OFFENDER REHABILITATION ACT

HEARING

BEFORE THE Senate

SUBCOMMITTEE ON NATIONAL PENITENTIARIES

OF THE

COMMITTEE ON JUDICIARY

UNITED STATES SENATE

NINETY-SECOND CONGRESS

SECOND SESSION

RELATING TO THE NULLIFICATION OF CERTAIN CRIMINAL RECORDS

S. 2732

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TO QUIET CERTAIN OLD CRIMINAL RECORDS WHICH ARE BARRIERS TO THE EMPLOYMENT OF REHABILITATED FORMER OFFENDERS

THURSDAY, FEBRUARY 3, 1972

U.S. SENATE,
SUBCOMMITTEE ON NATIONAL PENITENTIARIES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 6202, New Senate Office Building. Senator Quentin N. Burdick presiding.

Present: Senator Burdick.

Also present: James G. Meeker, staff director, Ronald E. Meredith, minority counsel, and Judith E. Snopek, chief clerk.

Senator BURDICK. We are here this morning to begin formal consideration of S. 2732, legislation to quiet certain old criminal records which are barriers to the employment of rehabilitated former offenders.

Although this is the first hearing we have held on this bill, these hearings are a continuation of work started by this subcommittee last year on the relationship between crime and unemployment, or underemployment. We have accumulated enough evidence to conclude that there is a real relationship and that we must begin to look for answers to some of the problems.

We have learned that a disproportionate share of the people who end up in the criminal justice system had already failed in the economic system. We also know that although most former offenders who are released attempt to secure legitimate employment, it is the ones who get and keep jobs who are most likely to stay out of further trouble.

This subcommittee has concerned itself with several aspects of crime and employment. In the Federal prison system, a fourth of the inmates are involved in training classes or industrial work assignments related to jobs on the outside. We have encouraged expansion of these programs.

Job training is not the only answer, however, to the employment of former offenders. There are many problems. Some involve desire, some involve personal attitudes, but some of the employment problems of exoffenders are the result of the barriers we have erected that bar legitimate employment.

The difficulties which exoffenders have in obtaining jobs is well known. In a 1968 survey of citizen attitudes toward crime, a majority of people felt that rehabilitation should be the end result of a criminal conviction, and that getting a job was the number one problem of former offenders. But a majority of these people also said that they would feel uneasy working alongside someone who had been convicted of a crime, and would hesitate to hire an exoffender for a job involving any degree of trust or responsibility.

These two dimensions of public opinion go in opposite directions, and I think that this goes to the heart of the subject this subcommittee has before it—how can we provide a reasonable way for rehabilitated offenders to rejoin the economic system as full partners.

A key part of this dilemma has already been answered by a group of former offenders who have acted responsibly when they were trusted to do so. The Department of Labor, in a new program, provides the money bond for any former offender who is denied a bonafide job because he can't be bonded through a regular insuror. The loss rate among former offenders is better than the loss rate for the rest of the population.

The law of corrections, however, is not full of similar success stories. It is full of barriers erected, and opportunities denied. For example, there is the case of the man who had successfully driven a school bus for 10 years but lost his job when the school board uncovered a 25-year-old criminal conviction.

There is the State prison which for years operated a vocational training program in barbering, but the State denied barber licenses to all convicted persons.

The most painful realization which one comes to in studying economic barriers is the lack of a reasonable connection between the past crime and the future employment. So often the barrier is against all convicted persons, and not just those who might have committed related crimes.

Discrimination against former offenders in employment, bonding and licensing denies legitimate employment to some. More often, however, it is the jobs with hope of personal improvement and future advancement which are denied.

One writer has said the former offender must prepare himself "to accept work in fields where the smallest number of people are looking for work . . ." It is a nice way of saying he is more likely to be pushed into intermittent jobs with low status and low pay.

In these circumstances the past record of criminal behavior becomes a self-fulfilling prophecy. It is a barrier which keeps the former offender from achieving what we define as success in a lawful society.

Our society has become deeply concerned about crime and particularly about the recidivistic rate of crime. If we are to make some headway against this problem, we must find the avenues which will give former offenders the means to succeed in a lawful lifestyle. The thought that we can safely drop some of the present barriers to employment of rehabilitated offenders is an idea whose time has come. (A copy of S. 2732 appears at this time in the record.)

92D CONGRESS
1ST SESSION

S. 2732

IN THE SENATE OF THE UNITED STATES

OCTOBER 20, 1971

Mr. BURDICK (for himself, Mr. BAYH, Mr. BROOKE, Mr. COOK, Mr. GRAVEL, Mr. HARRIS, Mr. HART, Mr. HUMPHREY, Mr. MCGOVERN, Mr. MANSFIELD, Mr. METCALF, Mr. MOSS, and Mr. WILLIAMS) introduced the following bill; which was read twice and referred to the Committe on the Judiciary

A BILL

Relating to the nullification of certain criminal records.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Offender Rehabilitation Act".

SEC. 2. The Congress hereby finds that the rehabilitation of criminal offenders is essential to the protection of society; that gainful employment is significant to the rehabilitation of criminal offenders; that misuse of past criminal records is a substantial barrier to employment and to the bonding and licensing to secure employment; and hereby

declares that the proper use of criminal records will aid the rehabilitation of offenders and protect the interests of society.

SEC. 3. (a) Any person convicted of the violation of any law of the United States, shall, if such person is otherwise eligible under this Act, be authorized to make application to the United States district court in which such conviction occurred for an order to nullify in all records all recordations relating to such conviction and any arrest, indictment, hearing, trial, or correctional supervision in connection therewith as follows:

(1) in the case of any such person who, following such conviction, was placed on probation, fined, or whose sentence was otherwise suspended, such person shall be eligible to make application at any time after the expiration of the thirty-six calendar month period following the date he is released from the jurisdiction of the court in connection with such conviction; and

(2) in the case of any such person who, following such conviction, was mandatorily released or released on parole, such person shall be eligible to make application at any time after the expiration of the sixty calendar month period following the date he is released from jurisdiction in connection with such conviction.

(b) If. upon the receipt of an application pursuant to

subsection (a) of this section the appropriate United States district court determines that the person making such application is an eligible applicant under this Act, and has, following the conviction with respect to which such application is made, shown evidence of his rehabilitation, such court shall, subject to the provisions of section 7 (c), of the Act, enter an order nullifying in all records, all recordations relating to his arrest, indictment, hearing, trial, conviction, and correctional supervision. Notwithstanding the foregoing provisions of this section or any other law, the district court for the district wherein such application is filed, in the exercise of its discretion and in furtherance of justice, may, at the request of the applicant made at the time of the filing of such application, transfer the application for hearing and determination to the district court for the district wherein such applicant resides.

SEC. 4. (a) Any person who is convicted of the violation of any law of the United States shall, if such conviction is shown on direct or collateral review or any hearing to be invalid by reason of innocence, or if such person, with respect to such conviction, has been pardoned on the ground of innocence, and if he is otherwise eligible to make application under this Act, be authorized to make application to the United States district court in which such conviction occurred for an order to nullify, in all records, all recordations

relating to his arrest, indictment, hearing, trial, conviction, and subsequent correctional supervision.

(b) If, upon the receipt of an application pursuant to subsection (a) of this section, the appropriate United States district court determines that the conviction with respect to which such application was made was shown on direct or collateral review or at any hearing to be invalid on the ground of innocence, or that the applicant, in connection with such conviction, was pardoned on the ground of innocence, the court, if it determines that such individual is otherwise eligible to make application under this Act, shall enter an order nullifying, in all records, all recordations relating to his arrest, indictment, hearing, trial, conviction, and correctional supervision. Notwithstanding the foregoing provisions of this section or any other law, the district court for the district wherein such application is filed, in the exercise of its discretion and in furtherance of justice, may, at the request of the applicant made at the time of the filing of such application, transfer the application for hearing and determination to the district court for the district wherein such applicant resides.

SEC. 5. (a) Any person arrested, indicted, or tried in connection with the violation of any law of the United States shall, if such person was found not guilty of the offense for which he was indicted, was released from such arrest, or

his indictment was dismissed, shall, if such person is otherwise eligible to make application under this Act, be authorized to make application to the appropriate United States district court to nullify, in all records, all recordations relating to his arrest, indictment, or trial, as the case may be.

(b) If, upon the receipt of an application pursuant to subsection (a) of this section, the appropriate United States district court determines that the applicant was found not guilty of the offense with respect to which he was indicted or that he was released from such arrest or his indictment was dismissed, and that such person is an eligible applicant under this Act, the court, subject to the provisions of section 7(c) of this Act, shall enter an order nullifying in all official records, all recordations relating to such arrest, indictment, or trial, as the case may be.

SEC. 6. No person shal be authorized to make application pursuant to this Act if—

(1) he has been convicted of any felony or misdemeanor (other than a petty offense) in any Federal or State court other than the offense with respect to which such application is made, unless such conviction was shown on direct or collateral review or any hearing to be invalid, or such person, with respect to such conviction, was pardoned on the grounds of innocence; and

(2) at the time of his application, such person was under arrest or indictment or was on trial or had outstanding a warrant for his arrest, in connection with the violation of a felony or serious misdemeanor under any law of the United States or any State.

SEC. 7. (a) The effect of any order issued by a court pursuant to this Act nullifying any record shall, subject to the provisions of subsection (c) of this section and section 9, be—

(1) to prohibit the use, distribution, or dissemination of any such record so nullified in connection with any inquiry or use involving employment, bonding, or licensing in connection with any business, trade, or profession of the person with respect to whom such order was issued;

(2) to restore to such person any civil rights or privileges lost or forfeited as a result of any conviction the records with respect to which were nullified by such order, including the right to vote, and to serve on juries; and

(3) to prohibit the use of any such record for purposes of impeaching the testimony of any person with respect to whom such order was issued in any civil or other action.

(b) Subject to the provisions of subsection (c) of this

section and section 9, in any case involving an inquiry made to any person involving any arrest, indictment, hearing, trial, conviction, or correctional supervision, made, obtained, or carried out in connection with such person and the records with respect to which were nullified pursuant to an existing order issued in accordance with this Act such person, if such inquiry is made for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession shall be authorized to answer such inquiry in a way so as to deny that any such arrest, indictment, hearing, trial, conviction, or correctional supervision (as the case may be) ever occurred. No such person shall be held thereafter under any provision of Federal or State law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, trial, hearing, conviction, or correctional supervision.

(c) Notwithstanding any other provision of this Act, any court issuing an order pursuant to this Act may, if it determines such action to be necessary in order to protect the public, qualify or otherwise limit the effect of such order to the extent to which it determines necessary to assure such protection.

(d) Any application made pursuant to this Act or an order to nullify certain records shall include a list of all persons, offices, agencies, and other entities which the appli-

cant has reason to believe have such records or copies thereof under their jurisdiction or control, and any such person, office, agency, or entity so listed which receive a copy of any such order so issued.

SEC. 8. Any officer or employee of the United States or any State who releases or otherwise disseminates or makes available for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession to any individual, corporation, firm, partnership, or other entity, or to any department, agency, or other instrumentality of the Federal or any State government, or any political subdivision thereof, any information or other data concerning any arrest, indictment, trial, hearing, conviction, or correctional supervision the records with respect to which were nullified by an existing order issued pursuant to this Act shall be guilty of a misdemeanor and shall be subject to a fine of not more than $1,000 or imprisoned not more than one year, or both.

SEC. 9. If, at any time following the issuance of a nullification order pursuant to this Act the person with respect to whom such order was issued is convicted of any felony or misdemeanor (other than a petty offense) under any Federal or State law, the Identification Division of the Federal Bureau of Investigation shall notify the clerk of the United States district court in which such order was issued

of that fact. Upon receipt of such notification, such court, if such conviction is not thereafter reversed or otherwise set aside and the time for appeal in connection therewith has expired, shall enter an order rescinding such nullification order and shall notify all appropriate departments, agencies, and other entities to that effect.

SEC. 10. Prior to the release of any person from the jurisdiction of the court or from correctional supervision who may thereafter be eligible to make application for a nullification order pursuant to this Act, an appropriate officer of the court, in the case of an acquittal or dismissal, in the case of a conviction, shall explain to such person the procedure for applying for a nullification order pursuant to this Act, and shall provide necessary forms in connection therewith.

SEC. 11. Any person arrested, indicted, tried, or convicted in connection with the violation of any State law shall, if the records with respect to such arrest, indictment, trial, conviction, or correctional supervision were expunged, sealed, or otherwise nullified under an order issued pursuant to State law, be eligible to make application to the appropriate United States district court for an order extending the effect of such State order to each of the other several States, and to the United States. Upon receipt of such application the United States district court shall have jurisdiction to enter an order, the effect of which shall be to extend such State order to

each of the other several States and to the United States. No such Federal order shall be issued unless the applicant, at the time of his application, is within the purview of section 6 of this Act.

SEC. 12. Nothing in this Act shall be construed as amending or otherwise altering or affecting the provisions of section 404 of the Controlled Substances Act or section 504 of the Labor-Management Reporting and Disclosure Act of 1959.

SEC. 13. As used in this Act, the term—

(1) "State" means any of the several States of the United States and any political subdivision thereof, the District of Columbia, the Virgin Islands, Guam, and the Commonwealth of Puerto Rico; and

(2) "indictment" includes any information.

SEC. 14. Notwithstanding any other provision of this Act, no Federal courts shall have jurisdiction to consider any application for nullification of records involving any offense arising out of or punishable under section 34, 1111, 1112, 1114, 1201, 1751, 2031, 2113(d), 2113(e), 2381, or 2383 of title 18, United States Code, or section 902(i) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472(i)).

I believe Senator Hart has a statement here and I ask unanimous consent that it be made a part of the record, at this time.

(The prepared statement of Senator Philip A. Hart follows:)

STATEMENT OF SENATOR PHILIP A. HART

HEARINGS—FEB. 3, 1972

I regret not being able to be with you this morning to hear the testimony of my friend and constituent, Mr. Stephen I. Schlossberg, on the pending bill, S. 2732. His thoughtful testimony is always helpful to us.

I am pleased that this subcommittee has begun to examine some of the real issues involved in the correction and rehabilitation of criminal offenders.

We, as members of Congress, are accountable for the institutions and services which we authorize, to see that they are meeting the nation's needs. In the case of penal institutions and correctional services, I think that we are accountable not just for their efficient management, but for their success in achieving what society expects—that somehow offenders will be returned to society as law-abiding citizens.

These institutions of criminal justice can only deal with certain aspects of crime, and are neither the beginning nor end of it. The breeding grounds of crime remain the underlying unsolved problems in our society, and any remedy which we fashion to deal with it must relate to the community as a whole.

Most of the individuals who are processed through the criminal justice system have been losers in their communities, and particularly losers in the economic system.

For them, a criminal record is not a deterrent to crime, but a further deterrent to achieving the minimum level of economic security which is required to achieve a stable, lawful pattern of behavior.

I commend the Chairman for his willingness to go into this difficult problem. Because of his leadership, we have been exposed to this serious problem, and must now enact legislation which will provide a carefully constructed solution.

The vital moment for the rehabilitated offender is the moment he applies for a job. The means we provide for the individual to handle the fact of his past record on an application form or in an interview is of crucial importance, and we must weigh this matter with great care.

Questions may arise regarding such problems as:

(1) Unexplained gaps in a job applicant's personal history.

(2) Whether a shorter waiting period of good behavior before an order can be obtained would be more effective.

(3) The appropriateness of authorizing the ex-offender to deny his past conviction.

I am sure these hearings will expose these questions so that the best possible solution can be offered to our colleagues for legislative action.

Senator BURDICK. And Senator Bayh sent his regrets, too, that he could not be here to hear the testimony, Mr. Schlossberg.

Our first witness this morning will be Mr. Stephen Schlossberg, general counsel of the United Auto Workers in Detroit.

STATEMENT OF STEPHEN I. SCHLOSSBERG, GENERAL COUNSEL, UNITED AUTO WORKERS, DETROIT, MICH., ACCOMPANIED BY JACK BIEDLER, LEGISLATIVE DIRECTOR, UNITED AUTO WORKERS, AND EDWIN FABRÉ, ASSISTANT GENERAL COUNSEL, UNITED AUTO WORKERS

Mr. SCHLOSSBERG. Thank you, Mr. Chairman.

Mr. Chairman, I have with me Mr. Jack Beidler who is the legislative director of the UAW and Mr. Edwin Fabré who is assistant general counsel of the UAW.

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Mr. Chairman, our statement is relatively brief, and I would ask your indulgence if, after I finish with our prepared statement, you will give a very few minutes to Mr. Fabré for a statement that he wishes to make orally on the record.

Senator BURDICK. Very well; be glad to.

Mr. SCHLOSSBERG. Thank you.

Mr. Chairman, members of the committee:

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, is an organization composed of nearly a million and a half members. Long ago this union determined that it could not properly serve the full and complete interests of its members and their families if it confined itself to narrow, parochial interests. We have come frequently to Capitol Hill and to various Government agencies to seek, in behalf of our members and their families, avenues for the improvement of the quality of American life. We have testified before this committee, for instance, on such broad matters as electoral reform, equal rights for women, civil rights and on nominations to the Supreme Court. In that spirit we come here today.

Our union welcomes this opportunity to testify in favor of Senate bill 2732 and to suggest some improvements to it. The UAW believes that a person who has paid his debt to society should not be prevented from taking his rightful place in society and in the labor force because of previous indiscretion or transgression of the law. All of us are familiar, undoubtedly, with the model citizen whose path to a distinguished life or career is blocked by the words: Criminal record. A bill such as the one before your committee is needed for many reasons, Mr. Chairman, only two of which we will discuss here.

THE PROBLEMS OF RECIDIVISM

Many leading authorities on criminology have taken the position that many recidivists are such because they find themselves in the position of having had few alternatives available to them. The system presently works this way: The released convict, having served his sentence and, theoretically, paid his debt to society, nevertheless finds employers unwilling to hire him, finds that he is not bondable, quickly learns that any skills or training that he may have amassed while in prison is neutralized, if not nullified, by the inability to procure meaningful or gainful employment. Thus, after imprisonment, his second period of punishment begins. Social and economic ostracism often provide a worse punishment than jail. The alternatives are bleak: Welfare, which strips him of much of his dignity, not to mention the burden it places on society; dead end jobs, which leave him in the lowest economic strata as well as with the stark realization that the job soon may be phased out or mechanized out of existence; or a return to crime. Faced with these possibilities, the exconvict faces, at best, a relatively hopeless future. Such a set of circumstances seems destined, in too many cases, to lead to the enactment of a vicious, self-fulfilling prophecy: The first criminal act, followed by the imprisonment and release, followed by unrealistically drab alternatives, ending with the commission of another crime. This cycle satisfies only those who would have us believe that there is some validity to the offensive observation, once a criminal, always a criminal.

THE PROBLEM OF UNDERUTILIZATION OF MANPOWER

The presence of a criminal record often precludes a person from consideration of a wide range of professions: law, medicine, teaching, law enforcement, to name just a few. At a period in time when our society is both crying out for quality in the above professions, as well as experiencing a woeful shortage, we cannot be afforded the luxury of denying admission to a professional, sufficiently qualified except for a criminal record.

Unfortunately, many persons who have previously been convicted of a crime preclude themselves from even considering areas where licensing, and thus rejection, is a factor. The Senate has taken, in the recent past, some forward-looking steps in the area of opening opportunities to minorities and disadvantaged groups to obtaining college and job training. Yet, notwithstanding such legislation, the hope it provides is no more than a cruel hoax or unfancied illusion to many whose criminal records will only act as a bar to realization of a dream.

Congress has long been aware of the problems which face a person who has been convicted of a crime and must live with that record. As early as 1950, legislation to quiet criminal records had been enacted into law. In 1950, the Youth Corrections Act enabled a youthful offender to have his record expunged upon showing that he had been rehabilitated and readjusted. The 91st Congress took even further steps in regards to nullifying criminal records in passage of the Comprehensive Drug Abuse Prevention and Control Act, the Organized Crime Control Act and the D.C. Court Reform and Criminal Procedure Act. All of these, while extremely important, failed to reach a large group of persons. It is because of the breach still remaining that a bill such as S. 2732 is necessary.

THE BILL AND SOME NEEDED AMENDMENTS

The bill, while undoubtedly a big first step, falls short of alleviating the woes of many reformed convicts. For example, the act would only apply to first offenders. We feel that by this shortcoming in the bill, all persons who, while having two or more convictions, have led exemplary lives since their last offense are excluded from the pool of persons affected.

At a minimum, we urge this committee to add language which will permit a person with only two strikes against him, so to speak, to be included within the purview of this legislation. Sometimes, it is the second offense and conviction which lead a person to the realization that crime does not pay. Thus, second offenders should be given

the same consideration under this act as first offenders. For these persons, protection under this act is sorely needed.

Similarly, this act does not speak to the issue of whether several counts of a crime are to be handled as one offense or multiple. For example, if a person is convicted of possession and sale of stolen goods as well as transporting them across State lines, does this mean that he is guilty of one or three offenses? We are of the opinion that the logic of the circumstances as well as the intent of the act dictate that multiple counts be deemed as one action, i.e., one offense.

In section 4, of the act presently under consideration, it is unclear whether a person, whose conviction has been held invalid, by review or appeal, must also wait for a period of 3 to 5 years before applying for an order to quiet the criminal record. This same lack of clarity is present in section 5 of the bill which speaks for circumstances where an arrested party is released, an indictment is dismissed or an accused is found not guilty. Does a person in these categories, too, have to await the passing of the 3- to 5-year period?

We would propose that, where a person falls within the ambits of section 4 or section 5, such persons be immediately eligible to petition the U.S. district court to order a nullification of their records. It is our view that to do otherwise would be tantamount to penalizing one, not for a criminal conviction, but rather for being unfortunate enough to have been arrested, indicted, or found innocent after a trial. The better view is to allow the immediate expunging of the record so as to encourage the potential for gainful employment. The basic presumption of our legal system, that is, one is innocent until proven guilty, dictates that a person so exonerated be permitted an immediate means of silencing any criminal records.

