recipients may be informed of the destruction or closing of a record, of any change in the status of a charge, and of any correction of the record. The Rule insures that the releasing agency can identify those persons to whom records are released, and that release was made within permissible limits.

The SEARCH Model Regulations, Regulation 15, contain a similar provision requiring a listing of agencies to whom criminal offender information is released; the Proposed Rules § 20.22(a)(3) require that releasing agencies maintain a list of all noncriminal justice dissemination being allowed within the state and showing, in addition to the identity of the recipients, the specific purpose and the statutory citation requiring dissemination. Record keeping provisions are also included in the administration bill, § 5(f). The Ervin bill § 301 (c)(8) gives the Board established by the legislation authority to require reports from agencies concerning their collection and dissemination of record information.

Rule 504 Responding to Requests for Non-Releasable Information.

When a request for information contained in arrest and conviction records is received, and the requested information may not be released under these Rules, the following reply shall be made:

The arrest and conviction records of the (insert name of agency) are not public records and are not open to public inspection. As a matter of department policy, release of such records is limited almost entirely to law enforcement agencies and criminal justice personnel. The purpose of this policy is to protect the rights of privacy of individual citizens. Accordingly, the department has not conducted a search of its records for information relating to your request.

Commentary

This Rule requires a standard response for use in denial of access to arrest or conviction record information. This response is to be used for all inquiries where release is not authorized, irrespective of whether or not there is a record for the individual who is the subject of the inquiry. This approach is necessary to implement the department's policy of limiting disclosure. If requesting persons are informed in one case that "the subject has no criminal record" and in another that "the subject's record cannot be released," the nondisclosure policy might be defeated by those sophisticated enough to note the difference in response.

SECTION VI. DESTRUCTION AND CLOSING OF RECORDS

Rule 601 Destruction.

A. General Rule. Unless required by statute or judicial order, arrest or conviction records shall not be physically destroyed until the subject thereof reaches the age of (seventy).

B. Exception. Upon a written determination by the (insert title of the head of agency) that manifest injustice would result from the maintenance of such record, destruction may be authorized.

Commentary

The Model Rules adopt the position that, unless required by law, the destruction of arrest or conviction records is not desirable. A number of considerations have influenced this position. First, it is believed that adoption of and adherence to these Model Rules will vastly reduce the record dissemination abuses which destruction is designed to eliminate. Second, attempts to eliminate every vestige of an actual event seem futile, since an individual's past brushes with the law can very often be reconstructed through indirect sources. See Kogen & Loughery, *supra*. Indelible traces still remain:

(i) Present limitations exist on the success of requesting full return of records distributed to other agencies;

(ii) Employers may ask the employee whether he has ever had an arrest record expunged or destroyed. There may even be available a record of expungement (perhaps sealed). See Note, *Discrimination on the Basis of Arrest Records*, 56 Cornell L. Rev. 470 (1971)¹¹;

(iii) In the case of conviction and actual incarceration, the time served is hard to explain on an employment form asking for past history, see Kogen and Loughery, *supra*, at 385;

11. The Note states that a survey of forms collected in an American Management Association Book of Employment Forms 167-274 (1967) shows that 66 percent of private companies asked whether an applicant for employment had ever been arrested. CORNELL L. REV. at 471, n. 5.

(iv) Certain convicted persons often have to acknowledge their presence in a community by registering with a law enforcement agency, e.g., persons convicted of specified sex offenses are required to register with the county sheriff (Ariz. Rev. Stat. Ann. § 13-1271); and,

(v) Destruction does not erase the memory of persons connected with a given event who may appear later and unexpectedly with their recollection warped to the detriment of the subject individual.

Third, it is unclear that destruction will truly protect the person who was the subject of the destroyed arrest record. As Judge Nebeker notes in his concurring opinion in *Irani v. District of Columbia*, *supra*, at 851, there are numerous circumstances in which a person might have to reveal the fact of arrest regardless of the destruction of his arrest record. Further, the majority opinion in *Irani* expressly states that, absent specific statutory authorization, courts may lack authority to permit persons to give a negative answer to questions concerning their criminal history because the courts have no inherent power to grant those persons immunity from prosecution for perjury or other criminal offenses. Fourth, retention of arrest and conviction records allows for the conduct of research which ultimately may be of service to the criminal justice system. See Kogen & Loughery, *supra*, at 386 n. 33, quoting an extract of a letter from the Director of the Ohio Youth Commission which states: "Many of the psychiatrists and psychologists wish to retain the records for research purposes." Fifth, the availability of the record may be a benefit to the individual in some cases, e.g., where it provides proof that no conviction occurred. *Sterling v. City of Oakland*, 24 Cal. Rptr. 696 (App. 1962). Sixth, and perhaps the most important, the retention of records may be necessary to protect the department and individual officers from civil liability. These records may be material in a civil case tried long after the event. *Spock v. District of Columbia*, *supra*, at 17, expressly notes the possibility of a charge against a police officer as a valid justification for retention of records.

The first optional provision of Rule 601 permits destruction when the subject of a record reaches the age of seventy. This provision reflects a judgment that when a person reaches an advanced age, the likelihood of his engaging in further criminal activity is minimized, and, therefore, the continued maintenance of his records is of

minimal value to the possessing agency. The seventy-year figure is only a suggestion; adopting agencies should feel free to insert any age that they believe to be appropriate.

The second optional provision is intended to permit destruction in those highly unusual situations when none of the reasons militating against destruction are present. The term "manifest injustice" is of necessity rather vague. What is contemplated is a situation such as a record resulting from a clearly mistaken arrest where maintenance of the record—even in closed form—could cause harm to the individual arrested. Instead of attempting to catalogue each of the possible circumstances that might call for destruction, the drafters have chosen to leave the decision to the head of an agency for his case-by-case determination.

Neither the Proposed Rules nor the administration bill contains any provision requiring destruction of records, although both do require that certain records be closed (sealed). The NAC Report, while it contains no recommendations requiring destruction, does suggest that destruction is appropriate in some cases, *e.g.*, records of arrests not followed by conviction. See Standards 7.5 and 8.3. Finally, the Ervin bill contains several provisions requiring either the closing or destruction of records, but sets forth no guidelines regarding which procedure should be employed.

Rule 602 Designation of a Closed Record.

A. **Non-Conviction.** If a person has been arrested and his case has been disposed of in a manner other than by conviction, the record pertaining to that arrest shall be designated a closed record five years after the date of the person's last known arrest or conviction, the last known date that the person was released from any prison or jail, or the last known date that the person was subject to probation or parole, whichever event occurs last in time.

B. **Conviction.** If a person has been arrested and convicted, the record of that conviction shall be designated a closed record ten years after the date of the person's last known arrest or conviction, the last known date that the person was released from any prison or jail, or the last known date that the person was subject to probation or parole, whichever event occurs last in time.

Commentary

As an alternative to requiring physical destruction of records, Rule 602 provides that the arrest or conviction record of a person who has been arrested or convicted be closed if that person stays "clean" for a period of ten years after a conviction or five years after an arrest not resulting in a conviction. The concept of closing records is drawn from the proposed SEARCH Model Regulations, Regulation 12.

In the original approved draft the various provisions dealing with closing of records was made optional. However, developments¹² since May, 1973 have convinced the drafters that it is now necessary to have mandatory closing provisions.

12. The Proposed Rules, the administration bill, the Ervin bill, and the NAC Report each contains mandatory closing (or sealing) provisions. The Proposed Rules § 20.22(b) require that an arrest record be sealed when the arrest does not result in a disposition adverse to the person arrested, or no disposition is provided within five years of the arrest, or upon receiving formal notice from the agency that made the arrest. When a record is sealed it means that dissemination of information contained therein is limited to criminal justice agencies solely for criminal justice purposes, to qualified researchers for research purposes, to the individual himself for purposes of review, and where necessary, to resolve a claim by the subject of a record that it is misleading, inaccurate or incomplete. See Rule 604.

The administration bill, § 9, provides for the sealing of records pursuant to a court order, state or federal statute, or regulations issued by the U.S. Attorney General. At a minimum, the U.S. Attorney General's regulations must provide for sealing a person's records if he has been free from the jurisdiction or supervision of a criminal justice agency for seven years, if previously convicted of a crime permitting the imposition of a sentence in excess of one year; five years if convicted of a crime where the maximum sentence is not greater than one year; five years following an arrest that did not result in a conviction during the period (if no prosecution is pending and the individual is not a fugitive at the end of the period). Access to a sealed record would be permitted for purposes of review by the individual, on the basis of a court order, or pursuant to a specific determination of the U.S. Attorney General.

The Ervin bill, § 206(b), contains similar provisions to the administration bill but, in addition, provides for the sealing of record information in any case where the police do not refer the matter to the prosecutor or where the prosecutor does not commence criminal proceedings. Once a record is sealed, information contained in it may be made available only for research, to the individual or his attorney for review, for an audit, or in response to a court order.

Finally, the NAC Report, Standard 7.5, recommends that information be purged from active files when, because of its age or for other reasons, it is no longer a reliable guide to the subject's present behavior. Specifically, information concerning convictions should be purged ten years following release from supervision if the conviction was for a serious offense; or five years if for a less serious offense, provided the individual remains "clean" for the prescribed period. Purged information is not necessarily destroyed; but may be disseminated only when necessary for in-house custodial activities or the regulatory needs of the Security and Privacy Council, for research, for review by the individual, for adjudication of a claim that the information is inaccurate or incomplete, and to meet the demands of a state statute.

Closing of records can serve many of the functions that destruction is intended to serve, but without the adverse effects on law enforcement that destruction entails. In vetoing a bill passed by the New Jersey legislature (which provided for destruction of arrest records when the arrest did not result in a conviction) the Governor, in his veto message, expressed some of the advantages of closing records compared with destroying them:

The primary objective of any expungement statute is to insulate the person from any disabilities or adverse effects resulting from the information sought to be expunged. The only danger in maintaining arrest records is the possible effects of dissemination of the fact of the arrest or the practical necessity that an arrested person must indicate that he has been arrested on employment applications.

The possible adverse effects of an arrest record can be prevented *without* physically destroying the information or removing it from police files. Police records can be sealed so that there will be no dissemination and provision can be made so that an arrested person, whose arrest record has been sealed, can answer in the negative when an application for employment requests information concerning that arrest. Sealing, therefore, achieves the purpose of both the police and the arrested person. It enables law enforcement agencies to retain the record for their needs and protects the arrested person from the possible adverse effects resulting from the arrest.

Application of Raynor, 303 A.2d 896, 897, 898 (N.J. Sup. Ct., App. Div. 1973).

Shorter time periods prior to (requiring the) closing of records were considered by the drafters and rejected as being unrealistic and unmindful of criminal patterns and activities. H.R. 13315, 92d Cong., Sess. (1972), proposed destruction of arrest records—including those with a disposition of conviction—after a two year “clean” period. It came under heavy criticism from the police community. See, e.g., *Commentary on H.R. 13315*, Police Legal Center, IACP Research Division (1972).

Rule 602 does not distinguish between serious and less serious offenses. To do so would involve administrative judgments perhaps possible with a computerized information system, but otherwise placing a huge burden on law enforcement agencies. Where an

agency's files are computerized, consideration might be given to setting lesser time periods prior to closing of records when conviction is for less serious offenses.

Rule 603 Opening a Closed Record.

A closed arrest or conviction record may be opened if the individual who is the subject of the record is subsequently charged with a crime. If the charge does not result in conviction, the opened record shall be reclosed, but the record of the new charge shall remain open until closed pursuant to Rule 602. If the charge does result in conviction, the opened record will remain open until closed pursuant to Rule 602.

Commentary

Rule 603 provides for reopening a closed record if the subject thereof is later charged with a crime. Reopening is provided for because the subject's entire criminal history may have relevance to the treatment and disposition of the new charge.

Rule 604 Release of a Closed Record.

Information contained in a closed record shall be held in confidence and shall not be released to any person or organization except as follows:

- (i) Where necessary for in-house custodial activities of the department;
- (ii) Where the information is to be used for *bona fide* research purposes as allowed by Rule 403;
- (iii) Where access is allowed by Rule 402 (personal inspection by the subject of the record);
- (iv) Where necessary to permit the adjudication of a claim that the record is inaccurate; and
- (v) Where a statute or court order specifically provides otherwise.

Commentary

The purpose of closing a record is to insulate an individual from the liabilities which normally attach simply due to the existence of arrest or conviction records. The principal justification is that “careful purging programs would contribute significantly to effective programs of rehabilitation.” SEARCH Model Regulations at 53. Where an arrested individual has not previously been convicted of a crime

and his arrest does not culminate in a conviction, closing or expunging his record is required by state or court decision in some jurisdictions. See, e.g., *U.S. v. McLeod*, 385 F.2d 734 (5 Cir. 1967); *U.S. v. Kalish*, *supra*.

Closed records would not be available for dissemination to employers or law enforcement agencies, for example, unless allowed under the exceptions: for in-house custodial activities; *bona fide* research; the individual's own access; adjudication of a claim that the record is inaccurate; and compliance with a statute or court order. These are instances where release is for the subject individual's benefit, or where it poses a minimal threat to his privacy.

Rule 604 permits dissemination of information contained in a closed record under many of the same conditions as the Proposed Rules, the administration bill, the Ervin bill, and the NAC Report. See, *supra*, note 12, for a discussion of the conditions under which dissemination of information contained in closed records is permitted by these proposals.

Rule 605 Notification of Other Agencies.

When a record has been destroyed or deemed closed, all persons or organizations who are known to have a copy of the record shall be notified at the time of destruction or closing and shall be requested to destroy or return all copies of the record.

Commentary

This Rule simply provides that if the records are destroyed or closed, or if release is otherwise limited, all law enforcement agencies to whom such records have been released shall be notified of the requirement. This is similar to California practice. California provides, for example, that when a custodian is informed of a sealing of records which were sent to him by another law enforcement agency, subsequent requests for such records are to be answered with "We have no record on that named individual." 40 Cal. Ops. Atty. Gen. 50 (1962). Similar requirements are imposed by the Ervin bill, § 206.

SECTION VII. PROCEDURES FOR CHALLENGING RECORD CONTENTS

This section is an addendum to the originally approved draft of the Model Rules. A requirement that the subject of a record

be permitted to challenge its contents is included in the Proposed Rules, § 20.22(d); the NAC Report, Standard 8.4; the Ervin bill, § 207; and the administration bill, § 6. The Rules herein are based largely on the recommendations of the NAC Report (which were in turn based on the SEARCH Model Regulations).

Rule 701 Notice of Right To Challenge.

When an individual requests the right to inspect his own record pursuant to Rule 402, he shall be told that he may submit written exceptions to the contents of the record on a form supplied by the agency, challenging its accuracy or completeness.¹³

Commentary

Rule 701 is complimentary of Rule 402. If an individual has the right to inspect his own record, he should also have the right to correct any mistakes therein. The requirement that he be told of this right imposes no great hardship on the agency maintaining the record, and will encourage its exercise. This will be of benefit to both the agency and the individual, as each has an interest in seeing that the record is as accurate as possible. This requirement is taken from the NAC Report, Standard 8.4(2). See also the administration bill, § 6(b) (2) and the Ervin bill, § 207(b) (2).

Exceptions must be made in writing because otherwise administrative review is difficult. To discourage frivolous and untrue claims, the individual or his counsel should be required to affirm that any exceptions are made in good faith and are believed to be accurate. NAC Report, Standard 8.4(2) (f).

Rule 702 Administrative Review of Exceptions.

The completed exception form shall be forwarded to (insert title of appropriate agency official) for review (in accordance with such procedures as the agency may wish to adopt). If the record is found to be accurate no changes shall be made. If inaccuracies or omissions are found they shall be corrected. After the review is completed the individual or his counsel shall be notified in writing of the results.

13. This form should require the individual or his counsel to affirm that the exceptions are made in good faith and that they are true to the best of the individual's knowledge and belief.

Commentary

Rule 702 requires each agency to establish its own internal procedures for reviewing challenges to the contents of its records. Specific procedures have not been addressed in the Rule, except that responsibility for their implementation should be with the one agency official who is most familiar with the agency record practices. Other details of the review procedure will depend on such factors as the size of the agency, the volume of records kept and the number of challenges anticipated, and the resources available to the agency to dispose of record challenges.

Written notification to the individual or his counsel of the results of the review is mandated. This will facilitate any additional review that the individual might wish to pursue, will create a written record for the agency's files, and will assure the individual that his claim has been given proper consideration.

For a further explanation of the requirements of this Rule, see the NAC Report, Standard 8.4(2) (g); the Proposed Rules, Rule 60.22(d); the Ervin bill, § 207(b) (2) (3); and the administration bill, § 6 (e) (f) (g).

Rule 703 Notification of Other Agencies.

When a record has been modified as the result of a challenge, all persons or organizations who are known to have a copy of such record shall be notified that the record has been modified and shall be requested to modify all copies of the record in their possession.

Commentary

This Rule is quite similar to Rule 605 and serves a similar purpose. If an agency's own records are found to be inaccurate or incomplete it is not unreasonable to require that all possible measures be taken to insure that the inaccurate or incomplete information in the hands of others is corrected. This is necessary to be fair to the subject of the record and may be important to whoever holds the accurate or incomplete record. See the commentary to Rule 501, *supra*.

Similar notification requirements are included in the NAC Report, Standard 8.4(2) (g); the Ervin bill, § 207(b) (5) (A) (B); and the administration bill, § 6(e).

SECTION VIII. WHEN FOREGOING RULES MAY BE DISREGARDED

Whenever it appears that any of the foregoing Rules should be modified or disregarded because of special circumstances, specific authorization to do so shall be obtained from the department's legal advisor or (insert name of other appropriate police or prosecution official).

Commentary

Section VIII recognizes that there may be a few unanticipated situations where the application of the foregoing rules will interfere with or impede reasonable law enforcement action. For these unusual circumstances it provides the opportunity for certain designated high officials to suspend application of the Model Rules.

