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Bernard Kogon

Donald L. Jr. Loughery

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CRIMINOLOGY

SEALING AND EXPUNGEMENT OF CRIMINAL RECORDS—THE BIG LIE

BERNARD KOGON AND DONALD L. LOUGHERY, JR.

Bernard Kogon, employed by the Los Angeles County Probation Department since 1951, is Director of the Staff Training Office. He received his LL.B. (1935) and M.S.W. (1942) degrees from Brooklyn Law School and Columbia University School of Social Work, respectively. He is a member of the New York Bar. From 1953 to 1968 he was an Associate Professor at California State College, Los Angeles, where he taught correctional and social welfare courses in the Sociology Department.

Donald L. Loughery, Jr., is Chief of Field Services, Western Division, Los Angeles County Probation Department. He received his A.B. degree in Sociology at UCLA in 1948 and his M.S. in public administration at USC in 1959. His twenty-two years of experience in probation includes assignments in adult and juvenile field work, juvenile forestry camps, personnel and training, and various levels of supervision and management.

According to the authors, the sealing and expungement of criminal records is not as humanitarian as it looks. Ostensibly a boon to the offender, it actually works against him and helps society to evade its obligation to change its views toward former offenders. Instead of accepting ex-law breakers and giving them a fair chance, the community requires them to lie, and the community lies to itself when it conceals their records in order to make them employable. This violates every principle of honest rehabilitation work.

The authors find, moreover, that aside from the issue of principle, it is a practical impossibility to deny reality. While certain records are destroyed, others are not. It is impossible to account for the blank time in a man's employment history during which he was in jail or prison. The order to seal a record constitutes a record in itself. The denial of reality is both unethical and inefficient. It is time society grew up.

The wide-spread practice of sealing or expunging criminal and delinquency records is a failure. Despite the good intentions of its proponents, it does not provide the relief intended and actually does harm, frequently, by the hoax it plays upon ex-offenders and the general public. The whole approach requires re-examination. Basic social values are involved; this is a matter of conscience, not merely convenience. It includes more than simply the concealment of offender records.¹

Review is timely, because there is a growing concern about the way "a record" handicaps an offender. Furthermore, correctional practice, in general, is being closely questioned and re-evaluated today. Certainly the traditional mis-

handling of the record should be among the first aspects of practice to be challenged.

Record sealing and expungement have been accepted casually and extended uncritically over the years, prospering in a rosy glow of good intentions and expediency, with little attention to evaluation of results.² There are few court decisions and attorney-general opinions dealing with the subject. Definitive law is absent because the subject matter has rarely been litigated upward. Extant litigation is scanty and inconclusive; appeal decisions are rare.

¹ Mirjan R. Damaska, in his exhaustive, two-part article, *Adverse Legal Consequences of Conviction and their Removal: A Comparative Study*, 59 J. CRIM. L., C. & P.S. 347, 542 (1968), indicates that: "collateral consequences flowing from criminal judgments are legion. . . . Views regarding removal of these consequences widely differ. . . . there is little conscious policy behind legal provisions dealing with this problem. . . . some of these provisions are not in harmony with modern correctional thinking. . . ."

Damaska refers to the general subject as a "rather neglected area", but does indicate that there is some evidence of growing improvement with respect to disqualifications resulting from conviction of crime.

¹ We prefer to use the terms "conceal" or "concealment" throughout this article, with respect to records, because: (a) these words reflect, in a generic sense, the societal intent to remove criminal records from scrutiny, whether permanently, temporarily, or for certain purposes only; and (b) because, although the terms "seal" and "expunge" are used in the statutes, in court decisions, and in legal parlance, we have no confidence that they mean what they say.

There is a variety of statutes on record concealment, but they are not universal by any means, although increasing legislative interest is being demonstrated. Current law tends to be unclear and ambiguous. There is little literature to dispel the general murkiness surrounding the subject. A search revealed none espousing the position of this article.

Briefly, it is believed that: 1) disabilities flowing from conviction of crime, or the juvenile delinquency equivalent, should be completely lifted upon discharge of criminal liability (or termination of juvenile court wardship), as part of society's recognition that "payment of the debt" has been accomplished; 2) the record should be left alone, *i.e.*, neither sealed nor expunged; and, 3) reintegration of the offender into the society should be supported through changes in societal attitudes toward ex-offenders (with the assistance of appropriate legislation) and not through efforts to legislate untruths. History, reality, "the record" cannot be changed, as Omar reminds us, by law or anything else.

This article proposes to accomplish the following objectives: define terms, examine current practice throughout the country, explain why the system of sealing and expungement is ineffective and cannot be made effective, and finally, present a more viable and rational method of reintegrating offenders who have presumably been rehabilitated.

In connection with this article, and in an effort to survey current practice, letters of inquiry were sent in August of 1968 to correctional agencies in all the states, to a number of city and county jurisdictions, and to federal authorities. Additional letters were sent to several agencies and individuals that had evinced prior connection with or interest in the subject matter. About 70 letters were sent; there were over 50 responses. As further preparation, the literature, including correctional journals, law review articles, court decisions, and attorney-general opinions, was reviewed.

DEFINITION OF TERMS

It may appear idle or unnecessary to spend any time defining terms. However, the survey clearly confirmed what had been suspected—tremendous confusion about their meaning. Analysis of the ways in which the words "seal" and "expunge" are used reveals neither precision in definition nor consensus as to meaning. Often the terms are used

interchangeably, but they are not the same. All of this adds to the hoax played upon the former offender population, a recurrent theme of this paper.

Gough, in his authoritative article on the subject, refers to the "extreme lack of uniform terminology, even within a single jurisdiction", and comments on how difficult it is to study the system under the circumstances.³ In his survey he found that the process of concealing or destroying the record is variously designated as expungement, record sealing, record destruction, obliteration, setting aside of the conviction, annulment of the conviction, amnesty, nullification of the conviction, purging, and pardon.⁴ Simply in the interests of basic communication we must define at least three terms which must not continue to be used interchangeably: "sealing"; "expunge-ment"; and "removal of disabilities."

Sealing

Essentially, "sealing" means that a record or proceeding is "merely" sealed—not destroyed. There is an obvious and intended implication that the sealed item or event may, under certain circumstances, be unsealed.

According to *Corpus Juris*, "the word 'seal' is defined as meaning to fasten with a seal, or a fastening impressed with a seal to guarantee security; so to fasten, that the seal, or the band or wrapper fastened by the seal, must be torn or broken in order to remove the inclosed article".⁵

Expungement

"Expungement," regarded by some as "a concept of fairly recent origin",⁶ literally means that the record or proceeding is erased—as if it had never happened in the first place. The memory of the event is blotted out permanently, with no

³ Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, (1966) WASHINGTON UNIVERSITY LAW QUARTERLY, 149.

⁴ *Ibid.* 149-150.