The above-cited legal presumption of innocence similarly leads us to recommend to the committee that section 6(2) be modified. Under section 6(2), an otherwise qualified applicant could not seek a quieting of his previous criminal record if he was under arrest or indictment or was on trial or had an outstanding warrant for his arrest, in connection with the violation of a felony or serious misdemeanor under any law of the United States or any State. Under the language of this bill at present, one who seeks an order to expunge is deemed unworthy not because of a second or subsequent criminal conviction but simply because there is an arrest, warrant for arrest or reason to believe that he will be found guilty of a subsequent crime. In short, the mere allegation, substantiated by an arrest, warrant or trial, no matter how specious, is sufficient to deny a man the protection otherwise afforded him by this act.

The potential for abuse is very grave should mere arrest serve as the mechanism by which a new start is short-circuited. Many members of the Senate have decried the arrest procedures of some police forces who, when confronted by mass but peaceful demonstrations, feel compelled to make mass arrests not due to unlawful behavior but often due to frustration. A person caught in such a sweep would be denied the effects of this bill. We urge that this committee seriously consider modifying this act so as to continue to give credence

to the time-honored theory that a man is innocent until proven guilty. We do not wish to suggest that section 6(2) will be abused but we do fear that an inadvertent or erroneous arrest will undermine the general thrust and purpose of this act.

We are seriously concerned also about the use, distribution or dissemination of the nullified record. Section 7 of this act does place prohibition upon the use and disclosure of previous criminal records and logical inconsistencies.

The general thrust of section 7(b) is to authorize lying as to one's previous record of arrest, conviction, indictment, incarceration, et cetera. In no other area of the law is one given congressional permission to lie or deviate, drastically, from the truth. We would propose that this committee adopt a more sound policy. We would suggest that this act contain language prohibiting the inquiry into a person's criminal background unless the question contains an exculpatory proviso.

Speaking in the June 1969, edition of the American Bar Association, Journal, Pasco L. Schiavo said in his article, "Condemned by the Record":

> In addition to provision for expungement of the record, legislatures should enact prohibitions against inquiry as to whether a person had been convicted of a crime unless there is a qualifying clause: Which has not been annulled or has occurred within the past 5 years. Questions as to arrest only should be completely prohibited. (Vol. 55, p. 543.)

We indeed are somewhat troubled by the logic which demands that the truth be told when under oath but cut back such policy in special cases.

Moreover, in the employment setting, we fear that notwithstanding this act, employers who ask a question of arrest or conviction will feel justified in dismissing an employee where he denies a criminal record by virtue of a nullification of same. In short, mandatory elimination of such questions is the only realistic alternative to the language of the act.

We would also suggest that the committee consider a review procedure. Under this procedure, an applicant who seeks to quiet his records could appeal an adverse decision to a three-judge panel for review. It is our feeling that should the request for a nullification order be denied, the rejected party should be entitled as a matter of right to appeal such a decision.

Moreover, where the application is denied, the applicant should be given a reason, in writing, for such a denial. The written denial and rebutting evidence could therefore be the record for a review by a three-judge court sitting in the same district in which the application was made. Justice and fairness dictates that one man should not serve as the judge of last resort in matters as crucial as these.

We focus our attention now on the time limitations as established in section 3(a)(1) and section 3(a)(2). We propose that the period which must elapse before an application can be made should be substantially reduced. Under Senate bill 2732, a person who, following

conviction, has his sentence suspended, is given probation, or who is fined in lieu of an incarceration must wait 36 months before he is eligible to petition the court. We think the period should be reduced to 12 months.

Consider, by way of a hypothetical case, the following: John, age 22, is convicted of a crime and given a 2-year suspended sentence. In the 2 years, in which he is under the court's jurisdiction, he is neither arrested, tried nor convicted of any subsequent crimes, He is now 24. Under the proposed bill, he must allow 3 additional years to elapse before he may seek a court-ordered expunging of his record. Thus, finally, at age 27, he may say "I have never been arrested, or convicted."

No beneficial purpose is served by the lengthy 36-month period. In fact, we fail to see the logic of the stringent requirement which forces him to await the completion of the time he must remain under the "jurisdiction of the court in connection with such conviction." Where a person has been fined, had his sentence suspended, or placed on probation, he should be eligible for a nullification order 1 year from the day the sentence was passed, or became final.

Section 3(a)(2) places a 5-year waiting period upon a person who has been incarcerated. This period is far too long and should indeed extend to a period no greater than 3 years. Our recommendation to the committee is that a person tried, convicted and sentenced be eligible to apply for the benefits of this act 3 years after the date of his release from prison regardless of whether this release was through parole, commutation of sentence, or a clemency order. We see no useful purpose served by forcing a long period to elapse before one may petition the court for a nullification order.

In the Congressional Record of October 20, 1971, you, Mr. Chairman, stated:

> I do not believe that the offender should forget what he has done. that is part of his rehabilitation. But there is a time when the records of his crime cease to have any value in determining his eligibility for employment, bonding and licensing.

We agree with this proposition. The events which have rocked our penal institutions over the past year, tragic in many instances, violent in many others, have pointed out a need for real criminal reform and criminal rehabilitation. The Offender Rehabilitation Act is a meaningful first step toward a sane, sound and hope-inspiring prison reform policy. Prison reform must be based on principles of hope for the individual prisoner. If our society fails to propose and pass legislation which inspires a wrongdoer to hope for a second chance, we will be perpetuating a despair similar to that expressed by Dante in his epic, "The Inferno," when he said:

> "Abandon hope, all ye who enter here."

We, therefore, urge the passage of S. 2732 with the improvements here suggested.

I would like to add, Mr. Chairman, one or two personal observations before I take advtntage of your kind indulgence and introduce Mr. Fabré.

We have, as the president of one of the UAW locals in the Midwest, a man who was convicted of bank robbery as a youth. He was enabled to run for office the first time only by a whisker and by an interpretation under the Landrum-Griffin Act which prohibits people from running within 5 years. And the legal question we had before the parole board was whether the 5 years ran from the time the sentence was concluded or the end of the probation period, because it had not been 5 years since the probation period ended when he first ran for office.

We were very fortunate in having the help of Mr. Bennett, the former Director of Prisons of the United States, who is a superb human being, and we were able to get this man qualified to run. I can tell you that he now presides over one of the best local unions in the UAW, and has not only been a model citizen in the sense of citizen participation and union participation but this man has taken upon himself the job of prison reform and at his own expense has toured prisons and talked to prisoners about rehabilitation. He is more than a model citizen. He is one who contributes on a larger scale.

I want to add that it has been my experience as a representative of unions, dealing with some of the employment problems, that one of the festering problems we have is where a man goes to X company and works 5, 10, 15 years for the company and has invested those valuable years of his best earning capacity and faithful service to the employer, and, then, some personnel director finds a falsified record and "When this man came to us 15 years ago, he falsified the record when asked whether he had been arrested or whether he had ever been convicted of same felony"; and, then, we find that man, after all of those years of useful service, in many cases, out. And umpires and arbitrators are very harsh about the statements which are direct lies. We have been fortunate in the Big 3 automobile companies in enacting statutes of limitation on these employment questions so that after so many years we have evolved a private system of law which expunges any misconduct in the filling out of an application.

Though, as the employers began to hire the people that had been excluded from society and who had not been given a chance and have suffered over the years, the employers having been urged to do this with this Union, indeed, leading the way, you are going to find more and more of these people who, through fear and misunderstandings and frustrations, are unable to bring themselves to fill out an employment record correctly, or an employment application correctly, when it asks that question. I think that the value of the fifth amendment comes clear to a worker who might have condemned it in the days of Senator McCarthy—talking about the old Senator McCarthy, Joe. In those days, many workers had some contempt for the fifth amendment, but today when a worker finds that he has to put down on paper how bad a guy he was 5 years ago or 10 years ago and what mistakes he made, knowing so well that that may be his economic death sentence, he then appreciates the beauty and the

morality of the principle that no man should be called upon to be a witness against himself.

And, now, Mr. Chairman, unless you have some questions of me, I would take advantage of your kind indulgence and introduce this young man next to me, Edwin Fabre, who is an outstanding new graduate from the University of Michigan and a new lawyer. He has just been admitted to the bar in the State of Michigan in the last couple of months, and he has joined the staff of the UAW as assistant general counsel. While he was at the University of Michigan, he had the honor of being the president of the Black Action Movement, called BAM, at the University of Michigan. And when we were interviewing him for employment, I spoke to the president of the University of Michigan, and I said to him: "What do you think of Ed Fabre as a lawyer for the UAW?" He said, "He is not only a superb intellect but I want to tell you that he negotiated the pants off of me when we had a confrontation."

So, with great pleasure—unless you have some questions—I will call on Mr. Fabre.

Senator BURDICK. I think I will defer my questions until Mr. Fabre is through.

I want to say that as long as you could not be a graduate of the University of Minnesota, I am glad you are a graduate of the University of Michigan.

You may proceed.

Mr. FABRÉ. Thank you, Mr. Chairman. I also support the UAW's position on the Senate bill before you.

However, I do think that there are some additional matters which should be considered in terms of giving the bill some possible amendments, et cetera. The bill goes to the question of first offenders only. I have a great deal of difficulty with that particular point of view, primarily because it is often the case that one turns to crime as the last resort when shut off from the economic markets, and I think there have been volumes upon volumes, long before and long after the Kerner Commission report stated, in effect, that we do have a society consisting of two societies, one black and one white, and they are not equal. We do have a great problem in terms of the racial policies of employers and of many State governments in terms of hiring practices. Therefore, many minority-group citizens—and I think primarily black citizens—are shut off from a real means of getting into the economic market to begin with.

Similarly, I think we ought to consider—and consider very seriously—the fact that the criminal law—adding to it the economic realization (in quotes)—of the United States is, in fact, stacked against black citizens and, I think, most minority-group citizens.

For example, as we look at arrest figures, I believe that it was in 1967 that the President's Commission on Criminal Law Enforcement and Administration of Justice did a rather large study and found out that while black citizens made up 11 percent of the population

in America they represented 28 percent of the arrests. Of that 28 percent of the arrests, better than 65 percnt were simply arrested on suspicion or were arrests which never led to a conviction.

The fact is, in fact, arrest records remain as such against those people.

Second, we got a question covered by that same report, and in that report neutral observers, doing studies for the Commission at that time, stated that their observations were that blacks were in a much greater position to be arrested than were their white counterparts. They used, for example, that in a major, large urban area, North or South, the prospects of the black youth or older black citizens being arrested for doing the same actions done by white citizens were greatly higher.

The question of asking about criminal records on an application, I think has been very well addressed by the general counsel. But we do go on to the factual happenings concerning that person who has made the first error. I think it was well hit by Mr. Schlossberg's testimony when he said that often it was the first offense which seems attractive, or you have stumbled into it by accident, or because of necessity. The second one seems as easy. After the second, you then begin to think that perhaps there is a better alternative.

Often, you have precluded yourself from those alternatives because of a conviction and a criminal record.

Similarly, we go to the question of present laws and how the courts are beginning to interpret an act passed by the Congress, title VII of the Human Rights Act of 1964. Title VII did go to the question that no employer is allowed to not hire or to fire a person because of his race.

Only a year ago, the Federal court in California read this to mean that for an employer to ask whether or not a person had been convicted was, while neutral on its face, discriminatory in its intent and its result. This has been the ruling. This has been the way in which the Federal court system has gone, in terms of title VII, and I think this is something which the Senators in their deliberations would want to consider.

To the extent that it was proved that tests had no business nor necessity and discriminated against certain people are invalid and unlawful, I think the use of the question "Have you ever been arrested or convicted?"—if it cannot have any business necessity or relationship with the job that the man is to be performing—should be invalid and unlawful.

I think also, as your committee, and I think the Nation, has seen, the problem with penal institutions in so many cases—they are more populated by blacks than others—has not had, really, in history, any real means of reform in terms of being able to train persons for something once they are, in fact, sent outside, be it by parole or the expiration of their sentence. So, what we have is again a rather vicious circle, no alternatives because of racism, a crime because it

was, in some cases, a means of survival, leading to a prison system in which they receive no training or training which is going to be nullified by the fact that they have been arrested and convicted.

So, what do we do? We go back to the vicious circle.

I think that I can speak to the point—and there will be those, undoubtedly, who will say "Well, look at yourself." It has been said, and I laugh everytime it is said—"Look at yourself. You have made it." I do not feel that necessarily it is the rule. In many cases it is the exception. I guess I just feel very strongly about the bill, and I think it does need tightening up in many areas, because I do feel strongly, as each time I think about the fact that I have made it this far, I do not feel it was because I was the dream that America holds for all people, but that I was there by the grace of God.

Thank you, sir.

Senator BURDICK. Well, thank you for your contribution.

I understand from your testimony—both of you—that you feel that the thrust of this legislation is in the right direction.

Mr. SCHLOSSBERG. Indeed, Senator.

Senator BURDICK. Bear in mind that it has only been within the last few years that our people have been conscious of this problem, and when I took over this subcommittee it had a budget of $5,000, and the only work that was done was to pay traveling expenses to visit penitentiaries. But thank goodness many of our citizens are now concerned about this problem.

You feel that this legislation does not go far enough and I am sure, from some of the comments you have made, that you agree that this is quite revolutionary in itself and is the first step.

You spoke of arrest records, and you and I know, as lawyers, that an arrest record cannot be used against a man at trial, yet arrest records—and I am not talking about convictions, but just arrests—find their way into reports, credit bureaus, and everything else over the land, and yet really do not prove a thing.

Mr. SCHLOSSBERG. If I may interpose at this point a comment—May I?

Senator BURDICK. Yes.

Mr. SCHLOSSBERG. We object to the form 20—I believe it is—to the Federal application for employment which goes into arrests for no good reason. You see, we speak from a very peculiar vantage point. Those of us who represent the labor movement understand some of these matters in ways that perhaps the rest of the body politic does not. I, for instance, Senator, was an organizer before I became a lawyer, an organizer for a union in the South. I have been arrested many times. I was involved in picket lines in West Virginia and Virginia and North Carolina and the Eastern Shore of Maryland, and Virginia, and I do not remember at this moment—I have a record somewhere—how many arrests I have had. It was for disturbing the peace, or whatever the local police chose to arrest for, and I would say that we are very sensitive to that. We think that the Federal Government ought to set the example in this area and ought not to delve into mere arrests. Those of us in labor know what "arrests" can be. I mean, the labor leaders

of this country, the people who head the unions, have most often been arrested, and the local police do not write down "This is a labor dispute and we were trying to break a strike and we arrested the leader." They write it another way—it is either disturbing the peace, or, in some cases, even "A and B," assault and battery when there is no assault and battery whatsoever. And the fact that you are not convicted nevertheless means that when you apply for employment, with many private employers, and shamefully, with the Federal Government, you must recall those arrests, even though they tell us nothing.

Senator BURDICK. Now, we start with that premise that arrest records do not prove anything and it is a smudge on a man's record because he has never had his day in court. Then, we take this step, at this particular time in our history—And how much further can we go? The studies show that the chances of rehabilitation are greater after a man has his first transgression, and that is the reason why this first step is made on first offenders.

Now, this bill is not in final form. This is the starting point of what we think we should do, and so we look for your testimony, and we appreciate your testimony. We are going to have further hearings—many days of hearing—on this bill to just see how far we can go and what the support will be.

Now, it is entirely possible that after a man has been arrested and pleads guilty and is on probation that maybe a year is enough, to ascertain his fitness for the quieting of his record. We are not sure. But I think, and I think my colleagues and much of the country think, we will require a pretty high standard before we remove the records of conviction. because we want to make sure that the man is rehabilitated. The time period is more or less arbitrary, and we will have to find our way on that.

Now, I was very much impressed with your comments on section 7(b). The staff had a great deal of trouble on that and what to do with that question, and it is true, as you said in your testimony, that this permits a man to lie. And how to get at it—Maybe your suggestion is much better. But he is going to be constantly asked in an oral or off-the-cuff manner if he has been arrested, and our only thought was that, as a matter of law, he has no arrest records when as a matter of fact he did have. So, I am impressed with your suggestion, and we are going to give it a lot of consideration.

Mr. SCHLOSSBERG. Thank you, sir.

Senator BURDICK. But this is troublesome; how to get at this one.

Mr. FABRÉ. I think what is happening, if we are to consider that in most cases a person who commits an offense is convicted, sent to prison or has his sentence suspended, is going to return, basically, to the same community. In some cases, if he commits an offense in Michigan he is going to be put under that jurisdiction's parole officer, and, therefore, particularly in small communities, it is going to be known anyway, and there is no way of getting around that. I guess the question does go to how do you just avoid—I mean, I find it a bit inconsistent as to section 7 as to how you deal with the two. Similarly, I can see in most cases no real business necessity or purpose to be served by asking: "Have you ever been arrested or convicted?"

Senator BURDICK. Well, what does the man do when he is asked the question?

Mr. SCHLOSSBERG. What we are suggesting that there be Federal law which would say in this area that an employer has to ask the question so the man can answer it honestly: "Have you ever been convicted?" as this writer in the American Bar Association is suggesting, adding the qualifying phrase, the prohibition against inquiry as to whether a person has ever been convicted unless there is a qualifying phrase "which has not been annulled or which has occurred within the past 5 years."

In other words, that the question would have to be asked so that it could be truthfully answered.

And the more we have found this in our private system of law—and we have worked this out with employers, for instance, we expunge records, classification of employment records filled out by employees, with General Motors, Ford and Chrysler and with the agricultural implement industry, after 5 years. After 5 years, the statute of limitations forbids an employer to inquire. It is our private statute of limitations. Forbids an employer to inquire into those matters, and we would urge that you give some more consideration to that. Maybe your way is the only way it can be done.

Senator BURDICK. We certainly will, because it has been very troublesome to me. And I think you have a good suggestion there.

Mr. SCHLOSSBERG. Thank you.

Senator BURDICK. We know that having these training programs in the prisons—and we have some good ones in the Federal systems, I think, because I have seen some that were very good programs—may all go for naught. If a man can become a sheetmetal worker or be a furniture repairman or work with punch cards or anything of the kind, it will all go for naught if he cannot make use of it when he gets out.

And let us not forget, the name of this game of rehabilitation is "jobs." If he does not have the opportunity for jobs, he is going to go back to what he did before.

Now, as to whether this should apply to those that have been arrested and convicted more than once, the argument could be made that a man that has been convicted five or six times might be more easily rehabilitated than somebody who was convicted once, and this is a fact; but we are dealing with setting some guidelines; we are breaking new ground in this field, and we are going to have to rely upon the witnesses like yourselves as to what you think the public will accept.

Mr. SCHLOSSBERG. Well, I do want to say that I bring you, Mr. Chairman, the personal greetings of President Leonard Woodcock of the UAW. We, as an institution, all of us who have looked at this matter, say that we are very grateful to you for your humanitarian attitude and for your forward-looking approach in approaching this legislation.

Now, I do not want to leave the impression that we are ungrateful. We think you are trying to make our society a better place in which to live, and a fair and an equitable society, and we are very grateful.

Senator BURDICK. And I hope that you understand that from the testimony in the hearings, we will put forth a bill which will be one that will keep this thrust.

Mr. SCHLOSSBERG. Thank you.

Senator BURDICK. I think the staff has a few questions here. We will see.

Mr. MEEKER. Mr. Schlossberg, on your proposal of the language for the handling of the record in the employment situation, do you think that there might be some means by which—I do not like to use the term "enforcement," because that is not a good word, but some means of assuring that an individual is asked only this question in the way you specified in the employment situation?

Mr. SCHLOSSBERG. Yes, I do, and I do not have any easy answer to that. But it seems to me that certain answers suggest themselves, that there could be a fine for those who refuse—they are in interstate commerce, and over them you have jurisdiction, and so on—who refuse to ask the question properly. In other words, who took advantage of this situation. And I believe, moreover, that public interest lawyers and union lawyers, and others, should feel it incumbent upon themselves to prosecute in cases like this in civil suits. I assume that we are talking now about convicts whose civil rights have been restored, and this does become then a civil rights matter. And I believe that imaginative lawyers can find ways for private actions. It might be that you could have legislation to correct misbehavior by employers and agents of employers in this situation, not only javing fines but treble-damage suits so that private attorneys or attorneys general could be encouraged to bring such litigation.

Mr. FABRÉ. I think, to add to that, that title VII has been used in such manner since about 1970, and I mean it started with a case in California, *Gregory* v. *Litton*, and there have been some six or seven since that time. And I think this has been a question that they could see that while the question was neutral on its face it had discriminatory overtones with the result being the same way; so, this may be something perhaps that you would want to write in the bill allowing the courts, the Federal courts, to be open for this purpose. I am not exactly sure what you would want to write in and structure in, but there have been ways that the courts have been used to knock out such questions.

Mr. SCHLOSSBERG. Mr. Beidler has suggested to me that you might also authorize an injunction by the Department of Justice where an employer shows a pattern or practice along this line, similar to the Department of Justice suits that have been authorized but not brought under title VII of the Civil Rights Act of 1964.

Mr. MEEKER. Would you, by the way, send to us your private law of the auto industry on employment of ex-offenders?

Mr. SCHLOSSBERG. What I may have to send you is stipulations that have been agreed to in arbitration decisions, and becomes the common law. But where we have it in contracts, I can do that, and I will get together for you a packet of either contract clauses or arbitration rulings. Some of these things are not codified into what we would call formal contract language but are codified by agreement of the parties in practice.

But, as best I can, I will submit that information.

Senator BURDICK. Using your term, is this modern common law?

Mr. SCHLOSSBERG. It is modern industrial common law, I believe, Mr. Chairman.

Senator BURDICK. Now, I think we can find no disagreement in the fact that arrest records are an impediment that should be removed, particularly in all cases where the cases have been dismissed or the action has been dropped in some way. If arrest records continue, it seems to be an injustice.

Mr. SCHLOSSBERG. I agree with that, and I hope you would extend that prohibition to the Federal Government.

