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# Expungement of Criminal Convictions Under the Youth Corrections Act: The Need for Revision

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# EXPUNGEMENT OF CRIMINAL CONVICTIONS UNDER THE YOUTH CORRECTIONS ACT: THE NEED FOR REVISION

## INTRODUCTION

A growing awareness of the deleterious effects that a criminal record has on the rehabilitation of former offenders[1] has led in recent years to the promulgation of expungement statutes.[2] The basic purpose of such statutes is to lessen the collateral consequences of a criminal conviction by limiting access to and use of one's past record of conviction.[3] Such consequences as limitations on an offender's right to vote, to possess firearms, and to hold public office, for example, are those intended to be alleviated by expungement statutes.[4]

This comment examines one of the earlier expungement statutes, section 5021 of the federal Youth Corrections Act,[5] by considering the legislative intent and judicial construction of section 5021 and comparable state statutes. Such an examination will reveal that the effect of section 5021 on the subsequent legal and social status of its beneficiary is unclear. Persons who have been granted relief under the statute often do not know what such relief entails. In addition, the judicial interpretation

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[1] *See generally Symposium—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

[2] The term "expungement statute" is used here and throughout this comment to mean any type of statute which purports to alleviate the collateral or residual effects of a criminal conviction in any way. Literally, "expungement" would indicate obliteration of the record, but statutes which set aside, annul, or vacate convictions are also characterized as expungement statutes.

[3] *See* footnotes 41-49 *infra* where the legislative purpose of the federal youth expungement statute is discussed.

[4] *See* text accompanying notes 51-76 *infra* for examples of judicial interpretation of these consequences.

[5] 18 U.S.C. §§ 5005-26 (1970). Section 5021 reads as follows:

(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

of section 5021 has yielded contradictory results. Some jurisdictions interpret the statute to grant true expungement,[6] even though such a construction does not comport with the section's language. More limited constructions, removing some but not all of the collateral consequences of a criminal conviction,[7] are of little utility to the section's beneficiary because they leave his status to case-by-case adjudication.

These weaknesses reveal the need for legislative revision of section 5021. The judiciary is not as able as the legislature to make far-reaching decisions concerning penology and rehabilitation. Legislative action will eliminate the current vagueness and the erratic judicial interpretation of section 5021.

## I. THE PROBLEM WITH SECTION 5021

When the federal Youth Corrections Act was passed in 1950, expungement statutes were uncommon and not generally understood or accepted. This lack of precedent probably explains the legislature's reluctance or inability to provide a broad but clearly defined grant of relief. The statute called for automatically setting aside a conviction upon the unconditional discharge of the youth from the youth corrections division prior to expiration of the maximum sentence allowed for the offense and for the issuance of a certificate to that effect.[8] However, the offender granted such relief was left in some doubt as to its precise effect. Could he, for example, possess a firearm? Be tried for a subsequent offense as a persistent or habitual offender? Occupy public office? Receive a license granted by a public authority? If the offender was an alien could he be deported because of his conviction? Finally, could he deny the conviction on an employment application or be impeached on the witness stand on the basis of the conviction?

Since the enactment of the Youth Corrections Act, section 5021 has been the subject of limited judicial interpretation. Some of the questions posed above have been resolved by the

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[6] *See* notes 70-76 and accompanying text *infra* for cases granting relief similar to true expungement.

[7] *See* notes 50-63 and accompanying text *infra* for cases limiting the relief under section 5021.

[8] 18 U.S.C. § 5021 (1970). *See* 18 U.S.C. § 5005 (1970) for the statutory authorization for the youth corrections division.

courts but much vagueness and inconsistency remains. In the First Circuit it appears that an alien whose conviction is set aside pursuant to the section may not be deported on the basis of that conviction.[9] In the Sixth Circuit a person who has received the relief granted by the section may possess a firearm despite the language of a federal firearms statute to the contrary.[10] In the Ninth Circuit a credit bureau may retain evidence of the conviction in its files, in spite of the fact that it has been set aside pursuant to section 5021.[11] These interpretations are not consistently applied throughout the various circuits.[12] In addition, some significant issues, such as consideration of the conviction by a potential employer, have not been litigated at all.[13]

Many states have enacted expungement statutes since the passage of section 5021. Almost invariably these statutes have been more precise than their federal predecessor.[14] Although no single statute is the ideal expungement statute, this state legislation represents a desirable trend. Since there is less need for judicial construction under these more precise state statutes, the offender is better informed about the effect of his prior conviction. Congress should follow this trend by revising sec-

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[9] Mestre Morera v. United States Immigration & Naturalization Serv., 462 F.2d 1030 (1st Cir. 1972).