⁵ 79 CORPUS JURIS SECUNDUM 475. The 1968 pocket part adds, at page 42: "The word 'seal' is also defined to mean any instrumentality that keeps something close, secret, or unknown."

⁶ Pettler & Hilmen, *Criminal Records of Arrest and Conviction: Expungement from the Public Access*, 3 CALIF. WEST. LAW REV. 124 (1967). The authors of this article indicate that expungement was brought up for the first time formally at the 1956 National Conference on Parole, with the objective of lessening or abolishing the "penalties which public opinion, as opposed to law, imposes upon one convicted of an offense against society".

possibility of refreshment or revival under any circumstances.⁷

Corpus Juris describes expungement as "a term expressive of cancellation or deletion, implying not a legal act, but a physical annihilation". In its elaboration, the words "rub out", "destroy", and "obliterate" are used.⁸

It may be seen therefore, that sealing does not purport to destroy the record, while expungement does. With respect to popular usage, however, the words are often used interchangeably. To cite an example, the Juvenile Court Act of Utah specifically provides for the "Expungement of Juvenile Court Record".⁹ The code section, however, goes on to indicate that, under certain conditions, the court "shall order sealed all records..." (Emphasis added). The section further provides for "inspection of such records", clearly indicating that the literal meaning of expungement was not intended. A further example: Pettler and Hilmen discuss several California statutes which actually deal with the sealing of records, but state: "Here records may be truly expunged by a petition to seal them" (Emphasis added).¹⁰

A law review article, devoted to California's "unusual expungement statutes", reflects the same basic error. Discussing Penal Code Section 1203.4, and related sections, none of which actually provides for expungement, it "suggests statutory amendments to make expungement a more meaningful reward for and aid to rehabilitation". The authors conclude by declaring that the difficulties demand that "the expungement requirements be sharpened to increase the credibility of the expungement as reflective of rehabilitation".¹¹

⁷ Gough emphasizes that not only is the record eradicated but, more significantly, the offender receives a "redefinition of status". *Op. cit. supra* note 3, at p. 149.

Stein, discussing Section 1203.4 of the California Penal Code, often and erroneously referred to as an expungement statute, states: "While there is no statutory definition of expungement, in both legislative and legal circles in California it is generally understood to mean that, as far as the law is concerned, the record does not exist, while in fact, physically, it does exist".

See Stein, *Guilt by Record*, 1 CALIF. WEST. LAW REV. 126 (1965).

⁸ 35 CORPUS JURIS SECUNDUM 343; see also West Publishing Company's WORDS AND PHRASES, Vol. 15A, 1968 pocket part, p. 72.

⁹ Section 55-10-117 Utah Code annotated 1953, as enacted by Laws of Utah, 1965.

¹⁰ 3 CALIF. WEST. LAW REV., *op. cit. supra* note 6, at p. 126.

¹¹ Notes and Comments—*The Effect of Expungement*

Gough states in this connection:

"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, although this is a significant part of its effect. 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."¹²

Removal of Disabilities

"Removal of disabilities" actually includes any legal effort made to nullify the bad effects of a record, whether or not concealment or secrecy are involved.

California's laws dealing with vacation of conviction, restoration of certain civil rights, and removal of some other disabilities are notoriously referred to as expungement laws, when in fact they seek only to remove certain disabilities and not to erase the record at all. As a result of the primal error, we see many efforts to make such laws more effective as expungement laws, in the face of the fact that they were not intended as such. These efforts unfortunately only tend to compound the initial fallacy.

Booth demonstrates the confusion clearly. He comments on California's Section 1203.4, a well-known provision dealing with dismissal of a case and removal of disabilities flowing from the conviction, after successful completion of a probation term.¹³ He notes that a motion under this section is commonly referred to as a motion for "expungement" and states: "Notwithstanding the fact that the remedy is commonly referred to as 'expungement', it is far from it". Elsewhere in his article, he uses the term "sealing" in the same context, without differentiation.

In response to a survey question about local sealing and expungement laws, a number of

on a Criminal Conviction: 40 SO. CALIF. LAW REV. 127 (1967).

¹² Gough, *op. cit. supra* note 3, at p. 149.

¹³ Booth, *The Expungement Myth*, 38 LOS ANGELES BAR BULLETIN, March 1963, 161-166.

It must be observed that Section 1203.4 does not even use the word "expunge", and that none of the many court decisions dealing with it and related sections declares the record expunged, or indicates that such was intended by the legislature.

respondents indicated that their laws provide for the "setting aside" of youthful-offender, misdemeanor, or felony convictions and the removal of disabilities flowing from such convictions.

Although such legislation is rather common, with evidence of a legislative trend in its favor, the vacation of convictions and the removal of disabilities do not constitute concealment of the record, any more than the declarations of confidentiality of juvenile court records are the equivalents of their concealment from scrutiny.¹⁴ The setting aside of convictions generally has a much more limited effect. While certain disabilities are clearly removed, and while there sometimes purports to be a concealment of the record, the fact is that it remains. In some few instances, however, similar to the juvenile court situation described above, the relief granted by vacation-of-conviction statutes may include a concealment of the record.

Booth's position is that current "expungement" does not work, that "our sense of fair play" should require us to give an offender "a second chance to start off with a clean record", and that the thing to do is to revise the statutes so as to make them more effective as real expungement laws.¹⁵ Current "removal of disabilities" provisions might be said to be even less effective, although they point toward a sounder direction.

CURRENT PRACTICES

An examination of the practices throughout the country revealed that laws pertaining to the subject of inquiry are either conflicting, thereby re-

¹⁴Baum states that "This type of relief—actually wiping out the legal event, sealing the records thereof, and authorizing denial of the occurrence of such event—has been a good deal more controversial than remedies only affording relief from disabilities resulting from conviction." Baum, *Wiping out a Criminal or Juvenile Record*, 40 CALIFORNIA STATE BAR JOURNAL 824 (1965).

While there is lack of clarity about the force and effect of the California so-called expungement statutes, the best of evidence indicates that they do not expunge conviction. An article, referred to earlier, studies six California statutes dealing with the concealment of records, and concludes as follows: "Expungement inaccurately describes the effect of the six California statutes, none of which literally expunges the conviction." The sentence or judgment is vacated, but not the conviction. *Supra* note 11, at p. 132.

The California Attorney General has ruled that the records of conviction are not destroyed upon the entry of an order of dismissal pursuant to Section 1203.4 (36 Ops. California Attorney General 1, 3-1960).

Gough emphasizes that provisions which set aside the crime do not reach the status of an offender. *Op. cit. supra* note 3, at p. 168.

¹⁵Booth, *op. cit. supra* note 13, at p. 166.

flecting a singular lack of clarity as to philosophy and goals, or else non-existent.

It is no exaggeration to declare that confusion is monumental. As has been said previously, there is no common currency with respect to the meaning of terms, but rather a tendency to use the words "seal and "expunge" interchangeably.