Senator BURDICK. Now, you have suggested that there be no impediment from pending criminal charges and arrest records, to granting an order nullifying the record showing such as a criminal conviction—would this not require the court to ask whether an individual was living lawfully and what the trial court may do with the pending charges?

In other words, you have an arrest pending which has not been concluded. Do you not think that the court would have a right to inquire into that, before granting these orders?

Mr. FABRÉ. I do not know. I think if we took the ratio or arrests-to-convictions, which is generally rather low—and I believe 2 years ago there was a study in Los Angeles that showed that out of something like 72 percent of the persons arrested only 18, in fact, were convicted.

Senator BURDICK. In a case where the man comes in and applies for a quieting of record and at that particular time there is an arrest and a charge pending against him which has not been disposed of, do you not think that the trial court would have a right to delay, ascertaining whether or not there is any merit to that charge, before he grants this order of expungement?

Mr. FABRÉ. That would be a valid action. I mean, I can see no problem with that. It is where—and I think this is where our worry comes in—they decide it based on the fact they have been arrested without waiting for a disposition.

Unless you have something else to offer, I want to thank you for your contribution this morning.

Mr. SCHLOSSBERG. We thank you very much, Mr. Chairman.

Senator BURDICK. And you are going to help us put forth what I hope will be a good piece of legislation.

Mr. SCHLOSSBERG. Well, with your name on it, I am sure it will be.

Senator BURDICK. Mr. Schlossberg's full statement will be made a part of the record at this point.

Without objection, at this time I would like to have the biographical sketch of Mr. Schlossberg made a part of the record at the time he was called to testify.

(The biographical sketch of Stephen I. Schlossberg follows:)

BIOGRAPHICAL SKETCHES

Stephen I. Schlossberg, Detroit, Mich.; general counsel, United Auto Workers; born in Roanoke, Virginia and graduate of the University of Virginia Law School, where he was awarded Order of the Coif. Joined United Auto Workers in 1963; author of *Organizing In The Law*, first published in 1967.

TESTIMONY OF STEPHEN I. SCHLOSSBERG, GENERAL COUNSEL OF THE UAW

Mr. Chairman, Members of the Committee: The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW is an organization composed of nearly a million and a half members. Long ago this Union determined that it could not properly serve the full and complete interests of its members and their families if it confined itself to narrow, parochial interests. We have come frequently to Capitol Hill and to various government agencies to seek, in behalf of our members and their families, avenues for the improvement of the quality of American life. We have testified before this Committee, for instance, on such broad matters as electoral reform, equal rights for women, civil rights and on nominations to the Supreme Court. In that spirit we come here today.

Our Union welcomes this opportunity to testify in favor of Senate Bill No. 2732 and to suggest some improvements to it. The UAW believes that a person who has paid his debt to society should not be prevented from taking his rightful place in society and in the labor force because of previous indiscretion or transgression of the law. All of us are familiar, undoubtedly, with the "model citizen" whose path to a distinguished life or career is blocked by the words: CRIMINAL RECORD. A bill such as the one before your committee is needed for many reasons, only two of which we will discuss here.

THE PROBLEM OF RECIDIVISM

Many leading authorities on criminology have taken the position that many recidivists are such because they find themselves in the position of having had few alternatives available to them. The system presently works this way: the released convict—having served his sentence and, theoretically, paid his debt to society—nevertheless finds employers unwilling to hire him, finds that he is not bondable, quickly learns that any skills or training that he may have amassed while in prison is neutralized, if not nullified, by the inability to procure meaningful or gainful employment. Thus, after imprisonment, his *second* period of punishment begins. Social and economic ostracism often provide a worse punishment than jail. The alternatives are bleak: *welfare*, which strips him of much of his dignity, not to mention the burden it places on society; *dead-end jobs*, which leave him in the lowest economic strata as well as with the stark realization that the job soon may be phased out or mechanized out of existence; or *a return to crime*. Faced with these possibilities, the ex-convict faces, at best, a relatively hopeless future. Such a set of circumstances seems destined, in too many cases, to lead to the enactment of a vicious, self-fulfilling prophecy: the first criminal act, followed by the imprisonment and release, followed by unrealistically drab alternatives, ending with the commission of another crime. This cycle satisfies only those who would have us believe that there is some validity to the offensive observation, "once a criminal, always a criminal."

THE PROBLEM OF UNDERUTILIZATION OF MANPOWER

The presence of a criminal record often precludes a person from consideration of a wide range of professions: law, medicine, teaching, law enforcement, to name just a few. At a period in time when our society is both crying out for quality in the above professions, as well as experiencing a woeful shortage, we cannot be afforded the luxury of denying admission to a professional, sufficiently qualified except for a criminal record.

Unfortunately, many persons who have previously been convicted of a crime preclude themselves from even considering areas where licensing, and thus rejection, is a factor. The Senate has taken, in the recent past, some forward looking steps in the area of opening opportunities to minorities and disadvantaged groups to obtaining college and job training. Yet, notwithstanding such legislation, the hope it provides is no more than a cruel hoax or unfancied illusion to many whose criminal records will only act as a bar to realization of a dream.

Congress has long been aware of the problems which face a person who has been convicted of a crime and must live with that record. As early as 1950, legislation to quiet criminal records had been enacted into law. In 1950, the *Youth Corrections Act* enabled a youthful offender to have his record ex-

punged upon showing that he had been rehabilitated and readjusted. The 91st Congress took even further steps in regards to nullifying criminal records in passage of the *Comprehensive Drug Abuse Prevention and Control Act*, the *Organized Crime Control Act* and the *D.C. Court Reform and Criminal Procedure Act*. All of these, while extremely important, failed to reach a large group of persons. It is because of the breach still remaining that a bill such as S. 2732 is necessary.

THE BILL AND SOME NEEDED AMENDMENTS

The Bill, while undoubtedly a big first step, falls short of alleviating the woes of many reformed convicts. For example, the Act would apply to first offenders. We feel that by this shortcoming in the Bill, all persons who, while having two or more convictions, have led exemplary lives since their last offense are excluded from the pool of persons affected.

At a minimum, we urge this committee to add language which will permit a person with only two strikes against him, so to speak, to be included within the purview of this legislation. Sometimes, it is the second offense and conviction which lead a person to the realization that crime does not pay. Thus, *second* offenders should be given the same consideration under this Act as *first* offenders. For these persons, protection under this Act is sorely needed.

Similarly, this Act does not speak to the issue of whether several counts of a crime are to be handled as one offense or multiple. For example, if a person is convicted of possession and sale of stolen goods as well as transporting them across state lines, does this mean that he is guilty of one (1) or of three (3) offenses? We are of the opinion that the logic of the circumstances as well as the intent of the Act dictate that multiple counts be deemed as one action, i.e. one offense.

In Section 4 of the Act presently under consideration, it is unclear whether a person, whose conviction has been held invalid, by review or appeal, must also wait for a period of three (3) to five (5) years before applying for an order to quiet the criminal record. This same lack of clarity is present in §5 of the Bill which speaks of circumstances where an arrested party is released, an indictment is dismissed or an accused is found not guilty. Does a person in these categories, too, have to await the passing of the 3-5 year period?

We would propose that, where a person falls within the ambits of §§4 or 5, such persons be immediately eligible to petition the U.S. District Court to order a nullification of their records. It is our view that to do otherwise would be tantamount to penalizing one, not for a criminal conviction, but rather for being unfortunate enough to have been arrested, indicted, or found innocent after a trial. The better view is to allow the immediate expunging of the record so as to encourage the potential for gainful employment. The basic presumption of our legal system, i.e., one is innocent until proven guilty, dictates that a person so exonerated be permitted an immediate means of silencing any criminal records.

The above-cited legal presumption of innocence similarly leads us to recommend to the committee that Section 6(2) be modified. Under Section 6(2), an otherwise qualified applicant could not seek a quieting of his previous criminal record if he was—

"Under arrest or indictment or was on trial or had an outstanding warrant for his arrest, in connection with the violation of a felony or serious misdemeanor under any law of the United States or any State."

Under the language of this bill at present, one who seeks an order to expunge is deemed unworthy not because of a second or subsequent criminal conviction but simply because there is an arrest, warrant for arrest or reason to believe that he will be found guilty of a subsequent crime. In short, the mere allegation, substantiated by an arrest, warrant or trial, no matter how specious, is sufficient to deny a man the protections otherwise afforded him by this Act.

The potential for abuse is very grave should mere arrest serve as the mechanism by which a "new start" is short circuited. Many members of the Senate have decried the arrest procedures of some police forces who, when confronted by mass but peaceful demonstrations, feel compelled to make mass arrests not due to unlawful behavior but often due to frustration. A person caught in such a "sweep" would be denied the effects of this bill. We urge that

this committee seriously consider modifying this Act so as to continue to give credence to the time-honored theory: "A man is innocent until proven guilty." We do not wish to suggest that Section 6(2) will be abused but we do fear that an inadvertent or erroneous arrest will undermine the general thrust and purpose of this Act.

We are seriously concerned also about the use, distribution or dissemination of the nullified record. Section 7 of this Act does place prohibition upon the use and disclosure of previous criminal records and logical inconsistencies.

The general thrust of Section 7(b) is to authorize lying as to one's previous record of arrest, conviction, indictment, incarceration, etc. In no other area of the law is one given Congressional permission to lie or deviate, drastically, from the truth. We would propose that this committee adopt a more sound policy. We would submit that this Act contain language prohibiting the inquiry into a person's criminal background unless the question contains an exculpatory proviso.

Speaking in the June, 1969 edition of the *American Bar Association Journal*, Pasco L. Schiavo said in his article, "Condemned by the Record,"

"In addition to provision for expungement of the record, legislatures should enact prohibitions against inquiry as to whether a person had been convicted of a crime unless there is the qualifying clause—'which has not been annulled or has occurred within the past five years.' Questions as to 'arrest' only should be completely prohibited." (Vol. 55, p. 543.)

We indeed are somewhat troubled by the logic which demands that the truth to told when under oath but cut back such policy in "special" cases.

Moreover, in the employment setting, we fear that notwithstanding this Act, employers who ask a question of arrest or conviction will feel justified in dismissing an employee where he denies a criminal record by virtue of a nullification of same. In short, mandatory elimination of such questions is the only realistic alternative to the language of the Act.

We would also suggest that the committee consider a review procedure. Under this procedure, an applicant who seeks to quiet his records could appeal an adverse decision to a three-judge panel for review. It is our feeling that should the request for a nullification order be denied, the rejected party should be entitled as a matter of right to appeal such a decision.

Moreover, where the application is denied, the applicant should be given a reason, in writing, for such a denial. The written denial and rebutting evidence could therefore be the record for a review by the three judge court sitting in the same district in which the application was made. Justice and fairness dictates that one man should not serve as the judge of last resort in matters as crucial as these.

We focus our attention now on the time limitations as established in Sections 3(a)(1) and 3(a)(2). We propose that the period which must elapse before an application can be made should be *substantially* reduced. Under Senate Bill 2732, a person who, following conviction, has his sentence suspended, is given probation, or who is fined in lieu of an incarceration must wait thirty-six (36) months before he is eligible to petition the court. We think the period should be reduced to twelve (12) months.

Consider, by way of a hypothetical case, the following: John, age 22, is convicted of a crime and given a 2-year suspended sentence. In the two years, in which he is under the Court's jurisdiction, he is neither arrested, tried or convicted of any subsequent crimes. He is now 24. Under the proposed bill, he must allow three additional years to elapse before he may seek a court ordered expunging of his record. Thus, finally, at age 27, he may say, "I have never been arrested, or convicted."

No beneficial purpose is served by the lengthy 36-month period. In fact, we fail to see the logic of the stringent requirement which forces him to await the completion of the time he must remain under the "jurisdiction of the court in connection with such conviction;" where a person has been fined, had his sentence suspended or placed on probation, he should be eligible for a nullification order one year from the day the sentence was passed, or became final.

Section 3(a)(2) places a *five*-year waiting period upon a person who has been incarcerated. This period is far too long and should indeed extend to a period no greater than *three* years. Our recommendation to the committee is that a person tried, convicted and sentenced, be eligible to apply for the

benefits of this Act, three years after the date of his release from prison, regardless of whether this release was through parole, commutation of sentence or a clemency order. We see no useful purpose served by forcing a long period to elapse before one may petition the court for a nullification order.

In the Congressional Record of October 20, 1971, Senator Burdick stated that:

"I do not believe that the offender should forget what he has done, that is part of his rehabilitation. But there is a time when the records of his crime cease to have any value in determining his eligibility for employment, bonding and licensing."

We agree with this proposition. The events which have rocked our penal institutions over the past year, tragic in many instances, violent in many others, have pointed out a need for real criminal reform and criminal rehabilitation. The Offender Rehabilitation Act is a meaningful first step toward a sane, sound and hope-inspiring prison reform policy. Prison reform must be based on principles of hope for the individual prisoner. If our society fails to propose and pass legislation which inspires a wrongdoer to hope for a second chance, we will be perpetuating a despair similar to that expressed by Dante in his epic, *The Inferno*, when he said:

"Abandon hope, all ye who enter here."

We therefore urge the passage of S. 2732 with the improvements here suggested.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW,
Detroit, Mich.,
March 13, 1972.

Hon. QUENTIN BURDICK,
Senate Subcommittee on National Penitentiaries,
Senate Office Building, Washington, D.C.

MY DEAR SENATOR BURDICK: You will recall that when I testified before your Subcommittee on National Penitentiaries with respect to Senate Bill No. 2732, I asked you to broaden the bill to prevent misconduct by the Federal Government with respect to its improper inquiries into past arrests and convictions.

I have now had called to my attention by Mr. James E. Youngdahl, an outstanding labor lawyer from Little Rock, Arkansas, a particularly glaring example of such misconduct by an agent of the National Labor Relations Board, Mr. William L. Jerome of Fort Worth, Texas. In a recent case filed by the Woodworkers' Union, involving an alleged discriminatory discharge, the named Field Examiner apparently thought it appropriate to ask potential witnesses whether they had been arrested or convicted of a felony.

If this kind of attitude is prevalent among such government agents, it certainly seems to me that the good work you are attempting to do, in connection with expungement of criminal records as a rehabilitative measure, needs to be augmented by a legislative effort to control federal bureaucrats.

I am enclosing a copy of a letter Mr. Youngdahl wrote to Peter G. Nash, General Counsel of the National Labor Relations Board, with enclosures, and I ask that it be inserted in the record of your hearings.

With warm personal regards.

Sincerely,

STEPHEN I. SCHLOSSBERG,
General Counsel.

YOUNGDAHL, SIZEMORE, BREWER, FORSTER, PATTON & UHLIG,
Little Rock, Ark., March 6, 1972.

Mr. STEPHEN I. SCHLOSSBERG,
General Counsel, International Union, UAW, Detroit, Mich.

DEAR STEVE: Do you have any reaction to this?

Sincerely,

JAMES E. YOUNGDAHL.

YOUNGDAHL, SIZEMORE, BREWER, FORSTER, PATTON & UHLIG,
Little Rock, Ark., March 6, 1972.

Mr. PETER NASH,
General Counsel,
National Labor Relations Board,
1717 Pennsylvania Avenue,
Washington, D.C. 20570

DEAR MR. NASH: I am writing as General Counsel for the International Woodworkers of America, AFL-CIO, CLC.

My client has been engaging in an organizing campaign among employees of Quadrant Corporation in Hugo, Oklahoma. During the course of the campaign it became necessary to file what otherwise amounted to a routine charge in Case No. 16-CA-4600. I was informed shortly thereafter that the Field Examiner who was investigating the charge was causing some consternation among the employees being interviewed because he was asking them if they had been arrested or convicted of a felony.

I wrote to Mr. Jerome on February 16, 1972; a copy of that letter is enclosed. Mr. Jerome responded on March 2, 1972; a copy is also enclosed.

Fundamentally for the reasons stated in my February 16 letter, I do not believe that this is appropriate inquiry for an NLRB field examiner except in certain cases where such arrest or conviction is substantively relevant to the issues involved in the charge.

Certainly an attorney preparing for trial needs to inquire about matters that may come up including perhaps conviction of certain crimes. However, as we all know, the admissibility of such evidence is limited under any circumstances. The reasons for such limitation are quite similar, in my view, to the reasons for not having such facts considered for credibility examinations in the Regional Offices. What we were told, in short, is that the employees felt that whereas they had filed a charge against the employer, they were being investigated. In a telephone conversation referred to in Mr. Jerome's letter to me, he told me that he doesn't ask such question when the interviewee appears to be "clean cut." That illustrates exactly the kind of subjective evaluation I do not think should be made.

I also enclose three affidavits, taken from Ernest D. Lane, Albert Havard, and David M. Carter which contain material to which I object. Please note that according to the affidavits of Havard and Carter, each was asked if he ever was arrested *or convicted*, surley going beyond the loosest standards of admissibility in any subsequent proceeding.

I normally would not bring such matters to the attention of the General Counsel, but evidently Mr. Jerome, after consultation with his Regional Director, is going to persist in this procedure. I would greatly appreciate your consideration of its advisability in the future.

Sincerely,

JAMES E. YOUNGDAHL.

NATIONAL LABOR RELATIONS BOARD,
Forth Worth, Tex., March 2, 1972.

JAMES E. YOUNGDAHL, ESQ.,
Youngdahl, Sizemore, Brewer, Forster, Patton & Uhlig,
Attorneys-At-Law,
Little Rock, Ark.

RE: QUADRANT CORP. CASE NO. 16-CA-4600

DEAR MR. YOUNGDAHL: This letter is to confirm our telephone conversation of February 28, 1972, in which we discussed the matter of *Quadrant Corporation*, Case No. 16-CA-4600, and the fact that I had apparently routinely asked affiants whether or not they had been arrested and convicted of a felony.

First, let me state that such is not a routine practice or policy of the Region. As you know from your years in dealing with Board Agents, the individual Board Agent making the investigation is responsible for the conduct of the particular investigations assigned to them, and such questions may or may not be relevant, in the event that the charge has merit, and the General Counsel thus becomes an adversary in the matter.

In such an occasion, it is the responsibility of the attorney handling the matter at the hearing to vouch for the credibility of any witnesses that he may call.

In the particular case which you called to my attention, it was my opinion that such questions should be directed to the witnesses, and it was my prerogative to make this decision.

I know of no single instance or case in which the question has been intimidatory, inasmuch as the witnesses are, without exception, given knowledge as to why the information is sometimes necessary. I appreciate your interest and concern in assuming that the question itself is intimidatory, however I can assure you that, in this particular instance, the questions were posed in an innocuous atmosphere.

Sincerely,

WILLIAM L. JEROME,
Field Examiner.

FEBRUARY 16, 1972.

Mr. WILLIAM L. JEROME,
Field Examiner,
16th Region,
National Labor Relations Board,
Fort Worth, Tex.

DEAR MR. JEROME: I am writing as General Counsel of the International Woodworkers of America, AFL-CIO, CLC.

It has been brought to my attention that during your investigation of our charge in *Quadrant Corp.*, Case No. 16–CA–4600, you apparently routinely asked affiants whether or not they had been arrested and convicted of a felony. I am further advised that there was no issue about such type of conduct or history on the part of any of the individuals involved. I have, for example, copies of the affidavits of Ernest D. Lane, Albert Havard, and David M. Carter, all of which show such information.

We wish strongly to protest these questions and the inclusion of this subject in your investigation. Of course we would have no objection when it is relevant to a specific defense of the employer, for example, concerning the reasons for a discharge which we allege to be discriminatory. I can not think of a single situation in which it otherwise might be relevant.

When this question is asked, further, in a context of discrimination and anti-union activity, as a practical matter the question itself is intimidatory and makes it appear that the affiants are under investigation, rather than the charge and the respondent in the charge.

I would like to know if such questions are the policy of the Region or your own practice, and respectfully request that in either event questions of this kind be discontinued.

I look forward to your response.

Sincerely,

JAMES E. YOUNGDAHL.

STATE OF OKLAHOMA, COUNTY OF CHOCTAW

AFFIDAVIT

I, Ernest D. Lane, having been duly sworn, give this statement to William L. Jerome, National Labor Relations Board, of my own free will:

I live at 206 Rosewood Drive, Hugo, Oklahoma. I don't have a telephone, but I can be reached through my next door neighbor, Liston Coffey . . . his telephone number is 326–3653 in Hugo, Oklahoma. My Social Security number is 444–40–8309. *I have never been arrested and convicted of a felony.*

I went to work for the Quadrant Corporation of Hugo, Oklahoma on or about September 15, 1971. I was hired by the plant manager, Clay Pinson . . . I was put to work as a sheet metal worker. I was experienced in sheet metal and plumbing work before I went to work for Quadrant. My rate of pay was $3.50 an hour . . . I worked 40 hours a week.

I had worked a couple of months when another employee came up to me and asked me what I thought about forming a good strong union. I told him that I didn't want a union.

I later attended a union meeting at a motel in Hugo on December 16, 1971, along with some other employees. At that meeting I signed a union authorization card for the International Woodworkers Union. I agreed to get other employees to sign authorization cards, and I took cards with me to work on December 17, 1971. I talked to employees during lunch and rest periods about signing authorization cards. I got five employees to sign cards.

On December 18, 1971 the company gave the employees and their wives a Christmas party. At this party both liquor and food were served. During the party I had a discussion with the plant manager, Clay Pinson, about the union trying to organize the employees. Pinson knew that the union was trying to organize, as I had talked to them when I was against it. At this party I told Mr. Pinson that I had attended the union meeting, and had signed a authorization card. His reaction was to take off his necktie and put it around my neck . . . he said something about it being a Christmas present. I tarowed it down, and he picked it up and put it in my wife's lap. I was pretty well drinking at the time . . . Mr. Pinson was drinking also.

On Thursday, December 23, 1971, the last day we worked before Christmas, I was sent to go to Harris, Idabel, and Broken Bow, Oklahoma to work on trailers that were being set up for the people to move in. Two other employees went with me . . . Randy Rankin, an electrician, and Kenneth Bates, my plumber's helper.