[10] United States v. Fryer, 545 F.2d 11 (6th Cir. 1976).

[11] Fite v. Retail Credit Co., 386 F. Supp. 1045 (D. Mont. 1975), *aff'd without opinion*, 537 F.2d 384 (9th Cir. 1976).

[12] *Cf.* United States v. Kelly, 519 F.2d 794 (8th Cir. 1975) on the issue of possession of firearms. There the court held that a person who had a prior conviction set aside under a Minnesota statute was still a convicted felon within the meaning of the same federal firearms statute that was at issue in the *Fryer* case. Significantly, that Minnesota expungement statute, MINN. STAT. ANN. § 242.31 (West Supp. 1977), reads very much like § 5021. The court examined the firearms and expungement statutes and concluded that the expungement statute did not provide the type of relief which would exempt the offender from the operation of the firearms statute. The court stated that in the future persons who received the relief offered by § 242.31 should be advised that the statute does not restore their right to possess firearms. *Kelly* indicates that the Eighth Circuit would reach an opposite result from the Sixth Circuit if presented with the facts of *Fryer*.

*Cf.* Briscoe v. United States, 391 F.2d 984 (D.C. 1968). There a youth offender's conviction was deemed "final" for deportation purposes despite the possibility of its being set aside.

[13] *See* Schaefer, *The Federal Youth Corrections Act: The Purposes and Uses of Vacating the Conviction*, FED. PROBATION 31 (Sept. 1975).

[14] *See* text and accompanying notes in parts II and V of this comment for examples of these statutes.

tion 5021. Before proceeding with a more detailed discussion of section 5021 it would be instructive to examine expungement statutes in general.

## II. EXPUNGEMENT STATUTES: AN OVERVIEW

All expungement statutes are designed to alleviate the collateral effects of criminal convictions. However, even a cursory review of such statutes reveals that a variety of approaches is available to achieve that end. The disparity in terminology demonstrates this. Different statutes speak of setting aside the conviction,[15] annulling the conviction,[16] expunging the record of conviction,[17] or sealing the record of conviction.[18] These variations in nomenclature are of little significance. The real differences in the statutes are the provisions that actually spell out the operation and effect of the grant of relief. These range from a general removal of penalties and disabilities[19] to a specific authorization to deny the existence of the conviction on employment applications.[20] Other provisions state that the conviction may not be used against the person,[21] that the person's civil rights shall be restored,[22] that the conviction will subsequently be treated as having never occurred,[23] and that the conviction does not preclude the person from being granted a license by a public authority.[24]

Expungement statutes generally are not blanket grants of relief to all persons who have been convicted. Relief has traditionally been limited to certain age groups, to those who have committed particular offenses, and to offenders who meet specified treatment or probationary requirements.

A common limitation on availability is that found in

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[15] *E.g.*, KAN. STAT. § 21-4616 (Supp. 1977); MINN. STAT. ANN. § 242.31 (West Supp. 1977).

[16] *E.g.*, MINN. STAT. ANN. § 242.31 (West Supp. 1977).

[17] *E.g.*, N.J. STAT. ANN. § 2A:164-28 (West Supp. 1977).

[18] *E.g.*, CAL. PENAL CODE § 1203.45 (West Supp. 1977).

[19] *E.g.*, KAN. STAT. § 21-4616 (Supp. 1977); MINN. STAT. ANN. § 242.31 (West Supp. 1977); N.J. STAT. ANN. § 2A:164-28 (West Supp. 1977).

[20] *E.g.*, CAL. PENAL CODE § 1203.45 (West Supp. 1977); KAN. STAT. § 21-4616 (Supp. 1977).

[21] *E.g.*, MINN. STAT. ANN. § 242.31 (West Supp. 1977).

[22] *Id.*

[23] *E.g.*, KAN. STAT. § 21-4616 (Supp. 1977).