Beyond the semantic problem—which amounts to far more than that in the lives of offenders—it was found that the vast majority of respondents to the aforementioned survey of correctional administrators regarded sealing and expungement, and particularly the former, as a desideratum. In different ways they championed the proposition that when an offender has paid his debt to society, he should not be hounded forever. A number of them indicated that bills pertaining to sealing were either currently before their legislatures, or were being advocated.¹⁶

Frequently, strong convictions were expressed about the desirability of such concealment practices, on the theory that we defeat our goals of rehabilitation if we permit the typical social bias against offenders to persist by perpetuating a record of their offenses. In the same vein, many respondents urged that rehabilitation was really enhanced by concealment of the record.

Partisans of concealment statutes ranged widely in their views. Some offered considerable reason and logic for their position, while others tended toward a more sentimental view about the humanitarian service we could render offenders when, at the point of death, they desperately wished to have the record cleared before they met the "Maker". Admittedly, this is an extreme, but it serves to make a point about the variety and confusion of motivation and myth surrounding this subject.

The common thread among all these responses involved the belief that the way to protect an ex-offender from continuing harassment and suspicion is through record concealment; that the trend must be toward tightening up concealment laws and practices to make them more effective.

Despite the overwhelming thrust in favor of concealment statutes, however, a search reveals

¹⁶In California a large number of such bills were submitted to the 1968 Legislature. Governor Reagan vetoed these bills because the Senate Judiciary Committee is currently studying the matter of record sealing. The Governor felt that such legislation should be deferred until the study was completed.

that most states do not actually have such laws. Many laws purport to provide for sealing or expungement, but do not, in fact, do so. Such misleading laws fall into two broad categories: 1) those affording the "protection" provided by "privileged" (generally juvenile) court records, and 2) those furnishing no such presumptive protection initially, but rather providing for the removal of disabilities resulting from conviction (or the juvenile delinquency equivalent) *after* a "good adjustment".

In response to a survey question about the existence of sealing and expungement laws, many responded by citing juvenile court law provisions for the privacy of hearings and the confidentiality of records. While juvenile court proceedings are generally private throughout the country, experience has shown that there is much unwarranted confidence in the inviolability of this "privilege" when it is challenged.

Realistically, one must address the question of confidentiality with respect to whom and under what circumstances, rather than in abstract terms. It is emphasized, however, that the confidentiality of records is not the same thing as sealing or expungement, and that to use all these words interchangeably is to compound the confusion. The Alabama Statute, for example, provides against "indiscriminate public inspection," which is hardly equivalent to a sealing, let alone expungement of the record.¹⁷

While most states have provisions for the protection or confidentiality of delinquency records, such provisions customarily do not extend to the sealing of the records.¹⁸

Efforts to Extend Current Trends

There are leading organizations which support current concealment laws and press for their improvement. An example of this is the model act

¹⁷ Title 13, Sec. 353, Code of Alabama, 1940, recom-piled 1958.

¹⁸ Several states indicated that their juvenile court laws specifically provide for record concealment, in addition to the requirement of confidentiality (e.g., Arkansas, Illinois, Minnesota, South Dakota, Vermont).

The Minnesota law indicates that: "... the Court may expunge the adjudication of delinquency at any time that it deems necessary". However, neither physical destruction nor sealing of records is required. (M.S. Sec. 260.185, subdiv. 2, Juvenile Code, 1959, as amended).

In Nevada, protection of records does not include sealing, at least in some counties. (Chapter 62, N.R.S., Procedure in Juvenile Cases).

concerned with the annulment of a conviction of crime, authored by the National Council on Crime and Delinquency in 1962.¹⁹ This act essentially provides for judicial power to annul a conviction. It is by no means unequivocal. Annulment is a matter of discretion, not of right. It, therefore, depends on the circumstances whether an offender gets one or not. Further, not all rights are unequivocally and absolutely restored; again, it "depends on the circumstances".

NCCD adds to the doubts about the efficacy of such equivocal, remedial legislation, by confusing the removal of disabilities with the blotting out of the record. For example, the article states:

"The kind of authority given to the court in the Model Act should produce wider and more uniform use of the power to *expunge the record* while allowing for sound discretion to take individual circumstances into account."²⁰ (Emphasis added.)

The Model Act itself does not use the word "expunge". It does refer to "annulling, canceling, and rescinding the record of conviction and disposition . . ." ²¹ While it thus may appear that expungement is intended, such an inference is dispelled by language in the Act which indicates that in a subsequent crime, the prior conviction may be considered by the court in determining what sentence to impose. The record is, therefore, not expunged in the real sense of the word. It is very much there, to be used against the offender.

The 1956 National Conference on Parole urged that:

"Expunging of a criminal record should be authorized on a discretionary basis. The court of disposition should be empowered to expunge the record of conviction and disposition through an order by which the individual shall be deemed not to have been convicted. Such action may be taken at the point of discharge from suspended sentence, probation, or the institution upon expiration of a term of commitment."²²

The Model Annulment Act emphasizes that "Annulment of the record serves a rehabilitative purpose".²³ A better approach, however, would be to annul attitudes rather than the record.

¹⁹ *Annulment of A Conviction of Crime—a Model Act*, 8 CRIME AND DELINQUENCY #2, April 1962.

²⁰ *Ibid.* p. 100

²¹ *Ibid.* pp. 97-102

²² National Conference on Parole: Parole in Principle and Practice, National Probation and Parole Association, N.Y. 1957, p. 136.

²³ Model Act, NCCD, *op. cit. supra* note 19, at p. 98.

Submitted to the 1969 Delegate Assembly of the National Association of Social Workers were a number of recommended changes with respect to goals of public social policy. Among these was a proposed policy statement on juvenile delinquency and crime. The specific recommendation, which "incorporates the more recent thinking and recommendations of social workers in the correctional field," provides that:

"A police or court record on a juvenile or an adult presents a continuing handicap to the individual as an obstacle to employment, enlistment in the armed services, or participation in other public or service programs. . . . The statutes should provide for the expungement of police and court records when certain conditions relating to individual adjustment have been met. To eliminate obstacles resulting from a record of criminal conviction, federal and state legislation should provide for vacation of conviction after the offender has successfully complied with the obligations imposed."²⁴

The American Civil Liberties Union in California inveighed against Senate Bill 990, as an example of "restrictive or regressive criminal law bills"²⁵—a bill which was introduced in the Senate in the fall of 1968 for the purpose of (a) repealing the existing statutes that provide for the sealing of criminal and juvenile records of minors, and (b) opening of presently sealed files.

While one can appreciate the motives of ACLU and others pressing for suppression of the record, Senate Bill 990 should have been supported, if we are ever to escape the intellectual dishonesty of the present system.

What is universally suggested in these statements and by some correctional authorities is, essentially, that society should go as far as possible—all out—in enacting, and improving existing concealment laws.²⁶ However, caveats

²⁴NASW News Nov. 1968, p. 21—Delegate Assembly (1969) Materials, Recom. #4, The Legal Code.