After we had finished work, we stopped and got us a bottle of whisky, and had one beer. On the way back we met the plant manager, Clay Pinson, and our supervisor, Noel Pence. We stopped and Randy Rankin got in the car with them and went to Broken Bow and pick up another vehicle. Rankin is an electrician at the plant, and has been against the union from the very start. He has slogans written on his hard hat saying "Stay Free" and "Vote No."

Kenneth Bates and I got back to the plant about 4:30 PM . . . this was just a few minutes before quitting time. When I reported for work on Monday, December 27, 1971, my supervisor, Noel Pence, told me that he wanted to talk to me. I went over to where he was . . . Pence asked me if I had anything to drink the previous Thursday. I told him that I did have a couple of drinks . . . he knew it already because he was talking to me while I was in the pickup. He said, "Well Ernie, I'm going to have to suspend you until tomorrow morning . . . you come back in the morning." I told Pence that I wasn't drunk in any manner.

Pence called Rankin over there and asked if we had been drinking on the job . . . he said that none of us had been drinking on the job. Pence said, "Ernie, the only thing we have to go on is your word and you admitted that you did, and they wouldn't." Actually, Pence couldn't have helped knowing that Rankin was drinking, for he rode in the station wagon with them.

I left work and returned the next morning at our regular starting time. Pence told me to wait for Pinson, and my brother-in-law, David Carter and I went into the office. David had picked up his tools and left with me the previous day when I was sent home.

When we went into the office Pinson spoke to us and asked us how we were doing. I told him "just fine". He asked me if I took any drinks . . . I told him that I did take a couple of drinks. He then turned to David and asked him if he quit. David told him that he didn't quit. He then turned to the secretary and told her to make out both of our checks. He told the secretary, just before he made out our checks, to put some kind of a sign on the bulletin board saying "no drinking." Pinson didn't mention Rankin or Bates either one. Neither of them were fired. Kenneth Bates told me that he didn't understand why they just fired me. Bates did sign an authorization card for me, although the company didn't know it. . . Rankin was against the union and spoke openly against it.

When they fired their plumber about the middle of October, and I was switched over as a plumber and given a 50¢ raise. My brother-in-law, David Carter, was given the sheet metal work. I was supposed to be a lead-man over both sheet metal and plumbing, but I never did have to check on the sheet metal work.

On or about December 17, 1971, I was putting stuff in a pickup to do some work . . . Mr. Pinson followed me to the pick-up and asked me what I had on my mind . . . he said that he could tell that I had something on my mind. I told him that for one thing, he had brought in a bunch of new boys. I told him that I had attended a union meeting, and I had been thinking that a union might be a good thing. Mr. Pinson said, "Are you going to stay here with us?" I told him that I did want to . . . that I lived here. He said, "We'll pay your expenses to Oklahoma City to take a plumber's test . . . we'll pay your expenses, and we'll

pay for your license." He asked me if I would do that and I told him that I would. He said to not say anything about it, but when I passed my plumber's test and came back, he would give me a 25% raise. Nothing more was mentioned of this.

When I was leadman I didn't have any authority to hire, or fire or recommend effectively. Any changes that I wanted to make in an employee or his work, I had to go tell Pence and Pence would do what he wanted to.

I have read this statement of two typewritten pages and it is true.

EARNEST D. LANE.

Subscribed and sworn to before me this 1st day of February, 1972 at Hugo, Oklahoma. William L. Jerome, Local Examiner, National Labor Relations Board.

STATE OF OKLAHOMA, COUNTY OF CHOCTAW

AFFIDAVIT

I, Albert Havard, having been duly sworn, give this statement to William L. Jerome, National Labor Relations Board, of my own free will:

I live at 201 East Rosewood, Hugo, Oklahoma . . . I have no telephone. My Social Security number is 465–72–0213. I have never been arrested or convicted of a felony.

I have worked for Guadrant Corporation of Hugo, Oklahoma approximately six months. I work as a carpenter . . . my immediate supervisor is Don Reed.

On or about December 15, 1971, one of the supervisors, Noel Pence, told me that he had told Don Reed if he didn't quieten me down on talking about the union, that Clay (Pinson . . . the manager) was going to fire me. Noel further told me that Don Reed told him that there wasn't anything he could do about it . . . that was my business.

The week-end following this, I went in and talked to Pinson, the manager, about this. I asked him if I was going to lose my job on account of the union talk going around. He said, "No." He said the only thing he wanted was for the men to either get the union, or quit talking about it.

I have read this statement consisting of ½ typewritten page, and it is true to the best of my knowledge and belief.

ALBERT HAVARD.

Subscribed and sworn to before me this 1st day of February, 1972, at Hugo, Oklahoma, William L. Jerome, Field Examiner, National Labor Relations Board.

STATE OF OKLAHOMA, COUNTY OF CHOCTAW

AFFIDAVIT

I, David M. Carter, having been duly sworn, give this statement to William L. Jerome, National Labor Relations Board, of my own free will:

I live at 906 West Jackson, Hugo, Oklahoma. . . . I don't have a telephone. My Social Security number is 527–90–4394. I have never been arrested or convicted of a felony.

I went to work for Quadrant Corporation of Hugo, Oklahoma on or about Sept. 17, 1971. I hired in as a sheet metal worker, and I worked with my brother-in-law, Ernest Lane. About three weeks after that Lane was made a plumber and was the lead man over the plumbing and sheet metal departments.

On or about December 14, 1971, Randy Rankin, Cecil Elizonda, and myself formed a committee for a company Christmas party. The funds were to come from scrap copper which we were saving. We three cleaned and collected all of the copper and went and sold it. We started to buy decorations and drinks and food, but the superintendent approached us and wanted the money. The superintendent, Reed, said he would put the money in petty cash, then Randy could go to town, buy whatever we needed, bring back receipts, etc., and get the cash for the receipts. We told him to just forget it . . . we asked the employees in the break room if they would pitch in two or three dollars . . . we would throw our own party and leave him out of it.

Ernest Lane, another employee and I attended a union meeting at the A–OK Motel in Hugo, Oklahoma on December 16, 1971. At this meeting I signed a card

and agreed that I would take some cards to the plant and help get the employees on the union side. I talked to Wesley Moorehead about joining, and explained it to him . . . he said that he wanted to attend the next union meeting, but he didn't. I was told later that he was a very good friend of plant manager Pinson.

On December 21, 1971, Don Reid, the superintendent, came to me and told me that I was getting a 25¢ raise. I was also told that I was a lead man and was doing a very satisfactory job.

On December 27, 1971, Ernest Lane came over and said that he was suspended until Clay Pinson got back from Dallas. He said that he was suspended for taking a Christmas drink on December 23. He also said that Randy Rankin and Kenneth Bates took a drink with him . . . he said that they weren't suspended. I got most of my tools and went home with Lane. We went to Clay Pinson's office with him on the 28th of December . . . Pinson asked me if I had quit . . . I told him I had not. He asked Ernest if he had any alcoholic beverages on December 23, 1971, and Ernest said "Yes, I had a couple." Pinson then told the secretary to make out both of our checks. I have read this statement of one page and it is true.

DAVID M. CARTER.

Subscribed and sworn to before me this 1st day of Feb. 1971 at Hugo, Okla., William L. Jerome, Field Examiner, National Labor Relations Board.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW,
Detroit, Mich., February 22, 1972.

JAMES G. MEEKER,
Staff Director,
Senate Subcommittee On National Penitentiaries,
U.S. Senate,
Washington, D.C.

DEAR MR. MEEKER: Your committee had requested that we forward to you information regarding the informal "statute of limitation" which now dictates many of the industrial settings in which the union is involved. This request was made in connection with Senate Bill 2732.

After researching the question with members of our staff, we find the following to be the case: by contracts which exist between the UAW and Ford Motor Company, the period in which falsification of records including criminal records, is limited to a one year period. That is, should a person hire into a Ford Plant and be asked the question, "Have you ever been arrested or convicted?" and such person answers no. If such falsification is not detected within a one year period, such falsification may not be the basis of the discharge of the employee. This decision is one which has been the rule since 1945. I am enclosing a copy of that landmark Umpire's decision along with others which have followed that precedent.

As to the use of falsified records as the basis of discharge in other segments of our Union, the period of limitation, by contract of both Chrysler Corporation and General Motors Corporation is 18 months from the date of hire. This period of limitation is set out by the contract in the case of both companies; the relevant sections of which I have enclosed in this correspondence.

As to our Aerospace policy, what is involved has been, to use the words of Burdick, "a modern day industrial common law." This is that the period in which a company can use falsified information as a basis of dismissal is between 18 and 24 months.

Also enclosed is the applicable contract section as it relates to our locals in the Agricultural Implement area.

Therefore, as you can see in the industrial setting it has been found, by our experience, a period in excess of 24 months serves no useful purpose. Furthermore, while researching this question I also came across a recent case of the National Labor Relations Board. I have enclosed, for the committee's inspection, an abstract of that case.

I hope the enclosed information, along with our testimony of February 3, 1972, will be helpful to your committee.

Respectfully,

EDWIN G. FABRE,
Assistant General Counsel.

Precedent setting decision regarding falsification of records and subsequent discharge.

Opinion A-184—May 4, 1945

Case No. 1447 (Lincoln—900)

THE UMPIRE—FORD MOTOR CO. AND UAW-CIO

DISCHARGE FOR FALSIFYING RECORD; LIMITATION ON PERIOD BETWEEN SUCH OFFENSE AND DISCIPLINE

J was discharged for false statements on his application for employment at the Lincoln plant. In 1942 J had been working at the Highland Park plant of the Company and was discharged there. A year later, in August of 1943, he applied for employment at the Lincoln plant and stated on the written application form that he had never been employed by the Ford Motor Company. There is no question that the falsification was deliberate and was made for the very purpose of securing employment which doubtless would have been denied had the truth been told.

It can hardly be doubted that such falsification of a material fact, intended to and having the effect of inducing the Company to grant employment which otherwise would have been denied, is a proper ground for discharge. It is a well-established principle in law and in generally accepted morals that a transaction induced by deliberate and material false statement may be rescinded. The employment transaction can hardly be an exception.

The question remains, however, of how long an employee's false statement in securing employment can continue to hang over him as a ground for discharge. Is he subject to discharge for time without limit so long as he remains in the employ of the Company? That would surely be a harsh and unjust rule. The notions of waiver and conditions are as well established in law and morals as is that of rescission for fraud. If, after learning of the false statement, the employer does not promptly discharge the employee but continues his employment, the continuance after knowledge may properly be considered as employment in the first instance with knowledge, and the falsification of itself cannot thereafter be deemed a proper ground for discharge.

But a rule that the employee guilty of such falsification is subject to discharge for a reasonable period after the employer first learns of the falsification, whenever that may be, would also be unduly harsh and capricious. It, too, would provide for no definite time limit. In addition, it would put a premium on the employer's failure to ascertain the truth. And the fate of employees similarly situated would depend entirely upon the pure chance of when the employer happened to learn of the falsification.

Again, in law and morals generally, the principle of a statute of limitations is well recognized, even though it means that the mere lapse of time thus enables a guilty person to escape what otherwise would be regarded as just punishment. The principle is recognized not merely in order to encourage diligence on the part of the aggrieved persons and to direct energies to the relative present rather than to the remote past, but also as a measure of justice to the guilty person whose offense, it is believed, should not render him permanently insecure. Life insurance policies, for example, commonly contain a so-called incontestability clause which precludes the insurer from contesting his liability on the ground of false statements by the insured.

The parties' Contract does not provide any period of limitation upon the offense here involved. But equally the parties' Contract also does not specifically mention this offense as a ground for discharge at all. The whole matter must be dealt with under the right of the Company, recognized in the Contract, to discipline employees for proper cause. That deliberate, material falsification for the purpose of securing employment is a proper cause cannot be doubted. But it equally can hardly be doubted that some time limitation upon the life of this cause must be implied. The time should be long enough to give the Company ample opportunity in which to learn of the falsification. It should not be so long as to become unjust to the employee. *One year is a reasonable period which answers both these requirements. An employee guilty of the offense stated may be discharged within one year after the commission of the offense. He may not be discharged thereafter for that offense alone, even though the Company did not learn of the fraud until later.* The offense, however, is a part of his record and like other offenses in his record may be taken into account in determining the appropriate penalty to be imposed when, as, and if he commits another violation for which he is subject to discipline.

J made his false statement and was hired at Lincoln on August 24, 1943. He was discharged on January 1, 1945. For the reasons stated above, my award is that he be reinstated without loss of seniority. Since this decision is the first specific guide to the parties for cases of this character, an award of back pay would be entirely inappropriate.

HARRY SHULMAN,
Umpire.

DPM-221

Case No. 14865—Appeal No. C-1041, St. Louis—Local 325

DISCHARGE—FALSIFICATION OF EMPLOYMENT APPLICATION—H. C. LAMBERT (No. 3361)

The aggrieved in this case, Homer C. Lambert, was discharged on February 26, 1954. Primarily, Lambert was discharged for having given false information on his application for employment; a further reason given was that he was an "unsatisfactory employee". The Union protests that the aggrieved was not guilty as charged and requests his reinstatement with compensation for his lost time.

Since Lambert committed no specific offense at the time of his discharge, the issue before me is whether the charge of falsifying his Employment Application was a proper one.

In March of 1953, when Lambert filled out an application for employment at the St. Louis Plant, he answered "No" to the question reading: "Have you ever been arrested? (other than minor traffic violations)." He was subsequently hired on April 30, 1953. After he had worked some six months, the Company, on the basis of a report that he had recently been arrested and placed on nine months' probation for larceny, decided to investigate his prior record and activities. This investigation revealed that Lambert had been twice picked up by the St. Louis Police in 1950 for "acting in a suspicious manner". The Company contends that his failure to report the two "arrests" on his employment application must be regarded as "falsification of records", and thus warranted his discharge.

As a result of inquiries I made of the St. Louis Police Department, I found that Lambert had been picked up by them on March 17, and again on July 7, 1950. On each occasion, however, he was held briefly for "investigation" and, according to Police records, was "released" without being charged with any violation of law. Assuming that such detention technically constitutes an "arrest", the question here is—did the aggrieved understand that the detentions were "arrests"; was he bound thereafter to report them as such; and did he then, to create a more favorable impression, deliberately withhold that information?

Lambert applied for employment at the St. Louis Plant about three years after the incidents described above. It is entirely reasonable to believe, since he was released from custody on those occasions without charge or conviction, that he would not regard those detentions as "arrests". In the absence of evidence that Lambert knowingly gave false and misleading information on his application for employment, and since there is sufficient doubt that the information can actually be regarded as false, I must conclude that his discharge was not warranted.

The award is that the aggrieved be reinstated without loss of seniority and with compensation in the usual manner for his lost time from the date of his discharge.

Dated: April 14, 1954.

Page 1270, HHP-1218

DISCHARGE—FALSIFYING EMPLOYMENT APPLICATION—EVERETT L. JUNIOR
Case No. 26,747—Appeal No. A-31761, Kansas City Assembly—Local 249

The aggrieved was hired June 9, 1966, and discharged November 11, 1966, on charge of falsifying his employment application. He protests and requests reinstatement.

In filling out his application the aggrieved answered "Yes" to whether he had ever been arrested (other than minor traffic violations) and in the space requesting "Date, Place, and Reason", he wrote "Disturbing peace 9-18-51". When it was discovered he had been arrested numerous times and was asked why he did not list all the arrests on the application he stated there was not enough room to do that. At the Umpire hearing, when asked the same question, he replied he told the Company representative orally that while he had been arrested more than once he was never convicted of a felony.

The aggrieved's police record, the accuracy of which he did not challenge, shows more than forty arrests for a wide variety of offenses and that he was convicted of some. Of course, it is understandable why he did not disclose his entire record. Had he done so, it is unlikely he would have been hired. I find incredible his testimony that he orally told the Employment Representative that he had been arrested more than once. His further claim that he told him he had never been convicted of a felony, I also find to be untrue. In his grievance he claimed that he told the Company Representative he "had never been convicted of any of the charges". If he did say so, that of course was also untrue.

The appeal is denied.

Dated: December 12, 1966.

Page 1196, HHP-1163

DISCHARGE FOR FALSIFYING EMPLOYMENT APPLICATION—H. AUSTIN
(No. 612)

Case No. 25,961—Appeal No. A-3882, Metuchen Assembly—Local 980

The aggrieved was hired April 16, 1965, and discharged four months later for falsifying his employment application. The Union protests the action and seeks his reinstatement with back pay.

In his employment application, the aggrieved listed as one of his previous employers the American Cyanamid Company for whom he claimed to have worked from April, 1944 to November, 1952, and gave as a reason for leaving that he was laid off. Also, he answered "no" to the question whether he had ever been arrested for other than minor traffic violations. In actual fact, the aggrieved worked for American Cyanamid from July, 1947 to 1950 and was discharged due to failure to perform his job satisfactorily. Further, according to Company evidence which he did not deny, the aggrieved was arrested and fined in Plainfied, New Jersey in 1955, for assault and battery.

Although the aggrieved claimed he "did not intend to lie" he did not adequately explain why he misstated the above material facts. Under the circumstances, I have no alternative but to deny the appeal.

Dated: April 15, 1966.

PRODUCTION AND MAINTENANCE MAIN AGREEMENT CONTRACT BETWEEN INTERNATIONAL HARVESTER AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AND ITS AFFILIATED LOCAL UNIONS—JANUARY 1971.

ARTICLE IX DISCRIMINATION

Section 1.

143 Neither the Company nor the Union, in carrying out their obligations under this Contract, shall discriminate in any manner whatsoever against any employee because of race, sex age as provided in the Age Discrimination in Employment Act of 1967, political or religius affiliation, or nationality.

Section 2.

144 The Company agrees to continue its present non-discriminatory policy offering equal opportunities for available jobs to qualified applicants without regard for their nationality, race, sex, age, as provided in the Age Discrimination in Employment Act of 1967, political or religious affiliation, or membership in any labor or other lawful organization.

ARTICLE X—STRIKES AND LOCKOUTS

Section 1.

145 The Company and the Union agree that the grievance procedure provided herein is adequate to provide a fair and final determination of all grievances arising under the terms of this Contract. It is their mutual desire to avoid any interruption of production.

146 The term "interruption of production" shall mean any work stoppage or strike, any intentional slowdown of production, or a concerted refusal to accept overtime assignments. Note: See letter dated February 6, 1968.

Section 2.

147 During the life of this Contract, the Company will not lock out any employee nor will the Union cause or authorize any interruption of production of any of the Company's operations until all of the grievance procedure as outlined in this Contract has been exhausted and in no case on which the Arbitrator shall have ruled or is empowered to rule nor in other cases on which the Arbitrator is not empowered to rule until at least (5) days following receipt of the Company's written answer in Step 2 of the grievance procedure and then only if the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, notifies the Company in writing of its intentions.

Section 3.

148 The Company and the Union agree that there shall be no intentional slow-downs of production by any employe or employes for any reason during the life of this Contract. For this purpose the term "intentional slow-down of production" shall be construed to mean a condition of willful restriction or reduction of production by any employe or employes which is within the reasonable control of such employe or employes.

Section 4.

149 The Union recognizes the duty and obligations of its representatives to comply with the provisions of this Contract and to make every effort toward inducing all other employes to do so.

150 In any case where an interruption of production occurs in violation of this Contract, the Union agrees that it will in good faith and without delay exert itself to bring about a quick termination of such interruptions of production, and will insist that the employe or employes involved therein return to work and to normal production promptly. To that end, the Local and International Union will promptly take whatever affirmative action is necessary.

Section 5.

151 During any period in which any employe or employes are engaged in any interruption of production in violation of this Contract, the Company will not be required to meet with representatives of the Union with respect to such employe or employes engaged in such interruption of production.

The committee will be in recess until February 15, at 10 o'clock.

(Whereupon, at 11:10 a.m., a recess was taken until 10 a.m., February 15, 1972.)

STATEMENT OF ROY BURKE, CHIEF OF POLICE, SEAT PLEASANT, MD.

Senator BURDICK. Our next witness is Mr. Roy Burke, chief of police, Seat Pleasant, Md.

According to the biographical study I have here, you were born in Clifton, Va., attended Babson Institute, University of Maine, and Northern Virginia Community College, and you served as chief of police in Winthrop, Maine, and Cairo, Ill., before coming to Seat Pleasant.

Mr. BURKE. That is correct.

Mr. Chairman, before I start, my mayor, Charles McGee, mayor of the town of Seat Pleasant, extends his commendation to you for this humanitarian proposal in this bill.

Speaking for myself, I am here to speak in sponsorship of Senate bill S. 3732: "Nullification of Certain Criminal Records," being introduced by the Honorable Senator Burdick of North Dakota.

Senate bill S. 2732 gives some ray of hope to some estimated 15 to 20 million "half American citizens."

"Half Americans?" Yes; for the majority of offenders there has been some kind of restriction added by society even though by law their debt to society has been completed. These restrictions range from voting rights, ownership of property, employment, parenthood, and a seemingly unending list of others.

However, the other half of these American citizens must pay taxes, serve their country, support their families, and conform to society norms or face arrest again.

The eighth amendment states: * * * "nor cruel or unusual punishment to be inflicted." How cruel or unusual can punishment be imposed by society when any individual must go through life as "half American citizen?"

Is this additional punishment necessary? Obviously to the incarcerated offender, who must make license plates, farm land, live behind high concrete walls without affection or companionship, sleep and eat when told, in some cases believes his punishment is unjust for trifling offenses while some predatory businessmen or politicians enjoy prosperity and freedom at the cost of his misery. Equally, it is hard to convince the majority of inmates, who represent the minority groups, when they believe their incarceration has moral significance, if their life experience has demonstrated to them that the police and the courts are less scrupulous of their rights than those of a white person. I believe any of these people would reply "No."

But for the social conformists who identify with the victim and are motivated to punish the offenders out of some combination of rage or fear, and when we still punish primarily for vengeance or to deter or in the interest of a just balance of accounts between deliberate evildoers on the one hand and the injured and enraged society on the other, here it is not necessary for me to answer whether additional punishment is necessary, for us present know the answer or we would not be here. We have not yet punished, or treated as a scientific criminologist would imply, namely, in order to change antisocial attitudes into social attitudes.