[24] *E.g.*, N.Y. CRIM. PROC. LAW § 720.35 (McKinney 1971).

youthful offender statutes.[25] Because youthful offenders are widely thought to be more amenable to rehabilitation than older offenders, statutes which grant expungement to persons who were convicted before a certain age (usually 21) are relatively popular. Some states also provide for varying degrees of relief for adult offenders.[26]

Several states limit the availability of expungement by reserving it for particular offenses such as misdemeanors,[27] or by exempting from the statute those convictions for which the state does not wish to grant the offender a second chance.[28] Rape, murder, capital offenses in general,[29] and offenses for which the defendant must register with the state[30] have been included in this latter category. Drug offenses and traffic violations have also been excluded from expungement statutes.[31]

Expungement statutes vary with regard to prerequisites, such as treatment, probation, or behavior, that are required prior to a grant of relief. Fulfillment of probation terms or unconditional discharge from a correctional authority are commonly required.[32] A few statutes require a waiting period following the termination of treatment or probation before the relief can be granted.[33] Some add the condition that the person stay out of trouble or generally exhibit good behavior.[34]

Perhaps the most arbitrary limitation on the availability of expungement is the varying degrees of discretion given to the

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[25] *E.g.*, CAL. PENAL CODE § 1203.45 (West Supp. 1977); KAN. STAT. § 21-4616 (Supp. 1977); N.Y. CRIM. PROC. LAW § 720.35 (McKinney 1971).

[26] In addition to their laws providing relief for youthful offenders, California and Kansas have laws providing slightly different relief for adult offenders. CAL. PENAL CODE §§ 1203.4-.4a (West Supp. 1977); KAN. STAT. § 21-4617 (Supp. 1977).

[27] *E.g.*, CAL. PENAL CODE § 1203.45 (West Supp. 1977).

[28] *E.g.*, N.J. STAT. ANN. § 2A:164-28 (West Supp. 1977).

[29] *Id.*

[30] *E.g.*, CAL. PENAL CODE § 1203.45 (West Supp. 1977).

[31] *Id.* This exclusion is probably the result of a need for disclosure in these areas. Drug offenders are notoriously prone to recidivism; consequently, the state has an interest in monitoring their activities and increasing penalties with each successive violation. Traffic offenders are perhaps not morally culpable. Therefore, rehabilitation and reformation are not especially necessary for them. In addition, there are fewer collateral consequences of a traffic conviction. A pure deterrence approach, culminating in the suspension of driving privileges after repeated infractions, is more effective than forgiveness after punishment.

[32] *E.g.*, MINN. STAT. ANN. § 242.31 (West Supp. 1977).

[33] *E.g.*, KAN. STAT. § 21-4617 (Supp. 1977).

[34] *Id.*

courts by some statutes. Certain states grant relief automatically based on objective criteria such as age, time elapsed, sentence, or probation.[35] Some give the court discretion, to be guided by similar objective criteria.[36] Still other statutes require the offender to petition the court for a hearing, resulting in a subjective decision as to the propriety of granting relief.[37]

In addition to limitations on the availability of relief in the first instance, most statutes contain express limitations on the breadth of the relief once granted. Few states have true expungement statutes. The specific denial of the right to possess certain types of firearms is one such limitation.[38] Other examples include the use of sealed records in defamation suits[39] and the use of the conviction in proceedings involving subsequent offenses.[40]

Many of these provisions are ambiguous and therefore susceptible to extensive judicial interpretation. None of the statutes expressly covers all circumstances regarding a person's rights and liabilities following the grant of relief. However, if all expungement statutes were pooled, a legislature could extract from the wealth of provisions a good expungement statute. Used here, "good" means as precise and as comprehensive as possible with regard to the nature of the relief granted, its availability, and its effect on the subsequent legal and social status of the beneficiary. The statute's terms should be clearly defined to aid the courts in those inevitable instances where disputes concerning the statute's operation and effect do arise.

## III. THE LEGISLATIVE HISTORY OF SECTION 5021

The legislative history of the Youth Corrections Act sheds little light on section 5021's precise operation. Nevertheless, many of the cases construing the section have purportedly been decided on the basis of legislative intent. The vagueness of the statute itself has forced courts to rely on the legislative record.

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[35] *E.g.*, MINN. STAT. ANN. § 242.31 (West Supp. 1977).

[36] *E.g.*, KAN. STAT. § 21-4616 (Supp. 1977).

[37] *E.g.*, KAN. STAT. § 21-4617 (Supp. 1977); N.J. STAT. ANN. § 2A:164-28 (West Supp. 1977).

[38] *E.g.*, CAL. PENAL CODE § 1203.4 (West Supp. 1977).

[39] *E.g.*, CAL. PENAL CODE § 1203.45 (West Supp. 1977).

[40] KAN. STAT. § 21-4616 (Supp. 1977); MINN. STAT. ANN. § 242.31 (West Supp. 1977).