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Report of the President's Task Force on Prisoner Rehabilitation, April 1970

PART I

Introductory

Of the several things America can and should do to reduce the incidence of crime, one with a particularly great potential for reducing it significantly and soon is improving the ways in which the nation's jails and prisons, its juvenile detention homes and training schools, its probation and parole services induce or help or enable criminals and delinquents to become law-abiding men, women and children. This big expensive "correctional system"—which is not a system at all, really, but a fortuitous agglomeration of a Federal system, 50 state systems and well over 3,000 county and municipal systems—has under its authority on any given day something like a million and a half people, and during a year it deals with perhaps twice that many. No one knows how many of them return to the community willing and able, as the result of their contact with corrections, to lead constructive lives; however, there is little doubt that the number, whatever it is, is too small. A substantial part of the correctional population, including perhaps a majority of serious offenders, are people who are being "corrected" for a second or third or fourth time. Furthermore, very many of those repeaters began their criminal careers by committing minor offenses, often when they were not more than 14 or 15 years old.

Those facts define with some precision the two great challenges the correctional system faces: The present safety of the community requires that thousands of dangerous and persistent criminals somehow be steered away from destructive pursuits, and the future safety of the community requires that hundreds of thousands of minor offenders, especially young

ones, be given the opportunity, the means and the desire to choose careers that are not criminal. Moreover, the magnitude of these challenges is increasing year by year not only because the amount of crime is increasing but because throughout the nation police and court operations will be improving; an inevitable consequence of better work by the police and the courts will be more work for corrections. In short, if the correctional system expects to perform only as well during the next few years as it does now, it will have to change considerably. To improve its performance will take great changes, indeed.

Locating specific places in the correctional system where Federal action now, beginning in 1970, can give impetus to such changes was the assignment the President gave this Task Force on Prisoner Rehabilitation.

He instructed us

to review, in broad perspective, what the public and private sectors are now doing in the area of prisoner rehabilitation and to recommend what might be done in the future, providing an overview of problems faced by the ex-offender in order to determine how he could best achieve a lastingly productive and rewarding return to society.

He gave us wide discretion about which aspects of corrections we considered, specifying only that what he particularly wanted was some practical proposals for actions he or the Congress could take at once.

We concluded early that there was no need for us to search for new ideas about rehabilitating prisoners. The voluminous literature on the subject—in the last two and a half years alone, according to the Library of Congress, almost 500 books, articles and monographs on corrections have been published—overflows with excellent ideas that never have been implemented nor, in many cases, even tested. We conceived our task as one of devising mechanisms through which the Federal government might help convert a few of the most promising of those ideas into action. We have made no attempt to be comprehensive, to deal with every aspect of corrections. We have been guided in our selection of what to discuss and what not to by the criterion of immediate feasibility.

We have recommended only such actions as seem to us to be publicly acceptable and financially supportable right now.

Under the circumstances this report may appear to be more a patchwork quilt than a tapestry. However, we believe that our specific recommendations, unrelated to each other as they may seem to be at first glance, have a common general context and that it will be useful for us to describe it briefly.

First, anyone concerned with prisoner rehabilitation also is concerned, perforce, with the reason people commit crimes. Obviously a program designed to restore offenders to the community must be based on some views about why they left the community in the first place. We have no novel thoughts about this much-discussed subject. We simply wish to record our agreement with the National Crime Commission, the Riot Commission, the Violence Commission, and scores of other thoughtful and painstaking analyses, that some of the toughest roots of crime lie buried deep in the social conditions, especially poverty and racial discrimination, that prevail in the nation's inner cities. These conditions not only make it difficult for millions of Americans to share in America's well being, but make them doubt society's good faith toward them, leaving them disposed to flout society. America's benefits must be made accessible to all Americans. How successfully America reduces and controls crime depends, in the end, upon what it does about employment and education, housing and health, areas far outside our present mandate or, for that matter, our particular competence. This is not to say that improvements in the correctional system are beside the point; on the contrary, many more improvements than those we call for in this report are needed, in fact overdue. Our point is that improvements in the correctional system are necessarily tactical maneuvers that can lead to no more than small and short-term victories unless they are executed as part of a grand strategy of improving all the nation's systems and institutions.

Second, perhaps the greatest obstacle to improvement in the correctional system always has been the tendency of much of the public to regard it and treat it as a rug under which to sweep difficult and disagreeable people and problems. The myopia of this attitude scarcely requires demonstration. After all, the overwhelming majority of offenders do not stay under

the correctional rug. Sooner or later, they and their problems emerge and inflict themselves once more upon the community; as a matter of fact, the two-thirds of the correctional population who are on probation or parole are in the community right now in body, if not in spirit. "Community-based corrections" is no visionary slogan but a hard contemporary fact. We support wholeheartedly the proposition that the community is the appropriate place in which to prepare offenders for useful participation in community life. Doubtless the public safety demands that certain dangerous people be kept behind bars, but we think it unlikely that custody in itself helps them learn how to be good citizens in a free society. In any case, a prerequisite of successful community-based corrections is public helpfulness toward offenders. The President put it well in his November 13, 1969 statement on correctional problems:

One of the areas where citizen cooperation is most needed is in the rehabilitation of the convicted criminal. Men and women who are released from prison must be given a fair opportunity to prove themselves as they return to society. We will not insure our domestic tranquility by keeping them at arm's length. If we turn our backs on the ex-convict, then we should not be surprised if he again turns his back on us.

Third, significant improvements in corrections are going to cost large amounts of money—and Federal money at that, since the states and localities barely can meet their present obligations. Because of our instructions to come forth with proposals meant to be adopted at once, we have avoided suggesting anything that would cost large sums in Fiscal Year 1971. However, a Fiscal Year is not long distant when there is no such thing as a commitment to a better correctional system without a concomitant commitment to spend money to get it. What the money is needed for mostly is people; of correctional bricks and mortar there are plenty on the whole—though of course there are in many places antique and squalid jails and prisons that urgently need remodeling or replacing if on no other ground than that of common humanity. But the real shortage in the system is of skilled personnel, particularly in

non-custodial jobs—teachers, therapists, counselors, probation and parole officers. It is a shocking fact that between 80 and 90 percent of the billion dollars or more a year America spends on corrections is spent on custody and its administration. When at most 15 percent of the system's annual budget is spent on what presumably is the system's chief objective, it is small wonder that that objective is all too seldom achieved. Moreover, for most of the people now working in the system, including those in custodial jobs, the pay is far too low, with resulting failure to attract the best people, and training is inadequate with a resulting less-than-optimum performance even by talented and dedicated people. Unless money is found to staff the correctional system adequately with respect to both quantity and quality, even the modest proposals we offer in this report will be difficult to translate into action. A program can be only as effective as the people who operate it.

Fourth and finally, it is probable that no discussion of corrections makes as much sense as it should because there is available so little precise information about correctional successes and failures. Extraordinarily enough, until some three years ago when the National Crime Commission made a survey, no one even knew the size or the composition or the cost of the correctional system in the United States—and most guesses about these matters by knowledgeable people had been so inaccurate that the survey's figures, when they were published, caused general astonishment in the field. Particularly little is known about either the amount or the causes of recidivism. Guesses about the percentage of prison leavers who commit new offenses range from 30 to 70. No one even ventures to guess about the percentage of crimes that are committed by prison leavers. And, most importantly, there is little or no hard information about which offenders repeat and why—or, even more to the point, which offenders do not repeat and why. Until some light is thrown on this last matter, the success of any correctional program will depend at best on intuition rather than on knowledge and planning.

We are reasonably confident that the recommendations in this report are sound, but we would be even more confident if they had arisen not only from our hard thinking and considerable experience, but from solid objective data as well. Indeed, we are sure that many ongoing correctional programs

would be strengthened or altered or abandoned, and many new ones would be organized, if correctional authorities knew a little more about the way offenders of various kinds respond to treatments of various kinds. Therefore, as one early and essential step toward assembling those basic facts about offenders that every correctional authority—and, for that matter, policemen, prosecutor and judge needs—we recommend:

The Law Enforcement Assistance Administration of the United States Department of Justice should proceed at once to put its National Criminal Justice Information and Statistics Service into full operation.

As another early and essential step, we recommend:

The United States Bureau of the Census should in each decennial census make a comprehensive enumeration of institutional inmates, and should make plans to conduct, using sampling procedures, regular interdecennial enumerations of all adjudicated offenders.

A fully operating crime information center will cost a lot of money—though when compared with the billions of dollars a year crime and the efforts to control crime cost America. If such a center makes it possible for not only corrections but every agency of law enforcement and justice to plan and evaluate its works rationally, it will be more than worth its price.

PART II

Jobs and Job Training

A constructive member of the community, by definition, is a working member. A common characteristic of offenders is a poor work record; indeed it is fair to conjecture that a considerable number of them took to crime in the first place for lack of the ability or the opportunity—or both—to earn a legal living. Therefore, satisfying work experiences for institutionalized offenders, including vocational training when needed, and the assurance of decent jobs for released offenders,

should be at the heart of the correctional process. To subject people with poor work habits and a low work motivation to the enforced idleness that prevails in most prisons and all but a few jails, or to the meaningless chores and humiliating working conditions that are characteristic of many prison programs, is simply to reduce further their capacity to derive satisfaction from, or even take part in, workaday community life. And of course the best institutional job and job-training program is futile if it does not lead on the outside to reasonably rewarding jobs.

It is pertinent to note that, when it comes to providing jobs outside, those very entities that are responsible for rehabilitating prisoners, the states and the Federal government, set a most unedifying example. Most states either are barred by statute or bar themselves by habit from hiring ex-offenders. The Federal government let down its bars somewhat a few years ago; it will now hire ex-offenders on an individual basis, if the agency that wants their services presents a strong brief, and after an elaborate and time-consuming screening by the Civil Service Commission. In other words, it is a great deal more trouble to hire an ex-offender than somebody else and, as a general rule, only agencies with a stake in the matter, the Bureau of Prisons or the Law Enforcement Assistance Administration, for example, are willing to take that much trouble regularly.

Surely the very first step toward improving its correctional process that any government—municipal, state or Federal—should take is to allow ex-offenders to be employed by government. The government is scarcely persuasive when it urges industry to adopt employment policies toward ex-offenders that it itself is unwilling to adopt. We recommend:

The United States Civil Service Commission should devise and put into operation a plan to stimulate Federal employment of ex-offenders.

We also recommend:

The National Institute of Law Enforcement and Criminal Justice of the Department of Justice should frame guidelines for state and local governments concerning the employment of ex-offenders.

What is required to make correctional job and job-training programs fruitful is close day-by-day collaboration between correctional agencies on the one hand and industry and labor on the other. The Federal correctional system has been a pioneer in establishing such relationships, and some of the results have been extremely promising, as with the training program for electronic welders operated by Dictograph in the Danbury, Connecticut prison, and a similar program for aircraft sheet-metal workers run by Lockheed in the prison in Lompoc, California.

Some state correctional agencies are beginning to work along the same lines, and this year the Law Enforcement Assistance Administration will fund local and state community-based employment and training programs for offenders to the extent of several hundred thousand dollars.

Taking these good, but small, beginnings as a cue to go farther and faster, we suggest a mechanism that could expand such efforts, coordinate them, bring additional expertise to both economic and correctional planning, disseminate information about programs to correctional authorities throughout the country and to the public, stimulate with ideas and money innovations and experiments, and evaluate ongoing programs. We recommend:

The President should establish a national agency whose function would be to stimulate, in the states and localities particularly, the adoption of programs for the employment and training of criminal offenders.

One form such an agency might take would be a public corporation with a presidentially appointed chairman and half a dozen directors representing industry, labor, voluntary agencies and the public.

One example comes to mind of how such an agency might work. Suppose it learned that the aircraft industry in the Pacific Northwest had projected its labor needs for the next several years as so-and-so many workers of this and that skill. The agency would find out from state and Federal correctional authorities in the area how many offenders might be available during those years for training in those kinds of skills, and broach to leaders of labor and management in the

industry the idea of locating a certain number of training programs in nearby correctional institutions. It would participate in the contractual negotiations leading to such programs between the industry and the correctional authorities, or, if necessary, itself contract to administer the programs. It would make sure that the standards of instruction in the programs were of the same quality as those the industry insisted upon on the outside, and that the working conditions were equivalent to those enjoyed by outside labor. It would preserve a relationship with the programs only until industry and the correctional authorities were able to operate them without its help; it would then withdraw. However, the agency would retain in an obligation to evaluate each program or project so that the experience that it produced was widely available. The industry probably would be willing to pay all or part of the operating costs of the programs; after all, it would have to pay as much or more for training programs elsewhere. The chief cost to the taxpayer would be the agency's overhead expenses.

Some programs might require that ex-prisoners be bonded when they move into certain kinds of jobs. The agency would explore the various ways this might be done, seeking to expand the use of Federal funds to provide back-up financial service.

The agency would by no means confine its activities to programs within institutions but would seek to encourage training and employment programs for prisoners granted work release from institutions, for prisoners in halfway houses and community rehabilitation centers, and for probationers and parolees. Indeed, no matter how effective an employment and training program behind bars may be, one of equivalent quality in the community is bound to be more effective for most offenders. The agency, therefore, would have a particular interest in testing a variety of community-based employment and training programs for offenders.

Another important opportunity at the local level would be for the agency to arrange for the establishment of community workshops and vocational training schools that offenders would be required to attend as a condition of probation or parole or early release from correctional institutions. Such an innovation would reduce the population of institutions, would

be cheaper than institutional placement, and, if used selectively, would better protect the community. Programs and projects of this sort, though initiated by the agency, should be transferred as soon as feasible to local interests to run.

The agency could arrange regional and local conferences on the training and employment of offenders, and thus involve management, labor and the local community in defining and launching local projects. It could also contribute, through public relations programs, to educating the public to special needs and problems of the ex-offender, and the importance of the individual citizen's role in his successful return to the community.

The agency could initiate and support experimentation with a variety of industrial programs in prisons. For example, the time has come for experimentation with a "prevailing wages" or "factory" prison. In establishing such a program, arrangements might be made for prisoners to support their families; or, to pay some of their wages towards the cost of room and board, or for that matter in income taxes. Consideration would have to be given also to grievance procedures and collective bargaining in relation to working conditions in a factory-prison. A factory-prison must not be a "sweat shop."

One distressing holdover in the criminal process from less enlightened times is the "thirty-days or thirty-dollars" kind of sentence in the misdemeanor courts, which means that each year many thousands of petty offenders are imprisoned for lack of money to pay fines—for debt, not to mince words. Often imprisonment causes them to lose their jobs. The agency could stimulate experiments with time payments, with loans to offenders who appeared to be good risks, and with "weekend jailing," which would allow offenders to serve their time in a series of two-day weekends. If such techniques were successful, many misdemeanants could continue to support themselves and their families while paying the price that society exacts from them.

The agency should review jointly with labor and management all laws, regulations and practices concerning the purchase of prison-made products and beyond that look into the possibility of the sale of such products to government agencies and through voluntary non-profit channels for domestic and foreign use.

The agency should encourage and stimulate the employment of selected ex-offenders in correctional work. One place it would appear entirely appropriate for ex-offenders to serve would be on an advisory committee to the agency, which would also include, of course, representatives of other parts of the community. Support should be given to the development of associations of ex-offenders for employment and therapeutic purposes.

The agency should maintain the closest liaison with Federal Prison Industries, Inc. There is larger need for the work of the agency in state and local corrections than in the Federal system, but there is certainly an opportunity to develop experimental models and test them in Federal institutions and programs. It may be that the agency should collaborate with Prison Industries in this regard, or it may be preferable for Prison Industries itself to assume the same functions in the Federal sphere as those we have suggested for the agency at the state and local levels. In any event they should draw strength from each other. One possible source of such strength is the annual dividend to the United States Treasury that Prison Industries declares which in 1969 amounted to \$5 million. Instead of going into the Treasury, this dividend might well be earmarked for use in rehabilitation work. It very likely would be more than enough, for one thing, to fund the agency we have been discussing. We recommend:

The Board of Directors of Federal Prison Industries, Inc. should undertake a study of the ways its annual dividend to the Treasury might be used in the area of prisoner rehabilitation, with special emphasis on job and job-training programs.

Finally, we have no illusion that the recommendations we have made here about employment and training for employment, even if fully implemented, will meet the immediate needs of all offenders. A lamentably large number of members of the correctional population are so educationally deficient, so lacking in self-confidence, so hostile to society, that before they will be able to learn vocational skills, much less work at them as free men, they must undergo extensive schooling and therapy and controlled experiences in commu-

nity living. Enlightened correctional authorities in many localities and states, and in the Federal system, are devoting themselves to these problems. We applaud their efforts and urge that they be given every possible Federal support, by the Department of Justice, of Labor, of Health, Education and Welfare, and on any other agency with technical expertise or funds that can be applied to this all-important purpose. Only to the extent that offenders are made employable can employment programs for them be worthwhile.

PART III

Regional Institutions and Programs

Inefficiency and ineffectiveness due to jurisdictional fragmentation are pervasive and endemic in America's correctional system—as in its entire system of criminal justice. Thousands of administrative units in villages and rural counties are too small to provide any services at all to offenders, and even some of the sparsely populated states cannot afford the facilities and services needed for offenders whose problems are in any way out of the ordinary. At the other end of the spectrum are those big-city, big-state systems that are so grossly overcrowded that their personnel barely manages to keep them going administratively, and has little or no time for any work in the field of rehabilitation. Gross inequality of institutions and services from jurisdiction to jurisdiction is the rule in corrections. One state may be relatively generous to corrections, while its neighbor may be parsimonious to the point of demanding its system show an annual profit. The penal code of one state may be liberal about probation and parole, and that of its neighbor restrictive. The misdemeanants in one county may be put to useful work during their incarceration, while in the adjoining county people serving the same sentences for the same offenses may sit idly in their cells.