The major disappointment of Senate bill S. 2732 is that it will affect only a selected few "half Americans." There still remains an estimated 35 million "half Americans." Although a nullification of criminal records will affect very few of the professional criminals because these offenders are very highly polished as well as very skillful; thus, like your job or mine, they are professionals in lucrative business and very doubtful to relinquish this business.

The majority of the remaining offenders not affected by Senate bill S. 2732 are ordinary or sick criminals.

For the ordinary criminal who most often is the product of immigrant parents, economical and environmental lower class status, or the results of discrimination by the white bureaucratic system for such a bill would affect them and us. These are the outcry, statistically, by police administrators, politicians and the public, known as "repeaters."

Why are there repeaters? There is a numerous list as to why, but one major cause is that they are not rehabilitated in the penal institutions by means of education, technical training to compete in employment once released; so here I contend that the same reasons are applicable for these criminals as for first offenders, if not even more so, to serve as a reward to conform.

I do not profess that if all criminal records were suppressed that we would have a zero repeater rate, but I do believe a considerable number would not be a recidivist figure. Surely, if only one additional repeater was less, society would benefit.

How many ex offenders are the result of the sick criminal category? Until a few years ago, alcoholism and mental disorders were not recognized as a sickness. But should not this individual be treated like the sick? Or perhaps there is some truth as to our enjoyment in human misery. Senate bill S. 2732—see 14—excludes the nullification of the heinous crime of homicide, but may I bring your awareness to an example of a sick criminal?

In 1971, Hon. Judge Sherhan, Montgomery County, Md., while incognito in the Nevada Prison System, befriended a convicted criminal who had killed his wife in an intoxicated rage—second-degree murder. The criminal was released shortly after the judge visited the prison. Upon the release from prison, the ex-convict was issued a notice that he could no longer teach as a sociologist in the State of Nevada for which he had been licensed prior to his arrest. His two children were also taken from him by the State. He now makes $32 a week, trying to get his children back and hopefully be able to teach again. The point is: Was this man sick under today's standards or shall he ever commit another murder providing he is cured? We don't really know.

The question is: Should American society be denied of their duress in human misery by excluding a safeguard against the so-called unregenerated brigand returning into the free world? The white society, in the passing of the Civil Rights Act, did not suffer but rather has enjoyed the untapped natural creativity of human resources by passage of that law and, equally, I feel, would profitable society, by following a man to be free of this law.

Such safeguards must be taken while the offender is going through the traumatic experience of being confined like a mad dog in our penal institution and through rehabilitation. Here, society has chosen for the offender to make restitutions and here is where it would be paid by the offender, and not by him and his loved ones once released to freedom.

The American society has long upheld the retribution concept for offenders of social conformity, and it apepars that Senate bill S. 2732 sheds a reflection of this concept. (Section 3(a)1 and 2 specify a time limit before obtaining the nullification of certain criminal records either 36 months or 60 months.)

The paradox of Senate bill S. 2732 seems to conflict when reviewing as to why first-time offenders are unable to be gainfully employed, bonded, or licensed because of this prior arrest. But, yet, does not the same problem exist during the waiting period of 36 months or 60 months?

In conclusion, although I defer with the limited few of ex-criminal records affected, it is hoped that perhaps Senate bill S. 2732 will have snowball results and within a few months or few years that we come to the reality that in the majority of cases society makes the criminals and repeaters, through our delight in human misery, discrimination and callous attitudes of the "mistortured."

I appeal to the legislatures to search your hearts for compassion of our few fellow-half-Americans, to make him whole by passage of Senate bill S. 2732 and look to the near future for additional legislation to decrease our "repeaters" rate.

Mr. Chairman, I did not write this next remark. I would like to comment on it. I have been a chief of police now since 1967. In my two prior positions I have been awarded the valor of honor in one position for disarming bombs next to court houses, and in the next position I was commended by the Governor of the State of Maine for achievement in law enforcement, mainly because of writing a book in that particular instance and dealing in law enforcement.

However, my legacy of myself is unique, because I am one who crossed the line. At the age of 16 I left home, uneducated, untrained, a child of parents of a lower-class status who, themselves, had many criminal intents as we recognize criminal conformity today.

No training, I decided that I was going to make my bid into society. Very unfortunately I did not know how to make that bid into society. Consequently, I violated society's social norm and was placed on probation for a year. And this is unheard of, because, as a chief of police and as a police officer in the past, this cannot be; I say it can be. Although the question was asked by yourself of the UAW men a few minutes ago: "What do you put down?" Well, I will be very honset with you. I belittled myself when I first applied as a patrolman in 1966, and I got on my hands and knees and I begged the man that he give me the opportunity, that I was not, as society says, once a criminal always a criminal. Although my offense was not classified as one of the major seven categories of the FBI, it was still an offense. And, so, he gave me that chance. And from that, I took it on my own to go through the University of Maine, Babson Institute in Massachusetts, and now Northern Virginia Community College for the last 4 years, and 11 law enforcement academies including the FBI, the Department of Justice "Drugs." The Government seems to be a paradox there, because they pay for my school but yet they have a questionnaire that says, "Is there any reason that you have in your past criminally that would exclude you from being a police officer?" How do you answer that question? I have answered that—tried to answer that one—myself; so, I have to leave it blank, because, obviously, I have been a police officer since 1966 and a chief since 1967. Very honestly, I think anybody—although the bill itself to nullify criminal records is of paramount importance, but if you went through, and I, like the previous gentleman before me—he said they

had records that possibly apply under this. Well, I probably will not have to, because I spent some $1,000 to clear my record. That is what it has cost me so far.

But there are many people that I spoke about that are not that fortunate. They cannot afford $1,000 here and $1,000 there to pay. And, very frankly, $500 went to somebody's campaign to get an expunging of my record.

They are not that fortunate, and these are the people that I am concerned about.

If you have any questions, I would be delighted to answer them for you, Senator.

Senator BURDICK. Well, I think that your last comments on your personal life is the best testimony that you can give for this bill.

Now, if this bill had been in effect at the time that you had your transgression, whatever it was, it would have been much easier for you, would it not, to have answered this question about prior conviction?

Mr. BURKE. It would have been much easier when I put it down in applying for the chief's job in two other locations. It would have been much easier, and my pocket would not have suffered and neither would my family. I agree with you.

Senator BURDICK. That is what we are trying to do. I presume yours was the first offense?

Mr. BURKE. Yes.

Senator BURDICK. That is part of the thrust of this legislation, that is, when somebody runs afoul of the law he will know at that time that this is his first offense and he has another shot at it, and that if everything goes well and he straightens out and changes his way, this will not be an impediment against him in future life. That is the idea and the thrust of the bill.

Mr. BURKE. As it was said by the previous gentleman from UAW, this 36 and 60 months to me seems to be the very same problem I have mentioned in my short recitation. The problem will be, if he is not rehabilitated, rather than our concept of retribution in our penal institutions that when he comes out the problem still does exist whether he is rehabilitated in our penal institution by education, technical training, he still comes out, and this question of awaiting 36 or 60 months and discrimination by the employer may create a bigger hazard for this man to go back and become a recidivist. This is my major concern.

Senator BURDICK. Well, of course, the period of time that he is going to give—in the act of rehabilitation, can be shortened, and that is not fixed in the bill. This is the question of judgment, for the thought behind the bill is there must be some demonstration that he is rehabilitated. He cannot apply the day after he leaves the institution and say "I am rehabilitated." There has to be some showing, I think, and that is why there is some period of time.

But getting back to the other crimes. Do you believe that anyone who has served his time, regardless of whether he is the first offender or the fifth offender—do you think that at this time we should include him in the act?

Mr. BURKE. I have some professional ethics involved, as to when you talk about the major or talk about the various crimes. If the

individual has been rehabilitated, if he is in the sick category, I would have a question about this. If he comes out unrehabilitated and commits act after act, whether he should be included I have a question, because I think the importance—although the bill in itself is for those who rehabilitate themselves more so than what prisons rehabilitate them, obviously for the period, the waiting period, that it would be of no advantage to have these people included into this bill, because they will commit that crime over and over again if they are not rehabilitated.

As to the various crimes I mentioned, murder, we know—and it has been proven through statistics, sociologists, psychiatrists—that murder is normally done—that it is a compassionate crime or a passion crime rather.

Senator BURDICK. Let us assume that it is first degree and premeditated?

Mr. BURKE. There is question again. As I said, I have professional ethics, and the premeditated, obviously, I would, my personal self, exclude it from this bill, because there is a mental problem there, as equally there was a crime problem, but more so mentally. And again child molesting and rape specifically, I believe that was mentioned in the bill, there is a mental problem. So, I agree with the bill that, in essence, there has to be a stopping point and a beginning point.

Again, I believe the bill is making that beginning, and as to whether we change the concept of our penal institutions or we change the concept of the discriminatory and the callous attitude of society, perhaps the bill can snowball this, and I would hope in the future to include these people.

Senator BURDICK. Then, you would agree that this is at least a starting point?

Mr. BURKE. This is the first, and, perhaps, of all bills that are passed in this edifice here of our country, of legislative bills, this is the best bill that has been introduced in this building.

That is my personal, professional opinion.

Senator BURDICK. Thank you very much. I know that the staff will be glad to know that, sir.

Well, I certainly want to thank you for your contribution. You were very helpful. Your full statement will be made a part of the record at this point.

CHIEF ROY BURKE, SEAT PLEASANT MD.

I am here to speak in sponsorship of Senate Bill S 2732 "Nullification of Certain Criminal Records", being introduced by the Honorable Senator Burdick of Nebraska.

Senate Bill S. 2732 gives some ray of hope to some estimated 15 to 20 million "half American citizens".

"Half Americans", yes! For the majority of offenders there has been some kind of restriction added by society even though by law their "debt to society has been completed." These restrictions range from voting rights, ownership of property, employment and a seemingly unending list of others.

However, the other half of these American citizens must pay taxes, serve their country, support their families, and conform to society norms or face arrest again.

The 8th Amendment states * * * "nor cruel or unusual punishment to be inflicted". How cruel or unusual can punishment be imposed by society when any individual must go through life as "half American citizen?"

Is this additional punishment necessary? Obviously to the incarcerated offender, who must make license plates, farm land, live behind high concrete walls without affection or companionship; sleep and eat when told and in some cases believes his punishment is unjust for trifling offenders, while some predatory businessmen or politicans enjoy prosperity and freedom at the cost of his misery. Equally, it is hard to convince the majority of inmates, who represent the minority groups, when they believe their incarceration has moral significance, if their life experience has demonstrated to them that the police and the courts are less scrupulous of their rights than those of a white person. I believe any of these people would reply, no!

But for the social conformists who identify with the victim and are motivated to punish the offender out of some combination of rage or fear. And when we still punish primary for vengeance or to deter, or in the interest of a "just balance of accounts between" deliberate evildoers on the one hand and the injured and enraged society on the other. Here it is not necessary for me to answer whether additional punishment is necessary, for us present know the answer; or we would not be here! We have not yet punished, or treated as a scientific criminologist would imply, namely, in order to change anti-social attitudes into social attitudes.

The major disappointment of Senate Bill S. 2732 is that it will effect only a selected few "half Americans." There still remains an estimated 35 million "half Americans." Although a nullification of criminal records will effect very few of the professional criminals because these offenders are very highly polished as well as very skillful thus, like your job or mine they are professionals in lucrative business and very doubtful to relinquish this business.

The majority of the remaining offenders not effected by Senate Bill S. 2732 are "ordinary or sick criminals."

For the ordinary criminal who most often is the product of immigrant parents; economical and environmental lower class status, or the results of discrimination by the white bureaucratic system for such a bill would effect them and us. These are the outcry statistic by police administrators; politicans; and the public known as the "repeaters."

Why are there repeaters? There is a numerous list as to why, but one major cause is that they are not rehabilitated in the penal institutions by means of education, technical training to compete in employment once released, so here I contend that the same reasons are applicable for these criminals as for 1st offenders, if not even more so to serve as a reward to conform.

I do not profess that if all criminal records were suppressed that we would have a zero repeater rate, but I do believe a considerable number would not be a recidivist figure. Surely if only one additional repeater was less then society would benefit.

How many ex-offenders are the results of the sick criminal category? Until a few years, alcoholism and mental disorders were not recognized as a sickness. But should not this individual be treated like the sick? Or perhaps there is some truth to our enjoyment in human misery. Senate Bill S. 2732, see 14, exclused the nullification of the heinous crime of homicide but may I bring your awareness to an example of a sick criminal.

"In 1971, the Honorable Judge Sherhan, Montgomery County, Maryland, while incognito in the Nevada prison system, befriended a convicted criminal, who had killed his wife in an intoxicated rage (2nd degree murder.) The criminal was released shortly after the judge visit to the prison. Upon the release from prison, the ex-convict was issued a notice that he could no longer teach as a sociologist in the State of Neveda for which he had been licensed prior to his arrest. His two children were also taken from him by the State. He now makes $32.00 a week, trying to get his children back and hopefully be able to teach again. The point is, was this man sick under todays standards or shall he ever commit another murder providing he is cured. We don't really know.

The question as should American society be denied of their dedress in human misery by excluding a safe guard against the so called "unregenerated brigands" returning into the free world? The white society in the passage of the "Civil Rights Act", did not suffer but rather has enjoyed the untapped natural creativity of human resources by passage of that law, and equally I feel would profitable society by following a man to be free of this law.

Such safeguards must be taken while the offender is going through the traumatic experience of being confined like a mad dog in our penal institution and through rehabilitation. Here society has chosen for the offender to make restitutions and here is where it should be paid by the offender, and not by him and his loved ones once released to freedom.

The American society has long upheld the retribution concept for offenders of social conformity and it appears that Senate Bill S. 2732 sheds a reflection of this concept:

"Sec. 3a 1 and 2 specify a time limit before obtaining the nullification of certain criminal records either 36 months or 60 months."

The paradox's of Senate Bill S. 2732, seems to conflict when reviewing why 1st time offenders are unable to be gainfully employed: bonded: or licensed because of this prior arrest but yet does not the same problem exist during the waiting period of 36 months or 60 months?

In conclusion, although I defer with the limited few of ex-criminal records effected it is hoped that perhaps Senate Bill S. 2732, will have snowball results and within a few months or few years that we come to the reality that in the majority of cases, society makes the criminals and repeaters, through our delight in human misery, discrimination and callous attitudes of the misfortured.

I appeal to the legislatures to search your hearts for compassion of our few fellow "half Americans" to make him whole by passage of Senate Bill S. 2732 and look to the near future for additional legislation to decrease our "repeaters."

S. 2732, RELATING TO THE NULLIFICATION OF CERTAIN CRIMINAL RECORDS

TUESDAY, FEBRUARY 15, 1972

U.S. Senate,
SUBCOMMITTEE ON NATIONAL PENITENTIARIES
OF THE COMMITTEE OF THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 11:10 a.m., in Room 457, Old Senate Office Building, Senator Quentin N. Burdick, presiding.

Present: Senator Burdick (presiding).

Also present: James G. Meeker, staff director, Ronald E. Meredith, minority counsel, and Judith E. Snopek, chief clerk.

Senator BURDICK. The witnesses this morning are Harry H. Woodward, Jr. of Chicago, Ill. and native of Georgia and a graduate of the University of Chicago. A professional social worker, Mr. Woodward has worked with several agencies carrying on community based programs in communities comprised mainly of differing ethnic groups. Since 1967 he has been director of correctional programs for the W. Clement and Jessie V. Stone Foundation.

The other witness is Dr. E. Preston Sharp of College Park, Maryland, and has served as general secretary of the American Correctional Association since 1965. ACA is the largest organization of persons interested in or employed in the field of corrections. Dr. Sharp's background includes field experience in adult and youth correctional institutions and programs.

And, if it would be all right with the two witnesses this morning, I would like to have them both approach the witness bench and both give their testimony and perhaps we can engage in colloquy or some questions thereafter.

STATEMENT OF HARRY H. WOODWARD, JR., DIRECTOR, CORRECTIONAL PROGRAMS; W. CLEMENT & JESSIE V. STONE FOUNDATION, CHICAGO, ILL.

Mr. WOODWARD. I appreciate the opportunity to be here today, and I hope my short remarks will add something to the purpose of this committee.

I have read the bill relating to the nullification of certain criminal records very carefully, and I applaud this modest step forward. As I read the bill, it seemed to me to be aimed at about 5 or 10 percent of the people falling into the correctional system. It would reward those people who can stand the trial by ordeal they are exposed to

on release from an institution and manage to keep out of trouble for an additional period of time. Certainly, some kind of recognition for good behavior, as contained in this bill, is desirable to serve as an example for others who are trying to mend their ways. To my way of thinking, this is what the bill is about.

I'm not sure in this day and age that there is any meaningful quieting of records—there are simply too many of them to be quieted in too many places. In my days as a social worker in Chicago, I used to have second thoughts about assuring a client that what he or she told me was confidential. Seven hundred agencies were part of the social exchange and were entitled to receive everything that they told us. Finally, I told all my interviewers to tell the client we simply couldn't assure them of confidentiality and not to share anything of this nature with us unless they understood our limitations in keeping it confidential.

If there is any part of the bill I might quibble with, it is section 14. Statistics are notoriously unreliable relating to offenders, but it is the current thinking in the field that people convicted of homicides and rape have perhaps the lowest recidivism rate of any definable group of felons. Since these are both crimes of passion in the great majority of cases, and there is often genuine repentence by the people committing them, I am puzzled as to why they have been excluded from enjoying the provisions of this bill. Perhaps there is a satisfactory explanation for why this has been done. I am prepared to listen to the arguments.

As I stated in my opening remarks, I think this is a modest step forward, and I am prepared to add my support to those favoring passage of this bill.

I will be happy to answer any questions the committee should like to ask.

Senator BURDICK. I will delay the questions until Mr. Sharp has testified.

STATEMENT OF DR. E. PRESTON SHARP, GENERAL SECRETARY OF THE AMERICAN CORRECTIONAL ASSOCIATION

Mr. SHARP. Mr. Chairman, it is an honor to be invited to testify before this committee on Senate Bill 2732 relating to the nullification of certain criminal records and known as the Offender Rehabilitation Act. It is encouraging to find members of this committee dealing with some of the contributory factors to crime. We realize that there is no panacea to the eradication of crime, but bills such as S. 2732 get to the roots of some of the basic problems.

In presenting this testimony, I am able to speak for the American Correctional Association as well as to add comments from my own experience. At the 101st annual Congress of Correction held in Miami Beach, Fla., Aug. 20 to 25, 1971, the following resolution was unanimously passed.

Whereas the penalties of a criminal conviction extend beyond the expiration of sentence to a limit and deny the rehabilitated offender opportunities for employment, trade and professional licensing, bonding and other rights and privileges, and

Whereas, the opportunity to obtain a job with a future is a strong factor in motivating the first offender to lead an honest and upright life during his period of correctional supervision and after his release,

Now, therefore be it resolved that all agencies of government should support legislation which would assist in the rehabilitation of offenders who have demonstrated successful community adjustment through the expungement or annulment of his conviction.

This resolution was unanimously passed.

Probably no group in the country has had more experience with the negative impact of criminal records than those who are working in the correctional field. Unfortunately, the emphasis of publicity is always on the heinous or atrocious crime and the general public is not informed of the number of minor offenders who enter the criminal justice system. The impact of this bill is not to act as an additional escape tool for the hardened criminal, but to remove from the first offender, when earned, the negative blight of a record. In order to give an indication of the ramification of individuals who would be helped by this bill, I will briefly cite three examples.

A few years ago I was contacted by a young couple who were concerned about the problem they faced in the adoption of a child. The major issue blocking the adoption was that the husband had been in trouble on one occasion and had a criminal record. The criminal act was minor and it had happened a number of years prior to the time in which the adoption activity was initiated. It was only through considerable pressure, discussion, and investigation that the ruling in approving the adoption was affirmative.

On another occasion, there was a young man who was being considered for appointment to a military academy. His appointment had all the necessary endorsements and he had all the qualifications necessary for a student in the military academy. Unfortunately, the investigation of his background disclosed that on one occasion he had been in trouble and as a result he was excluded from the opportunity of becoming an officer in the military service. All his activities subsequent to the illegal incident had been positive, however this fact was overlooked when the prior record was disclosed.

The effect of criminal records is not limited to employers or appointing authorities. One of the most dramatic cases brought to my attention was a man who had served a sentence in an institution and when released secured a position in a clothing manufacturing company. He had been employed for 2 or 3 years and his work was so commendable that his superior decided to promote him to a middle management position. Apparently some of his coworkers had learned of his record and as a result, began to put pressure upon the owner of the factory to have him fired. He came to me with the frank statement that because his work was so good he was going to be fired and the only reason was that on one occasion, he had been in trouble, served a sentence and had a criminal record.

It is very difficult to explain this logic to an exoffender and in this case it took a great deal of time and a great deal of intestinal fortitude on the part of the owner of the factory to preserve the exoffender's position. Unfortunately, he did not receive the promotion.

Often we overlook the fact that there are certain individuals in our

communities that become involved in some illegal act for a thrill or as the result of a misunderstanding. It is well known that the adolescent is very prone to peer pressures and consequently many young men are unable to say no when a group decides to participate in an illegal act. Do not interpret that I am condoning participation in illegal acts, but if a youth commits an illegal act as a result of peer pressures and proves by subsequent behavior that there is no deep seeded pattern of criminality, then consideration should be given. Often individuals of this type have severe conscience reactions. The total life of a person should not be marred by a minor offense committed on the thrill basis resulting from peer pressures.

There are also individuals who, through no fault of their own become involved in situations in which circumstantial evidence points strongly to their guilt. One of the examples of this type of case occurred in the city of Philadelphia when a young seminary student returning to his college secured a hitchhike from a group of young men in a car. He did not realize that the car was stolen and when the police apprehended the car he was arrested along with those who had committed the theft. It was difficult for him to unravel the circumstances to the satisfaction of the police and he had a record of being arrested. Fortunately, his reputation and his record at the seminary was such that it did not result in his expulsion. However, the arrest record still exists.