That record leaves little doubt that the broad purpose of the Youth Corrections Act was to provide an alternative in youth rehabilitation.[41] Section 5021 was intended to provide the youth a second chance. However, such broad expressions of intent are of little help in deciding the nature of the specific relief authorized by the section. As the district court in the *United States v. Fryer*[42] noted, "[T]he legislative history of Section 5021 is of some value in deciding what scope and effect should be given to the section. Again, however, it is not so definitive as to remove all doubt."[43] In *Fryer* the court pointed out that the committee reports are silent about section 5021 and the testimony presented before the subcommittee indicated disagreement concerning the effect of the section. Two judges testified that the section provided rather extensive relief, while a third judge testified that the record of conviction would remain available for inspection under some circumstances.[44]

As originally drafted, section 5021 expressly provided for relief similar to an executive pardon. However, this reference to the executive pardon was deleted for fear of an unconstitutional infringement upon the presidential pardoning power.[45] Despite this deletion, the section was meant to be somewhat like a pardon.[46]

Section 5021 was amended in 1961 to extend relief to youth probationers as well as to those who had been committed to the youth division.[47] Senator Dodd, sponsor of the amendment, commented on the section's purpose: "I think section 5021 represents an important factor in the treatment of youthful offenders. It provides an additional incentive for maintaining good

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[41] H. R. REP. No. 2979, 81st Cong., 2d Sess. 3, *reprinted in* [1950] U.S. CODE CONG. SERV. 3983, 3985.

[42] 402 F. Supp. 831 (N.D. Ohio 1975), *aff'd*, 545 F.2d 11 (6th Cir. 1977).

[43] 402 F. Supp. at 835-36.

[44] *Id.* at 836 (citing *Hearings on S, 1114 and S. 2609 Before the Subcomm. of the Sen. Comm. of the Judiciary*, 81st Cong., 1st Sess. 69 (1949)).

[45] *See* Schaefer, *supra* note 13, at 32.

[46] *Id.* Schaefer concludes that § 5021 provides more extensive relief and protection than does a presidential pardon.

[47] The 1961 amendment added subsection (b) to provide relief to persons who had served a term of probation pursuant to the Youth Corrections Act, and who had been discharged from the probation prior to the maximum term. *See* 18 U.S.C. § 5021(b) (1970) in note 5, *supra*.

behavior by holding out to the youth an opportunity to *clear his record.*"[48] The Senator referred to the relief granted by section 5021 as a "new start" and implied that the section calls for erasure of the record of conviction for all purposes.[49]

The legislative history of section 5021 is inconclusive at best. It serves only to underscore the broad purpose of expungement statutes in general. The meager congressional record highlights Congress's failure to carefully consider the actual application of section 5021. The result of that failure is a vague provision which has been thrust upon the courts for interpretation.

## IV. JUDICIAL CONSTRUCTION OF SECTION 5021

Only a few cases have involved the precise issue of a person's legal and social status after his conviction has been set aside pursuant to section 5021. The courts which have addressed this issue are far from unanimity. A court today would have little difficulty finding at least some precedent for any position it might desire to take.

Recently, two federal courts of appeals faced the question of whether section 5021 is a true expungement statute.[50] In *United States v. McMains*[51] the petitioner was unsatisfied with the vague protection afforded by the certificate he received when his conviction was set aside. He petitioned the court for an order of expungement. His request was granted by the district court but denied on appeal. The Eighth Circuit Court of Appeals found an examination of legislative history, scholarly

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[48] 107 CONG. REC. 8709 (1961) (remarks of Sen. Dodd) (emphasis added).

[49] *Id.*

[50] Section 5021 is implicated in two types of cases. First is the *McMains* type of action where the petitioner is seeking a broad order of expungement. Courts of general jurisdiction have always had equitable power to grant an expungement under conditions compelling such an extraordinary grant of relief. *See* United States v. Doe, 556 F.2d 391 (6th Cir. 1977), and United States v. McMains, 540 F.2d 387 (8th Cir. 1976), where the petitioners grounded the request for relief on § 5021 first, and in the alternative, on the court's equitable powers to expunge.

The second situation finds the offender attempting to prevent some specific use of the prior conviction. *See, e.g.*, United States v. Fryer, 545 F.2d 11 (6th Cir. 1976), where the offender sought to prevent a prior felony conviction, which had been set aside pursuant to § 5021, from constituting an essential element of a subsequent offense. For a further discussion of *Fryer*, see text accompanying notes 74-76 *infra*.