²⁵The Bill File—A report on the 1968 Legislative Sessions, by Coleman Blease, ACLU Legislative Advocate. The bill was vetoed only because the Senate Judiciary Committee is currently studying the sealing of records. The Governor is reported to have stated: "Further legislation in this area should be deferred until the Committee has had an opportunity to complete its inquiry." (Supra note 16)

²⁶The article by Pettler and Hilmen, *op. cit. supra* note 6, closes with six suggested reforms for restricting or preventing public access to records of offenders who have satisfied the penalties imposed on them. Gough urges the same view. He states: "it is the writer's view that providing institutional means of restoring status after reformation is an appropriate way to harmonize

are invariably introduced. Such laws, proponents urge, need to be consistent with public safety and, further, exceptions need to be made as to what kinds of records are concealed, for what kinds of offenders, and for what kinds of offenses. They offer ways of tightening up concealment laws and putting more teeth therein, but invariably wind up with caveats.²⁷ The result is not a clear, viable, and unequivocal philosophic position but, instead, the familiar posture which, in effect, says: "It all depends"—a position which exasperates and frustrates offenders, and the general public too, who seek a "straight answer" to the question as to whether or not a record is expunged upon good adjustment and discharge from the correctional system.

THE INEFFECTIVENESS OF THE PRESENT SYSTEM

Despite the good intentions and the evidently laudable goals of record concealment proponents, it is apparent that the system cannot and does not work.²⁸ Record concealment is unworkable; it fails to lift other penalties attendant to the record; it sanctions deceit; its half-secrecy leads to speculative exaggerations; it frustrates constructive research; and it is not equally available to all. More particularly:

1. *The process is impractical, unworkable, and unenforceable.* The record is still retrievable through secondary sources. It is simply not possible, physically or literally, either to seal or expunge a record. Baum refers to the "poet's claim that what the Moving Finger writes cannot be cancelled out," and elsewhere in his article he states: "It seems that when the Moving Finger writes these days, a dozen Xerox copies likely are made."²⁹

the sanctioning activities of the democratic body politic with the ultimate value—human dignity. *Op. cit. supra* note 3, at p. 149.

²⁷Note the following typical position: "The breadth of expungement of records must, of course, be determined by a careful weighing of the public interest in knowing of the record against the public policy of doing everything possible to aid the former offender's return to society." Pettler & Hilmen, *op. cit. supra* note 6, at p. 128. The authors cite examples of the more paramount societal need, and then state: "The very existence of these areas makes expungement in the sense of an erasure or destruction impractical as well as inadvisable. *Ibid.* p. 129.

²⁸Professor Fred Cohen in his perceptive writing on the "rehabilitative ideal", refers to the "oft-repeated error of confusing benevolent purpose with actual or potential arbitrary outcome . . . a benevolent purpose is no guarantor of success or fairness". 47 TEX. L. REV. 1 (1968).

²⁹Baum, *op. cit. supra* note 14, at pp. 816, 824.

Pettler and Hilmen also point up the problem:

"... In the absence of any penal sanctions against disclosure, the accessibility of such records is generally a matter of whom one knows in the department in which they are kept. Disclosure is further pyramided by the many places to which such records are distributed, and thus additional sources from which they may be procured."³⁰

Elsewhere, the authors emphasize that statutes dealing with sealing and expungement commonly provide nothing more than a notation of the record concealment. They state:

"There are not any controls, at least penal sanctions, against disbursing information contained in expunged records, nor are there any provisions requiring destruction of copies held by various public agencies and private individuals. In short, expungement statutes as they presently stand neither expunge nor aid a former offender—They are arbitrary in nature and uncertain in the practical remedy they provide."³¹

All records are not and cannot be sealed. That which is sealed may readily become unsealed, formally and procedurally, on the basis of limitations and exceptions customarily written into the law.³² Informal "leaks" in the seal are commonplace.

A state with a concealment statute cannot require the FBI to seal or return records to it, so that an ex-offender may receive protection only in his own jurisdiction. Furthermore, concealment statutes do not help an ex-offender in relation to security checks.

Police records, which are hardly ever sealed or destroyed, provide information which is damaging to the ex-offender and which includes clues leading to ultimate record disclosure. Although many states, in a variety of patterns, restrict or prohibit the use of criminal and delinquency records, it does not generally follow, where such restrictions or prohibitions obtain, that police records are affected. They remain, with very few exceptions, even where sealing and expungement laws exist.³³

³⁰ *Op. cit. supra* note 6, at p. 132.

³¹ *Ibid.*, p. 128.

³² "Expungement statutes are so riddled with legislative and case law exceptions that they are almost wholly ineffectual." *Op. cit. supra* note 6, at p. 125. "... the exceptions to the 'no disabilities whatsoever' have become the rule." *Op. cit. supra* note 11, at p. 129.

³³ Section 1203.4, California Penal Code, the often-quoted "expungement" statute, applies to convictions, not arrests. *Op. cit. supra* note 13, at p. 161. Also see *op.*

Loopholes in law and practice provide additional leads to record disclosure, leads which any reasonably skilled investigator can pursue. It is not unusual, for example, that the written order for records to be sealed or destroyed is itself not concealed; this, of course, creates a "track" to be followed. Entries in state criminal identification bureaus customarily indicate that certain records are sealed, in accordance with a given code section; this constitutes another example of a lead to information and record disclosure.

Evasion of legislative intent by prospective employers abounds. As an example, an applicant may be asked whether he had ever requested relief under various sealing or expungement laws, or whether he had ever had a criminal or delinquency record sealed.³⁴

Because records which are concealed, presumably even destroyed, may be brought to light without too much difficulty, the conclusion is inescapable that such practices do not and cannot work.

2. *Other disabilities and restrictions remain even where the record is concealed.* Ours is a penalty-oriented system of justice. Ex-offenders continue to suffer from statutory and extra-legal penalties long after their offender status has been terminated.

Even where statutes providing for vacation of conviction and removal of disabilities also include some form of record concealment, it is common knowledge that this does not lift other limitations and lingering penalties.

In many jurisdictions, the ex-offender must register with police for life.³⁵ Increased punishment for later offenses is commonplace where "priors" can be established. Testimony of ex-offenders, even those whose records have been "expunged," can often be impeached with such information.³⁶

cit. supra note 7, at p. 130, where the author discusses police records.

³⁴ According to Gough, probation officers claim that agencies often ask: "Have you ever had an offense record expunged?" or "Have you ever appeared as a moving party in any court?" *Op. cit. supra* note 3, pp. 164-65.

³⁵ Until recently, an ex-felon in California had to register with police "forever" under Penal Code, Sec. 290, or Health and Safety Code, Sec. 11853, even though disabilities were removed under Section 1203.4 of the Penal Code.