The political and financial, not to say the Constitutional, obstacles to converting this vast nest of eels into a rational system are formidable. However, there are few promising and inexpensive steps toward regionalizing or pooling facilities

and services that could be taken right now to eliminate some of the system's anomalies and correct some of its injustices.

Jails

The most glaringly inadequate institution on the American correctional scene is the one that affects more human lives than any other—the jail, be it county or city. According to the report of the Corrections Task Force of the National Crime Commission, there were 3,473 jails in operation in 1966, about three-quarters under county governments, the rest under cities or cities and counties combined. During 1966 the number of persons held for the service of a sentence—as distinct from suspects being detained pre-trial—was 1,016,748 and the average daily population of those serving sentences was 141,303. A jail can be anything from a two-cell hovel in a small rural county to a concrete and glass skyscraper in a big city. Whether it is one or the other of those or, more likely, something in between, more often than not the living conditions within it are squalid, whether because of obsolescence or overcrowding or just plain indifferent housekeeping by the staff. And the vocational, counseling, educational, psychological and even medical services and programs it offers its inmates range from skimpy to nonexistent.

The anomaly of this situation is that offenders who commit small transgressions against society are treated more harshly than those who commit large ones—for, with a few egregious exceptions, both living conditions and correctional programs are far better in state prisons than in county jails. And the pity of the situation is that the small transgressors who make up the bulk of the jail population, many not being as yet confirmed criminals, may well be more susceptible to rehabilitation than prison inmates. We believe that if jails—and juvenile detention homes—did as much as they should do in the way of rehabilitation, a great many fewer young men and women would choose to pursue criminal careers than now do. If prisons confirm many offenders in crime, jails first turn them toward it and, in that sense, are the real “schools of crime.” But be that as it may, the conditions that prevail in many jails are so abominable that they are nothing less than an affront to common humanity, and every American who knows the facts, regard-

less of his philosophy about corrections, must insist they they be drastically bettered. We recommend:

The Federal government, through subsidies, should encourage individual states or combinations of states to establish, by conversion or construction, regional jails of approved standards of construction and operation for persons serving sentences of more than one month or less than one year.

We further recommend:

The Federal government should withhold all subsidies for conversion or construction of correctional facilities of any kind in any state that fails to initiate a program for the establishment of regional short-term institutions where needed.

There are two corollaries to the above.

First, large local jurisdictions should be encouraged, by a system of subsidies and standards, to establish county or metropolitan Departments of Corrections, so that not only jails but also juvenile detention halls and adult and juvenile probation services would be under professional correctional administrators.

Second, every local jurisdiction should be encouraged, again by a system of subsidies and standards, to reduce its local jail population. Two ways of doing this that many jurisdictions already have adopted are to institute special programs for chronic alcoholics, who now make up perhaps half the jail population, and by bail reform, so that as few suspects as possible undergo pre-trial detention for lack of money bail.

Juvenile Detention Homes

To say that juvenile detention facilities in well-organized local jurisdictions are, on the whole, better than adult facilities is not to say much. What is more to the point is that the basic deficiencies of the jail system—overcrowding, obsolete facilities, unprofessional supervision, inadequate programs—can be found in somewhat less aggravated form in the juvenile deten-

tion system as well. And, of course, in those small or poor or callous jurisdictions where there are no separate juvenile detention facilities the situation is far more aggravated.

Part of the solution to this problem, clearly, is to expand programs under which juveniles are released—to their parents, to foster homes, to a social agency of one kind or another—rather than detained. More juvenile officers are detained today than need be. We urge the Law Enforcement Assistance Administration to search with special diligence for programs of release for juveniles, and to fund them generously.

A second part of the solution may be regionalization, as with jails. No doubt removing a child or youth from his family would work a hardship on both him and them, but it is a hardship that can be better borne than the damage an inadequate and squalid local detention home may do him.

In sum, we have only one specific recommendation about juvenile homes other than those we have made out of jails. We recommend:

The Federal government should withhold correctional funds from any jurisdiction that does not have detention facilities that separate juveniles from adults, or at the very least a plan for creating such facilities at once.

Offenders Who Have Been Adjudicated Mentally Abnormal or Deficient

The Joint Information Service of the American Psychiatric Association and the National Association for Mental Health has recently completed a national survey of the resources currently available to meet the needs of adult mentally ill offenders, who always have posed a very difficult problem for the entire criminal justice system.

A significant finding was that nearly 40 percent of all offenders admitted to the state hospitals or psychiatric wards the survey covered were being held for competency determination pending trial. The survey did not inquire into how much of their time the professional staffs in those facilities spent on diagnosis and on testifying at competency hearings, but one can reasonably suppose that it is a substantial enough

percentage to reduce sharply their ability to administer therapy to the offender patients under their care.

We believe that both increased administrative efficiency and improved therapeutic care for offender patients would result from relieving the staffs of treatment facilities of the responsibility for diagnosing those charged with crimes, and lodging it in special community mental health centers. There, the staffs of such centers do the diagnostic work for the courts, and develop experimental programs for dealing with special kinds of mentally ill offenders in collaboration with the police, the courts and corrections. We recommend:

The Federal government should establish centers in selected metropolitan areas for the purpose of providing diagnostic clinical services to both Federal and state courts, and to offenders on probation and parole.

Some offenders who are hospitalized for mental illness are being reasonably well treated in existing state facilities. Others receive little more than bed and board; the psychiatric therapy, the education, the skill training and vocational guidance that have a direct bearing on their behavior after discharge—or, for that matter, on their eligibility for discharge—are inadequate or even lacking altogether. A chief reason for such deficiencies, where they exist, is that many jurisdictions do not have enough offender patients to justify the operation of up-to-date, full service mental health programs and hospitals for them. We recommend:

The Federal government should establish regional mental health programs and institutions for offenders, in which the states should be permitted to board prisoners needing such care at one-half the per capita operating costs, including treatment.

The fifty-fifty figure for cost-sharing is arbitrary, but the principle behind it is not. In our opinion, even if Federal regional mental health facilities were vastly superior to state ones, no state would make much use of them unless lodging a patient in one cost it no more than keeping him in the state.

The Long-Term Tractable Prisoner

In every prison system there is a small percentage of offenders who, although presenting minimal custodial problems, are serving life sentences or their equivalent. Programs of counseling, vocational education and the like are irrelevant as far as they, and the correctional authorities, are concerned. They need constructive employment, but few state prison systems have sufficiently well developed industrial programs to provide it. Moreover, the current trend in many institutions is in the direction of using industries less for productivity than for on-the-job training in preparation for release into the community. We recommend:

The Federal prison system, which has as good a prison industries organization as any in the country, should accept long-term tractable prisoners from the states on a low-cost basis. Existing Federal prisons could become the regional facilities for this kind of prisoner.

A corollary to putting the above proposal into effect would be to divert certain prisoners now in the Federal system to the states. For example, there is a large number of Federal offenders who violated a state law at the same time that they violated a Federal one. We call attention, especially, to those convicted under the Dyer Act, which makes it a Federal offense to transport a stolen vehicle across a state line. More than 3,000 Dyer Act violators are committed annually to the Federal Bureau of Prisons, which is not only inappropriate use of a statute designed to deal with professional car thieves, but also costs the Federal government better than eight million dollars a year. Dyer Act offenders who are not professional criminals or members of car-theft rings should be left to the states to prosecute. The substantial savings made possible could be spent to better purpose on operating regional institutions and programs, which ultimately would be of financial benefit to the states.

A second group that might be diverted from Federal to state facilities are the between one and two thousand Federal prisoners serving sentences of a year or less.

The Narcotic Addict

Though many cities and states have programs of one sort or another for narcotics addicts, and the big states of New York and California, where many of the country's addicts reside, have extensive programs of civil commitment, the extent of the problem is such that much more must be done. Federal help is needed, especially, for those many metropolitan areas where the number of addicts, though large enough to cause serious concern, is not so large as to justify embarking upon the kind of elaborate program of long-term treatment and supervision that experience indicates is essential to making headway against addiction. Regional facilities, each one of which could handle patients from several such areas, appear to be a sensible way to deal with the problem, and the United States Public Health Service, with the great amount of knowledge it has acquired over the years from operating its institutions for addicts in Lexington and Fort Worth, is well suited to fill the gap in those regions where there is as yet little local expertise. We recommend:

The Federal government should establish regional care and treatment programs for narcotic addicts.

Such programs should, of course, be situated in metropolitan areas, perhaps in existing facilities in Veterans Administration hospitals.

Recent legislation that authorizes civil commitment of addicts by United States courts has two serious defects, in our opinion. One is that the program is available only to "first offenders," a term that has little practical meaning when applied to addicts, since as a rule and addict does not come to the attention of the criminal justice system even for the first time until he is a veteran user. The other is that it does not call for intensive post-detoxification supervision, which we believe is essential in any treatment program for addicts. We recommend:

The Federal government should restudy its program for addicts with a view to making it consistent with the best current practice in the field.

The Problem of the Female Long-Term Offender

Only a few states have a large enough number of female prisoners serving long terms to justify establishment of separate, well-staffed institutions. Such states as Idaho, New Mexico and Utah have fewer than fifty such prisoners at any given time; some have scarcely any. The Federal government operates two institutions for females, one in the east and one on the west coast, with none in intermediate locations. In addition, many county jails have female prisoners serving sentences as long as six months to a year under the most inadequate circumstances of housing and program. We recommend:

The Federal Bureau of Prisons should study the need for establishing, in appropriate locations, regional institutions for female prisoners to accommodate such prisoners in institutions with a capacity not to exceed 300 each.

Such institutions should be built or converted at Federal government expense, and the states should be permitted to board female offenders in them at one-half the per capita cost of operation. We note that interstate compact have been negotiated in some regions, but financial, political and administrative difficulties have militated against their successful operation. Some of these problems might be solved, at least in part, by Federal participation in the capital outlays and operating costs.

*PART IV**Toward Community-Based Corrections*

The argument for conducting as much of the correctional process as possible in the community rather than in custodial institutions is a simple one. What is wrong with most offenders is that for any number of good or bad reasons they are unable or unwilling to respect the standards of the community, to adhere to its customs, to fulfill their obligations to

t, or use to advantage the opportunities it provides. Hence "correction" or "rehabilitation" or "reintegration"—use what polysyllable you will—is at bottom a process intended to give offenders the ability and the desire to be good citizens. The difficulty of pursuing this objective in the authoritarian, monotonous and, above all, artificial environment of a jail or prison is obvious; you do not train aviators in submarines. The way to learn how to solve the problems of community living is to tackle them where they exist. The way to learn to understand and appreciate community life is to become immersed in it.

However, if offenders could do this on their own, most of them would not have become offenders in the first place. They need help and supervision, a great deal of both. As things stand now, most of that two-thirds of all offenders who do live in the community—i.e., those on probation and parole—receive little of either. The prime, though not the only, reason for this is numerical. There simply are not enough probation and parole officers. The National Crime Commission suggested that a proper ratio of officers to offenders in a probation or parole service was one to thirty-five. It found that most adults on probation, including felons, reported to officers with caseloads of over 100, and that parole officers and juvenile probation officers were in only slightly better straits, with caseloads that commonly ran around 75. It does not take much of a mathematician to calculate how much time, on the average, an officer with a caseload of 100 can spend on each of his cases during a 175-hour working month—even assuming he writes no pre-sentence reports and does no other paperwork or traveling, which actually consume as much as half of the time of many officers. In this connection, we note that many probation and parole officers spend much of their time on routine investigatory and reporting duties that could be handled just as efficiently by paraprofessionals, thus freeing them for the expert counseling and guidance work they were trained for. We recommend:

The Federal government should grant funds to the states and localities for the training and employment of substantially greater numbers of qualified probation and parole workers, both professional and paraprofessional.

Along with adequate numbers, adequate training is the key to effective programs of probation and parole. Thorough, up-to-date training programs, pre-service and in-service, cost a great deal more money than any small jurisdiction can afford and most large jurisdictions have so far been willing to spend. This is particularly true of in-service programs, which are the best possible means for seeing to it that working professionals keep abreast of new developments in the field and have an opportunity to exchange experiences with colleagues they otherwise might not meet. We recommend:

The Federal government should establish regional training programs to provide continuing in-service training for probation, parole and all other correctional officers.

We further recommend:

The Federal government should promulgate national standards for parole and probation services, and condition its aid to the states and localities on their willingness and ability to meet those standards.

In connection with the last recommendation, we suggest that the American Correctional Association's *Manual of Correctional Standards*, a revised edition of which is now in preparation, might be a useful guide to those entrusted with formulating national correctional standards not only for institutions, but also for services. The accreditation plan for correctional services the Association is now developing also merits Federal attention and, in all likelihood, support.

Probationers and parolees are, of course, people who have been through the full criminal process from arrest through sentencing—and, in the case of parolees, incarceration. There is also a part to play for corrections—or, if "corrections" is the wrong word under the circumstances, for people who also perform correctional services—with respect to certain defendants against whom criminal or delinquency charges have not yet been adjudicated, and sometimes also with respect to their families. This applies especially to children and young people. A prudent rule to follow for those waiting to

conserve both human and fiscal resources, is that whenever an offender, especially a juvenile offender, can be diverted from going through the full criminal process without jeopardizing the safety of the community, he should be. However, this kind of diversion, which, of course, presumes the consent of the offender to a carefully worked out alternative to trial and punishment, is possible only if there is available in the community pre-adjudication services of many kinds: diagnostic, therapeutic, counseling and guidance, educational, employment, the entire spectrum. We recommend:

The Congress should enact legislation and appropriate funds for the creation, within existing community and mental-health facilities, of special units to provide pre-adjudication (as well as post-adjudication) services of all kinds to defendants, and information about defendants to prosecutors and judges, with the object of diverting as many defendants as possible from full criminal process.

We further recommend:

The Federal government should fund an experimental program to determine the effectiveness, first, of pre-trial counseling and supervision of defendants and, second, of deferred adjudication of certain defendants under probation.

One way of stimulating diversion, as California has demonstrated with its "probation subsidy" program, is for states (under the Safe Streets Act) to reimburse local governments operating programs that succeed in keeping both defendants and convicted offenders out of penal institutions.

Juvenile offenders rather commonly, and sometimes adult offenders also, are members of so-called "multi-problem" families—families that have a host of difficulties, financial, medical, marital, criminal, educational and so forth—and are the objects of attention of half a dozen different social agencies, from welfare agencies to the police. It appears probable that the best way to rehabilitate many offenders who are members of such families is to treat the families as a whole, not just the offenders as separate individuals. One program

along these lines that appears promising, though its results are still not conclusive, is the Family Centered Program in Columbus, Ohio, operated by the probation service. It deals with recidivist delinquents in multi-problem families by using intensive case work on the family, coordinating the work of all the agencies that deal with it, and insisting on uniform documentation. It is a kind of experiment that should be tried in other localities. We recommend:

The Federal government should undertake a demonstration project to test the effectiveness of non-institutional therapeutic family-oriented programs for treating offenders from multi-problem families.

In some ways, only an ex-offender can understand fully the problems offenders face upon their return to the community. The use of ex-offenders as counselors to probationers and parolees is already being explored. That exploration should be intensified. We recommend:

The Federal government should extend its support of demonstration projects to test the effectiveness of using ex-offenders as counselors to probationers and parolees.

Finally, as we noted in the introductory part of this report, the feasibility of a comprehensive program of community-based corrections depends on the attitudes of the community itself. The community must be more than passively accepting; it must be actively helpful.

This means that community organizations and agencies of every kind—schools, churches, settlement houses, family services, mental-health clinics and all the rest—must develop a desire to help offenders and an expertise about their special problems, so that a policeman has somewhere else to take a wayward child then to the lock-up, so that a judge can order probation for a person in the reasonable expectation that a wealth of community resources are accessible to that person, so that a parole officer can get the kind of expert help he so often needs.

It means that newspapers, radio and television should expand their interest in corrections to include its workaday

problems and achievements, rather than confine their reporting, as so many do, to scandals and riots and the lapses from grace of “ex-convicts”—a favorite word in the media.

It means that homeowners’ and businessmen’s groups should think about human lives as well as real estate values and the “tone” of their neighborhoods when proposals for halfway houses here or there are made.

It means, as we said at length in Part II, that jobs and training for jobs should be easily accessible to ex-offender’s.

One very specific way of easing an ex-offenders way through life is to make sure that his criminal record is not permanently attached to him. We recommend:

The Federal government should adopt, and urge the states to adopt, legislation that would, with appropriate exceptions, prohibit non-judicial use of a misdemeanant’s criminal record after a defined period of time; in the case of felons, legislation should provide that, after an appropriate period of law-abiding behavior, the supervising agency could recommend pardons for them.

In sum, making a place for ex-offenders in their communities rather than giving them the cold shoulder is one way to help convince them that there is another life besides one of crime.

TWO STUDIES OF LEGAL STIGMA

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Legal thinking has moved increasingly toward a sociologically meaningful view of the legal system. Sanctions, in particular, have come to be regarded in functional terms.¹ In criminal law, for instance, sanctions are said to be designed to prevent recidivism by rehabilitating, restraining, or executing the offender. They are also said to be intended to deter others from the performance of similar acts and, sometimes, to provide a channel for the expression of retaliatory motives. In such civil actions as tort or contract, monetary awards may be intended as retributive and deterrent, as in the use of punitive damages, or may be regarded as a *quid pro quo* to compensate the plaintiff for his wrongful loss. While these goals comprise an integral part of the rationale of law, little is known about the extent to which they are fulfilled in practice. Lawmen do not as a rule make such studies, because their traditions and techniques are not designed for a systematic examination of the operation of the legal system in action, especially outside the courtroom. Thus, when extra-legal consequences—e.g., the social stigma of a prison sentence—are taken into ac-

Revised version of paper read at the Annual Meeting of the American Sociological Association, August, 1960. This paper draws upon materials prepared by students of the Law and Behavioral Science Division of the Yale Law School. We wish to acknowledge the contributions of Michael Meizner, who assisted in the experiment, and especially that of Dr. Robert Wyckoff, who surveyed medical practitioners. We are indebted to Donald T. Campbell and Hanan Selvin for valuable comments and sugges-

¹ Legal sanctions are defined as changes in life conditions imposed through court action.

count at all, it is through the discretionary actions of police, prosecutor, judge, and jury. Systematic information on a variety of unanticipated outcomes, those which benefit the accused as well as those which hurt him, might help to inform these decision makers and perhaps lead to changes in substantive law as well. The present paper is an attempt to study the consequences of stigma associated with legal accusation.