[51] 540 F.2d 387 (8th Cir. 1976).

commentary, and judicial precedent to be inconclusive. Therefore, it based its decision on the plain meaning of the statutory language, aided by some very general rules of construction. The court noted that the express wording of the statute does not call for expungement and that Congress could have so provided if that had been its intent.[52] The certificate granted to the petitioner upon discharge, indicating that the conviction had been set aside, was thought to be a clear indication that the section called for something less than the true expungement.[53] There would be no need for such a certificate if the offender's record were cleansed of any trace of the conviction. The court concluded that the statute's purpose could be fulfilled without granting the expungement.[54]

A similar situation was presented and a similar conclusion reached in *United States v. Doe.*[55] The district court's denial of a petition for expungement was affirmed by the Sixth Circuit Court of Appeals. The Sixth Circuit considered several cases, including one of its own,[56] which intimated that section 5021 was a true expungement statute. Despite this previous ruling, the court decided against total expungement, noting that no court had ever actually issued an order of expungement based upon section 5021.[57] The court concluded that the language of the section did not authorize expungement. However, it did state that the F.B.I. could be compelled by the courts to annotate its record of the conviction to indicate that it had been set aside.[58]

*Fite v. Retail Credit Co.*[59] presented facts somewhat different from those found in *McMains* and *Doe.* In *Fite,* plaintiff's theft conviction had been set aside pursuant to section 5021. However, the record of that conviction was supplied to his current employer by a credit company, resulting in his dismissal.

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[52] *Id.* at 389.

[53] *Id.*

[54] *Id.*

[55] 556 F.2d 391 (6th Cir. 1977).

[56] The Court of Appeals for the Sixth Circuit had previously decided the *Fryer* case.

[57] 556 F.2d at 393.

[58] *Id.*

[59] 386 F. Supp. 1045 (D. Mont. 1975), *aff'd* without opinion, 537 F.2d 384 (9th Cir. 1976).

Plaintiff sought both a declaratory judgment to the effect that his record had been "exonerated" and an injunction preventing the defendant from maintaining a record of the conviction. The court denied the relief, holding that section 5021 does not compel an obliteration of the criminal record.[60] The court noted that a prior conviction for theft was a legitimate consideration of the employer in determining the applicant's fitness for the job.[61] Although contrary precedent existed, the court settled for the "different approach" taken by the courts in the Ninth Circuit:[62] "[A] conviction under the Youth Corrections Act does not disappear when a certificate of discharge is issued."[63] This is, in effect, the same result reached in *McMains* and *Doe.*

The *McMains, Doe,* and *Fite* decisions present formidable support for the argument that section 5021 is not a true expungement statute. However, commentary and precedent exist which indicate a need for a contrary result. One commentator, who argues that section 5021 should be a true expungement statute,[64] states that statutes which merely set aside a conviction, like the Youth Corrections Act, "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."[65]

Many parties who have an interest in discovering past convictions do not treat section 5021 as an expungement statute. Employers and public agencies do not see the statute as providing for erasure of the record and, remarkably, their use of the prior conviction is rarely contested in court.[66] "Oftentimes the

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[60] 386 F. Supp. at 1047.

[61] *Id.*

[62] The court relied on two Ninth Circuit cases, Hernandez-Valensuela v. Rosenberg, 304 F.2d 639 (9th Cir. 1962) and Garcia-Gonzales v. United States Immigration & Naturalization Serv., 344 F.2d 804 (9th Cir. 1965), for the proposition that § 5021 is not an expungement statute. In the *Hernandez* case it was held that a conviction under the Youth Corrections Act was final for purposes of deporting aliens, despite the possibility of the conviction being set aside. *Garcia-Gonzales* interpreted a California law which, analogous to § 5021, set aside a prior conviction. The court ruled that, despite the vacated conviction, the act which was the basis of the conviction was still a valid ground for deportation.

[63] 386 F. Supp. at 1047.

[64] Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 WASH. U. L.Q. 147.

[65] *Id.* at 150.