³⁶ Under California Law, if an ex-felon testifies in the case of another, he may deny a former conviction, under Sec. 1203.4, Penal Code. However, if he testifies in his own defense in any subsequent prosecution, he will be

Opportunities to obtain or renew licenses or permits to practice certain trades or professions, or to get them restored after suspension or cancellation following conviction, are sharply curtailed throughout the United States.³⁷ "Expungement" of the record often does not help restore the ex-offender's status since innumerable court decisions have held that the matter is entirely within the discretion of the licensing body.

The use or possession of firearms is oftentimes limited.³⁸ As noted earlier, in another context, record suppression does not provide an ex-offender with any relief in security checks by employers, or in relation to federal usage of records—by the military or FBI, as an example. Excepted also from expungement legislation are certain Motor Vehicle Code violations.

3. *The system sanctions deceit—it institutionalizes a lie.* In trying to conceal a record we seek to falsify history—to legislate an untruth. Such suppression of truth ill befits a democratic society. Good intentions are no defense. To enable an offender to deny that he has a criminal record when in fact he has one is to help him deny a part of his identity. In encouraging him to lie, the society communicates to him that his former offender status is too degrading to acknowledge, and that it is best forgotten or repressed, as if it had never existed at all. Such self-delusion and hypocrisy is the very model of mental ill health—the reverse of everything correctional philosophy stands for.

Members of the American Law Institute, when working on the Model Penal Code, were concerned about this point. One of the drafts indicated that:

"A provision for vacation [of criminal records] troubled some members of the Council in the view that it attempts to rewrite history, and may lead in its consequences to legitimate denial of the fact of conviction in communications where this fact is relevant and should be stated."

impeached, regardless of the "expungement" of the prior conviction.

³⁷ "Of approximately 60 licensed occupations in California, the disciplinary provisions of 39 occupations permit license denial, revocation, or suspension for conviction of a felony, or any offense involving moral turpitude, while others specifically provide that the offense must be connected with the licensee's occupation." *Op. cit. supra* note 11, at p. 137.

³⁸ Section 12021, California Penal Code, does not permit an ex-felon to have a firearm capable of concealment on the person, even though disabilities were removed under Section 1203.4, Penal Code.

The members complacently concluded, nevertheless:

"We think, however, that it is unlikely that the procedure will be deceptive . . ."³⁹

The ex-offender, usually not knowing where he stands at the time his case is closed, oftentimes unwittingly finds himself in a false situation. An all-too-familiar example concerns the offender who, in response to a query about his record, denies it because he believes it has been wiped out. He then gets fired, not because he has an offense history, but because of falsification; that is, he lied.⁴⁰

Further, a man who conceals his record is forced into more elaborate falsehoods in order to account for the time lapse in his past during which he was actually in jail or prison.

There is some evidence that where record concealment statutes are invoked employers react negatively. Gough, in citing studies of employer attitudes with respect to the hire of ex-offenders, states:

"Several [employers] 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.'"⁴¹

4. *The system encourages harmful speculation and distorts the record with half-truths.* When portions of the record are revealed, as inevitably happens despite the concealment statutes, the actual and total record is usually inaccessible, so that only a part of the "truth" is revealed. The consequence oftentimes is that the information is distorted, exaggerated, or misinterpreted, usually to the ex-offender's disadvantage. Business men, civil service agencies, army recruiters and others usually assume the worst, filling in the blanks with imaginations far more lurid perhaps than the facts themselves.

³⁹ See American Law Institute, Model Penal Code, Tentative Draft #7, Philadelphia, Pa., May 3, 1957, Section 6.05, p. 30. Baum states: "What to proponents seems a commendable cleaning of the slate necessary to effective rehabilitation or to assure a second chance to one already rehabilitated, seems to opponents a sort of official 'new think', and a license to tell falsehoods." *Op. cit. supra* note 14, at p. 824.

⁴⁰ *Op. cit. supra* note 11, at fn. 57, p. 133.

⁴¹ *Op. cit. supra* note 3, at p. 154.

An editorial which appeared in the Los Angeles Times of August 26, 1968, reacted negatively to a bill introduced in the California Legislature in the fall of 1968 providing for the sealing of police records in cases of mistaken identity. Calling attention to a number of drawbacks, while acknowledging that sealing and destruction of records "may sound appealing on the surface . . .", the editorial concluded:

"Furthermore, we feel that the very concept of selective destruction of police records is dangerous. In the long run, the innocent party is better protected by having the record of his arrest—and release—clearly documented."⁴²

5. *Records should not be tampered with because they have value for research purposes.* The administration of criminal justice can hardly be complacent regarding its current effectiveness. It is frequently under scrutiny, as well as attack.

Under the circumstances, we should maximize the availability of all records and data for study by social scientists. The correctional system is notorious for its paucity of complete and reliable information, so that we can ill afford to deny students of the system access to criminal and delinquency records.⁴³

6. *Concealment procedures are not equally available to all, anyway.* If sealing and expungement procedures were readily available for all ex-offenders desiring to conceal or erase the records, they would nevertheless merit opposition. The fact remains, however, that these procedures are not readily available to all.

No jurisdictions are known which provide for automatic sealing or expunging. Ordinarily a petition is required, and the grant is within the court's discretion. The result is that the system is functional only for a very small number of offenders who have resources and can negotiate the system. For the vast number of ex-offenders, largely members of lower-class and minority groups, sealing and expungement are meaningless terms.⁴⁴

⁴² The bill was vetoed because the sealing of records is currently the subject of study by the Senate Judiciary Committee. *Supra* note 16.

⁴³ "Many of the psychiatrists and psychologists wish to retain the records for research purposes. . . ."—extract from letter, dated August 28, 1968, from Daniel W. Johnson, Director of the Ohio Youth Commission.

⁴⁴ It is common knowledge, easily verified by statistics, that where pardon procedures exist, the same condition obtains, *viz.*, they are out of the reach or knowledge of the vast majority of ex-offenders, who therefore never apply for them.

In "Answer Line," a regular column in the Los Angeles Examiner, the following question appeared in the issue of December 30, 1968:

"Several years ago I was convicted of a felony, and have managed to stay 'clean' ever since. My problem is that now I can't find a job, as no one wants to hire a convicted felon. Is there any way I can have my record sealed?"

"Answer Line" responded as follows:

"Under some circumstances, depending on the state it was committed in, a criminal record can be sealed, says a local attorney. It is a complicated procedure, however, and would best be handled by a reputable attorney."

What is communicated to the ex-offender, who is "clean" and has presumably paid the debt, is that "it all depends"; "it's complicated"; and "you'd better get a lawyer". Those who are ignorant of such legal provisions or who have no funds to hire attorneys anyway, do not have equal access to this "remedy".