In the Congressional Record of October 20, 1971, when this bill was introduced, Senator Burdick used very advisedly the word "hope". Frequently we forget that this is of major importance in all of our lives and especially for the offender. The most dramatic examples of the importance of hope occurred at the Neurenberg Prison when it was opened immediately at the close of World War II. The colonel who was in charge of the prison at that time told me that one of the major problems he faced when that prison was opened was the excessive number of suicides. Everything possible was done to reduce them to a minimum. The suicides continued even to the point that men would run down the halls with their heads down, crash against the stone wall and commit suicide.

In an attempt to solve this problem, a group of psychiatrists were called in to analyse the issue. A Scottish psychiatrist made a recommendation that a thorough study be made of the prisoners and the first week release as many as possible and the second week increase the number, the third week continue the acceleration and observe the results. The first week, 15 were released and there was a slight drop in the suicides. The second week, approximately 30 were released and the suicide rate dropped almost 50 percent. After the 3d or 4th week of releasing a fair number of the prisoners, the suicides stopped.

The reason given by the psychiatrist for the suicides was that the prisoners, many of them civilians, had lost hope and as a result of the confusion and the loss of hope they had used the solution of suicide to solve their problems.

As indicated by the chairman, this bill provides hope.

One of the most difficult, but important issues in aiding people to improve themselves is to provide motivation. The possibility of being able to earn the right to have a record expunged is a motivating factor of high priority.

I would like to suggest to the committee that in the section dealing with the decision effecting expungement that there be inserted a few additional requirements. As the bill reads now, it might be possible to use the "Good Joe" technique. In other words, it does not require a thorough investigation in order to effectuate the expungement. Undoubtedly the majority of courts would require investigations, but it is well for the offenders to know that this is one of the requirements.

The requirement for the investigation should include reports from probation or parole officers and other individuals such as employers, families, etc. to substantiate by facts that during the required period subsequent to the termination of the sentence, that the offender had proven by precept that rehabilitation had been successful.

With this spelled out in greater detail, it could be presented to the first offender as a goal and undoubtedly would have value in motivating a successful adjustment in the community.

One of the indirect advantages of this bill would be a specific example of society's attitude toward the offender. Fortunately, the ex-offender has more opportunities today than at any time in the history of our country in making a success if he is willing to fulfill the requirements for success. For many years and even today in the minds of many of our underprivileged people, is the feeling that society always wants its pound of flesh.

This bill is a clear indication of society's desire to give a person another chance if they desire and are able to prove the ability to use such an exception.

I strongly recommend the passage of this Senate bill 2732.

Senator Burdick. I'd like to thank you both for cooperation and your contribution this morning.

I have a few questions in mind and one or both may answer, and we can have a discussion here.

I am sure you are mindful of the fact that it has only been in recent years that people have—the general public, rather, have seen the necessity for doing something meaningful in rehabilitation. We wring our hands, we moan about the high recidivism rate and we don't know much about it, or haven't. I presume this committee is the best example of it. For years and years it had a $5,000 appropriation for its affairs, and what was used of it was to visit institutions. It didn't have any purpose, apparently, other than that, and we have seen a rising interest in the citizenry. We have seen the bar associations and various other groups now coming to the realization that if we're going to do anything about crime, let's try to reduce this terrible cycle of recidivism, if for no other reason than just to help the taxpayer, if nothing else.

But, of course, we do have something else. We have the question of restoring to society someone who has made mistakes. Now, the question was asked in another hearing why we limit this to first offenders, why not someone who has been involved with the law four or five times. He might be better material for rehabilitation than some first offenders. I suppose that that could be true in some cases, but I just want you gentlemen to know that we are breaking new ground and we have to work with areas in which we will be most successful, and

if we are successful in showing some progress when a first offender comes into difficulty with the law, then there is a better chance, if this is successful, to broaden and widen legislation to other people.

Now, Mr. Woodward asked the question why do we exclude those who are guilty of the heinous capital crimes. Well, I just don't think, based upon the evidence we have received and the letters we have received and the information that the staff has had, that the American public is yet ready to remove completely the record of a conviction for, let's say, first degree premeditated murder. I don't think they're ready for it. Whereas, for the youthful offender or the first offender where he is given another chance, I think, the committee thinks, the staff members thing, that if we can do a good job here and prove to society that real rehabilitation is possible, we can expand it later on.

Mr. Woodward, that is the answer given to you.

Does it make any sense?

Mr. WOODWARD. I think so, Senator.

We have our programs. We have four different programs and institutions. I have the outlines here if you would like to see them. One of them is a prison art show and we are getting ready to put on our fourth national prison art show, so I have come into contact with about 30 inmates since the first of the year—former offenders, I should say, and the only one I could find that would qualify under the terms of this bill was a guy who was in for murder. He murdered his wife. His only offense. The rest of them had two or more offenses.

I've been trying to check out the terms of the bill as against my personal experience in working with the inmates, and I agree with your theory. I think it's perfectly understandable that you've got to bring the public along every step of the way because you can pass bills to kingdom come, but if the public doesn't believe, it's not going to do any good.

Senator BURDICK. We're here to prove the theory's right and over a period of time we can do that.

Mr. SHARP. Mr. Chairman, I probably have lived with 15,000 convicts, 200,000 to 300,000 delinquents. Most of the things I know, I think I learned from them, but I just want to caution this committee, and it simplifies or underlines further one of my comments. One of the words that we have to be careful about is first offender because sometimes first offender means it is the first time they were caught.

Some of the smartest individuals that I have lived with got away with a lot before they were caught, but technically they were first offenders. Some of the dumbest people—I remember some forgers who would get drunk and forge a check signing their own name and they were caught and they were first offenders, so that the degree of——

Senator BURDICK. As a matter of fact, I remember one particular fellow was very indignant that he was arrested because this time he was innocent.

[General laughter.]

Mr. SHARP. And the other area of caution is the area of chronology, because probably some of the most dangerous individuals I've known have been 16 years of age, so that we cannot axiomatically use either first offenders or chronology without a little bit more depth of knowledge in the decisionmaking process.

Senator BURDICK. The theory behind the first offender is that it fits in with other programs that are in mind such as diversion, such as parole or probation before sentence—use any term you wish.

It fits in with that, and the theory was that this is one time that this offender had a chance to have another chance. That was the whole theory behind it. We could stop it—nip it in the bud.

I readily agree that it might be some third and fourth offenders who are far more rehabilitatable than the first offenders, and I suppose we have to have a frame, a starting point.

Mr. SHARP. Oh, I make no recommendation for change, there. I just make a recommendation for a more thorough process.

Senator BURDICK. Now, in the first hearing we had, a witness testified that he thought that the period of time required to elapse before one would be eligible was too long, and there again, we are breaking new ground. We're not sure it's too long. It may be too long, but only experience will tell whether that is the right period of time or not.

Mr. SHARP. We have an old saying in the field—it has been there for years—that a person released from an institution is like a baby or a widower. If you get him over the second year, your prognosis begins to improve, and the acceleration of fatalities is axiomatic almost within the time period. The greatest number occur within the first 6 months. Then there are fewer the next 6 months, and the final 6 months of the 2 years you have the least number, and hopefully you have no reoccurence of criminality then.

Senator BURDICK. Of course, this bill takes care of the area of arrests, too, and an arrest means nothing. The party has never had a day in court. He just has a blotch on his record. It finds its way into credit reports and everything else, and he's done nothing wrong. An arrest is just one of the processes by which a man is brought to trial. But, he's not brought to trial, the case is dismissed and nothing has been proved, and those things in themselves are quite a blotch on a man's records. So, it will deal with that.

And I think we're making some progress.

Mr. WOODWARD. I think we might. You know, from my experience on examining records and institutions, we might examine what actually you can allow to go in records. It seems to me that keeping records in a process of industrial society. I grew up in South Carolina on a farm and at that time they would take a guy off and send him down to Tallahassee to do time for bootlegging or they would send him to the State pen for another crime of assault or something and when he got ready to come out, I know I personally had several guys when I was 18, 19, 20 years old, signed over to me working on the farm, and these were unanalysed, no professional had had contact with them at that point.

So, we were perfectly willing to let them work on the farm. Now, I was down in a southern State not long ago, and I was looking through the records, and here was a guy who was in on a murder charge. He had had a family quarrel. He had killed his brother-in-law, and was serving about 4 years, and a psychologist had analyzed him as being a psychopathic personality with schizoid tendencies, and I said, you put something like that on a man's record, and there's nothing at all to back it up. Even down South on the farm you're not

going to find a farmer that's going to hire him. He'll hire a murderer, but he's not going to hire a psychopathic personality with schizoid tendencies.

And I asked them why they were doing that, and they said they had to, the Department of Vocational Rehabilitation required that kind of analysis before they would give us money. And if we had many of these psychopathic personalities with schizoid tendencies who had been classified like that, it's going to be terribly hard to get them back into the mainstream.

Senator BURDICK. If the man hasn't had his day in court, it shoudn't be on the record.

Mr. SHARP. One of the things I'd like to underline—that is the area in which you are exploring. In other words, we have so much bizarre, so much sensationalism going on today about corrections. Those of us who have been toiling in the vineyards for years know that corrections have only made progress as a result of chaos, and we have a number of people today that are geting back to your terminology—I call it a Columbus complex. In other words, they feel that they have discovered America and they didn't realize that history reports that in 1492.

This has been going on for years, this matter of neglect, the matter of the priority of appropriations, the matter of sweeping under the rug, and what we are getting into here are some of the basic areas which do not have sensationalism, but I think will definitely have a lasting effect, and I do want to applaud that particular approach.

Senator BURDICK. I think you're right. We find there are still some people in this Nation who speak of our institutions as coddling criminals and don't see these in the same light as you see it.

They say sweep under the rug any breakers of the law—get them out of sight—but they don't say out of sight. The offender will be back with us, and we have to do our best to make the institutions correct. That's what it is called, isn't it? Correctional?

Mr. WOODWARD. Mr. Chairman, we have a newsletter that is just coming out and we aim at primarily the inmates. I've just gotten the first edition here and we have just started this, and I would like to—we send it to all of the correctional institutions in the country: penitentiaries, jails, and if you have no objection, I will include something in that, if you would like some mail from inmates on their experience with records, if this would be helpful to you.

Senator BURDICK. Oh certainly, certainly.

Mr. WOODWARD. Because I think some of them—we always make it a point of trying to get their opinion on our own programs, and as you perhaps are well aware, there are some very vociferous groups of exoffenders out on the street now, and I was thinking about this when I was being asked to testify. My problem, in a sense, is not the hiding of records, but they're becoming so vociferous about being former offenders. I've got some people in our art show, for instance, who have been out 4 or 5 years, and I say, look now, you've got to stop standing on that crutch of being exoffenders to sell your art, because it does jack up the sales, and of course this is groups from New York and California and others who are not only not trying to hide their past, but it seems to me they are kind of flaunting it, and

the foundation has even received a number of requests from people who have been turned down for jobs to see if we would provide funding for them to pursue a lawsuit against a company to stop them from employment on the basis of their records.

Now, we are getting these. I'm sure it will only be a short while before a matter like this goes up to court. It's just a natural chronology here, and there will definitely be some lawsuits filed very soon.

Senator BURDICK. You talk of the different categories of crime such as the more sensational crimes or the ones committed with a group of friends. Would you say that these lesser crimes are the vast majority of crimes?

Mr. SHARP. I would say percentagewise, yes, because many of them, as you indicated, in just the arrest—many of them come into the misdemeanor level and others into the felony level. I would say the vast percentage of them numerically, would be in that category.

Senator BURDICK. I address this to both of you.

I'm sure that you agree that the heart of the nullification of records is what the individual can do and say when he's filling out an application form or being interviewed for a job. What should he say when he's asked if he's ever been arrested or if he has ever appeared in court?

Mr. WOODWARD. We tell ours—we cover this in our program as part of our guide for better living program, and we spend quite a bit of time with this. We always say you have to be truthful for yourself, and this is because we've had experience, you know. We run these job preparation classes as a part of this. They say what if any of you are asked a question like this, and we say, well, you can't say you don't have a record—they usually answer you something like, well, I was on a 2 year vacation. I was self-employed in business, and we say, well, you can't do it.

I was director of an urban progress center in Chicago where we had 150 exoffenders every summer to work on summer projects and of course, the whole neighborhood, I would suspect, we probably had 5,000 to 6,000 exoffenders in this neighborhood, and after they filled out a certain number of job applications, I didn't even need to go to any further records. You get a pattern there. You can tell just by the way the record (job application) is filled out.

I would say in 90 percent of the cases, I could tell if he had a record or not without taking a further step.

Senator BURDICK. At a former hearing one of the witnesses suggested that we change the language in our act, which says that a person shall be authorized to answer such inquiry in a way so as to deny that any such arrests, indictment, hearing, trial, conviction, or correctional supervision ever occurred.

Of course, technically, he would not be telling the truth, and it was suggested by this witness that we make it unlawful for any employer to ask such a question, and I am inclined to believe that is a much better approach.

Mr. SHARP. That's a very interesting point. I have thought over that particular question for a long time because I have been faced with it with these men saying what shall I say. Now, like Harry just mentioned here, none of us have had the opportunity of dealing with

these men whose records have been expunged, so that I have followed in the same pattern he has, and that was, if it comes straight out, to always tell the truth, although I know they don't do it. And I know sometimes the reason they don't do it, they tried it the first time and it didn't work.

However, this brings up a very important element of your legislation and any legislation that is intelligent of this nature. We not only have to have the vehicle for its implementation and the capability of making it work courtwise and systemwise, but you also have to have the interpretation to the public of the value and reason for it, so that along with this—and I personally would assume a certain degree of responsibility to the American Correctional Association, whatever avenues we have of supporting and assisting in public education as to the implications of this sort of thing, so, it's a very interesting point, and I prefer what you have just said.

On the other hand, people are very conditioned in our society, and we have to build some degree of protection, such as you have indicated, to these men once expungement has taken place.

Senator BURDICK. Let's assume that the suggestion I just made, based upon the former witness's testimony, was carried out and placed in the bill, namely that the employer be forbidden to ask the question of whether or not—but to couch it in such a way as to exclude a first offender.

Now, suppose you followed this idea. How can you be sure that subtle pressures won't be used to violate this in some other way? In other words, there would be some subtle way.

Mr. WOODWARD. With most jobs, if you fill out a job résumé, this is the way I used to tell when the guys come in. Like I said, I didn't need to go to other records because they would fill out a résumé of their experience and for instance they would have 1961–63, self-employed.

Okay, you would ask a few questions along there. What business were you in? And it didn't take you long to find out what self-employed meant. It meant they were out of circulation. Now, with us, you see, they would be doing what Dr. Sharp said. They had been turned down before so they talked to some other people and they said, look, always put self-employed or put something that can't be checked out.

But an employer, very quickly becomes aware of this, and with very little questioning it comes out.

Mr. SHARP. I think there's another area here, and again I don't think there's any panacea to the question you raised, but, for example, in filling out the applications, do you have a criminal record, and this man has an arrest and his conviction——

Senator BURDICK. A criminal record that has not been expunged.

Mr. SHARP. But I'm speaking of one who had been expunged, then he would have the right, I would think, to say "No." And there has been built up—I have on frequent occasions served on oral committees around the country for various positions and I know the majority of the merit systems have a rigid regulation that you do not involve yourself in any question which would inquire as to the politics or religion of the candidate. There is kind of an ethical standard around

the country, and I think in this particular area we could get into the same category of ethics, and maybe this is one way of helping, although I don't think that it's a panacea.

Senator BURDICK. Well, public education along these lines would be very helpful.

Mr. Woodward, if, quieting records is not possible, what can we do to overcome these employment barriers created by the record?

Mr. WOODWARD. It's a matter of public education. I have been checking with people with records who are now employed to find out if they did, indeed, keep their records quiet or even make an attempt to and I must say I can't find one in the Chicago area that I am in touch with that has kept his quiet.

Now, usually it depends on only one person knowing, and that's say, an immediate supervisor. I just had a gentleman from a hotel corporation who came in—very nice looking guy, who served 4 years in a Federal pen—and his record was expunged, but he decided not to keep this a secret because he felt that it was impossible. When I asked him why, he said, I think it's going to come out. I've got friends that call on me that I see and somebody is going to give it away. And, it's best that I tell them right off hand so that at least one person in the company will know this.

Mr. SHARP. At the present time, the American Correctional Association is working jointly with the U.S. Chamber of Commerce and hopefully within about a month we will have a publication entitled Marshalling Citizen Power for Corrections. It will be a kind of a pamphlet form, and of course, this bill has not yet passed, and through a LEAA grant we hope to distribute about a million of these throughout the country.

One of the things that we say in there, and it is an attempt to give factual information to refute some of the sensationalism and also to encourage and try to get some positive support to improve corrections. In there, one of the comments we make is that in employing an exoffender, the employer knows more about this individual than someone who comes in off the street, and this is one of the things I have used for years and used it effectively.

Once an employer knows that he's not buying a pig in the poke, that you can give him all the facts about the individual, frequently they will be receptive to this sort of an approach, so that I think the climate is changing. I've observed business and industry really going further now than I've seen them in the years I've been in the service.

Senator BURDICK. Do you think it would be a practical approach in cases where State laws forbid the licensing of anyone with a record, do you think that it's an insurmountable job to get the State laws changed?

Mr. WOODWARD. I don't. It hasn't been in Illinois. They have recently changed the laws regulating licenses. I think the biggest thing to do is to find a Commissioner of Corrections, like Peter Bensinger, who is willing to get out and work and make a determined effort to see that the law is changed. I don't regard it as an insurmountable handicap. I think if you have the right person doing the right job, it'll be done.

Mr. MEEKER. Even the revised Illinois statutes provide for good moral character, and there's a substantial line of Supreme Court cases

which says that a conviction of any offense is a justifiable basis for a licensing board to automatically assume that that is evidence of the opposite of good moral character.

Mr. WOODWARD. Yes, I think that is true, but as far as a practical matter, they have taken some of these people. They have licensed some of them in some of the professions, so we can always say, look, I think in a lot of these things it's the idea, that your opportunity, your hope, is not closed off, because everybody's not going to become a lawyer or a doctor or whatever, but the idea that the line is open—and they do have some examples to point to. You know, there are some people that made it, so keep striving, keep trying, keep hoping, and I think they have accomplished this, with the passage of this bill because it did give hope when they actually took people in and made it concrete.

Mr. SHARP. The American Bar Commission on Corrections Facilities and Programs, under Dan Sholer's direction, is going to involve itself in the study of the limitations for employment of exoffenders. One of the interesting things is that these things pop up all over the country and in very odd places, and it's rather difficult to identify every one. A very specific and dramatic case—there was a 1905 White House Directive 325A which deals with employment of prisoners, and actually, that directive, which has not been changed, was issued by President Theodore Roosevelt, and has permeated down through certain of the regulations of various departments like the Department of Transportation, and it means that a State prisoner does not have the opportunities for employment that a Federal prisoner has.

For example, a State prisoner cannot fight a fire on Federal lands. A State prisoner cannot be involved in any type of production for any Federal agency. One releasee was employed on an airfield project which had Federal funds financing it, and was fired from his job because he was technically a State prisoner and could not be employed on any type of activity in which Federal funds were employed.

So there are a lot of hidden legalistic as well as directive types of blockages toward the employment of anyone with a record.

Senator BURDICK. While we're on the right track with this legislation, due to the facts we have before us suggested a few minutes ago, why couldn't we repeal the State laws? Staff has advised me that there are over 4,000 separate State licensing laws, so you see the collosal job you would have taking this piece by piece in each State, and if we pass legislation like this, at least we can help the first offenders to start with and then we can go from there.

Mr. SHARP. Definitely.

Mr. WOODWARD. I agree.

Senator BURDICK. Do you have anything else you'd like to say before we close?

Mr. SHARP. No, but I hope that the direction of the committee keeps moving in the direction of some of these basic things because in reality we're going to face—5 years from now, we won't even be talking about corrections in these halls of Congress. It will be in something else. It will be in ecology or maybe the sex life of squirrels, and I'm hoping we get as much mileage as we possibly can while there is this area of interest.

And I again thank this committee for their approach.

Mr. WOODWARD. I would like to echo Dr. Sharp's remarks. I hope one of the things that our program attempts to do is to inspire hope, and I think the fact that this committee is giving the men something to look forward to, and women, in the institutions, will certainly help us in our work because they do follow these proceedings very closely—If the general public doesn't follow them, certainly when I go to some of the institutions, they can read me back what we have said here today, and for this reason I think it is very important.

I hope I can help you in your public education in this area.

Senator BURDICK. Again, I want to thank you.

I think one of the contributions you've made here this morning is that even though we pass this law and other laws like it, there is a lot of public education needed in this area.

I thank you very much. Your full statements will be made a part of the record at this point.

STATEMENT BY HARRY H. WOODWARD, JR., DIRECTOR, CORRECTIONAL PROGRAMS, W. CLEMENT AND JESSIE V. STONE FOUNDATION, CHICAGO, ILL.

I have read the bill relating to the nullification of certain criminal records very carefully, and I applaud this modest step forward. As I read the bill, it seemed to me to be aimed at about 5 or 10 percent of the people falling into the correctional system. It would reward those people who can stand the trial by ordeal they are exposed to on release from an institution and manage to keep out of trouble for an additional period of time. Certainly, some kind of recognition for good behavior, as contained in this bill, is desirable to serve as an example for others who are trying to mend their ways. To my way of thinking, this is what the bill is about.

I'm not sure in this day and age that there is any meaningful quieting of records—there are simply too many of them to be quieted in too many places. In my days as a social worker in Chicago, I used to have second thoughts about assuring a client that what he/she told me was confidential when we were sharing records with other agencies through the social service exchange. Finally, I told all my interviewers to tell the client we simply couldn't assure them of confidentiality and not to share anything of this nature with us unless they understood our limitations in keeping it confidential.