[66] Schaefer, *supra* note 13, at 31.

conviction is still considered valid by Federal and State agencies which consequently deny the offender's application for a job or license."[67] The F.B.I. does not treat the statute as it would an expungement statute.[68] When the bureau expunges a criminal record it deletes all references to it. When presented with a certificate stating that a youthful offender conviction has been set aside the bureau merely annotates the record of conviction to indicate that the conviction has been vacated. Employers and public agencies can still discover the conviction.[69]

Some cases have implied that section 5021 is a true expungement statute. In *Mestre Morera v. United States Immigration & Naturalization Service,*[70] the First Circuit Court of Appeals ruled that a conviction set aside pursuant to section 5021 is not grounds for deporting an alien pursuant to the Immigration and Nationality Act.[71] This was done despite strong language in that Act against the toleration of aliens who deal in drugs. The court referred to the certificate given to the offender as a "certificate of expunction"[72] and held that section 5021 erases the conviction for all purposes in order to "give him [the youth offender] a second chance free of a record tainted by such a conviction."[73]

In *United States v. Fryer,*[74] the Sixth Circuit Court of Appeals also implied that section 5021 was a true expungement statute. Petitioner had been charged with possession of a firearm by a convicted felon and with failure to reveal his conviction on the application for purchase of the firearm. Fryer contended that he did not have a prior conviction necessary for either offense because the conviction had been set aside pursuant to section 5021. The district court agreed with Fryer, ruling that "once a conviction has been set aside pursuant to section 5021, it is expunged from the defendant's record for all

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[67] *Id.*

[68] *Id.* at 35.

[69] *Id.*

[70] 462 F.2d 1030 (1st Cir. 1972).

[71] *Id.* The Immigration and Nationality Act is codified at 8 U.S.C. § 1251(a)(11) (1970).

[72] 462 F.2d at 1031.

[73] *Id.* at 1032.

[74] 545 F.2d 11 (6th Cir. 1976).

purposes and may not later be used to convict someone of violating a statute which requires as an essential element of the offense a prior felony conviction."[75] The court of appeals affirmed, noting that in light of legislative intent and prior case law section 5021 should be read as an expungement statute.[76]

It should be noted that the precedential value of the *Fryer* case has been severely limited by the Sixth Circuit's decision in *Doe*. In fact, it is not at all clear what section 5021 means in the Sixth Circuit. Within a year's time the court has said that the section is an expungement statute and that it is *not* an expungement statute. Until the court offers some clarification it can only be assumed that section 5021 provides very broad relief but not true expungement.

## V. COMPARATIVE EXPUNGEMENT STATUTES

A final perspective on section 5021 can be achieved by comparing its language, operation, and effect with that of various other expungement statutes.

### A. *New Jersey*

The initial grant of relief in the New Jersey expungement statute[77] is broader than that in section 5021. The statute provides that "an order may be granted directing the clerk of such court to *expunge from the records all evidence of said conviction* and that the person against whom such conviction was entered shall be forthwith thereafter relieved from such disabilities as may have heretofore existed by reason thereof."[78]

The New Jersey statute is thus designed to obliterate the record of the conviction. The statute nevertheless provides for specific exceptions to the operation of the relief for offenses such as homicides other than those resulting from the operation of a vehicle, assaults on heads of state, kidnapping, rape, and robbery.[79] In addition, the grant of relief is discretionary with the court. The offender must petition the court for relief more

[75] 402 F. Supp. 831, 837 (N.D. Ohio 1975).
[76] 545 F.2d at 11.
[77] N.J. STAT. ANN. 2A:164-28 (West Supp. 1977).
[78] *Id.* (emphasis added).
[79] *Id.*

than ten years after the conviction; the court may listen to evidence and objections presented by state authorities, and, in some cases, order the petitioner to submit to a fitness evaluation by the state diagnostic center.[80] The petitioner does not enjoy a presumption in favor of receiving the relief offered by the statute.[81]

B. *California*

The California expungement statute most comparable to section 5021 with regard to age requirements[82] specifically authorizes the person to deny the existence of the conviction and provides for the sealing of the records.[83] As is the case with the New Jersey statute, this initial grant of relief is much broader and more specific than that provided for on the face of section 5021. However, the California statute incorporates several limitations on the scope and effect of this relief.

Application of the statute is limited to misdemeanor offenses.[84] In addition, several offenses are exempted: certain offenses for which the offender is required to register with the state, certain health and safety code violations, and stated violations of the vehicle code.[85] The effect of the statute is further limited in that it does not apply in certain cases to persons convicted of more than one offense.[86] Finally, upon a showing of good cause the records may be opened for admission into court in a defamation suit.[87]

C. *Kansas*

The Kansas statute sets aside the criminal conviction of

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[80] *Id. See* Comment, *Expungement and Sealing of Arrest and Conviction Records: The New Jersey Response*, 5 SETON HALL L. REV. 864, 890 (1974).