DISSENT AGAINST THE SYSTEM

While, as indicated earlier, most survey respondents supported concealment statutes, there were a few who expressed reservations in support of the writers' viewpoints. Some of these were as follows:

Paul Keve, Commissioner of the Minnesota Department of Corrections, wrote, in part:

"I tend to be very unimpressed with the value of sealing or expunging records, and I am more inclined to argue for maintaining records that are highly responsible in their quality and then to make them actually more available than they had been in the past. My own experience is that recruiting officers and civilian employers are often more willing to consider the qualitative aspects of a person's record than to categorically rule against him on the mere fact of the record's existence. I would argue that once a thing has happened there is no way in this world to say that it did not happen, not even by expunging a record of what happened. We may seal, hide or burn our records, but there is no way of guaranteeing that some record card does not still exist in a police file, and we cannot prevent the record from existing in the minds of the people who knew about the record. When a young man is asked by a recruiting officer if he was ever in Juvenile Court, he usually says yes. Right then and there the main part of the damage is done and after that our record has a chance to be helpful to him by reveal-

ing the positive things about how he progressed on probation, etc. But if the record has in any way been removed from scrutiny there is no way to avoid the bad effects of the recruiting officer knowing the fact of the delinquency but not the quality of it."⁴⁵

Jack Wiseman, Director, Board of Parole and Probation, Salem, Oregon, stated:

"... I personally do not feel that the procedures are as functional and socially purposeful as intended. I say this with respect to the adult offender who is inclined to feel that an expunged record eliminates the possibility of someone else gaining knowledge of this record at a date in the future. As you well know, knowledge of an expunged record is available if the prints have been forwarded to the FBI. In other words, the person develops a false sense of security and anonymity regarding the record that certainly does not maintain in practice. In my estimation, it is quite possible that he could find himself in all sorts of difficulties on job applications because of this."⁴⁶

Commenting on the effectiveness of laws which permit an offender whose record has been concealed to say that he has none, Judge Margaret E. Driscoll of the Juvenile Court in Bridgeport, Connecticut, pointed out that people who ask the question, such as District Attorneys, can get around it by other questions. She said:

"Of course experience in other areas has indicated that somehow the questions could change to get around whatever law is passed."⁴⁷

Barton Anson, Director of Court Services, Ramsey County Probation Department, Minnesota, while generally endorsing "some system of expunging records", expresses reservations about complete expungement. In his response he stated:

"... My own personal views on the subject are that this system does not accomplish what some may hope that it does—namely, that the state completely forgives the person his transgression by saying in effect that the record does not exist. The problem is that it does and if anyone wanted to really find out about the record undoubtedly he could..."

"The ultimate expungement would mean the physical destruction of any and all records... The drawback to destruction of records is that you have

destroyed not only what might be held against a person but also what can be said that is constructive or at least more complete about a person. This would be particularly important where it was already known that he had been in difficulty but no record can be found. An aura of suspicion and confusion from lack of anything tangible can be more negative than the record..."⁴⁸

Howard L. Snowden, Technical Consultant, Illinois Youth Commission, takes the position that on the whole the sealing of juvenile court records serves the intended purposes. In his letter he added:

"However, in those many instances where the offense is repeated, or where the offense is so grave that the youth must be incarcerated... some facts of the statutory violation become known to the public, and it is my opinion that very little can be accomplished by sealing the records. In fact, the rumored stories are often more damaging to the youth's reputation than the actual facts of the incident."⁴⁹

Paul Murchek, Director of the Florida Probation and Parole Commission, wrote:

"I personally believe that expungement and sealing of criminal and delinquency records would encourage many individuals to conceal the truth about this and subsequently many other important considerations, secure in the knowledge that such laws will create and protect his right to lie..."⁵⁰

Apart from specific survey responses... in a letter regarding the sealing of juvenile records which was written to the Los Angeles County Delinquency and Crime Commission on November 15, 1967, Judge Alfred J. McCourtney, then Presiding Judge of the Juvenile Court of Los Angeles County stated:

"... Young people are not profiting by the law which was intended to help them, and those who take advantage of it are qualified quite inappropriately to claim a falsehood, namely, that they did not commit the acts which in all truth they did commit..."

Mr. Harold R. Muntz, Assistant Chief Probation Officer of the Los Angeles County Probation Department, stated in a departmental administrative bulletin issued January 28, 1968:

⁴⁵ Quoted from letter dated August 22, 1968.

⁴⁶ Quoted from letter dated August 16, 1968.

⁴⁷ Quoted from letter dated August 30, 1968.

⁴⁸ Quoted from letter dated August 29, 1968.

⁴⁹ Quoted from letter dated August 28, 1968.

⁵⁰ Quoted from letter dated October 7, 1968.

"We have on several occasions taken the position that the process of sealing a juvenile court record has only led to injurious surmise, rather than the removal of the disability of such a record . . . When records pertaining to a period of wardship are ordered sealed, reports of a minor's achievement are made inaccessible, thus acting to the disadvantage of the minor. For example, school records acquired during a stay in a forestry camp must be sealed when such an order is made. Records cannot thereafter be furnished to other schools or colleges to which a minor transfers, without breaching the order . . ."

THE REMEDY

One suspects that at the root of the problem is the fact that our correctional philosophy and practice are incongruent in respect to record concealment—as in many other aspects of criminal justice administration.⁵¹ We are not clear about this business of records; we are in conflict about it. We are, therefore, endlessly fussing with the removal of selected records from view—only to discover that they crop up again somewhere else.

We can continue to refine the removal-of-disabilities, annulment of conviction, and record concealment statutes; we can continue to declare that the criminal conviction is no more, and that the record can no longer plague the offender because it is either sealed or expunged; nevertheless, it will remain—an iceberg somewhere below the surface, and an unacknowledged barrier to full social reintegration.

⁵¹ *The Declaration of Principles of the American Correctional Association*, first uttered in 1870, proclaims that "no law, procedure or system of correction should deprive any offender of the hope and the possibility of his ultimate return to full, responsible membership in society" (Principle 19); and concludes with the declaration that "The correctional process has as its aim the reincorporation of the offender into the society as a normal citizen" (Principle 33). See AM. J. OF CORRECTION, September–October 1960, for complete statement of principles, adopted in 1960 by the American Congress of Corrections.

One does not need to be a sociological savant to understand that there is a wide disparity between what we profess and the way we actually behave. Although practically a hundred years have gone by since the first statement of principles, correctional practice, in many respects, is still not consonant with the lofty principles expressed in the Declaration. David Matza, in his provocative book *DELINQUENCY AND DRIFT* (1964), expresses a notion that even if one reforms, one is not forgiven, and makes some very insightful comments about this disparity between what we say and what we do. He states: "Whatever our philosophical preferences in the assignment of fault, the question of consistency—the avoidance of hypocrisy—is paramount. . . . Hypocrisy—saying one thing and doing another—is fundamentally corrosive of trust." (page 97).

Actually, the real issue is not the record, but the social attitude toward it. The record, as history, must be retained. Keeping records available should result in their improvement generally, by virtue of the fact that more availability should make for more scrutiny of the product—the record, so that authors of a record would be more prone to consider quality and accuracy in its preparation.