From a sociological viewpoint, there are several types of indirect consequences of legal sanctions which can be distinguished. These include differential deterrence, effects on the sanctionee's associates, and variations in the degree of deprivation which sanction imposes on the recipient himself.

First, the imposition of sanction, while intended as a matter of overt policy to deter the public at large, probably will vary in its effectiveness as a deterrent, depending upon the extent to which potential offenders perceive themselves as similar to the sanctionee. Such "differential deterrence" would occur if white-collar anti-trust violators were restrained by the conviction of General Electric executives, but not by invocation of the Sherman Act against union leaders.

The imposition of a sanction may even provide an unintended incentive to violate the law. A study of factors affecting compliance with federal income tax laws provides some evidence of this effect.² Some respondents reported that they began to cheat on their

² Richard D. Schwartz, "The Effectiveness of Legal Controls: Factors in the Reporting of Minor Items of Income on Federal Income Tax Returns." Paper presented at the annual meeting of the American Sociological Association, Chicago, 1959.

tax returns only *after* convictions for tax evasion had been obtained against others in their jurisdiction. They explained this surprising behavior by noting that the prosecutions had always been conducted against blatant violators and not against the kind of moderate offenders which they then became. These respondents were, therefore, unintentionally educated to the possibility of supposedly "safe" violations.

Second, deprivations or benefits may accrue to non-sanctioned individuals by virtue of the web of affiliations that join them to the defendant. The wife and family of a convicted man may, for instance, suffer from his arrest as much as the man himself. On the other hand, they may be relieved by his absence if the family relationship has been an unhappy one. Similarly, whole groups of persons may be affected by sanctions to an individual, as when discriminatory practices increase because of a highly publicized crime attributed to a member of a given minority group.

Finally, the social position of the defendant himself will serve to aggravate or alleviate the effects of any given sanction. Although all three indirect consequences may be interrelated, it is the third with which this paper will be primarily concerned.

FINDINGS

The subjects studied to examine the effects of legal accusation on occupational positions represented two extremes: lower-class unskilled workers charged with assault, and medical doctors accused of malpractice. The first project lent itself to a field experiment, while the second required a survey design. Because of differences in method and substance, the studies cannot be used as formal controls for each other. Taken together, however, they do suggest that the indirect effects of sanctions can be powerful, that they can produce unintended harm or unexpected benefit, and that the results are re-

lated to officially unemphasized aspects of the social context in which the sanctions are administered. Accordingly, the two studies will be discussed together, as bearing on one another. Strictly speaking, however, each can, and properly should, stand alone as a separate examination of the unanticipated consequences of legal sanctions.

Study I. The Effects of a Criminal Court Record on the Employment Opportunities of Unskilled Workers

In the field experiment, four employment folders were prepared, the same in all respects except for the criminal court record of the applicant. In all of the folders he was described as a thirty-two year old single male of unspecified race, with a high school training in mechanical trades, and a record of successive short term jobs as a kitchen helper, maintenance worker, and handyman. These characteristics are roughly typical of applicants for unskilled hotel jobs in the Catskill resort area of New York State where employment opportunities were tested.³

The four folders differed only in the applicant's reported record of criminal court involvement. The first folder indicated that the applicant had been convicted and sentenced for assault; the second, that he had been tried for assault and acquitted; the third, also tried for assault and acquitted, but with a letter from the judge certifying the finding of not guilty and reaffirming the legal presumption of innocence. The fourth folder made no mention

³ The generality of these results remains to be determined. The effects of criminal involvement in the Catskill area are probably diminished, however, by the temporary nature of employment, the generally poor qualifications of the work force, and the excess of demand over supply of unskilled labor there. Accordingly, the employment differences among the four treatment groups found in this study are likely, if anything, to be *smaller* than would be expected in industries and areas where workers are more carefully selected.

of any criminal record.

A sample of one hundred employers was utilized. Each employer was assigned to one of four "treatment" groups.⁴ To each employer only one folder was shown; this folder was one of the four kinds mentioned above, the selection of the folder being determined by the treatment group to which the potential employer was assigned. The employer was asked whether he could "use" the man described in the folder. To preserve the reality of the situation and make it a true field experiment, employers were never given any indication that they were participating in an experiment. So far as they knew, a legitimate offer to work was being made in each showing of the folder by the "employment agent."

The experiment was designed to determine what employers would do in fact if confronted with an employment applicant with a criminal record. The questionnaire approach used in earlier studies⁵ seemed ill-adapted to the problem, since respondents confronted with hypothetical situations might be particularly prone to answer in what they considered a socially acceptable manner. The second alternative—studying job opportunities of individuals who had been involved with the law—would have made it very difficult to find comparable groups of applicants and potential employers. For these reasons, the field experiment reported here was utilized.

Some deception was involved in the

study. The "employment agent"—the same individual in all hundred cases—was in fact a law student who was working in the Catskills during the summer of 1959 as an insurance adjuster. In representing himself as being both an adjuster and an employment agent, he was assuming a combination of roles which is not uncommon there. The adjuster role gave him an opportunity to introduce a single application for employment casually and naturally. To the extent that the experiment worked, however, it was inevitable that some employers should be led to believe that they had immediate prospects of filling a job opening. In those instances where an offer to hire was made, the "agent" called a few hours later to say that the applicant had taken another job. The field experimenter attempted in such instances to locate a satisfactory replacement by contacting an employment agency in the area. Because this procedure was used and since the jobs involved were of relatively minor consequence, we believe that the deception caused little economic harm.

As mentioned, each treatment group of twenty-five employers was approached with one type of folder. Responses were dichotomized: those who expressed a willingness to consider the applicant in any way were termed positive; those who made no response or who explicitly refused to consider the candidate were termed negative. Our results consist of comparisons between positive and negative responses, thus defined, for the treatment groups.

Of the twenty-five employers shown the "no record" folder, nine gave positive responses. Subject to reservations arising from chance variations in sampling, we take this as indicative of the "ceiling" of jobs available for this kind of applicant under the given field conditions. Positive responses by these employers may be compared with those in the other treatment groups to obtain

⁴ Employers were not approached in preselected random order, due to a misunderstanding of instructions on the part of the law student who carried out the experiment during a three and one-half week period. Because of this flaw in the experimental procedure, the results should be treated with appropriate caution. Thus, chi-squared analysis may not properly be utilized. (For those used to this measure, $P < .05$ for table 1.)

⁵ Sol Rubin, *Crime and Juvenile Delinquency*, New York: Oceana, 1958, pp. 151-156.

an indication of job opportunities lost because of the various legal records.

Of the twenty-five employers approached with the "convict" folder, only one expressed interest in the applicant. This is a rather graphic indication of the effect which a criminal record may have on job opportunities. Care must be exercised, of course, in generalizing the conclusions to other settings. In this context, however, the criminal record made a major difference.

From a theoretical point of view, the finding leads toward the conclusion that conviction constitutes a powerful form of "status degradation"⁶ which continues to operate after the time when, according to the generalized theory of justice underlying punishment in our society, the individual's "debt" has been paid. A record of conviction produces a durable if not permanent loss of status. For purposes of effective social control, this state of affairs may heighten the deterrent effect of conviction—though that remains to be established. Any such contribution to social control, however, must be balanced against the barriers imposed upon rehabilitation of the convict. If the ex-prisoner finds difficulty in securing menial kinds of legitimate work, further crime may become an increasingly attractive alternative.⁷

Another important finding of this study concerns the small number of positive responses elicited by the "accused but acquitted" applicant. Of the twenty-five employers approached with this folder, three offered jobs. Thus, the individual accused but acquitted of assault has almost as much trouble finding even an unskilled job as the one who was not only accused of the same offense, but also convicted.

From a theoretical point of view, this result indicates that permanent lowering of status is not limited to those explicitly singled out by being convicted of a crime. As an ideal outcome of American justice, criminal procedure is supposed to distinguish between the "guilty" and those who have been acquitted. Legally controlled consequences which follow the judgment are consistent with this purpose. Thus, the "guilty" are subject to fine and imprisonment, while those who are acquitted are immune from these sanctions. But deprivations may be imposed on the acquitted, both before and after victory in court. Before trial, legal rules either permit or require arrest and detention. The suspect may be faced with the expense of an attorney and a bail bond if he is to mitigate these limitations on his privacy and freedom. In addition, some pre-trial deprivations are imposed without formal legal permission. These may include coercive questioning, use of violence, and stigmatization. And, as this study indicates, some deprivations not under the direct control of the legal process may develop or persist after an

⁶ Harold Garfinkel, "Conditions of Successful Degradation Ceremonies," *American Journal of Sociology*, 61 (March, 1956), pp. 420-24.

⁷ Severe negative effects of conviction on employment opportunities have been noted by Sol Rubin, *Crime and Juvenile Delinquency*, New York: Oceana, 1958. A further source of employment difficulty is inherent in licensing statutes and security regulations which sometimes preclude convicts from being employed in their pre-conviction occupation or even in the trades which they may have acquired during imprisonment. These effects may, however, be counteracted by bonding arrangements, prison associations, and publicity programs aimed at increasing confidence in, and sympathy for, exconvicts. See also, B. F. McSally, "Finding Jobs for Released Offenders," *Federal Probation*, 24 (June, 1960), pp. 12-17; Harold D. Lasswell and Richard C. Donnelly, "The Continuing Debate over Responsibility: An Introduction to Isolating the Condemnation Sanction," *Yale Law Journal*, 68 (April, 1959), pp. 869-99; John Andeneas, "General Prevention—Il-lusion or Reality?," *J. Criminal Law*, 43 (July-August, 1952), pp. 176-98.

TABLE 1.
EFFECT OF FOUR TYPES OF LEGAL FOLDER ON JOB OPPORTUNITIES
(IN PER CENT)

	No record	Acquitted with letter	Acquitted with- out letter	Convicted	Total
	(N=25)	(N=25)	(N=25)	(N=25)	(N=100)
Positive response	36	24	12	4	19
Negative response	64	76	88	96	81
Total	100	100	100	100	100

official decision of acquittal has been made.

Thus two legal principles conflict in practice. On the one hand, "a man is innocent until proven guilty." On the other, the accused is systematically treated as guilty under the administration of criminal law until a functionary or official body—police, magistrate, prosecuting attorney, or trial judge or jury—decides that he is entitled to be free. Even then, the results of treating him as guilty persist and may lead to serious consequences.

The conflict could be eased by measures aimed at reducing the deprivations imposed on the accused, before and after acquittal. Some legal attention has been focused on pre-trial deprivations. The provision of bail and counsel, the availability of habeas corpus, limitations on the admissibility of coerced confessions, and civil actions for false arrest are examples of measures aimed at protecting the rights of the accused before trial. Although these are often limited in effectiveness, especially for individuals of lower socioeconomic status, they at least represent some concern with implementing the presumption of innocence at the pre-trial stage.

By contrast, the courts have done little toward alleviating the post-acquittal consequences of legal accusation. One effort along these lines has been employed in the federal courts, however. Where an individual has been accused and exonerated of a crime, he may petition the federal courts for a "Certificate of Innocence" certifying

this fact.⁸ Possession of such a document might be expected to alleviate post-acquittal deprivations.

Some indication of the effectiveness of such a measure is found in the responses of the final treatment group. Their folder, it will be recalled, contained information on the accusation and acquittal of the applicant, but also included a letter from a judge addressed "To whom it may concern" certifying the applicant's acquittal and reminding the reader of the presumption of innocence. Such a letter might have had a boomerang effect, by reemphasizing the legal involvement of the applicant. It was important, therefore, to determine empirically whether such a communication would improve or harm the chances of employment. Our findings indicate that it increased employment opportunities, since the letter folder elicited six positive responses. Even though this fell short of the nine responses to the "no record" folder, it doubled the number for the "accused but acquitted" and created a significantly greater number of job offers than those elicited by the convicted record. This suggests that the procedure merits consideration as a means of offsetting the occupational loss resulting from accusation. It should be noted, however, that repeated use of this device might reduce its effectiveness.

The results of the experiment are summarized in Table 1. The differences in outcome found there indicate that

⁸ 28 United States Code, Secs. 1495, 2513.

various types of legal records are systematically related to job opportunities. It seems fair to infer also that the trend of job losses corresponds with the apparent punitive intent of the authorities. Where the man is convicted, that intent is presumably greatest. It is less where he is accused but acquitted and still less where the court makes an effort to emphasize the absence of a finding of guilt. Nevertheless, where the difference in punitive intent is ideally greatest, between conviction and acquittal, the difference in occupational harm is very slight. A similar blurring of this distinction shows up in a different way in the next study.

*Study II: The Effects on Defendants
Of Suits for Medical Malpractice*

As indicated earlier, the second study differed from the first in a number of ways: method of research, social class of accused, relationship between the accused and his "employer," social support available to accused, type of offense and its possible relevance to occupational adequacy. Because the two studies differ in so many ways, the reader is again cautioned to avoid thinking of them as providing a rigorous comparative examination. They are presented together only to demonstrate that legal accusation can produce unanticipated deprivations, as in the case of Study I, or unanticipated benefits, as in the research now to be presented. In the discussion to follow, some of the possible reasons for the different outcomes will be suggested.

The extra-legal effects of a malpractice suit were studied by obtaining the records of Connecticut's leading carrier of malpractice insurance. According to these records, a total of 69 doctors in the State had been sued in 64 suits during the post World War II period covered by the study, Sep-

tember, 1945, to September, 1959.⁹ Some suits were instituted against more than one doctor, and four physicians had been sued twice. Of the total of 69 physicians, 58 were questioned. Interviews were conducted with the approval of the Connecticut Medical Association by Robert Wyckoff, whose extraordinary qualifications for the work included possession of both the M.D. and LL.B. degrees. Dr. Wyckoff was able to secure detailed response to his inquiries from all doctors contacted.

Twenty of the respondents were questioned by personal interview, 28 by telephone, and the remainder by mail. Forty-three of those reached practiced principally in cities, eleven in suburbs, and four in rural areas. Seventeen were engaged in general practice and forty-one were specialists. The sample proved comparable to the doctors in the State as a whole in age, experience, and professional qualifications.¹⁰ The range was from the lowest professional stratum to chiefs of staff and services in the State's most highly regarded hospitals.

Of the 57 malpractice cases reported, doctors clearly won 38; nineteen of these were dropped by the plaintiff and an equal number were won in court by the defendant doctor. Of the remaining nineteen suits, eleven were settled out of court for a nominal amount, four for approximately the amount the plaintiff claimed and four resulted in judgment for the plaintiff in court.

The malpractice survey did not reveal widespread occupational harm to the physicians involved. Of the 58 respondents, 52 reported no negative effects of the suit on their practice, and five of the remaining six, all spe-

⁹ A spot check of one county revealed that the Company's records covered every malpractice suit tried in the courts of that county during this period.

¹⁰ No relationship was found between any of these characteristics and the legal or extra-legal consequences of the lawsuit.

cialists, reported that their practice improved after the suit. The heaviest loser in court (a radiologist), reported the largest gain. He commented, "I guess all the doctors in town felt sorry for me because new patients started coming in from doctors who had not sent me patients previously." Only one doctor reported adverse consequences to his practice. A winner in court, this man suffered physical and emotional stress symptoms which hampered his later effectiveness in surgical work. The temporary drop in his practice appears to have been produced by neurotic symptoms and is therefore only indirectly traceable to the malpractice suit. Seventeen other doctors reported varying degrees of personal dissatisfaction and anxiety during and after the suit, but none of them reported impairment of practice. No significant relationship was found between outcome of the suit and expressed dissatisfaction.

A protective institutional environment helps to explain these results. No cases were found in which a doctor's hospital privileges were reduced following the suit. Neither was any physician unable later to obtain malpractice insurance, although a handful found it necessary to pay higher rates. The State Licensing Commission, which is headed by a doctor, did not intervene in any instance. Local medical societies generally investigated charges through their ethics and grievance committees, but where they took any action, it was almost always to recommend or assist in legal defense against the suit.

DISCUSSION

Accusation has different outcomes for unskilled workers and doctors in the two studies. How may these be explained? First, they might be nothing more than artifacts of research method. In the field experiment, it was possible to see behavior directly, i.e., to de-

termine how employers act when confronted with what appears to them to be a realistic opportunity to hire. Responses are therefore not distorted by the memory of the respondent. By contrast, the memory of the doctors might have been consciously or unconsciously shaped by the wish to create the impression that the public had not taken seriously the accusation leveled against them. The motive for such a distortion might be either to protect the respondent's self-esteem or to preserve an image of public acceptance in the eyes of the interviewer, the profession, and the public. Efforts of the interviewer to assure his subjects of anonymity—intended to offset these effects—may have succeeded or may, on the contrary, have accentuated an awareness of the danger. A related type of distortion might have stemmed from a desire by doctors to affect public attitudes toward malpractice. Two conflicting motives might have been expected to enter here. The doctor might have tended to exaggerate the harm caused by an accusation, especially if followed by acquittal, in order to turn public opinion toward legal policies which would limit malpractice liability. On the other hand, he might tend to underplay extra-legal harm caused by a legally insufficient accusation in order to discourage potential plaintiffs from instituting suits aimed at securing remunerative settlements and/or revenge for grievances. Whether these diverse motives operated to distort doctors' reports and, if so, which of them produced the greater degree of distortion is a matter for speculation. It is only suggested here that the interview method is more subject to certain types of distortion than the direct behavioral observations of the field experiment.