[81] Comment, *supra* note 80, at 893.

[82] CAL. PENAL CODE § 1203.45 (West Supp. 1977). California provides a more limited expungement for adult offenders. *Id.* § 1203.4.

[83] *Id.* § 1203.45(a).

[84] *Id.*

[85] *Id.* § 1203.45(c).

[86] *Id.* § 1203.45(d).

[87] *Id.* § 1203.45(f). The apparent purpose of this limited access to an expunged conviction is to preserve the defense of truth in defamation actions. Where a defendant in a defamation suit has imputed wrongdoing or criminal conduct to the plaintiff, he would be hard pressed to prove his allegation without access to records of arrest and conviction.

persons convicted before age 21.[88] Thereafter the person is "released from all penalties and disabilities resulting from the crime of which he or she has been convicted, and such defendant shall in all respects be treated as not having been convicted."[89] The statute also authorizes the defendant to deny his conviction on employment applications or when appearing as a witness in court.[90] Finally, the custodian of records is directed not to disclose the record of the conviction except in very limited circumstances.[91]

The effect and application of the statute is limited by a provision which allows the use of the prior conviction by the court in determining the sentence to be imposed for a subsequent offense.[92] In addition, the granting of this relief by the court appears to be discretionary.[93]

D. *New York*

New York takes a somewhat different approach to the problem of criminal stigmatization. In fact, section 720.35 of the criminal procedure code[94] cannot validly be termed an expungement statute because it does not operate to remove, vacate, or erase convictions. Instead, it throws a blanket of confidentiality over all youthful offender adjudications.[95] The statute provides that such confidential convictions preclude neither the holding of public office or employment nor the granting of any license by a public authority.[96]

The confidentiality afforded by the New York statute ends

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[88] KAN. STAT. § 21-4616 (Supp. 1977). Kansas also provides the same basic relief for those who were convicted after age 21. *Id.* § 21-4617. However, the availability of relief under § 21-4617 is restricted by a five-year waiting period during which the offender must stay out of trouble and exhibit good behavior.

[89] *Id.* § 21-4616(a).

[90] *Id.* § 21-4616(b).

[91] *Id.* § 21-4616(c). Access is permitted only to the person whose conviction was annulled or to a sentencing court if the individual has committed a subsequent crime. *See* text accompanying note 92 *infra.*

[92] *Id.* § 21-4616(a).

[93] *Id. But see* Note, *Expungement of Criminal Convictions in Kansas: A Necessary Rehabilitative Tool*, 13 WASHBURN L.J. 93, 101 (1974), where the author concludes that the relief offered by this statute is mandatory and that the hearing provided is merely for the purpose of establishing the person's objective qualifications.

[94] N.Y. CRIM. PROC. LAW § 720.35 (McKinney 1971 & Supp. 1977).

[95] *Id.* § 720.35(2).

[96] *Id.* § 720.35(1).

"where specifically required or permitted by statute or upon specific authorization of the court."[97] Thus the record of conviction can be released when the confidentiality statute conflicts with the purpose of another statute, as was the case in *Fryer*, or where public policy dictates disclosure.[98]

### E. *Minnesota*

The Minnesota expungement statute[99] is worded very much like section 5021. It provides that the conviction of a youth may be "set aside" following an unconditional discharge from the corrections board or following a successful period of probation.[100] However, the statute is more specific than section 5021 with respect to the subsequent effect of setting aside the conviction. It states that the relief serves to "restore the defendant to his civil rights and purge and free the defendant from all penalties and disabilities arising from his conviction and it shall not thereafter be used against him, except in a criminal prosecution or a subsequent offense if otherwise admissable therein."[101] The possible use of the conviction in a subsequent prosecution is the only limitation on the effect of the relief granted under the statute. The relief granted under the Minnesota statute is automatic after the initial decision to discharge has been made by the corrections board.[102]

## CONCLUSION

The full impact of the relief granted by section 5021 remains unclear. The courts have failed to apply the section consistently. Several courts hold it is not an expungement statute; others have hinted that it is an expungement statute although none have actually ordered an expungement of the records.[103]

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[97] *Id.* § 720.35(2).

[98] In *Fryer* the public policy at stake was the protection of society from repeat offenders. *See also* People v. Geller, 278 N.Y.S.2d 41 (App. Div. 1967), where a New York Supreme Court held that a prosecutor, on cross-examination, could validly elicit the existence of a vicious or immoral act which was the basis of a youthful offender adjudication, despite the confidentiality statute.