Sol Rubin makes a pithy comment related to this matter, but in another context—access by a defendant to a presentence investigation report. He states:

"Because probation staffs are inadequate in most departments in numbers and quality, it cannot be assumed that reports are complete and accurate. Disclosure to the defendant would militate against laxity in the investigation, carelessness in the writing of the report; and rubber-stamping of the report by the judge."⁵²

Rubin cites a court case and includes the following relevant line from the court decision:

"Anonymity also encourages misinformation and removes an incentive for accuracy and thoroughness by those obtaining the information."⁵³

We need to pass laws outlawing discrimination against people with records. Rubin observes in this connection:

"We know of no statute protecting against discrimination against persons with criminal records . . . Perhaps the closest analogous statutes are those protecting individuals from discrimination in employment because of race or religion."⁵⁴

Our often-stated objective of helping an offender to make a new start in life can thus be achieved by leaving the slate as is, and helping him by the means suggested above—leaving the record alone, and developing programs designed to change attitudes about offenders, via education and supporting legislation.⁵⁵

⁵² RUBIN, *THE LAW OF CRIMINAL CORRECTION* (1963) 92.

⁵³ *Ibid.*, p. 92.

⁵⁴ *Ibid.*, p. 639.

⁵⁵ Gough, in his excellent article, states: ". . . 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." *Op. cit. supra* note 3, at p. 150. Our position, of course, is to get at this matter of offender status by means of a new acceptance of offenders, and not concealing records.

Gough also notes: "Public good demands the re-assimilation into full social status of all who have offended against it." *Ibid.*, p. 155.

Sooner or later we must acknowledge that it is the society, not the record, which must be changed. Our relentless and permanent rejection of deviants will destroy them, and everyone else with them, if it persists. This is one of the basic issues at the heart of current urban ghetto problems. As long as the ghetto breeds crime and the society blocks the employment and rehabilitation of former criminals, no relief is in sight. The cycle of riot and reaction spirals unchecked toward revolution. This has been recognized equally by governmental investigative commissions and private industry.⁵⁶

How real and practical is the remedy proposed? It is neither visionary nor utopian, as opponents may claim. Former offenders with records are, more and more, being hired on regular jobs. Moreover, they are being used as change-agents, as partners with professionals in the rehabilitative functions. As a matter of fact, ex-offenders are increasingly being sought as such, so that the record becomes a passport to a job, in many cases, and no longer the stigma it once was.

⁵⁶ The National Advisory Commission on Civil Disorders states as fifth among its basic strategies for the use of employment to ameliorate civil disorder: "Artificial barriers to employment and promotion must be removed by both public agencies and private employers" . . . "Government and business must consider, for each type of job, whether a criminal record should be a bar, or whether a high school diploma is an inflexible requirement." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, Sup't. of Documents, U.S. Government Printing Office, Washington D.C. (1968) Catalogue #Pr 36.8:C49/R29, p. 232.

Additionally, the Governor's Commission on the Los Angeles Riots asserts: "While security considerations sometimes preclude hiring a defendant with an arrest record, blanket rejection of such persons without regard for the nature of the arrest or whether there has been a conviction should be discouraged. We urge employers . . . to increase employment opportunities for persons with arrest records." VIOLENCE IN THE CITY—AN END OR A BEGINNING?, a report to the Governor of California by the Governor's Commission on the Los Angeles Riots, published in Los Angeles on December 2, 1965. (See p. 47.)

Finally, in emphasizing the need for a new frame of reference if employment is to be found for the hard-core unemployed, the National Association of Manufacturers points out: "For example, in the past, police records have automatically screened out applicants in most companies. Yet in the culture of poverty, police records tend to be the norm. . . . By now, companies have had sufficient experience employing people with records to know that there is very little correlation between having a police record and not being a productive worker." EFFECTIVELY EMPLOYING THE HARD-CORE, National Association of Manufacturers, New York, (1968), p. 5; available through the reprint service of "Notes and Quotes," Connecticut General Life Insurance Co., Hartford, Conn.

Of course this is true only in relative terms. Certainly it is not suggested that offenders have an easy time of it in their reintegration. There is indisputable evidence of significant changes in the society's attitude, nevertheless. These changes show that we *can* do it; we are *already* doing it. We are focusing attention not on the record but, instead, on the primary task of reintegration.⁵⁷

Why does this solution seem so difficult? We must examine the root causes and reasons for our problem, and then move resolutely to eliminate barriers to the remedy.

It is proposed that there is a latent, pervasive attitude in our society which stresses the generic unworthiness of the criminal—his permanent unfitness to live in "decent society". He is seen as an unredeemable, permanently flawed, ever-threatening deviant. Proper citizens are felt to be menaced or degraded by consorting with him whether or not he has "paid his debt".⁵⁸

It is significant that proponents of record concealment prefer sealing practices and are generally reluctant to go as far as expungement, in the real sense of the term. This reflects their underlying reservations. They are just not sure, and therefore prefer to have the record around, albeit sealed, to be used "as needed". This persisting suspicion subtly mocks the reformed offender.

The Lex Talionis motif permeates many aspects of the correctional system, despite our protestations to the contrary. It is plainly evident in our penal codes which specify "punishments" for crimes. There are many societal cues which are communicated to the former offender in such terms that he readily perceives that the society intends to punish him; in some respects, forever.⁵⁹ The conflict of trust and distrust can be seen in the balance of rights restored and rights denied.

The correctional "graduate" may marry, vote, participate in contractual relationships and deny his record. He may have to register with the police for the rest of his life though, and, if he

⁵⁷ Paul Keve states in this connection: "I think we are making great strides in the direction of getting the general public to be far more accepting of the previous offender, and I strongly feel that this is the way we should go to solve the problem rather than strengthening the stigmatic nature of the record by hiding it." *Op. cit. supra* note 45.

⁵⁸ Judge Warren E. Burger, writing on "Paradoxes in the Administration of Criminal Justice", 58 J. CRIM. L., C. & P.S. 428 (1967), refers to our tendency to "regard all criminals as human rubbish."

⁵⁹ Goldstein and Katz refer to the unconscious motivations which are operative in our treatment of law violators. 72 YALE LAW J. 854, 856 (1963).

transgresses again, the record can be "resurrected" and used against him once more. Clearly, he is never truly restored to equal citizenship as long as he cannot ever again become a "first offender".⁶⁰

What we do with offenders at the end of the correctional system is very instructive, as we contrast it with what we do with them at the beginning. In the "intake process", the offender is "mugged", finger-printed and booked. Eventually he gets a trial, after several preliminary court experiences. Counsel goes through various adversary procedures. After conviction, there is an appeal system. Even this sequence does not exhaust the possible steps and ramifications. The succession is highly institutionalized and complex. We solemnize the offender's induction into the system.

When he successfully concludes the program, though, we fail to institutionalize his departure correspondingly. It's fun to catch the fish but hard to let him go.