Even if such distortion did not occur, the results may be attributable to differences in research design. In the field experiment, a direct comparison

is made between the occupational position of an accused and an identical individual not accused at a single point in time. In the medical study, effects were inferred through retrospective judgment, although checks on actual income would have no doubt confirmed these judgments. Granted that income had increased, many other explanations are available to account for it. An improvement in practice after a malpractice suit may have resulted from factors extraneous to the suit. The passage of time in the community and increased experience may have led to a larger practice and may even have masked negative effects of the suit. There may have been a general increase in practice for the kinds of doctors involved in these suits, even greater for doctors not sued than for doctors in the sample. Whether interviews with a control sample could have yielded sufficiently precise data to rule out these possibilities is problematic. Unfortunately, the resources available for the study did not enable such data to be obtained.

A third difference in the two designs may affect the results. In the field experiment, full information concerning the legal record is provided to all of the relevant decision makers, i.e., the employers. In the medical study, by contrast, the results depend on decisions of actual patients to consult a given doctor. It may be assumed that such decisions are often based on imperfect information, some patients knowing little or nothing about

the malpractice suit. To ascertain how much information employers usually have concerning the legal record of the employee and then supply that amount would have been a desirable refinement, but a difficult one. The alternative approach would involve turning the medical study into an experiment in which full information concerning malpractice (e.g., liable, accused but acquitted, no record of accusation) was supplied to potential patients. This would have permitted a comparison of the effects of legal accusation in two instances where information concerning the accusation is constant. To carry out such an experiment in a field situation would require an unlikely degree of cooperation, for instance by a medical clinic which might ask patients to choose their doctor on the basis of information given them. It is difficult to conceive of an experiment along these lines which would be both realistic enough to be valid and harmless enough to be ethical.

If we assume, however, that these methodological problems do not invalidate the basic finding, how may it be explained? Why would unskilled workers accused but acquitted of assault have great difficulty getting jobs, while doctors accused of malpractice—whether acquitted or not—are left unharmed or more sought after than before?

First, the charge of criminal assault carries with it the legal allegation and the popular connotation of intent to harm. Malpractice, on the other hand, implies negligence or failure to exercise reasonable care. Even though actual physical harm may be greater in malpractice, the element of intent suggests that the man accused of assault would be more likely to repeat his attempt and to find the mark. However, it is dubious that this fine distinction could be drawn by the lay public.

Perhaps more important, all doctors and particularly specialists may be

¹¹ See Eliot Freidson, "Client Control and Medical Practice," *American Journal of Sociology*, 65 (January, 1960), pp. 374-82. Freidson's point is that general practitioners are more subject to client-control than specialists are. Our findings emphasize the importance of professional as compared to client control, and professional protection against a particular form of client control, extending through both branches of the medical profession. However, what holds for malpractice situations may not be true of routine medical practice.

immune from the effects of a malpractice suit because their services are in short supply.¹¹ By contrast, the unskilled worker is one of many and therefore likely to be passed over in favor of someone with a "cleaner" record.

Moreover, high occupational status, such as is demonstrably enjoyed by doctors,¹² probably tends to insulate the doctor from imputations of incompetence. In general, professionals are assumed to possess uniformly high ability, to be oriented toward community service, and to enforce adequate standards within their own organization.¹³ Doctors in particular receive deference, just because they are doctors, not only from the population as a whole but even from fellow professionals.¹⁴

Finally, individual doctors appear to be protected from the effects of accusation by the sympathetic and powerful support they receive from fellow members of the occupation, a factor absent in the case of unskilled, unorganized laborers.¹⁵ The medical society provides advice on handling malpractice actions, for instance, and referrals by other doctors sometimes increase as a consequence of the sympathy felt for the malpractice suit vic-

tum. Such assistance is further evidence that the professional operates as "a community within a community,"¹⁶ shielding its members from controls exercised by formal authorities in the larger society.

In order to isolate these factors, additional studies are needed. It would be interesting to know, for instance, whether high occupational status would protect a doctor acquitted of a charge of assault. Information on this question is sparse. Actual instances of assaults by doctors are probably very rare. When and if they do occur, it seems unlikely that they would lead to publicity and prosecution, since police and prosecutor discretion might usually be employed to quash charges before they are publicized. In the rare instances in which they come to public attention, such accusations appear to produce a marked effect because of the assumption that the pressing of charges, despite the status of the defendant, indicates probable guilt. Nevertheless, instances may be found in which even the accusation of first degree murder followed by acquittal appears to have left the doctor professionally unscathed.¹⁷ Similarly, as a test of the group protection hypothesis, one might investigate the effect of an acquittal for assault on working men who are union members. The analogy would be particularly instructive where the union plays an important part in employment decisions, for instance in indus-

¹¹ National Opinion Research Center, "Jobs and Occupations: A Popular Evaluation," *Opinion News*, 9 (Sept., 1947), pp. 3-13. More recent studies in several countries tend to confirm the high status of the physician. See Alex Inkeles, "Industrial Man: The Relation of Status to Experience, Perception and Value," *American Journal of Sociology*, 66 (July, 1960), pp. 1-31.

¹² Talcott Parsons, *The Social System*, Glencoe: The Free Press, 1951, pp. 454-473; and Everett C. Hughes, *Men and Their Work*, Glencoe: The Free Press, 1958.

¹³ Alvin Zander, Arthur R. Cohen, and Ezra Stotland, *Role Relations in the Mental Health Professions*, Ann Arbor: Institute for Social Research, 1957.

¹⁴ Unions sometimes act to protect the seniority rights of members who, discharged from their jobs upon arrest, seek re-employment following their acquittal.

¹⁶ See William J. Goode, "Community Within A Community: The Professions," *American Sociological Review*, 22 (April, 1957), pp. 194-200.

¹⁷ For instance, the acquittal of Dr. John Bodkin Adams after a sensational murder trial, in which he was accused of deliberately killing several elderly women patients to inherit their estates, was followed by his quiet return to medical practice. *New York Times*, Nov. 24, 1961, p. 28, col. 7. Whether the British regard acquittals as more exonerative than Americans is uncertain.

tries which make use of a union hiring hall.

In the absence of studies which isolate the effect of such factors, our findings cannot readily be generalized. It is tempting to suggest after an initial look at the results that social class differences provide the explanation. But subsequent analysis and research might well reveal significant intra-class variations, depending on the distribution of other operative factors. A lower class person with a scarce specialty and a protective occupational group who is acquitted of a lightly regarded offense might benefit from the accusation. Nevertheless, class in general seems to correlate with the relevant factors to such an extent that in reality the law regularly works to the disadvantage of the already more disadvantaged classes.

CONCLUSION

Legal accusation imposes a variety of consequences, depending on the

nature of the accusation and the characteristics of the accused. Deprivations occur, even though not officially intended, in the case of unskilled workers who have been acquitted of assault charges. On the other hand, malpractice actions—even when resulting in a judgment against the doctor—are not usually followed by negative consequences and sometimes have a favorable effect on the professional position of the defendant. These differences in outcome suggest two conclusions: one, the need for more explicit clarification of legal goals; two, the importance of examining the attitudes and social structure of the community outside the courtroom if the legal process is to hit intended targets, while avoiding innocent bystanders. Greater precision in communicating goals and in appraising consequences of present practices should help to make the legal process an increasingly equitable and effective instrument of social control.

THIEVES, CONVICTS AND THE INMATE CULTURE

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In the rapidly-growing literature on the social organization of correctional institutions, it has become common to discuss "prison culture" and "inmate culture" in terms suggesting that the behavior systems of various types of inmates stem from the conditions of imprisonment themselves. Use of a form of structural-functional analysis in research and observation of institutions has led to emphasis of the notion that

internal conditions stimulate inmate behavior of various kinds, and there has been a glossing over of the older notion that inmates may bring a culture with them into the prison. Our aim is to suggest that much of the inmate behavior classified as part of the prison culture is not peculiar to the prison at all. On the contrary, it is the fine distinction between "prison culture" and "criminal subculture" which seems to make understandable the fine distinction between behavior patterns of various categories of inmates.

A number of recent publications have defended the notion that behavior patterns among inmates develop with

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The Collateral Consequences of a Criminal Conviction

The language of these statutes, in the absence of other recognized and established principles of law, would seem to divest a citizen of all rights whatsoever and render him absolutely civiliter mortuus, but the principles of law which this verbiage literally imports had [their] origin in the fogs and fictions of feudal jurisprudence and doubtlessly [have] been brought forward into modern statutes without fully realizing either the effect of [their] literal significance or the extent of [their] infringement upon the spirit of our system of government.

Byers v. Sun Savings Bank, 41 Okla. 728, 731, 139 P. 948,
949 (1914).

As a general matter [civil disability law] has simply not been rationally designed to accommodate the varied interests of society and the individual convicted person. There has been little effort to evaluate the whole system of disabilities and disqualifications that has grown up As a result, convicted persons are generally subjected to numerous disabilities and disqualifications which have little relation to the crime committed, the person committing it or, consequently, the protection of society. They are often harsh out of all proportion to the crime committed.

THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT
AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT:
CORRECTIONS 88 (1967).

demands that public affairs be administered by officers bearing no stigma of a conviction.⁴⁵⁵

Although the courts seem to agree that provisions excluding convicted citizens from public office are reasonable, some courts have been more restrictive than others in applying the provisions to specific problem areas. One area in which the states are in conflict involves the question of whether a convicted person can seek public office after his rehabilitation or after receiving a pardon.⁴⁵⁶ In the absence of a pardon, the offender, even though rehabilitated, will be unable to hold public offices in most states.⁴⁵⁷ The courts have reached conflicting decisions when considering the effect of a pardon on public office disqualifications.⁴⁵⁸ There also is judicial disagreement on the question of whether a conviction in one state prevents an offender from holding public office in another state.⁴⁵⁹ Some courts have held that only a conviction in the state where the person is a candidate for office renders him ineligible.⁴⁶⁰ Others, however, hold that criminal offenders are disqualified from office, regardless of where they were convicted.⁴⁶¹

Although the courts have upheld laws disqualifying convicted persons from public office, these laws have been criticized by the President's Commission on Law Enforcement and the Administration of Justice. The Commission has suggested that the states should rely on the judgment of the voters for elective officials and on the appraisal of the persons with appointive power for appointive positions.⁴⁶² The Swedish already follow the policy suggested by the President's

455. *State ex rel. Guthrie v. Chapman*, 187 Wash. 327, 329-34, 60 P.2d 245, 246-47 (1936).

456. For a general discussion of the possible ways to remove civil disabilities see notes 570-659 on pages 1143-54 *infra* and accompanying text.

457. *People ex rel. Symonds v. Gualano*, 97 Ill. App. 2d 248, 240 N.E.2d 467 (1968) (candidate disqualified even though the court recognized that he had been rehabilitated since his conviction more than a quarter of a century earlier). *Contra*, *Webb v. County Court*, 113 W. Va. 474, 476-78, 168 S.E. 760, 761 (1933). The case involves an interpretation of a West Virginia statute excluding persons convicted of certain crimes from public office "while such conviction remains unreversed." W. Va. CODE ANN. § 6-5-5 (1966).

458. *People ex rel. Symonds v. Gualano*, 260 N.E.2d 284 (Ill. App. Ct. 1970) (governor's certificate of restoration removes disqualification); *State ex rel. Cloud v. Election Bd.*, 169 Okla. 363, 366, 36 P.2d 20, 23 (1934) (pardon removes disqualification). *Contra*, *Ridgeway v. Catlett*, 238 Ark. 323, 379 S.W.2d 277 (1964) (disqualification irrespective of pardon), noted in 78 HARV. L. REV. 1676 (1965).

459. For a detailed discussion see notes 142-71 *supra* and accompanying text.

460. See, e.g., *Hildreth v. Heath*, 1 Ill. App. 82 (1878); *State ex rel. Mitchell v. McDonald*, 164 Miss. 405, 145 So. 508 (1933). See also *Guterman v. State*, 141 So. 2d 21 (Fla. 1962).

461. E.g., *Crampton v. O'Mara*, 193 Ind. 551, 139 N.E. 360 (1923), error dismissed, 267 U.S. 575 (1925).

462. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 90 (1967) [hereinafter cited as TASK FORCE REPORT].

Commission, reasoning that if an ex-convict becomes a candidate, his former conviction probably will become an issue during the campaign. If the voters are informed about the candidate and nevertheless choose to elect him, the Swedes believe that the legislature should not interfere with their choice.⁴⁶³

VI. LOSS OF EMPLOYMENT OPPORTUNITIES

The right to work has been acclaimed "the most precious liberty that man possesses."⁴⁶⁴ For the ex-convict, however, the right to work in an occupation of his choice is at best a qualified right and in many instances is nonexistent. A job applicant with a criminal record may face substantial prejudice on the part of many prospective employers. In addition, the ex-convict is confronted with a vast array of federal, state, and local regulations labeling him unsuitable for public employment and a host of licensed occupations.

A. Exclusion of Convicted Criminals by Private Employers

Conviction of a crime can have lasting social and economic consequences for the offender.⁴⁶⁵ Depending upon the nature and gravity of his offense,⁴⁶⁶ employment opportunities in the private sector may be severely limited. Numerous studies have surveyed the extent and effect of private employers' discrimination against former convicts.⁴⁶⁷ Although findings have not been consistent, it is generally concluded that substantial discrimination is practiced.⁴⁶⁸ Many employers, for example, flatly reject applicants with criminal records. Most employers avoid hiring released convicts if other personnel are available.⁴⁶⁹ Moreover,

463. Damaska, *Adverse Legal Consequences Of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L.C. & P.S. 347, 358 (1968).

464. *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting). See also *Algeyer v. Louisiana*, 165 U.S. 578, 589 (1897); *Crowley v. Christensen*, 137 U.S. 86, 89 (1890).

465. See *Parker v. Ellis*, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting). See generally D. GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 311-401 (1964).

466. An ex-convict's reliability is often related to the gravity of the offense for which he was convicted. Statistics indicate, however, that perpetrators of more serious crimes, such as murder and rape, are less likely to return to crime. See generally D. GLASER, *supra* note 465, at 54-85.

467. See, e.g., D. GLASER, *supra* note 465, at 328; TASK FORCE REPORT, *supra* note 462, at 31-33 (1967); Mellichercik, *Employment Problems of Former Offenders*, 2 NAT'L PROBATION & PAROLE ASS'N J. 43 (1956).

468. See note 467 *supra*; S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 639 (1963). But see D. GLASER, *supra* note 465, at 361 (suggesting that a former convict's primary barrier to employment is not his criminal record, but rather his lack of extensive or skilled work experience).

469. See S. RUBIN, *supra* note 468, at 638-40; Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 307 (1970).

since most fidelity insurance companies refuse to bond ex-convicts, the released offender is often ineligible for employment in positions that require bonding.⁴⁷⁰ Past criminality is usually overlooked only in employing persons for low-skilled jobs.⁴⁷¹ Consequently, many ex-convicts who are successful in obtaining meaningful employment probably did not disclose their criminal records.⁴⁷²

Discrimination by private employers based on age, sex, or race is unlawful.⁴⁷³ Moreover, in a recent federal court decision a private employer's refusal to hire a job applicant because of his arrest record was held to be violative of the Civil Rights Act.⁴⁷⁴ Convicted criminals, however, may be refused private employment with impunity. Elimination of private prejudice and discriminatory practices against former convicts was long thought to be the task of educators and social scientists.⁴⁷⁵ There is increasing awareness, however, that equal employment opportunity for released convicts, like other minority groups, requires government action.⁴⁷⁶ At present, nevertheless, an ex-convict probably stands a better chance of gaining entrance to private employment than to either public employment or licensed occupations.⁴⁷⁷

B. Exclusion of Convicted Criminals from Licensed Occupations

No member of society is more likely to forfeit his right to engage in a licensed occupation than a convicted criminal. Laws of the federal government,⁴⁷⁸ every state,⁴⁷⁹ and countless municipali-

470. Lykke, *Attitude of Bonding Companies Toward Probationers and Parolees*, 21 FED. PROBATION 36 (Dec. 1957).

471. See, e.g., Harris, *Changing Public Attitudes Toward Crime and Corrections*, 32 FED. PROBATION 12 (Dec. 1968).

472. See D. GLASER, *supra* note 465, at 350-55.

473. 29 U.S.C. §§ 621-34 (Supp. IV, 1969) (age); 42 U.S.C. §§ 2000e-a (1964) (race, sex, and religion).

474. *Gregory v. Litton Systems, Inc.*, 39 U.S.L.W. 2049 (C.D. Cal. Aug. 10, 1970) (enjoining employer from denying job to applicant because of his arrest record on the ground that the practice discriminates against Negroes since they are arrested more frequently than whites).

475. See S. RUBIN, *supra* note 468, at 639.

476. See note 34 on page 1160 *infra* and accompanying text.

477. See, e.g., D. GLASER, *supra* note 465, at 414; S. RUBIN, *supra* note 468, at 640.

478. E.g., 7 U.S.C. § 12a(2)(B) (Supp. IV, 1969) (Secretary of Agriculture may refuse to register felons as futures commission merchants and floor brokers); 46 C.F.R. § 10.02-1 (1969) (persons convicted of narcotics violations ineligible for licensing as deck or engineering officers for 10 years after conviction).