If there is any part of the bill I might quibble with, it is Section 14. Statistics are notoriously unreliable relating to offenders, but it is the current thinking in the field that people convicted of homicides and rape have perhaps the lowest recidivism rate of any definable group of felons. Since these are both crimes of passion in the great majority of cases, and there is often genuine repentence by the people committing them, I am puzzled as to why they have been excluded from enjoying the provisions of this bill. Perhaps there is a satisfactory explanation for why this has been done. I am prepared to listen to the arguments.

As I stated in my opening remarks, I think this is a modest step forward, and I am prepared to add my support to those favoring passage of this bill.

I will be happy to answer any questions the committee should like to ask.

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Non-degree education.—A course in management offered by De Paul University in Chicago, 1964. A two-quarter course in Supervision, 1967–68, University of Chicago, School of Social Service Administration.

Membership in Organizations.—National Association of Social Workers, American Correctional Association, American Management Association, National Council on Crime and Deliquency.

Civic Responsibilities.—President, World Correctional Service Center for Community and Social Concerns, Inc.; Chairman, Advisory Committee on Correctional Programs, Chicago State University; Board Member, John Howard Association of Illinois.

Military Status.—5–A Honorable release from reserve active duty November 14, 1957. Final honorable discharge August 16, 1962. Service Period: January 31, 1956 to November 14, 1957.

Foreign Travel.—Cuba, Ireland, Arctic Circle, France and most of Carribean Islands while in Navy, 1957. England, Belgium, Netherlands, Denmark, Sweden, Norway, West Germany, France, Luxemburg, Spain and Portugal. I visited these countries as a student on fellowship in 1962-63. There was a nine month residence in Spain during this period studying the Spanish Social Welfare System. Greece, Turkey, Egypt; September, 1966, vacation. West Germany, Austria, Italy, France, Spain and Portugal; May, 1968, vacation. Japan, Hong Kong, Singapore, Thailand, Iran, Yugoslavia, Spain, Portugal; August—September, 1970. Attended the IV UN Congress on the Prevention of Crime and Treatment of Delinquency in Kyoto, Japan—August 17–27, 1970, and the VI International Congress of Criminology, September 21–27, 1970, Madrid, Spain.

Publications.—"The Southern White Migrant in Lake View," monograph, published by E. R. Moore Company, 1962, Chicago, Illinois, 40 pages. This study is the result of two years of research into the adjustment of low income, rural southern white people to an urban industrial environment. "A Social and Physical Plan for the North River Area," privately published by the North River Commission, Chicago, Illinois, 1965, 25 pages. This plan was presented to Mayor Richard J. Daley of Chicago in March, 1965, as a response from a local community to the city's comprehensive plan which had been outlined in the fall, 1964. It was the first such response received from any group in the city and was extensively publicized by the Mayor, who hoped to receive similar responses from other groups in the city. "Guides for Better Living," *Journal of Correctional Education*, Summer, 1969. An article dealing with the work of the author in correctional institutions across the country. "Art in Correctional Institutions," *American Journal of Correction*, May–June 1970. Some observations on how art programs are operated in prisons in the U.S. "Motivating the Inmate Learner to Learn," published by University of Hawaii, 1970, under a federal grant to revise educational curriculums in prisons. I also served as a consultant on this project. "The Educational Setting: Breeding Ground for Unrest" paper presented at International Symposium on Youth Unrest, Tel-Aviv University, Israel, October 26, 1971. "The Etiquette of Fund Raising" *Journal of Correction*, Winter, 1972; basic points to be covered before requesting funds from the federal government or a foundation.

Contact with other Media.—I have been interviewed a number of times on radio and TV. Most of this has been in connection with my association with southern whites in the city of Chicago. In October, 1968, I participated in an hour TV program titled "The Crime of Punishment" which discussed the book by the same title by Karl A. Menninger, M.D. Dr. Norval Morris of the University of Chicago Law School and Dr. Menninger were the other members of the panel. This program, which originally appeared on Channel 11, Educational TV Chicago, has been syndicated to other stations across the country and approximately 5,000 scripts of the program have been distributed to people who requested them. A brief report I wrote on the Spanish penal system in May, 1968, has been issued as a special report by the Spanish Embassy in Washington, D.C.

Special Aptitudes.—During my service in the Navy, I published the ship's newspaper aboard the aircraft carrier U.S.S. Intrepid. From this initial experience, I have maintained an interest in public relations, and over the years have written several hundred press releases on activities that I have been associated with both professionally and as a volunteer. Establishing an organization and seeing it operate in a smooth manner, I would regard as my next best area of activity. This ties in with my interest in teaching, which I have been engaged in for the past ten years.

Special Projects.—Chairman and Organizer of Law, Psychiatry & Corrections program, London, England, July 19 and 20, 1971. This program, held in conjunction with the American Bar Association, brought together speakers and participants from five countries to discuss the relationship between the various systems.

Employment Record.—(1) Period of Service: November 15, 1967 to present. Position: Director, Correctional Programs W. Clement & Jessie V. Stone Foundation 1439 South Michigan Avenue, Chicago, Illinois 60605. My primary responsibility is to operate pre-release educational programs in the United States. There are two programs, Guides For Better Living, which is primarily for men and Feminine Development, which is for women. When I started with the Foundation, there were 5 Guides programs in one state. At the present time, (January, 1972), there are approximately 70 sites in 19 states. The Feminine Development program was started in January 1969. There are now 26 sites in 16 states. Both of these programs are operated primarily by volunteers which our organization trains. In February, 1969, our program sponsored the first nationwide prison art show which has become an annual event. It runs most of the year in conjunction with not-for-profit organizations which are interested in furthering this kind of work. I also write advisory opinions on requests submitted by organizations connected with penal work to the W. Clement & Jessie V. Stone Foundation.

(2) Period of Service: February 1, 1965 to November 15, 1967. Position: Center Director, Chicago Committee on Urban Opportunity, 33 West Grand Avenue, Chicago, Illinois 60610. I was Center Director at the Montrose Urban Progress Center, 901 West Montrose Avenue, from February to August, 1965. Starting initially with five people on February 12, 1965, the staff had grown to 165 by August 1st of that year. Additionally, an Advisory Council of 55 local citizens was organized to provide guidance for the Center. An average of 1,000 people a week were served in the Center. On August 1, 1965, I was asked to move to the Halsted Urban Progress Center, 1935 South Halsted, to repeat more or less the same procedure. Starting with a staff of two, I had 190 full-time adult workers, 465 Neighborhood Youth Corps members, was responsible for coordinating 22 agencies housed in the Center, and had a youth program that enrolled 1,200 members that I was responsible for by the time I left. I had also organized a Senior Citizen group numbering 225 that became a separate chartered organization. Approximately 2,300 people a week came to the Center for the following services: employment, health, housekeeping assistance, senior citizen, Head Start, Vista Volunteer, legal aid and recreation. At Montrose, the population was mainly southern white migrants, American Indians, Puerto Ricans and a sprinkling of virtually every known ethnic group, in a population of 72,000. At Halsted, the Spanish speaking, primarily Mexican, were the largest single group, while Eastern Europeans formed the next largest block. Italians and Negroes comprised about one-fifth of the area, which numbered approximately 140,000. The Center's staff reflected the diversity of the community.

(3) Period of Service: November 1, 1964, to February 1, 1965. Position: Executive Director, Chicago Southern Center, 1028 West Wilson Avenue, Chicago, Illinois 60640. I was in this position three months. At that point, the Director of the Division of Community Development, Chicago Committee on Urban Opportunity, requested that I be released from this job in order to assume employment with them. The Chicago Southern Center is a private organization working primarily with migrants from rural areas of the South who are settling in Chicago. It offers them a job placing service, social welfare assistance, and an opportunity to participate in cultural activities. After leaving this position, I was requested to serve on their board, which I do today.

(4) Period of Service: February 15, 1964, to October 30, 1964. Position: Executive Director, North River Commission, 4808 North Spaulding Avenue, Chicago, Illinois 60625. This is a private organization on the north side of Chicago dedicated to keeping an area of the city from falling into decay. Dur-

ing my period of service, I drew up the area's official response to Chicago's comprehensive plan. This was subsequently published and presented to the Mayor of Chicago as the first comprehensive neighborhood response. I was fulfilling a contractual agreement for the period I served. At the end of the time, I decided not to renew it, even though requested to do so by the Board of Directors.

(5) Period of Service: September 1, 1960, to September 1, 1962. Position: Community Representative, Lake View Citizens Council, 1005 West Belmont, Chicago, Illinois 60657. During this period, I was conducting a survey on the impact that southern white migrants were having on a community of the north side of Chicago. Working through police, schools, social welfare and other available records, as well as home visitations, I outlined the major factors limiting the successful adjustment to the city by this group. Also, I offered possible ways that this situation could be changed. This work was published as a monograph, "The Southern White Migrant in Lake View," in August, 1962, and is used as a source work by all the institutes of higher learning in the Chicago area.

Other Pertinent Experience.—(1) During my two graduate years at the University of Chicago, I worked part-time as a counselor for the Illinois Home and Aid Society. This consisted of doing group work with five emotionally disturbed children in a residential setting. This lasted two school years and two summers. ((2) For five years, I have been teaching courses on urban conditions at Chicago colleges. In 1964-65, I taught at North Park College. In 1965-66, I taught at the north campus Illinois Teachers College Chicago-North, 5500 North St. Louis Avenue, Chicago, Illinois. Since 1966, I have been teaching a course titled "The History and Culture of the Southern Appalachian" at the Center for Inner City Studies, 700 East Oakwood Boulevard, which is a special branch of Northeastern State University-Chicago restricted to students studying for their masters degree.

STATEMENT OF DR. E. PRESTON SHARP, GENERAL SECRETARY OF THE AMERICAN CORRECTIONAL ASSOCIATION

Mr. Chairman, members of the Committee, it is an honor to be invited to testify before this group on Senate Bill 2732 relating to the nullification of certain criminal records and known as "Offender Rehabilitation Act." It is encouraging to find members of this committee dealing with some of the contributory factors to crime. We realize that there is no panacea to the eradication of crime, but bills such as S 2732 gets to the roots of some of the basic problems.

POSITION OF THE AMERICAN CORRECTIONAL ASSOCIATION

In presenting this testimony I am able to speak for the American Correctional Association as well as to add comments from my own experience. At the 101st annual Congress of Correction held in Miami Beach, Florida, August 20-25, 1971, the following resolution was unanimously passed.

"Whereas the penalties of a criminal conviction extend beyond the expiration of sentence to a limit and deny to the rehabilitated offender opportunities for employment, trade and professional licensing, bonding and other rights and privileges, and

"Whereas, the opportunity to obtain a job with a future is a strong factor in motivating the first offender to lead an honest and upright life during his period of correctional supervision and after his release

"Now, therefore be it resolved that all agencies of government should support legislation which would assist in the rehabilitation of offenders who have demonstrated successful community adjustment through the expungement or annulment of his conviction."

SPECIFIC EXAMPLES OF CRIMINAL RECORD

Probably no group in the country has had more experience with the negative impact of criminal records than those who are working in the correctional field. Unfortunately, the emphasis of publicity is always on the heinous or atrocious crime and the general public is not informed of the number of minor offenders who enter the criminal justice system. The impact of this Bill

is not to act as an additional escape tool for the hardened criminal, but to remove from the first offender, when earned, the negative blight of a record. In order to give an indication of the ramification of individuals who would be helped by this Bill, I will briefly cite three examples.

A few years ago I was contacted by a young couple who were concerned about the problem they faced in the adoption of a child. The major issue blocking the adoption was that the husband had been in trouble on one occasion and had a criminal record. The criminal act was minor and it had happened a number of years prior to the time in which the adoption activity was initiated. It was only through considerable pressure, discussion, and investigation that the ruling in approving the adoption was affirmative.

On another occasion, there was a young man who was being considered for appointment to a military academy. His appointment has all the necessary endorsements and he had all the qualifications necessary for a student in the military academy. Unfortunately, the investigation of his background disclosed that on one occasion he had been in trouble and as a result he was excluded from the opportunity of becoming an officer in the military service. All his activities subsequent to the illegal incident had been positive, however this fact was overlooked when the prior record was disclosed.

The effect of criminal records are not limited to employers or appointing authorities. One of the most dramatic cases brought to my attention was a man who had served a sentence in an institution and when released secured a position in a clothing manufacturing company. He had been employed for two or three years and his work was so commendable that his superior decided to promote him to a middle management position. Apparently some of his co-workers had learned of his record and as a result, began to put pressure upon the owner of the factory to have him fired. He came to me with the frank statement that because his work was so good he was going to be fired and the only reason was that on one occasion, he had been in trouble, served a sentence and had a criminal record.

It is very difficult to explain this logic to an ex-offender and in this case it took a great deal of time and a great deal of intestinal fortitude on the part of the owner of the factory to preserve the ex-offenders position. Unfortunately, he did not receive the promotion.

TYPES OF OFFENDERS

Often we overlook the fact that there are certain individuals in our communities that become involved in some illegal act for a thrill or as the result of a misunderstanding. It is well known that the adolescent is very prone to pere pressures and consequently many young men are unable to say no when a group decides to participate in an illegal act. Do not interpret that I am condoning participation in illegal acts, but if a youth commits an illegal act as a result of pere pressures and proves by subsequent behavior that there is no deep seeded pattern of criminality, then consideration should be given. Often individuals of this type have severe conscience reactions. The total life of a person should not be marred by a minor offense committed on the thrill basis resulting from pere pressures.

There are also individuals who, through no fault of their own, become involved in situations in which circumstantial evidence points strongly to their guilt. One of the examples of this type of case occurred in the City of Philadelphia when a young seminary student returning to his college secured a hitchhike from a group of young men in a car. He did not realize that the car was stolen and when the police apprehended the car he was arrested along with those who had committed the theft. It was difficult for him to unravel the circumstances to the satisfaction of the police and he had a record of being arrested. Fortunately his reputation and his record at the seminary was such that it did not result in his expulsion, however the arrest record still exists.

IMPORTANCE OF HOPE

In the Congressional Record of October 20, 1971 when this Bill was introduced, Mr. Burdick used very advisedly the word "hope". Frequently we forget that this is of major importance in all of our lives and especially for the offender. The most dramatic examples of the importance of hope occurred at the Neurenberg Prison when it was opened immediately at the close of World

War II. The Colonel who was in charge of the prison at that time, told me that one of the major problems he faced when that prison was opened was the excessive number of suicides. Everything possible was done to reduce them to a minimum. The suicides continued even to the point that men would run down the halls with their heads down, crash against the stone wall and commit suicide.

In an attempt to solve this problem, a group of psychiatrists were called in to analyse the issue. A Scottish psychiatrist made a recommendation that a thorough study be made of the prisoners and the first week release as many as possible and the second week increase the number, the third week continue the acceleration and observe the results. The first week, fifteen were released and there was a slight drop in the suicides. The second week, approximately thirty were released and the suicide rate dropped almost 50%. After the third or fourth week of releasing a fair number of the prisoners, the suicides stopped.

The reason given by the psychiatrist for the suicides was that the prisoners, many of them civilians, had lost hope and as a result of the confusion and the loss of hope they had used the solution of suicide to solve their problems.

As indicated by the Chairman, this Bill provides hope.

POTENTIALS FOR MOTIVATION

One of the most difficult, but important issues in aiding people to improve themselves is to provide motivation. The possibility of being able to earn the right to have a record expunged is a motivating factor of high priority.

I would like to suggest to the Committee that in the section dealing with the decision effecting expungement that there be inserted a few additional requirements. As the Bill reads now, it might be possible to use the "Good Joe" technique. In other words, it does not require a thorough investigation in order to effectuate the expungement. Undoubtedly the majority of courts would require investigations, but it is well for the offenders to know that this is one of the requirements.

The requirement for the investigation, should include reports from probation or parole officers and other individuals such as employers, families, etc. to substantiate by facts that during the required period subsequent to the termination of the sentence, that the offender had proven by precept that rehabilitation had been successful.

With this spelled out in greater detail, it could be presented to the first offender as a goal and undoubtedly would have value in motivating a successful adjustment in the community.

IMPACT OF BILL ON PUBLIC PHILOSOPHY

One of the indirect advantages of this Bill would be a specific example of society's attitude toward the offender. Fortunately the ex-offender has more opportunities today than at any time in the history of our country in making a success if he is willing to fulfill the requirements for success. For many years and even today in the minds of many of our underprivileged people, is the feeling that society always wants its pound of flesh.

This Bill is a clear indication of society's desire to give a person another chance if they desire and are able to prove the ability to use such an exception.

I strongly recommend the passage of this Senate Bill 2732.

BIOGRAPHICAL STATEMENT OF E. PRESTON SHARP, PH.D.

Elected General Secretary, American Correctional Association, February 1965, assumed office June 1, 1965.

Served as Executive Director, Youth Study Center, Philadelphia from March 1952 to June 1965. His initial responsibility was to open and organize the Center.

Served as Chief, Division of Training Schools, Maryland Department of Public Welfare, from July 1948 to March 1952. Served as Director, Maryland Commission for Youth.

Before going to Maryland, he was employed by the Pennsylvania Department of Welfare for 14 years. During this period, he was Supervisor of Rehabilitation at the Eastern State Penitentiary in Philadelphia: Superintendent of the Pennsylvania Training School at Morganza and Director of the Bureau of Community Work in Harrisburg.

Prior to entering the correctional field, he was an administrator in the public school system in Pennsylvania for 9 years.

Member of the Professional Council of the National Council on Crime and Delinquency; member of the National Council, Boy Scouts of America; member of the Board of Directors, The Osborne Association and Past President, American Correctional Association, National Conference of Juvenile Agencies and Pennsylvania Probation and Parole Association. N.A.S.W. Academy of Certified Social Workers since 1961.

National Correspondent of the United States to the United Nations in the field of Social Defense. Appointed by President Johnson on December 27, 1965. Member of the Special Civilian Committee for the Study of the U.S. Army Confinement System. Chairman, Advisory Committee on Naval Corrections. Member, National Chamber of Commerce Advisory Panel on Crime Prevention and Control.

Born in a suburb of Pittsburgh, Pennsylvania. Received Bachelor's Degree from Geneva College, Beaver Falls, Pennsylvania. Master's Degree and Ph.D. from University of Pittsburgh. Honorary Degree, Doctor of Humane Letters, Geneva College, Beaver Falls, Pennsylvania, June 1966.

Member of the Special Civilian Committee for U.S. Army, 1969.

Listed in *Who's Who* since 1950 and *Who's Who in the East*.

Member of the Special Civilian Committee U.S. Army Confinement System 1969.

Member of U.S. Delegation, Fourth United States Nations Congress, Kyoto, Japan 1970.

Chairman of the Advisory Committee on Naval Corrections.

U.S. SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C., February 16, 1972.

HON. QUENTIN N. BURDICK,
Chairman, Subcommittee on National Penitentiaries,
Washington, D.C.

DEAR MR. CHAIRMAN: The enclosed copy letter from an Alabama constituent may be of interest to your Committee in considering the merits of S. 2732. It is forwarded to you for information only and no acknowledgment is required.

With kindest regards, I am
Sincerely yours,

JAMES B. ALLEN.

HUNTSVILLE, ALA., *February 5, 1972.*

Senator JAMES ALLEN,
U.S. Senator, Alabama,
Washington, D.C.

DEAR SENATOR ALLEN: I would like to discuss a problem that, I believe is national, needs correcting and correcting it would greatly benefit a large group of people.

Many people are arrested by the police each year for many reasons—some more serious than others. As a result most of these people then have a 'record'. Following the arrest, the arrested one is then given a hearing or trial. The hearing judge either (1) allows the arrested one to go free or to go free but be on probation for a period of time or (2) requires the arrested one to serve time in jail. In either case, after the arrested one has settled his 'run-in' with the law (with society) his crime is supposed to be or should be forgotten so that he can live normally as others do.

However, the arrest is not forgotten by an important group.

When the previously arrested or convicted one applies for employment, many 'application-for-employment' forms contain the following question:

HAVE YOU EVER been arrested or convicted or paid a fine in excess of 30 dollars?

Not—Have you been arrested or convicted during the past 3 years?
Not—Have you been arrested or convicted during the past 5 years? Or even 10 years?
But—*HAVE YOU EVER* been arrested or convicted?
This can go on throughout the person's life no matter how young the person was when the crime was committed, or how good the person has been since or how sorry the person may be that the crime was committed. Should there not be an ending to this at some reasonable time?
The 'application-for-employment' form may allow an explanation of the circumstances surrounding the arrest or conviction. However, no matter what explanation were offered, many employers would hesitate to hire a person who has been arrested or convicted. Even though the arrested or convicted one has settled the score with the law (society), the potential employer may not be able or willing to overlook the fact of the arrest or conviction.
Could you consider initiating some action to accomplish correction of the above? Could not the employer be prohibited from asking the prospective employee *no more than*: "Have you been arrested, been convicted or paid a fine exceeding $30.00 during the past 3 (or 5—or even 10) years?" Many controls are placed on employers by the Government and it is granted that this would be an additional control—a very, very minor one. Considerable good could result from this minor control.
Benefits resulting from achieving the above corrective action:
1. The formerly arrested or convicted one can truly and completely rejoin society.
2. Jobs will be available to these people which jobs may not now be available.
3. A chance will be available to bury an unpleasant past.
4. The former criminal one can lead a normal life, possibly, to the degree led by those who never 'strayed'.
Some *disadvantages* associated with the present system are:
1. The former arrested one or criminal can not get an opportunity at some jobs open to others.
2. He must at times be faced with the greatest of frustration and helplessness.
3. He may revert to crime out of desperation because he can not find a job.
4. He is forced to lead a more restrictive life (for his whole life) than others.
Senator Allen, if there is something that you could do along this line, I believe a new life could be available to many unfortunate people.
If there are others you would suggest I write to about this, please let me know.

Sincerely,

JOE C. THOMPSON.

(Whereupon, at 12 o'clock noon, the subcommittee was recessed, to reconvene at 10 o'clock a.m. Feb. 22, 1972, in room 2228, New Senate Office Building).