It is tragic that we "accentuate the negative" and "eliminate the positive"; that we mark the entry with ceremony, and the exit with nothing which symbolizes the offender's "return to full, responsible membership in society"—his reincorporation "into the society as a normal citizen".⁶¹ Instead of celebrating the negotiation—or survival—of the perilous correctional experience (no mean accomplishment), we remove disabilities grudgingly. At the same time we interject so many "if's" and "but's" as to render the benefit nugatory, while tampering with the records as if we could rewrite history. The net result is that the ex-offender, puzzled and frustrated by our hy-

⁶⁰ It is meaningful to note that while courts often broadly and liberally construe so-called expungement laws, legislatures invariably go the other way, raising serious doubts about societal intent with respect to offenders. In an article, referred to earlier, the author refers to the judicial trend and then states: "... legislatures respond by amending the statute to nullify the effect of the court's interpretation". *Op. cit. supra* note 11, at p. 133. In the same vein, it is also significant that the legislatures, and courts too, have generally narrowed the effects of removal-of-disabilities laws, so that ex-offenders are really released from very few penalties and disabilities—even though the statute may refer to the removal of "all" disabilities. *Ibid.* p. 143.

Section 1203.4, California Penal Code, states... "who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted". This all-inclusive declaration is a monstrous lie, as we witness the many legal and extra-legal penalties and disabilities the ex-offender continues to experience, the language to the contrary notwithstanding.

⁶¹ Declaration of Principles, *op. cit. supra* note 51.

procris, is hindered rather than helped in his readjustment.

How could it be otherwise! The community is so prejudiced against former offenders that any celebration of successful rehabilitation inevitably would be condemnatory by its acknowledgement of the graduate's earlier "criminal" status. "To know him is to despise him." Until this bias can be uprooted, real correctional rehabilitation will remain effectively crippled. Contradictory attempts to conceal the record conditionally may help the society evade this fundamental issue but they certainly do not really help the former offender to return.

Sutherland and Cressey, commenting on the social ostracization of offenders, state that:

"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. Thus they are kept isolated from law-abiding groups. If they are to be turned into law-abiding citizens, they must be assimilated into society and treated as persons with the potential to be law-abiding citizens."⁶²

Gough comments well in this context. He states:

"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. There has been surprisingly little 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. 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'."⁶³

Gough further emphasizes that "there is considerable evidence to indicate that the failure of the criminal law to clarify the status of the reformed offender impedes the objectives of reintegrating him with the society from which he has become estranged."⁶⁴

⁶² SUTHERLAND AND CRESSEY, *PRINCIPLES OF CRIMINOLOGY* (5th Ed., 1955) 318.

⁶³ *Op. cit. supra* note 3, at p. 148.

⁶⁴ *Id.*

In his well-written article (which, incidentally, supports concealment laws and concludes with eight requisites of an effective expungement statute), Gough plaintively asks whether offenders should "... be forced to bear forever the stain of their immature and impulsive conduct", and states that "without the aid of an expungement statute, [he] would be compelled to bear the mark of his past mistake".⁶⁵ The writers contend that Gough correctly assesses the problem but incorrectly solves it. The way to remove the mark is to accept the person; not conceal the record.

Because in some ways we have become an enlightened society—at least as we contrast correctional work today with what it was like a century ago—the punishment motif alone no longer suffices. We feel guilty about our treatment of offenders because we see that unrelieved condemnation and rejection will inevitably consign anyone to hopeless defeat.

To some extent we expiate our guilt by providing some means to restore, partially, the former transgressor's status in society. Many laws demonstrate this effort—laws which provide that a declaration of wardship in juvenile delinquency cases does not constitute a criminal conviction; provisions for confidentiality of records and proceedings in juvenile court cases; provisions for the removal of *some* disabilities resulting from the offense; provisions for the annulment of the conviction itself; and provisions for the sealing or expunging of the very records of the transgressions. All can be cited as evidence. We seem to understand that an offender ought to be able, at some point, to stop "paying the debt". We understand, too, that if we surround him with all sorts of disabilities flowing from the crime or delinquency, he cannot succeed. Therefore, we endeavor to leaven the harsher aspects of criminal law with benign, though frequently ineffective, redemptive provisions.

There is no longer time for ambivalence and irresolution. Redemptive provisions must be made thoroughly effective. Any sound policy of dealing with ex-offenders should include legislation which removes disabilities flowing from the delinquency or crime. There should be an end to retribution. Rights and privileges should be completely restored and such restoration should be automatic. Then we can indeed convince the population and re-

assure the former offender that the debt has been paid and that resumption of full citizenship is achievable. Nevertheless, whether removal-of-disabilities laws exist or not, records should not be tampered with. There should be no need to delude ourselves about a man's past in order to give him a fair chance in the present.

It is a profound mistake to mix in with redemptive legislation any provision for concealing the records. To help the ex-offender by restoring rights and removing disabilities is an absolute necessity. Alteration or destruction of the record, however, only protects the body politic from confrontation regarding its own aberrant attitudes and the necessity to change. It basically corrupts the fundamental correctional objective of rehabilitating offenders.

SUMMARY

In summary and as a conclusion, we reaffirm our conviction that sealing and expungement practices should be abandoned and not merely altered. They have no utility in the administration of criminal justice.

Criminal and delinquency records can be neither sealed nor destroyed altogether, physically or practically. The record comes out inevitably, with the result that efforts to conceal it work invariably to the offender's detriment.

Record manipulation does not address itself to the real problem. The pursuit of record manipulation practices results in our deluding ourselves, and, worse, in deluding offenders who have made a good adjustment.

The only way to breach the barriers standing in the way of an offender's reintegration into the society is to assault them frontally. The remedy lies in a radically different approach—leaving the record alone while constantly striving to improve its quality, and mounting an educational program, with statutory supports, designed to liberalize public attitudes toward offenders.

All of the above is predicated upon our belief that we must destroy the myth that if we can only find a way to wipe out a "sin" somehow, so that it was really never committed, then and only then can we relate to the offender as a fellow human being. Such a pathway, we are convinced, is illusory, doomed to failure, and only serves to perpetrate a cruel hoax on the offender.

⁶⁵ *Ibid.*, at pp. 186, 157.

Schimel, writing on the "Role of Rationality in Crime and Corrections: An Epilogue," states:

"There is a hierarchy of tasks if we are to work toward a brighter future. . . . The fourth (perhaps it should be first) task lies in the minds of men, professional and lay both. If the task is genuinely a rehabilitative one, all those aspects of corrections

which social scientists have pinpointed and which alienate man from himself must be eliminated. If the task is recognized as worthy, the appropriate resources must be allocated to it."⁶⁶

⁶⁶ An article by Dr. John L. Schimel, psychoanalyst, in *CRIME, LAW, AND CORRECTIONS* (1966), edited by Ralph Slovenko.