479. ALA. CODE tit. 46, §§ 1-345 (1958 & Supp. 1967); ALASKA STAT. §§ 08.01.010-99.100 (1968); ARIZ. REV. STAT. ANN. §§ 32-101 to -2391 (1956 & Supp. 1969); ARK. STAT. ANN. §§ 71-101 to -2423, 72-121 to -1717 (1947 & Supp. 1969); CAL. BUS. & PROF. CODE §§ 1-300047 (1962 & West Supp. 1970); CONN. GEN. STAT. REV. §§ 20-1 to -395 (1968); DEL. CODE ANN. tit. 24, §§ 101-3536 (1953 & Supp. 1968); D.C. CODE ANN. §§ 47-2301 to -2350 (Supp. III, 1970); FLA. STAT.

ties⁴⁸⁰ single out the ex-convict for possible exclusion from the majority of regulated occupations. In general, if a trade, profession, business, or even an ordinary job requires licensing, conviction of any serious crime may disqualify the offender from obtaining or holding a license.⁴⁸¹

1. *Scope of Occupational Licensing.*—Under licensing laws, an individual's right to engage in an occupation becomes a privilege granted by the state.⁴⁸² Entrance to and continued participation in a licensed occupation is conditioned upon the applicant's ability to meet qualifications prescribed by the legislature.⁴⁸³ Unlicensed participation in a regulated activity may lead to criminal prosecution.⁴⁸⁴ Until the end

ANN. §§ 454.01-493.56 (1965 & Supp. 1969); GA. CODE ANN. §§ 84-101 to -9980 (1970); HAWAII REV. LAWS §§ 25-436 to -471 (1968 & Supp. 1969); IDAHO CODE ANN. §§ 54-101 to -2705 (1947 & Supp. 1969); IND. ANN. STAT. §§ 63-101 to -3617 (1961 & Supp. 1970); IOWA CODE §§ 147.1-158.11 (1949 & Supp. 1970); KAN. STAT. ANN. §§ 65-1001 to -3101 (1964 & Supp. 1968); KY. REV. STAT. §§ 311.250-333.990 (1969); LA. REV. STAT. ANN. §§ 37:1-2368 (1964 & Supp. 1970); ME. REV. STAT. ANN. tit. 32, §§ 1-4803 (1964 & Supp. 1970); MD. ANN. CODE art. 43, §§ 1B-754 (1957 & Supp. 1969); MASS. ANN. LAWS ch. 112, §§ 1-107 (1965) & Supp. 1970; MICH. STAT. ANN. §§ 18.1-1259 (1957 & Supp. 1970); MINN. STAT. ANN. §§ 147.01-157.15 (1947 & Supp. 1970); MISS. CODE ANN. §§ 8632-01 to 8923-51 (1956 & Supp. 1968); MO. ANN. STAT. §§ 326.001-343.250 (1960 & Supp. 1970); MONT. REV. CODES ANN. §§ 66-101 to -3114 (1970); NEB. REV. STAT. §§ 71-101 to -3715 (1966); NEV. REV. STAT. §§ 623.010-654.210 (1969); N.H. STAT. ANN. §§ 309:1-332:17 (1955 & Supp. 1969); N.J. STAT. ANN. §§ 45:1-25 (1963 & Supp. 1969); N.M. STAT. ANN. §§ 67-1-1 to -36-18 (1953 & Supp. 1969); N.Y. EDUC. LAW §§ 6501-7713 (McKinney 1953 & Supp. 1969-70); N.C. GEN. STAT. §§ 83-1 to 93D-16 (1965 & Supp. 1969); N.C. CENT. CODE §§ 43-01-01 to -34-14 (1960 & Supp. 1969); OHIO REV. CODE §§ 4701.01-4749.99 (1964 & Supp. 1969); OKLA. STAT. ANN. tit. 59, §§ 1-1408 (1963 & Supp. 1970); PA. STAT. ANN. tit. 63, §§ 9.1-1015 (1963 & Supp. 1970); R.I. GEN. LAWS ANN. §§ 5-1-1 to -44-25 (1956 & Supp. 1969); S.C. CODE ANN. §§ 56-1 to -1617 (1962 & Supp. 1969); S.D. CODE §§ 36-1-1 to -25-30 (1967 & Supp. 1970); TENN. CODE ANN. §§ 62-101 to 63-1521 (1955 & Supp. 1969); UTAH CODE ANN. §§ 58-1-1 to -34-9 (1953 & Supp. 1969); VT. STAT. ANN. tit. 26, §§ 1-2598 (1967 & Supp. 1969); VA. CODE ANN. §§ 54-1 to -915 (1954 & Supp. 1970); WASH. REV. CODE ANN. §§ 18.04.020-92.900 (1961 & Supp. 1969); W. VA. CODE ANN. §§ 30-1-1 to -21-15 (1966 & Supp. 1970); WYO. STAT. ANN. §§ 33-1 to -385 (1957 & Supp. 1969). Licensing provisions appear throughout the codified statutes of Colorado, Illinois, Texas, and Wisconsin.

480. Municipal ordinances excluding former criminals from occupations are generally upheld when the regulation bears reasonable relation to public health, safety, and welfare. See, e.g., *Kaufman v. Taxicab Bureau*, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849 (1965) (taxicab operator); *Moyant v. Borough of Paramus*, 30 N.J. 528, 154 A.2d 9 (1959) (solicitors); cf. *Dasch v. Jackson*, 170 Md. 251, 183 A. 534 (1936) (regulation of paper hangers held unreasonable). See generally E. McQUILLIN, *MUNICIPAL CORPORATIONS* § 26.74 (3d rev. ed. 1964).

481. A license may be refused if an applicant has committed any act for which a licensee would be subject to disciplinary action. See, e.g., CAL. BUS. & PROF. CODE § 4511 (West Supp. 1970) (psychiatric technicians).

482. See, e.g., *In re Morris*, 74 N.W. 679, 681, 397 P.2d 475, 476 (1964) (license to practice law confers no vested right, but is a conditional privilege, revocable for cause).

483. Statutory qualifications often embrace the applicant's character, criminal record, age, education, skill, experience, and entrance examination scores. See generally Barron, *Business and Professional Licensing—California, A Representative Example*, 18 STAN. L. REV. 640 (1966).

484. See, e.g., N.J. STAT. ANN. § 45:25-13 (Supp. 1969-70) (misdemeanor to seek employment as x-ray technician without license).

of the nineteenth century, few occupations other than medicine and law were subject to license requirements.⁴⁸⁵ Since that time, however, occupational licensing has proceeded at a feverish pace.⁴⁸⁶ In addition to licensed professional callings,⁴⁸⁷ modern statutes regulate semi-skilled and unskilled workers ranging from ambulance attendants⁴⁸⁸ to billiard-room employees.⁴⁸⁹ Regulations for many of these licenses are imposed by local ordinances.⁴⁹⁰ Although no definite figures are available, it is clear that a substantial portion of the working population is subject to licensing.

The United States Supreme Court has upheld the local regulation of essential occupations as a valid exercise of police power necessary to the safety, health, good order, and morals of the community.⁴⁹¹ The Court, however, has consistently emphasized that a state cannot, under the guise of protecting the public, arbitrarily deny access to lawful occupations by imposing unreasonable restrictions.⁴⁹² Consequently, patently unreasonable regulations have been stricken by a number of courts.⁴⁹³ As a general rule, however, courts are reluctant to substitute their judgment for that of the legislature.⁴⁹⁴

Access to licensed employment is most often a matter of

485. See W. GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* 126 (1956).
486. COUNCIL OF STATE GOVERNMENTS, *OCCUPATIONAL LICENSING LEGISLATION IN THE STATES 7-8* (1952) (indicating that approximately 80 occupations were licensed by state laws).

487. E.g., ALA. CODE tit. 46, §§ 258-94 (Supp. 1967) (physicians); ARIZ. REV. STAT. ANN. §§ 32-2016 to -2755 (Supp. 1969-70) (attorneys); CAL. BUS. & PROF. CODE §§ 1600-1808 (West Supp. 1970) (dentists); FLA. STAT. ANN. §§ 461.01 to .15 (Supp. 1969) (podiatrists); GA. CODE ANN. §§ 79A-501 to -521 (Supp. 1969) (pharmacists); ILL. REV. STAT. ANN. §§ 322.010-380 (Baldwin 1969) (engineers); MICH. STAT. ANN. §§ 18.1-24 (Supp. 1970) (accountants); N.C. GEN. STAT. §§ 83-1 to -15 (Supp. 1969) (architects).

488. E.g., MICH. STAT. ANN. § 14.528(59) (1970).

489. E.g., N.Y. GEN. BUS. LAW §§ 460-72 (McKimmer 1968). See also ALA. CODE tit. 46, §§ 64(38)-(70) (Supp. 1967) (cosmetologists); CAL. BUS. & PROF. CODE §§ 9540-45 (West Supp. 1970) (dry cleaners); IND. ANN. STAT. §§ 63-2301 to -2303 (1961) (watch makers); N.C. GEN. STAT. §§ 72-31 to -45 (1965) (tourist camp operators); N.C. STAT. ANN. §§ 45-4-27 to -56 (Supp. 1969-70) (barbers).

490. States often delegate broad regulatory power to municipal corporations. In some states, the power of municipalities extends to the licensing of amusements, trade, business, vocations, occupations, and professions conducted within the municipality. See generally E. McQUILLIN §§ 26.22-31, *supra* note 480.

491. *Dent v. West Virginia*, 129 U.S. 114 (1889).

492. E.g., *Jay Burns Baking Co. v. Bryan*, 264 U.S. 54, 513 (1924).

493. E.g., *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 31 (1949) (licensing of photographers held an unreasonable restriction of a lawful and harmless occupation, bearing no relation to public health, morals and safety); *Livesay v. Tennessee Bd. of Examiners*, 204 Tenn. 500, 322 S.W.2d 209 (1959) (licensing of watch repairmen held unnecessary).

494. E.g., *Daniel v. Family Security Life Ins. Co.*, 36 U.S. 220 (1949) (upholding state statute regulating insurance agents).

administrative determination.⁴⁹⁵ Federal⁴⁹⁶ and state⁴⁹⁷ statutes, as well as municipal ordinances,⁴⁹⁸ confer licensing authority on administrative agencies such as licensing boards and boards of examiners. In some instances, authority is vested in a single official.⁴⁹⁹ Most agencies are composed of appointed members of the regulated occupation and exercise broad discretion in processing applications and supervising licensed personnel.⁵⁰⁰

It is well settled that licensing authorities may not refuse, revoke, or suspend a license without informing the applicant or licensee of the reason for the proposed action and giving him an opportunity to be heard.⁵⁰¹ In the absence of a hearing satisfying due process standards, mandamus or similar relief is available in most state courts.⁵⁰² Moreover, it has been held that arbitrary action by licensing authorities is a violation of civil rights cognizable in federal courts.⁵⁰³ When an agency determination is contested on the merits, however, the scope of judicial review varies considerably between jurisdictions.⁵⁰⁴ A number of courts, for example, have held that licensing authority actions are exclusively administrative and have refused to accord review on the merits.⁵⁰⁵ In other jurisdictions, however, expanded judicial review is either authorized by statute⁵⁰⁶ or assumed by the reviewing court.⁵⁰⁷

495. See generally W. GELLHORN, *supra* note 485, at 105-51 (1956).

496. E.g., 47 U.S.C. §§ 303, 318 (1964) (FCC licenses radio operators); 49 U.S.C. §§ 1421-22 (1964) (FAA establishes eligibility requirements for civil airman).

497. E.g., PA. STAT. ANN. tit. 71, § 102 (Supp. 1969).

498. See generally E. McQUILLIN, *MUNICIPAL CORPORATIONS* §§ 26.62-.67 (3d rev. ed. 1964).

499. E.g., OHIO REV. CODE ANN. § 3905.01 (Baldwin 1964) (insurance).

500. See W. GELLHORN, *supra* note 485, at 105-18. See also Affeldt & Seney, *Group Sanctions and Personal Rights—Professions, Occupations and Labor Law*, 11 ST. LOUIS U.L.J. 382, 399-414 (1969); Barton, *supra* note 483, at 649-57.

501. *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) (refusal of Bar admission without hearing is denial of procedural due process).

502. See generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 176 (1965).

503. See, e.g., *Hornsby v. Allen*, 326 F.2d 605, 612 (5th Cir. 1964) (arbitrary refusal of liquor license held to be in violation of 42 U.S.C. § 1983 (1964)).

504. See L. JAFFE, *supra* note 502, at 107-09; Note, *DeNovo Judicial Review of State Administrative Findings*, 65 HARV. L. REV. 1217 (1965).

505. See, e.g., *DeMond v. Liquor Control Comm'n*, 129 Conn. 642, 30 A.2d 547 (1943); *State Bd. v. Scherer*, 221 Ind. 92, 46 N.E.2d 602 (1943); *Johnson v. Sanchez*, 67 N.M. 41, 351 P.2d 449 (1960); *State v. Huber*, 129 W. Va. 198, 40 S.E.2d 11 (1946).

506. E.g., OKLA. STAT. ANN. tit. 59, § 689 (1963) (appeal from refusal or revocation of veterinarian's license); R.I. GEN. LAWS ANN. § 5-31-11 (1956) (appeal from revocation of dentist's license); TEX. REV. CIV. STAT. art. 4506 (1966) (appeal from revocation of license to practice medicine).

507. *State v. Department of Motor Vehicles*, 229 Ore. 543, 368 P.2d 386 (1962); *Commonwealth v. Cronin*, 336 Pa. 469, 9 A.2d 408 (1939); *McAnerney v. State*, 9 Utah 2d 191, 341 P.2d 212 (1959).

Some courts have found that pursuit of an occupation is a property right, the deprivation of which requires a trial *de novo* on review.⁵⁰⁸

2. *Effect of Criminal Conviction under Licensing Statutes.*—The United States Supreme Court, in *Hawker v. New York*,⁵⁰⁹ recognized the power of local governments to bar individuals from occupations on the basis of past criminality. In upholding a provision prohibiting convicted felons from the practice of medicine, the Court noted that a legislature might reasonably require that members of a profession be of good character and provide that conviction of crime demonstrates a lack of this requisite character.⁵¹⁰ More recently, in *Barsky v. Board of Regents*,⁵¹¹ the Court upheld suspension of a practicing physician's license because of his conviction for refusing to produce records subpoenaed by a congressional committee. In *Schwartz v. Board of Bar Examiners*,⁵¹² however, the Court indicated a readiness to examine more closely character standards that bar citizens from professional life. In reversing on due process grounds the refusal of an application for Bar admission, the Court noted that any standard by which an applicant is measured must have a rational connection with his fitness for the profession.⁵¹³ In its most recent decision in this area, *DeVeau v. Braisted*,⁵¹⁴ the Court upheld a provision of the New York Waterfront Commission Act of 1953 prohibiting convicted felons from holding office in waterfront unions. Although this latest decision cites *Hawker* with approval, it is clear that the Court attached special significance to the circumstances that prompted the challenged legislation. In light of the conditions then existing on the waterfront, the Court found the legislature's judgment entirely reasonable.⁵¹⁵ Read together, *Schwartz*

508. See, e.g., *Laine v. California State Bd. of Optometry*, 19 Cal. 2d 831, 123 P.2d 457 (1942) (license to practice optometry is a vested property right). See also *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 783, 204 N.E.2d 504 (1965): "There is growing recognition . . . that administrative decisions on applications for licenses and permits to engage in a lawful occupation . . . directly affect the personal rights, property, or economic interests of the applicant, and . . . that fundamental considerations of fairness require such decisions . . . to be made objectively, under reasonable procedures and with appropriate opportunity for judicial review The problem is important because of the increasingly large numbers of occupations now being subjected to administrative regulations." *Id.* at 788, 204 N.E.2d at 508.

509. 170 U.S. 189 (1898).

510. "It is not open to doubt that the commission of crime . . . has some relation to the question of character When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule" *Id.* at 196.

511. 347 U.S. 442 (1953).

512. 353 U.S. 232 (1957).

513. *Id.* at 239.

514. 363 U.S. 144 (1960).

515. *Id.* at 158.

and *DeVeau* indicate that in the future the United States Supreme Court will subject legislative restrictions on occupational choices to greater scrutiny than is suggested by the *Hawker* decision. Even so, recent legislation⁵¹⁶ and judicial decisions⁵¹⁷ make it clear that a criminal conviction remains a serious obstacle to the pursuit of a licensed occupation.

For a significant number of former convicts, the barriers to employment created by licensing laws may be insurmountable.⁵¹⁸ Entrance to a licensed occupation may be especially difficult for an individual with a criminal record because he has the burden of establishing good character.⁵¹⁹ The person already holding a license is in a more favorable position, since he has the benefit of prior performance in the occupation as evidence of his fitness. Moreover, the burden of demonstrating unfitness rests with the licensing authority.⁵²⁰ On the other hand, the licensee convicted of crime may be faced with a presumption that he has betrayed the trust conferred by the license, thereby forfeiting his privilege to continue in the occupation.⁵²¹ Once expelled, reinstatement is unlikely.⁵²²

As a general rule, acquittal of criminal charges does not preclude refusal or revocation of a license.⁵²³ Moreover, it is usually held that neither suspension of sentence nor pardon will prevent exclusion from licensed employment.⁵²⁴ Even in states that provide for expungement⁵²⁵ of

516. See, e.g., MO. ANN. STAT. § 334.590 (Supp. 1969) (conviction of felony or crime involving moral turpitude bars licensing as physical therapist); N.C. GEN. STAT. § 89A-7 (Supp. 1969) (convicted felons may be excluded from practice of landscape architecture). See also *Model Professional and Occupational Licensing Act*, 5 HARV. J. LEGIS. 67, 77 (1967) (conviction of felony or crime involving moral turpitude suggested as basis for possible exclusion from all licensed professions and occupations).

517. See, e.g., *Kaufman v. Taxicab Bureau*, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849 (1965) (taxicab license refused because of applicant's prior convictions of participating in student civil disorders); *In re Morris*, 74 N.M. 679, 397 P.2d 475 (1964) (attorney's conviction of involuntary manslaughter justifies suspension from the Bar).

518. It is likely that many former convicts barred from licensed employment do not seek judicial relief due to the prohibitive expense of litigation.

519. See, e.g., *Application of Patterson*, 213 Ore. 398, 410, 318 P.2d 907, 912 (1957) (casting on petitioner "the burden of showing by a preponderance of the evidence that he is of good moral character," but failing to define "good moral character").

520. See, e.g., *Sica v. Board of Police Comm'rs*, 200 Cal. App. 2d 137, 19 Cal. Rptr. 277 (1962) (public dance hall permit).