[99] MINN. STAT. ANN. § 242.31 (West Supp. 1977).

[100] *Id.* § 242.31(1), (2).

[101] *Id.* § 242.31(2).

[102] *Id.* § 242.31(1), (2).

[103] *See* notes 51-76 and accompanying text *supra* for a discussion of these cases.

There are grave problems with the various judicial constructions of the section. The "true expungement" interpretation is not a valid substitute for missing provisions. It creates a broad grant of relief that is more than what should be accomplished by an expungement statute. Expungement, like arrest, conviction, incarceration, probation, and parole, is only another step in the criminal justice process. Its scope should be guided by well-conceived objectives; in some situations, society's interest in disclosure outweighs the defendant's interest in rehabilitation through expungement.[104]

The judicial view of the section as providing for something less than total expungement is so vague that it is almost useless. Because it can only be applied through case-by-case adjudication, it has little predictive value for the former youth offender who wishes to know which civil disabilities remain in force.

A more effective expungement statute could be drafted today. When section 5021 was enacted in 1950 Congress did not have a large fund of models from which to draw. The drafters did not anticipate difficult questions regarding the use of the residual record of conviction. Today there is a wealth of statutes more specific and precise than section 5021. It is time to revise section 5021.

Consideration should focus on whom the statute is intended to cover, the type and extent of the relief to be afforded, and whether the relief is to be automatic or discretionary.

Discretionary relief should be made within the framework of specific guidelines. Where relief is granted automatically, the state has a legitimate right of access to the records of prior offenses in the case of another offense. In this way the statutory relief is given to as many persons as possible while the state maintains some means of protecting society from recidivists. The state's right of access is harder to justify when the granting of relief is discretionary in the first instance. If a judge has discretion to grant or deny relief, it is his job to screen out potential recidivists. Society can be protected by proper exercise of the discretion; with an automatic statute, society can

[104] *Cf.* Gough, *supra* note 64, at 147-62, 181-82. Although Professor Gough argues for broader expungement statutes, he recognizes that disclosure is necessary in some instances.

only be protected by permitting subsequent access to records.

The choice of alternatives requires a balancing of competing interests.[105] First, there is society's interest in rehabilitating and reassimilating a reformed offender. A corollary is the interest in according dignity and respect to all human beings and preventing the imposition of needless disabilities upon those who have transgressed against society. It is irrational to prevent a person from functioning responsibly in society who has failed on one occasion or in one aspect of his life. For example, a person who has demonstrated a tendency for violent reactions to stressful situations may not be an irresponsible voter or a bad employee—though he may legitimately be deprived of the right to possess firearms.

Second, society has an interest in protecting itself from the habitual criminal. Perhaps the most reliable predictor of future behavior is past behavior. In some circumstances it might be desirable to restore to the released offender only a limited number of his civil rights or privileges.

These competing interests will affect the statute's availability, in terms of both the offenders to which it will apply and the criteria or prerequisites for relief, and its comprehensiveness. By carefully articulating the availability and comprehensiveness of the statute, Congress can devise a statutory scheme which is susceptible to individualistic application within the realistic bounds of a complex criminal justice system. Some offenders may not deserve relief; others may merit a removal of specified civil disabilities and penalties; and still others might warrant total expungement.

Several statutory approaches are conceivable:

(1) Give the court absolute discretion to grant expungement within precise guidelines. If granted, the expungement should be total. The court can weed out those who have not been rehabilitated and offer a second chance to those who have.

(2) Make the relief automatic but reserve a right of access to the record in the event of a subsequent offense. In this way

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[105] *See* Note, *The Effect of Expungement on a Criminal Conviction,* 40 S. CAL. L. REV. 127, 135-43 (1967) for case examples of the balancing of society's interest in disclosure against the interest of rehabilitation via expungement. *See also* Gough, *supra* note 64, for a discussion of the competing interests.

more offenders get a second chance as long as they deserve it.

(3) Make the relief automatic and total, but exempt from the statute certain offenses which are not deemed appropriate for expungement. Perhaps a lesser degree of relief could be provided in these latter cases.

(4) Make the relief applicable to all offenders but retain specified disabilities such as the removal of the right to possess firearms.

The possibilities are virtually endless. Whatever the final combination of provisions, the statute should be specific. "Weak, loophole-ridden statutes are ineffective."[106]

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[106] Comment, *Expungement in Ohio: Assimilation Into Society for the Former Criminal*, 8 AKRON L. REV. 480, 497 (1975).