521. See, e.g., *In re Morris*, 74 N.M. 679, 681-82, 397 P.2d 475, 476 (1964).

522. *In re Flynn*, 52 Wash. 2d 589, 596, 328 P.2d 150, 154 (1958).

523. Cases cited note 549 *infra*.

524. See, e.g., *Page v. Watson*, 140 Fla. 536, 192 So. 205 (1938) (physicians); *Stone v. Oklahoma Real Estate Comm'n*, 369 P.2d 642 (Okla. 1962); *State Bd. of Dental Examiners v. Breeland*, 208 S.C. 469, 38 S.E.2d 644 (1946).

525. E.g., CAL. PENAL CODE § 1203.4 (West Supp. 1970).

penalties and disabilities incident to conviction, it is generally held that this relief does not extend to licensed employment.⁵²⁶

The extent that occupational freedom is diminished by licensing laws is uncertain. Conviction of an abominable crime will probably make an individual unsuitable for most licensed employment. Petty offenses, on the other hand, seldom bar the offender.⁵²⁷ Between these extremes there is a broad range of criminal conduct that invariably casts a shadow on an individual's employment future. Disqualification depends largely on the nature of both the occupation pursued and the crime committed. To determine the exact effect of his conviction, a former convict must look to the applicable licensing provisions of the jurisdiction in which he seeks employment. In some instances, federal law is pertinent,⁵²⁸ but more often state or municipal regulations control.

Licensing laws vary considerably among the states and even among regulated occupations within a state. Municipal regulations contribute further to the lack of consistency. Thus, a conviction that bars a person from an occupation in one state may not preclude licensing in another.⁵²⁹ Similarly, within the same state an ex-convict may be excluded from some occupations and qualified for others.⁵³⁰ Exclusion may be mandatory for certain occupations and for others discretionary.⁵³¹ In some instances, the conviction's proximity in time may be

526. *Copeland v. Department of Alcoholic Beverage Control*, 241 Cal. App. 2d 186, 50 Cal. Rptr. 452 (1966) (beer license denied on basis of lack of good character evidenced by expunged conviction).

527. Misdemeanors involving moral turpitude, however, may disqualify the offender. See, e.g., CAL. BUS. & PROF. CODE § 3094 (West 1962) (optometrists); N.C. GEN. STAT. § 93A-4 (1965) (real estate brokers).

528. See, e.g., 18 U.S.C. §§ 922(g)(1), (h)(1) (Supp. IV, 1969) (unlawful for any person under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship, transport, or receive firearms or ammunition in interstate or foreign commerce).

529. Alabama requires mandatory license revocation when an engineer is convicted of a crime involving moral turpitude. ALA. CODE tit. 46, § 128(20) (Supp. 1967). California provides for discretionary revocation for a felony in connection with engineering or any crime involving moral turpitude. CAL. BUS. & PROF. CODE § 6775 (West 1964). Michigan bases revocation on an engineer's professional negligence. MICH. STAT. ANN. § 18.84(21) (1957).

530. Arizona, for example, no longer lists felony convictions as a ground for refusing a barber's license (ARIZ. REV. STAT. ANN. § 32-353 (1956)), but still prohibits issuance of a license to practice cosmetology if the applicant has been convicted of a felony. ARIZ. REV. STAT. ANN. § 32-552 (Supp. 1969-70).

531. The reason for the distinction is often not clear. North Carolina, for example, requires mandatory refusal or revocation of a physical therapist's license for any act derogatory to the standing or morals of the profession. N.C. GEN. STAT. § 90-265 (Cum. Supp. 1969). In the same state, however, revocation of a physician's license is discretionary. N.C. GEN. STAT. § 90-14 (1965).

determinative.⁵³² A few jurisdictions have enacted provisions mitigating the effect of a criminal record on employment opportunity.⁵³³ Although these statutory variations and inconsistencies make it difficult to gauge accurately the effect of a criminal conviction on future employment, it is possible to determine the extent of probable exclusion from licensed employment by examining typical statutory provisions.

(a) *Common grounds for excluding convicted criminals.*—Prior criminal conduct may disqualify an individual in several ways. Most licensing laws exclude persons convicted of relatively serious crimes or crimes indicating lack of moral character. Moreover, general character requirements often preclude licensing of ex-convicts. Professionals convicted of a crime may be disqualified on the basis of unprofessional conduct.

(i) *Lack of good moral character.*—Statutes and ordinances frequently establish character standards that must be met for admission to an occupation.⁵³⁴ Some statutes also authorize revocation of licenses for immoral acts.⁵³⁵ Most, if not all, professional callings require applicants to prove good character.⁵³⁶ In addition, a surprising number of non-professional occupations impose character requirements. Thus, failure to demonstrate good moral character may prevent an individual from operating a dry-cleaning plant,⁵³⁷ selling hearing aids,⁵³⁸ or becoming a forester.⁵³⁹ Although character standards bearing little or no relationship to a regulated activity may be stricken, courts have found good character to be a reasonable prerequisite in a wide variety of vocations and activities.⁵⁴⁰ Even when character is not a statutory

532. See, e.g., MICH. STAT. ANN. § 19.803 (Supp. 1970) (authority to deny or revoke a real estate broker's license because of a felony conviction is limited to cases in which an applicant has been convicted within the past 5 years).

533. See notes 568-71 *infra* and accompanying text.

534. Character standards are now so firmly embedded in admission requirements that little thought is given to their relevance. See, e.g., *A Model Professional and Occupational Licensing Act*, 5 HARV. J. LEGIS. 67, 81 (1967) (good moral character should be an entrance requirement for all licensed professions and occupations).

535. Teachers' certificates may be revoked on the basis of immoral conduct. See, e.g., ALA. CODE tit. 52, § 337 (1960); N.Y. EDUC. LAW § 3020 (McKinney 1953). In Arizona a dental hygienist's license may be revoked for acts of gross immorality. ARIZ. REV. STAT. ANN. § 32-1290 (1956).

536. See generally Affeldt & Senev, *supra* note 500, at 399-410.

537. E.g., CAL. BUS. & PROF. CODE § 9551.5 (West Supp. 1970).

538. E.g., MICH. STAT. ANN. § 18.276(6) (Supp. 1970).

539. E.g., OKLA. STAT. ANN. tit. 59, § 1212 (Supp. 1969-70). See also ALA. CODE tit. 46, § 120(35) (Supp. 1967) (dental hygienists); CONN. GEN. STAT. REV. § 20-80 (1968) (midwives); MO. ANN. STAT. § 329.050 (1966) (cosmetologists); N.C. GEN. STAT. § 87-74 (1965) (water well contractors); PA. STAT. ANN. tit. 63, § 642 (1968) (poultry technicians).

540. See, e.g., *Moyant v. Paramus*, 30 N.J. 528, 154 A.2d 9 (1959) (ordinance imposing character requirements on solicitors and canvassers).

requirement, some courts find that the licensing authority has the implied power to bar persons who are found morally unfit for participation in the licensed activity.⁵⁴¹

Conviction of a crime is quite generally held to be evidence that the offender lacks the requisite character for either a professional calling⁵⁴² or the most ordinary pursuit.⁵⁴³ Some reviewing courts look beyond the conviction in determining whether an individual's exclusion on character grounds is justified.⁵⁴⁴ A court may conclude, for example, that denial of a license is unreasonable in light of the applicant's rehabilitation.⁵⁴⁵ More often, however, a record of conviction will be conclusive evidence of bad character. Exclusion on character grounds may be upheld even on the basis of an applicant's association with criminals.⁵⁴⁶

(ii) *Conviction of crime.*—Most statutes expressly make conviction of certain types of crimes a ground for exclusion.⁵⁴⁷ The record of conviction is normally a sufficient basis for the licensing authority to act.⁵⁴⁸ In a few cases, licenses have been revoked even though the holder was acquitted of the criminal charge.⁵⁴⁹

541. *E.g.*, *Dorf v. Fielding*, 20 Misc. 2d 18, 197 N.Y.S.2d 280 (Sup. Ct. 1948) (denial of license to sell secondhand goods because of convictions for running house of prostitution).

542. *E.g.*, *Application of Brooks*, 57 Wash. 2d 66, 355 P.2d 840 (1960), *cert. denied*, 365 U.S. 813 (1961) (denial of application to practice law because of conviction for failure to report to work camps for conscientious objectors during World War II).

543. *See, e.g.*, *Hirsch v. City and County of San Francisco*, 143 Cal. App. 2d 313, 300 P.2d 177 (Dist. Ct. App. 1956) (merchant); *Kaufman v. Taxicab Bureau*, 236 Md. 476, 204 A.2d 521 (1964), *cert. denied*, 382 U.S. 849 (1965) (taxicab operator).

544. A few states expressly provide for the exercise of similar discretion by licensing authorities. *See, e.g.*, CAL. BUS. & PROF. CODE § 117 (West 1962) (record of conviction only conclusive of the fact of conviction and authorities may inquire into the circumstances to determine if the offense involved moral turpitude). *But cf.* CAL. BUS. & PROF. CODE § 9540.3(d) (West 1964) (conviction of felony or crimes involving moral turpitude constitutes evidence that applicant for license to operate dry cleaning establishment lacks moral character).

545. *See, e.g.*, *Tanner v. DeSapio*, 2 Misc. 2d 130, 150 N.Y.S.2d 640 (Sup. Ct. 1956) (reversing a refusal to license former convict to operate beauty parlor).

546. *Hora v. City and County of San Francisco*, 233 Cal. App. 2d 375, 43 Cal. Rptr. 527 (Dist. Ct. App. 1965) (denial of application to operate massage parlor because applicant's wife, running same establishment, had been convicted of morals violations). *Contra*, *Roosevelt Taxi, Inc. v. Commissioner of Pub. Safety*, 27 App. Div. 2d 753, 279 N.Y.S.2d 1016 (Sup. Ct. 1967) (reversal of denial of taxicab license because applicant's brother, a known criminal, was applicant's business associate).

547. A few statutes provide for license revocation upon the commission of a crime. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-1263 (1969-70) (mandatory revocation of dentist's license upon commission of a felony).

548. *See, e.g.*, *Otash v. Bureau of Private Investigators & Adjusters*, 230 Cal. App. 2d 568, 41 Cal. Rptr. 263 (Dist. Ct. App. 1964) (private investigator).

549. *See, e.g.*, *Freeman v. Board of Alcohol Control*, 264 N.C. 320, 141 S.E.2d 499 (1965); *accord*, *Silver v. McCamey*, 221 F.2d 873 (D.C. Cir. 1955).

Conviction of a felony⁵⁵⁰ is often a ground for denial or revocation of a license. Felons are barred from occupations ranging from practical nursing⁵⁵¹ to selling horsemeat.⁵⁵² Crimes, irrespective of where committed, are generally classified as a felony or misdemeanor according to the law of the licensing jurisdiction.⁵⁵³ When a license is refused or revoked on the basis of a felony conviction, courts are reluctant to disturb the licensing authority's determination.⁵⁵⁴ There have been instances, however, when reviewing courts have found the exclusion of felons unreasonable.⁵⁵⁵

Crimes involving moral turpitude are frequently grounds for disqualification from a licensed occupation. A few statutes exclude persons convicted of a felony involving moral turpitude,⁵⁵⁶ but the usual provision embraces any crime involving moral turpitude.⁵⁵⁷ Thus, misdemeanors involving moral turpitude may exclude the offender under most statutes.⁵⁵⁸ Irrespective of statutory language, both licensing authorities and courts have experienced considerable difficulty in applying the moral turpitude standard.⁵⁵⁹

A few statutes bar persons convicted of enumerated crimes. These provisions may limit exclusion to crimes that indicate unfitness for a

550. For a discussion of the definition of felony, see notes 108-20 *supra* and accompanying text.

551. *E.g.*, N.C. GEN. STAT. § 90-171.5 (Supp. 1967).

552. *E.g.*, ILL. ANN. STAT. ch. 56 ½, § 242.2(d) (Smith-Hurd 1967). *See also* CAL. BUS. & PROF. CODE § 17769 (West 1964) (trading stamp dealers); N.Y. ALCO. BEV. CONTROL LAW § 102 (McKinney 1970) (night club employees).

553. *E.g.*, *Erdman v. Board of Regents*, 24 App. Div. 2d 698, 261 N.Y.S.2d 634 (1965) (conviction of felony in federal court was a misdemeanor under state law). *See notes* 151-61 *supra* and accompanying text.

554. *E.g.*, *Barton Trucking Corp. v. O'Connell*, 7 N.Y.2d 299, 165 N.E.2d 163, 197 N.Y.S.2d 138 (1959) (denial of public cart license because of felony conviction 20 years earlier). The court stressed that the petitioner's conviction had been for criminal activities linked to the business in which he sought to be licensed. *Id.* at 313, 165 N.E.2d at 170.

555. *See, e.g.*, *Brown v. Murphy*, 3 Misc. 2d 151, 224 N.Y.S.2d 423 (Sup. Ct. 1962). A license to drive a tow truck was refused by the New York City Police Commission based on the applicant's court-martial conviction of carrying a concealed, loaded weapon and subsequent bad conduct discharge from the Navy 15 years earlier. The New York Supreme Court reversed because of the Commissioner's failure to accord a proper hearing, but noted in dictum that deprivation based solely upon the stated grounds would be capricious in light of the applicant's commendable record since discharge from the service. *Id.* at 157-59, 224 N.Y.S.2d at 429-31.

556. *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-289 (Supp. 1969-70) (insurance agent's license).

557. *E.g.*, ARK. STAT. ANN. § 72-1613 (Supp. 1969) (inhalation therapist's license refused or revoked for conviction of moral turpitude crime).

558. *E.g.*, ALA. CODE tit. 46, § 16 (Supp. 1967) (revocation of architect's license authorized for misdemeanor involving moral turpitude).

559. For a discussion of what constitutes moral turpitude see notes 139-41 *supra* and accompanying text.

particular occupation. The offense of receiving stolen property, for example, may prevent licensing as a junk dealer.⁵⁶⁰ Revocation may also be confined to offenses involving use of a license.⁵⁶¹ As a general rule, however, specificity is lacking in licensing legislation.

Statutes also may provide that persons separated from the Armed Forces under less than honorable conditions are barred from licensed employment. New York, for example, refuses to issue a peddler's license to a former serviceman who failed to obtain an honorable discharge.⁵⁶² Court-martial conviction of a wide variety of military offenses may subject the offender to dishonorable discharge.⁵⁶³ Moreover, Armed Forces personnel may be separated administratively as undesirables under less than honorable conditions.⁵⁶⁴

(iii) *Unprofessional conduct.*—Professionals such as doctors, lawyers, and accountants may have their licenses revoked or suspended for unprofessional conduct.⁵⁶⁵ Courts have upheld this vague criterion despite attacks on the failure to prescribe specific standards of conduct.⁵⁶⁶ Conviction of a crime is generally regarded as unprofessional conduct, and revocations frequently are sustained even though criminal proceedings are dismissed.⁵⁶⁷

(b) *Mitigating provisions.*—A few states have enacted legislation mitigating the effect of criminal conviction under licensing laws. Several statutes, for example, provide for reinstatement of revoked licenses following specified periods of time, normally one to five years.⁵⁶⁸ A similar remedy is available in New York where a certificate of good conduct may be issued to former criminals after five years of satisfactory conduct.⁵⁶⁹ Although this statute expressly states that issuance of a

560. N.Y. GEN. BUS. LAW § 61 (McKinney 1968). See also ME. REV. STAT. ANN. tit. 32, § 575 (Supp. 1970) (embezzlers barred from becoming collections agents); N.Y. GEN. BUS. LAW § 74 (McKinney 1968) (conviction of illegal possession of weapons disqualifies for guard duty).

561. See, e.g., ARIZ. REV. STAT. ANN. § 32-2322 (Supp. 1969-70) (structural pest control).

562. N.Y. GEN. BUS. LAW § 32 (McKinney 1968).

563. E.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES § 127c (rev. ed. 1969) (absence without leave, violation of a lawful general order, feigning illness).

564. See generally Lynch, *The Administrative Discharge: Changes Needed?* 22 ME. L. REV. 141 (1970).

565. See, e.g., MICH. STAT. ANN. § 14.533 (Supp. 1970) (physicians).

566. E.g., *Irwin v. Board of Regents*, 304 N.Y.S.2d 319 (Sup. Ct. App. Div. 1969) (upholding statute revoking license of accountant for unprofessional conduct, defined as acts evidencing moral unfitness).

567. See, e.g., *Meyer v. Board of Medical Examiners*, 34 Cal. 2d 62, 206 P.2d 1085 (1949) (physicians).

568. See, e.g., N.Y. GEN. BUS. LAW § 409 (McKinney 1968) (reinstatement of cosmetologist's license possible after one year).

569. N.Y. EXEC. LAW § 242 (McKinney Supp. 1969-70).

certificate shall not proscribe licensing authority discretion, a few New York licensing statutes require recognition of the certificate.⁵⁷⁰ California recently enacted legislation requiring licensing authorities to recognize prison training when passing upon a former criminal's application.⁵⁷¹ Under this provision, an inmate who has received training for an occupation in the course of a prison rehabilitation program cannot be denied the right to take the examination required to obtain a license for that occupation. In effect, if the applicant is otherwise qualified, his conviction will not bar licensing.

Most licensing statutes, however, make no provision for mitigating the effect of a criminal conviction. In these jurisdictions, an applicant excluded from licensed status on the basis of his criminal record must depend upon the courts for relief. In many instances, judicial review of the agency determination may be of limited scope.⁵⁷² In the absence of a showing of arbitrary or capricious action, it is unlikely that a licensing authority's exclusion of a convicted criminal will be disturbed by the reviewing court.⁵⁷³

C. Exclusion of Convicted Criminals from Public Employment

The difficulties experienced by the ex-convict in securing public employment are no less formidable than those he encounters in seeking entrance to licensed occupations. The restrictions excluding convicted criminals from public employment affect a large number of job opportunities. Federal, state, and local governments employ more than twelve million people.⁵⁷⁴ One out of six civilian workers is a public employee.⁵⁷⁵ Moreover, three and one-half million men and women currently serve in the Armed Forces.⁵⁷⁶

A number of government employees are elected or appointed to positions of public trust. Individuals occupying these positions are generally thought of as public officers. The many restrictions on the convicted criminal's privilege of holding public office, as well as the distinction between officers and employees, are fully discussed elsewhere.⁵⁷⁷ The present inquiry embraces the many public occupations

570. E.g., N.Y. GEN. BUS. LAW § 74 (McKinney 1968) (private investigators).

571. CAL. BUS. & PROF. CODE § 23.8 (West Supp. 1970).

572. See note 505 *supra* and accompanying text.

573. See, e.g., *Stephens v. Dennis*, 293 F. Supp. 589, 595 (N.D. Ala. 1968) (revocation of pharmacist's license). See generally W. GELLHORN, *supra* note 485, at 118-25.

574. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1969, at 430-31 (90th ed. 1969).

575. *Id.* at 211.

576. *Id.* at 255.

577. See notes 342-60, 363-77 *supra* and accompanying text.

that are not appreciably different from jobs in the private sector. Although a number of these positions appear particularly suited to ex-convicts, both federal and local governments have been slow to recognize this fact.⁵⁷⁸ Thus, it is not unusual to find constitutional and statutory provisions barring convicted criminals from a wide variety of routine public occupations. Additionally, regulations requiring that public employees be of good moral character may disqualify many offenders.

The decision whether to employ an applicant with a criminal record is often discretionary with governmental agencies. Available information indicates, however, that examining and certifying agencies actually hire few ex-convicts.⁵⁷⁹ It is likely that those offenders who do succeed in obtaining employment are most often placed as unskilled laborers.⁵⁸⁰ Even an acquittal of a criminal charge will generally not prevent the offender from being denied employment if the public agency regards him as unfit.⁵⁸¹ Similarly, neither pardon nor expungement preclude exclusion.⁵⁸² There may even be instances in which members of a convicted criminal's family will be barred from public employment.⁵⁸³

For some offenders, the passage of time may lower the barriers to employment.⁵⁸⁴ Others may be employable by reason of positive rehabilitation measures initiated by the federal government and certain states.⁵⁸⁵ Under a few court decisions, pardoned offenders may have increased employment opportunities.⁵⁸⁶ It is apparent, however, that under current practices many ex-convicts are barred from public employment. It is equally clear that reviewing courts are not likely to

578. See, e.g., C. RHYNE, *MUNICIPAL LAW* § 8-2 (1957) (typical public employees include architects, medical inspectors, engineers, matrons, janitors, park attendants, superintendents of nurses, switchboard operators, and watchmen).

579. See Wise, *Public Employment of Persons with a Criminal Record*, 6 NAT'L PROBATION & PAROLE ASS'N J. 197 (1960).

580. See D. GLASER, *supra* note 465, at 359-61.

581. See, e.g., *Berman v. Gillroy*, 198 Misc. 369, 97 N.Y.S.2d 521 (Sup. Ct. 1950), *aff'd*, 305 N.Y. 688, 112 N.E.2d 771 (1953), *cert. denied*, 347 U.S. 921 (1954).

582. *Taylor v. Macy*, 252 F. Supp. 1021 (S.D. Cal. 1966) (upholding dismissal from United States Civil Service even though state conviction of vagrancy had been expunged).

583. E.g., *Sheridan v. Gardner*, 347 Mass. 8, 196 N.E.2d 303 (1964) (upholding provision that convicted person's immediate family cannot serve on crime commission).

584. E.g., MASS. ANN. LAWS ch. 31, § 17 (1966) (convict eligible for public employment one year following conviction).

585. See, e.g., MD. ANN. CODE art. 64-A, § 19 (1968) (expressly declaring ex-convicts eligible for civil service appointment).

586. See, e.g., *Slater v. Olson*, 230 Iowa 1005, 299 N.W. 879 (1941) (application for civil service position as assistant smoke inspector); *Commissioner of Metro. Dist. Comm'n v. Director of Civil Serv.*, 348 Mass. 184, 203 N.E.2d 95 (1964) (disabled veteran applying for police department position).

intervene unless exclusion is found to be arbitrary or patently unreasonable.⁵⁸⁷

1. *Federal Employment.*—The United States Constitution does not require exclusion of convicted criminals from federal employment. Congress, however, has enacted legislation barring certain types of offenders from many federal positions. A number of disqualifying provisions under the Federal Criminal Code have already been discussed in connection with the prohibitions against convicted criminals holding public office.⁵⁸⁸ Many of these provisions apply equally well to public employees.⁵⁸⁹ Other federal statutes, however, make it clear that individuals convicted of certain crimes are barred from all federal employment. Conviction of either advocating the overthrow of the government⁵⁹⁰ or promoting insubordination in the Armed Forces,⁵⁹¹ for example, disqualifies the offender from employment by the United States government or any department or agency thereof for a period of five years following the conviction. Moreover, under the Omnibus Crime Control and Safe Streets Act of 1968,⁵⁹² a person convicted of inciting a riot or civil disorder and sentenced to imprisonment for one year will be ineligible for federal employment for five years subsequent to conviction. Under the Study Draft of the New Federal Criminal Code,⁵⁹³ disqualification from federal office or employment because of criminal conviction is discretionary with the sentencing court.⁵⁹⁴ Moreover, the Draft provides for automatic removal of the disqualification five years after the defendant has completed his sentence.⁵⁹⁵

Conviction of a serious crime often disqualifies the offender from military service. Only in exceptional cases, for example, are convicted felons permitted to enlist in the Armed Forces.⁵⁹⁶ In addition, a wide

587. *City of Aurora v. Schoberlein*, 230 Ill. 496, 82 N.E. 860 (1907) (removal from civil service is administrative and not to be judicially tried *de novo* on the merits); *accord*, *Appeal of Fredericks*, 285 Mich. 262, 280 N.W. 464 (1938); *City of Jackson v. McLeod*, 199 Miss. 676, 24 So. 2d 319 (1946).

588. See notes 365-74 *supra* and accompanying text.

589. E.g., 18 U.S.C. § 1905 (1964) (disclosure of confidential information); *id.* § 1913 (lobbying with appropriated moneys).

590. *Id.* § 2385.

591. *Id.* § 2387.

592. 5 U.S.C. § 7313 (Supp. IV, 1969) (inciting, organizing, promoting, encouraging, aiding, or abetting a riot or civil disorder or any offense determined by the head of an employment agency to have been committed in furtherance of civil disorder).

593. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE* (1970).

594. *Id.* § 3501.

595. *Id.* § 3503.

596. 10 U.S.C. § 504 (Supp. IV, 1969) (Service Secretaries may authorize exceptions in meritorious cases).

variety of civil and military offenses may result in a serviceman's separation from the Armed Forces under less than honorable conditions.⁵⁹⁷ Servicemen who fail to receive an honorable discharge are ineligible for preferential Civil Service appointments available to other veterans.⁵⁹⁸

In certain instances, convicted criminals may be barred from employment in activities regulated by the federal government. Under the Labor-Management Reporting and Disclosure Act of 1959,⁵⁹⁹ for example, felons are ineligible to serve as officers or directors of any labor organization. Similarly, an individual convicted of an offense involving dishonesty or breach of trust normally is not employable by a bank insured by the Federal Deposit Insurance Corporation.⁶⁰⁰ Convicted criminals also may be denied employment with either the federal government or defense-related industries because their criminal records preclude issuance of the requisite security clearance.⁶⁰¹

Even in the absence of direct prohibitions against hiring convicted criminals, federal agencies exercise broad discretion in deciding whether to employ applicants with criminal records. United States Civil Service regulations, for example, provide that "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct" may be the basis for disqualifying individuals from the federal service.⁶⁰² Formerly, before an applicant could be considered for a responsible position, the Civil Service Commission required two years to elapse following discharge from a felony sentence, and one year following discharge from a misdemeanor sentence.⁶⁰³ Since employment of rehabilitated offenders has recently received special emphasis in the federal service,⁶⁰⁴ however, the Commission now accepts applications from ex-convicts at any time. Determination of the applicant's suitability embraces the nature, seriousness, and circumstances of the crime, the offender's age, social and economic environment, and rehabilitation. The Commission, however, neither requires applicants to disclose information concerning convictions by juvenile authorities that occurred prior to age 21, nor considers arrests that were not followed by conviction. Moreover,

597. See note 563 *supra*.

598. 5 U.S.C. §§ 2108(1), (2) (Supp. IV, 1969).

599. 29 U.S.C. § 504(a) (1964).

600. 12 U.S.C. § 1829 (1964).

601. 32 C.F.R. §§ 155.5, 156 (1970).

602. 5 C.F.R. § 731.201(b) (1969).

603. D. GLASER, *supra* note 465, at 414.

604. See *Employment of the Rehabilitated Offender in the Federal Service*, in *Civil Service Form 941* (Feb. 1968), reprinted in 32 *FED. PROBATION* 30 (Sept. 1968).

current Civil Service regulations⁶⁰⁵ authorize employment of federal prisoners participating in work-release programs pursuant to the Federal Prisoner's Rehabilitation Act of 1965.⁶⁰⁶

2. *State and Municipal Employment.*—Many states and municipalities bar convicted criminals from public employment.⁶⁰⁷ The disability may be imposed by constitutional provision,⁶⁰⁸ statute,⁶⁰⁹ or ordinance.⁶¹⁰ In some instances, former criminals are permanently barred,⁶¹¹ while in others employment is permitted at a specified time after conviction.⁶¹² In most states, ex-convicts are barred from holding police or correctional employment.⁶¹³

Many constitutional and statutory provisions disqualifying convicted criminals appear to limit the disability to public office.⁶¹⁴ It is clear, however, that a wide variety of routine government jobs may fall within these proscriptions. Recently, for example, the dismissal of a school bus driver upon disclosure of a felony conviction 24 years earlier was upheld under a constitutional provision barring convicted felons from holding "office or appointment of honor, trust, or profit."⁶¹⁵

State and municipal civil service provisions usually authorize exclusion of convicted criminals. Typical regulations provide that both state and municipal commissions may refuse to examine or certify an applicant guilty of either a crime, or infamous or notoriously disgraceful conduct.⁶¹⁶ Thus depending on a commission's policy, a criminal conviction can be a serious obstacle to civil service appointment. In addition, immoral or criminal conduct may disqualify employees even in

605. 5 C.F.R. § 213.3102(x) (1969).

606. 18 U.S.C. § 4082 (Supp. IV, 1969).

607. See S. RUBIN, *supra* note 468, at 613-14, 625-26 (listing 27 states).

608. E.g., DEL. CONST. art. 2, § 21; LA. CONST. art. 8, § 6; PA. CONST. art. 2, § 7; WIS. CONST. art. 13, § 3.

609. E.g., ARIZ. REV. STAT. ANN. § 38-912 (Supp. 1969-70); FLA. STAT. ANN. § 112.01 (1960); N.M. STAT. ANN. § 5-1-3 (1966).

610. See generally E. McQUILLIN, *supra* note 498, §§ 12.58, 229-270.

611. E.g., CAL. GOV'T CODE § 1029 (West 1966) (felons prohibited from being peace officers).

612. E.g., MASS. ANN. LAWS ch. 31, § 17 (1966) (civil service closed for one year).

613. See S. RUBIN, *supra* note 468, at 628.

614. See note 344 *supra* and accompanying text.

615. *Thomas v. Evangeline Parrish School Bd.*, 138 So. 2d 658 (La. 3d Cir. Ct. App. 1962). The Louisiana Constitution was recently amended to provide that convicted felons can hold public employment not involving responsibility for public funds. LA. CONST. art. 8, § 6.

616. E.g., CAL. GOV'T CODE § 18935 (West 1963); N.Y. CIV. SERV. LAW § 50(4) (McKinney 1959). See, e.g., *Alderv. Lang*, 21 App. Div. 2d 107, 248 N.Y.S.2d 549 (1964) (denial of application for job as assistant mechanical engineer because of prior arrest record that included misdemeanor conviction, reversed because of civil service commission's failure to scrutinize circumstances surrounding the petitioner's record).

the absence of a conviction.⁶¹⁷ One state supreme court, for example, recently upheld the dismissal of a water tradesman with fifteen years' service on the ground that he had committed adultery and that this conduct was wantonly offensive to the public and unbecoming an employee of the city.⁶¹⁸ Under the reasoning of this case,⁶¹⁹ it is likely that many individuals with criminal records will be disqualified from civil service.

VII. LOSS OF JUDICIAL RIGHTS

The American judicial system imposes a number of disabilities on the citizen with a criminal record. In some states, for example, the prison inmate lacks the capacity to sue, although he or his representative may be sued. Similarly, the offender may be unable to execute judicially enforceable instruments, such as contracts and wills, or to serve as a court-appointed fiduciary, such as an executor, administrator, or guardian. A criminal conviction also may affect the offender's participation in the judicial process as a witness or juror. Convicted persons, for example, generally cannot testify in judicial proceedings without their testimony being impeached. Persons convicted of perjury lack the capacity to testify in some states. Moreover, convicted persons often are precluded from serving as jurors, irrespective of their individual qualifications or sentiments.

A. Capacity to Litigate

At common law, citizens imprisoned in a penitentiary lacked the capacity to sue,⁶²⁰ but their imprisonment did not prevent them from being sued.⁶²¹ This rule developed from the practice that a criminal

617. See, e.g., 4 N.Y.C.R.R. § 3.2 (1969), appearing in N.Y. CIV. SERV. LAW, Rules and Regulations of the Dep't of Civil Service § 3.2 (McKinney Supp. 1969) (applicant who lacks good moral character or satisfactory reputation may be disqualified from examination or appointment). See also *Berman v. Gillroy*, 198 Misc. 369, 97 N.Y.S.2d 521 (1950), *aff'd*, 305 N.Y. 688, 112 N.E.2d 771 (1953), *cert. denied*, 347 U.S. 921 (1954) (upholding civil engineer's removal because of sodomy charge, even though criminal prosecution dismissed).

618. *State ex rel. Gudlin v. Civil Serv. Comm'n*, 27 Wis. 2d 77, 133 N.W.2d 799 (1965).

619. "[T]here must be an area where conduct of an employee of a municipality . . . in violation of important and fundamental standards of propriety is of legitimate concern to the municipality. . . . When an employee's unacceptable conduct falls within this area of concern, we find no implication in the statute or ordinance that such conduct cannot be cause for discharge unless it can be shown directly to impair performance of duties." *Id.* at 86-87, 133 N.W.2d at 804.

620. See, e.g., *Avery v. Everett*, 110 N.Y. 317, 18 N.E. 148 (1888); *Miller v. Turner*, 64 N.D. 463, 253 N.W. 437 (1934); *Kenyon v. Saunders*, 18 R.I. 590, 30 A. 470 (1894).

621. See, e.g., *Gray v. Gray*, 104 Mo. App. 520, 79 S.W. 505 (1904); *Green v. Boney*, 233 S.C. 49, 103 S.E.2d 732 (1958).

conviction resulted in a forfeiture of the offender's goods to the crown.⁶²² Since prisoners had no property or rights for which suit could be brought, there was no reason to give them the right to sue.⁶²³ Today, forfeiture has been abolished in all states,⁶²⁴ but states that have retained civil death statutes generally do not permit prison inmates to maintain civil actions. Most states, however, now permit prisoners to bring civil actions. The common law rule permitting prisoners to be sued has remained unchanged.

1. *Capacity of Prisoners to Sue.*⁶²⁵—The majority of states today permit prison inmates to institute civil suits either in their own names or through personal representatives or committees appointed to manage the estates of prisoners. Persons imprisoned in the penitentiary, however, lack the capacity to sue in most of the thirteen states that have retained civil death statutes.⁶²⁶ The overwhelming majority of states, including many states that have civil death statutes, provide that imprisonment is a disability that tolls the statutes of limitations. Consequently, upon release, most prison inmates, including those who are unable to sue while incarcerated, can maintain a cause of action that accrued during imprisonment.

(a) *Capacity of prisoners to sue in their own names.*—In most states without civil death statutes, citizens imprisoned in the penitentiary retain the right to sue in their own names.⁶²⁷ In the absence of a specific statute, the courts have ruled that prisoners have the capacity to sue since the legislatures have not provided that criminal offenders lose their civil rights during imprisonment.⁶²⁸ Some non-civil death states have enacted statutes dealing with suits instituted by prisoners. Both New Hampshire

622. *Kenyon v. Saunders*, 18 R.I. 590, 30 A. 470 (1894).

623. *Id.*

624. See notes 103-19 on pages 1080-82 *infra* and accompanying text.

625. This section will not review general restrictions on prisoners or the remedies available to prisoners who are mistreated. See, e.g., *Hanna, The Convict and the Compensation Law*, 34 CALIF. L. REV. 167 (1946); *Vogelman, Prison Restrictions—Prisoner Rights*, 59 J. CRIM. L.C. & P.S. 386 (1968); Note, *Remedies Available to Penal Inmates For Injuries Received While Incarcerated*, 34 IND. L.J. 609 (1959); Note, *Federal Remedies for Lawfully Committed Prisoners Who Claim Mistreatment*, 2 J. PUB. LAW 181 (1953); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962); Note, *Prisoners' Remedies for Mistreatment*, 59 YALE L.J. 800 (1950).

626. For a discussion of the civil death statutes, see notes 70-79 *supra* and accompanying text.

627. See, e.g., *Willingham v. King*, 23 Fla. 478, 2 So. 851 (1887); *Department of Welfare v. Brock*, 306 Ky. 243, 206 S.W.2d 915 (1947); *Bosteder v. Duling*, 115 Neb. 557, 213 N.W. 809 (1927).

628. E.g., *Bosteder v. Duling*, 115 Neb. 557, 564, 213 N.W. 809, 812 (1927).