S. 2732, RELATING TO THE NULLIFICATION OF CERTAIN CRIMINAL RECORDS

WEDNESDAY, FEBRUARY 23, 1972

U.S. SENATE,
SUBCOMMITTEE ON NATIONAL PENITENTIARIES,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 4221, New Senate Office Building, Senator Quentin N. Burdick, presiding.
Present: Senator Burdick (presiding)
Also Present: James G. Meeker, staff director; Mrs. Judy Snopek, chief clerk; Ronald E. Meredith, minority counsel.
Senator BURDICK. The first witness this morning will be Herbert S. Miller, Deputy Director of the Institute of Criminal Law and Procedure, Georgetown University Law Center, Washington, D.C.
I am pleased to see you before the committee again, Mr. Miller.
You may proceed in any manner you wish.

STATEMENT OF HERBERT S. MILLER, ESQ., DEPUTY DIRECTOR, INSTITUTE OF CRIMINAL LAW AND PROCEDURE, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. MILLER. All right. Mr. Chairman, I do have a statement. I won't read all of it. I will discuss just the highlights of it. I would like to submit it to the committee for inclusion in the record.
Senator BURDICK. The full statement of yours will be made a part of the record without objection.
(The statement of Herbert S. Miller and a biographical sketch in full follow:)

TESTIMONY OF HERBERT S. MILLER IN RE: S. 2732, RELATING TO THE NULLIFICATION OF CERTAIN CRIMINAL RECORDS

HERBERT S. MILLER—PERSONAL HISTORY

Graduate, Georgetown University Law Center.
Deputy Director, Institute of Criminal Law and Procedure, Georgetown University Law Center.
Chairman, American Bar Association Committee on Corrections and Rehabilitation.
Member, National Governing Board of Common Cause.
Chairman, Offender Aid and Restoration Board of Fairfax County.
Project Director, Survey of *The Effect of a Criminal Record on Employment with State and Local Public Agencies* (prepared for the U.S. Department of Labor, 1972).

Vice-Chairman, Criminal Justice Advisory Board, Fairfax County, 1967–71.
Chairman, Citizens Committee on Crime and Delinquency, Fairfax County. 1968–71.
Advisor on narcotics and drug abuse, President's Crime Commission, 1965–66.
Advisor to Joint Commission on Correctional Manpower 1968–69.
Reporter to American Bar Association Project on Standards for Criminal Justice (author of Standards for Probation) 1967-70.
Prosecutor, Criminal Division, Department of Justice, 1961–65.
Counsel to Oregon State Legislature, Criminal Code Revision 1958–61.
Member, Virginia State Bar.
Author of articles on Criminal Law Reform.

At the outset I want to say that S. 2732 represents a great breakthrough at the federal level in mitigating the effect of a criminal conviction and arrest record on violators of federal law, particularly as it relates to job opportunities. The specific procedures spelled out in the bill and the exact definition given to the meaning of nullification are very important. One of the prime weaknesses of existing expungement and nullification statutes has been the failure to spell out procedures and define terms.

There are, however, several areas where the bill could go further to accomplish its stated goal, that of removing some legal obstacles to employment which now confront the offender as he attempts to take his place in the community. Section 3 requires an application to be made in the instance of those who have no prior convictionus and also requires long delays before nullification can occur. The most restrictive provision in this section is the 36-month waiting period after final release from probation and the 60-month waiting period after mandatory release from prison or completion of parole. I believe that nullification should be authorized immediately after final release from prison and immediately after termination of parole or probation supervision.

Should the law create unusually long delays in enabling an individual to find gainful employment? The language of rehabilitation is the language of education and training for jobs. If we really believe in rehabilitating those who are convicted of crimes against society then we should encourage such people to obtain jobs. We know that many individuals with criminal records have low educational attainments and infrequent and low level job opportunities. Many programs funded by the federal government are specifically geared to overcome these shortcomings. Of what use is it to train people for jobs and then in effect deny them jobs because of a legal structure of our making. I repeat the recommendation that nullification should be authorized to begin as soon as final release from imprisonment, parole or probation.

Section 3 also requires an application to be filed. This will create a substantial number of mandatory proceedings before nullification can be granted. In the interests of lessening the burden on the courts nullification ought to be automatic unless the government affirmatively petitions the court to suspend the operation of the nullification process for cause. If, on the basis of government objection, a nullification is denied the individual should be authorized to make application for nullification one year later. The court then can grant nullification if it found that the individual had been rehabilitated.

Under this procedure many nullifications could be granted without any proceedings whatsoever. Where the government felt that the public interest required a denial of nullification then an opportunity would be available to have hearings before the court. And if the nullification was denied the person would then have to affirmatively petition no earlier than one year later for nullification and the court could, at its own discretion, grant such nullification if it found the person to be rehabilitated. I believe this procedure effectively protects the public interest and cuts down the number of cases which the court would otherwise have to hear.

Under this approach procedures could be worked out for notice of a pending nullification to be given to the Attorney General and a reasonable time period provided for so that the appropriate U.S. Attorney could have time to enter any objections to the nullification.

Section 4 contains provisions relating to nullification in those cases where on direct or collateral review the conviction is shown to be invalid by reason of innocence or the person has been pardoned on the ground of innocence. It is my view that any invalidation of a conviction upon direct or collateral review wipes out that conviction and that there should be no necessity that a finding of innocence be attached to such invalidation. Therefore, aside from some provisions which would require the court to order that a vacation of the conviction be noted in all records, I do not believe that any provisions relating to invalidation of convictions is required.

Section 4 also provides for nullification procedures if the convicted individual is pardoned on the ground of innocence. I believe that a pardon on the basis of innocence would be in effect a full pardon which has been held to release the person and blot out the existence of guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense. Other partial or conditional pardons merely affect certain aspects of the legal consequences of the conviction as spelled out in the order pardoning the convicted individuals. In either case I don't see the need for statutory provisions relating to pardons.

Section 5 relates to those arrested, or indicted or tried where the charges are either dropped or the person is found not guilty. It authorizes such an individual to make an application for nullification. I believe that in such cases nullification should be automatic because there has been no conviction. If the presumption of innocence means anything there should be no reason why any formal procedure must be entered into by the person. Section 5 would therefore read as follows:

"If a person arrested, indicted or tried in connection with the violation of any law of the United States is found not guilty of the offense for which he was indicted, was released from such arrest, or his indictment was dismissed, the appropriate United States District Court shall issue an order nullifying in all official records, all recordations relating to such arrest, indictment, or trial as the case my be."

Section 6 restricts the application of the act to first offenders and denies its application to those who may be under arrest or indictment or on trial at the time nullification might otherwise apply. Again I think we must look at the purpose of this proposed legislation and make a determination of whether or not we want to make it more and more difficult for those with criminal records to function in our society. The fact that an individual is a repeater should not mean that he is foreclosed from removing the obstacle to his functioning in our society. If we don't remove such an obstacle we may in effect be forcing him to return to criminal activity. Therefore, in the case of those with prior convictions, the individual should be authorized to apply for an order of nullification. If the court finds he has been rehabilitated it should grant such an order. This approach avoids arbitrariness, but yet protects the public by requiring an application and also requiring the court to make a finding of rehabilitation.

A further distinction in this section should be made by eliminating prior conviction of misdemeanors from its coverage. Under this approach the authority of the government to contest an otherwise automatic nullification order would provide the protection in those cases involving individuals with long records of serious misdemeanors.

Section 7 defines the effect of nullification and is the heart of the legislation. The prohibition on the use or distribution of the record in connection with employment, bonding or licensing is an extremely important provision which spells out in detail just what nullification means. The restoration of civil rights and privileges, which specifically spells out the right to vote and to serve on a jury, is also salutory.

But subparagraph 3 of Section 7(a) is one that requires close examination. For certain purposes prior convictions should be available to the courts, particularly if the conviction record is otherwise admissible in court. I refer specifically to those cases which may involve the impeachment of a witness or in those instances where a person is convicted in a case involving substantial damages to other individuals. The persons who sue the convicted individual should be permitted to have evidence of the conviction admitted into evidence in the subsequent civil case where appropriate.

Section 7(b) provides that perjury will not be committed by an individual who denies a criminal record which has been nullified. This provision will serve a useful purpose in putting teeth in nullification. I suggest, however, for our purposes, that the statute require federal job application forms to spell out for the applicant the meaning of this provision so that individuals who have had the conviction nullified will know what they can say.

An alternative approach might be to add to the question on the job application form the following phrase: "Have you ever been convicted of a crime which has not been nullified?" A person with a nullified conviction could answer this question—No.

Section 7(c) authorizes the court to qualify or limit the effect of a nullification order "in order to protect the public." This is a broad and vague provision. Specific criteria should be delineated which describe how the records can be maintained and for what uses. I would suggest that the following criteria be written into the statute which provides for the use of criminal conviction records, even where they have been nullified, in specific instances. Following are some suggested exceptions:

(a) Inquiries received from another court of law;

(b) Inquiries from an agency preparing a presentence report for another court;

(c) Inquiries from law enforcement agencies where the request for information is related to the investigation of a crime or a position within that agency; and

(d) Inquiries from an agency considering the person for a position immediately and directly affecting the national security.

Section 7(d) should be amended to provide that the agency having custody over the offender must notify the Attorney General of the final discharge and that should the order of nullification be granted the Attorney General must then notify all agencies which might be involved in the recording of the conviction record and its nullification. The individual with the nullified record could supply a list of agencies to the Attorney General to supplement the list the Attorney General may already have. This notification to the Attorney General would enable him to plan, if his office desires, to contest any automatic granting of nullification. This section could provide for a 30-day period in which the Attorney General could decide whether or not to contest the nullification.

I would delete Section 9 on the ground that once a record has been nullified it serves no useful purpose to rescind it should the individual be subsequently convicted of a crime. The subsequent conviction is on the record and the court could refuse to grant a further nullification on that conviction unless there is a showing of rehabilitation. This approach would adequately protect the public. The present provisions might otherwise create a substantial amount of paper work to reinstate a rescinded nullification among a large number of agencies.

This concludes my testimony on the provisions now in the bill. I would like to discuss one of the most critical points at which a person may be affected in the whole process of finding a job—when he first looks at a job application form. In previous testimony to this Committee I pointed out that many employers do in fact ask for arrest records. The question alone has a chilling effect on an applicant and may stop him from completing the job application form.

A federal district court in California has held that simply asking a black whether or not he has been arrested is discriminatory under Title VII of the civil rights act. *Gregory v. Litton*, 316 F. Supp 401 (C.D. Cal. 1970). A study prepared for the Department of Labor by the Institute of Criminal Law and Procedure at Georgetown University documents the fact that arrest records are asked for and that they in fact do constitute a significant absolute bar to employment in many jurisdictions. The study also outlines the basis for federal jurisdiction in prohibiting any employer from asking about arrest records not followed by conviction. This study is now at the printer and will be available within two weeks. I would like to submit the study for Committee consideration when it is released.

But at this time I would like to discuss the major legal basis which authorizes the federal government to issue an order through the Equal Employment Opportunity Commission—an order which would prohibit *private* employers from asking that question. It also empowers Congress to enact legislation prohibiting *any* employer from asking the arrest record question. Listen to the holding in *Gregory v. Litton*:

"If Litton is permitted to continue obtaining information concerning the prior arrests of applicants for employment which did not result in convictions, the possible use of such information as an illegally discriminatory basis for rejection is so great and so likely, that, in order to effectuate the policies of the Civil Rights Act, Litton should be restrained from obtaining such information. . . . An intent to discriminate is not required to be shown so long as the discrimination shown is not accidental or inadvertent."

This key case has recently been bolstered by a Supreme Court opinion which disallowed the requirement of a high school education for initial assignment to a job and transfer within a power company. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). This case involved an interpretation of the same title of the Civil Rights Act. Speaking for a unanimous court Chief Justice Burger wrote:

"The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices . . . What is required by Congress is the removal of artifical, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification . . . The act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. . . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question . . . Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."

This powerful language, plus the findings and holdings of the Institute study and the *Litton* opinion, establish a firm basis for the exercise of federal authority in the field of arrest records. The basis holding in *Griggs* is that there must be some connection between the qualifications and the job, and that barring such connection the qualifications are improper if they in fact act to mitigate against the hiring of minority groups. *Litton* held that asking the question of blacks was discriminatory per se. There is really no relationship between the existence of an arrest record and the ability of an individual to perform the job. These two cases, taken together, provide ample grounds for federal jurisdiction.

As a matter of fact the Equal Employment Opportunity Commission issued three opinions in 1971 all specifically finding that asking for arrest records is discriminatory per se. One of these EEOC opinions held the same for a minor gambling conviction.

I believe that EEOC now has the authority to issue a rule prohibiting private employers from asking about arrest records. It is my understanding that EEOC's jurisdiction would not extend to state and local governments. In addition, there is some question as to whether EEOC would issue this rule at this time.

I therefore strongly urge the Committee to consider an additional section to S. 2732 which would simply prohibit any employer, public or private, federal, state or local, from asking about arrest records which are not followed by a conviction.

There are other reasons why Congress should take the lead in this field. Resolution of the problem via court suit remains unsatisfactory to most individuals because of the propensity of courts to narrow the effect of their rulings to the particular matter brought before them and to the uncertainties attendant upon such court rulings. In addition, suits to expunge, destroy or obtain such records assume individuals with the capabilities for instituting such suits, hiring an attorney, and spending the long time which may be involved before a suit is resolved and final appeals are heard.

Perhaps the futility of court suits as the major approach to remedying the abusive use of arrest records is illustrated by *Spock v. District of Columbia*, 283 A. 2d 14 (1971). In this case 75 persons were arrested on minor charges

of disorderly conduct. Six defendants were tried and acquitted. Charges as to the remaining defendants were *nolle prossed* (dropped). On a motion for expungement of the record the D.C. Court of Appeals held that the records must be preserved for a variety of reasons. The only relief judicially available for "appellants who desire to pursue their cases further" would be to make

"Such explanatory showing of nonculpability, by affidavit or otherwise, as in their view the facts warrant. *** Of course, should there be a dispute of fact, a hearing will be required for resolution thereof ***." (p. 20)

The court stated that should the arrested person *affirmatively* demonstrate nonculpability, the police and court records should reflect the fact.

In the *Spock* case all charges were dropped in May 1970. The Court of Appeals opinion was rendered September 1971, sixteen months later. The procedures for obtaining a "nonculpability" stamp on the record could be lengthy if the government did not agree with evidence submitted by the persons arrested. There are simply not enough lawyers to handle all the potential cases, even for a fee. And many persons with arrest records could not afford the extensive litigation which is almost mandatory under the *Spock* ruling.

The *Spock* case illustrates another problem. The District of Columbia Government has a policy of not divulging arrest records not followed by conviction. Nevertheless one defendant in this case found that it took over one year for the Metropolitan Police Department to stop making this record unavailable.

There is another consideration. Many persons are not aware of this policy and may think the record is available to potential employers. And even if they knew it was not available would they not have to answer an arrest record question truthfully? Should they lie? The only way to avoid this dilemma is for the question to be prohibited.

In my view the problem has national implications requiring a uniform nationwide policy established after thorough consideration of all the issues. I also feel that a problem of this dimension, affecting so many Americans throughout the country, requires the kind of comprehensive approach which only a legislative body can take. Only one legislative body can provide a comprehensive, uniform, national policy, the Congress of the United States, which must act in this area to prevent the continued use of arrest records from hindering the development of so many citizens.

This viewpoint has recently been substantiated by the case of *Menard v. Mitchell*,—F. Supp.—(Civil Action No. 39-68 at 13-14, June 15, 1971), where the court stated,

"Where the Government engages in conduct, such as the wide dissemination of arrest records, that clearly invades individual privacy by revealing episodes in a person's life of doubtful and certainly not determined import, its action cannot be permitted unless a compelling public necessity has been clearly shown. Neither the courts nor the Executive, absent very special considerations, should determine the question of public necessity *ab initio*. The matter is for the Congress to resolve in the first instance and only congressional action taken on the basis of explicit legislative findings demonstrating public necessity will suffice."

BIOGRAPHICAL SKETCH OF HERBERT S. MILLER

Herbert S. Miller, who is professor of law and Deputy Director of the Institute of Criminal Law and Procedure at Georgetown University, is chairman of the Committee on Corrections and Rehabilitation of the American Bar Association. Mr. Miller has also worked with corrections at the community level, as chairman of the Offender Aid and Restoration Board and Citizens Committee on Crime and Delinquency as well as vice chairman of the Criminal Justice Advisory Board, all in Fairfax County, Virginia.

Mr. MILLER. At the outset I just want to say that Senate bill 2732 represents a great breakthrough at the Federal level in mitigating the effect of a criminal conviction and arrest record as they relate to violators of Federal law.

To me the real significance of this bill is the impact it has on job opportunity for people with criminal records and I think that as I testify, I am going to keep referring to the fact that we are really talking about people being able to function in our society by working and that is the real purpose I believe behind the legislation.

I think the bill accomplishes two important things. It spells out specific procedures and it defines the meaning of nullification and the great weakness of most statutes in the State and the Federal level on this subject is that they fail to do either.

There are several areas where I think the bill could go further. I think the key area is in the provisions in section 3 which now provide a delay of 36 months before nullification can be applied as to someone who is released from probation supervision and a delay of 60 months as to someone released from prison or from parole.

I am recommending that the bill be amended to provide that nullification be authorized immediately upon release from probation, from parole or from imprisonment that there will be no delay whatsoever.

I am doing this because there is a real question in my mind as to whether the bill specifies an unusually long delay and I think 36 months is an unusual delay in enabling an individual to find gainful employment.

After all, we talked about rehabilitating these people and the language of rehabilitation is the language of education and training for jobs.

If we really believe in rehabilitating those who are convicted of crimes against society, should we not encourage them to obtain jobs? The President's Commission and many others have found that most people with records have low educational levels. They work frequently at low-level jobs and we therefore have concluded that the name of the game is to get these people jobs to work at better than low-level jobs. Yet, we have deliberately—not deliberately but we in fact have built a legal structure in our society which prevents these same people from getting jobs and the purpose of your legislation, as I understand, is to do away with these obstacles.

For this reason I think that such a delay serves no useful purpose. I think rather than protecting society it endangers it. If you train a person for a job and then he finds he can't get a job because of his record, we are almost saying to him go out and create more crime. That is the only way he can make a livelihood. I call your legislation right to work legislation and I think there is a right to work.

The other part of section 3 is the requirement that application be filed by an individual and that the court grant the nullification if it finds the person is rehabilitated. I am suggesting that nullification be automatic when a person is released from probation or parole or from imprisonment with the provision that the Attorney General for the United States can contest such automatic nullification for cause and that time be permitted to give notice to the Attorney General and the U.S. attorney to make a decision as to whether they wish to contest this nullification which is otherwise automatic and that the court can then deny the nullification.

And I would further add if nullification is denied, that a year later the convicted person would be authorized to then apply for a nulli-

fication order and if the court finds he has been rehabilitated, that a nullification order be granted.

I think this accomplishes several purposes. It cuts down on a lot of court case load problems if the nullification is automatic in almost every case and I don't believe the U.S. attorney's office is going to contest every nullification. There wouldn't be any reason to. So there will be many done automatically without necessity for hearings.

It protects the public because the U.S. attorney can contest the nullification and yet it avoids arbitrariness by providing if nullification is denied a person, he can apply a year later and the court can use a standard of rehabilitation at that point.

Senator BURDICK. You understand, Mr. Miller, that this bill's inadequacies that you talk about are because the bill is really breaking new ground?

Would you nullify every conviction?

Mr. MILLER. My view, Senator, is that if the person is going to be in the community, we have to make a basic decision as to whether we wish to be vindictive or whether we wish him to function; whether we wish him to work to pay taxes to get his family off of welfare or not.

If the legal structure prevents him from getting a job, he may hit somebody on the head twice as hard as in his prior offense.

Senator BURDICK. I am taking your second point first. Would you nullify every conviction?

Mr. MILLER. For purposes of a person obtaining employment, yes. Later on I am going to talk about specific exceptions to nullification as they relate to law enforcement and other purposes.

Senator BURDICK. Do you realize, Mr. Miller, that today arrest records applying to anyone who has been arrested and never convicted but just arrested that for years and years that arrest remains on the record and nothing happens to it?

Mr. MILLER. Yes, Senator.

Senator BURDICK. We may have to change this in short steps rather than just one major leap. We are still dealing with a lot of people who resist any new approach at all.

Mr. MILLER. I happen to believe, Senator, that there has been a massive shift in public opinion in this whole field of rehabilitation and the public opinion polls show this. I think if the context of this kind of legislation is framed in the right to work area, that all we are doing is simply giving them the legal right to work; that the structure as it now exists legally prevents them from working and I don't know how people can really object if it is framed this way.

We are not suggesting that the record be destroyed. We are not suggesting that it not be available for certain purposes. I might add that later in my testimony I am going to talk about places where the record should be used for specific purposes; where there is a inquiry received from another court of law, for instance, the record should be available to any court of law that wants to see it. Where it is being used for presentence purposes, where there are inquiries from law enforcement agencies relating to the investigation of crime or to a position with that law enforcement agency that record should be available and, finally, in a position where the Federal Government

is involved where the national security is directly and immediately involved.

I believe the record should always be available for those purposes. So, for legitimate law enforcement, security, sentencing, none of these aspects of our criminal system would be affected under the approach I would take. What you are left with is the employment aspect.

Senator BURDICK. I understand your argument. I understand your reasoning very well. But here we have done nothing even about arrest records for all of these years. Do you think all of a sudden this Congress is going to nulify a conviction of first degree, premeditated murder?

Mr. MILLER. For purposes of a person finding a job if he is in the community, why not?

Senator BURDICK. Well, do you think this Congress would do that?

Mr. MILLER. I hope to exert every amount of my power towards making it do that.

Senator BURDICK. We are dealing here with the art of the possible you know.

Mr. MILLER. Well, we have our ear to the ground in different ways, Senator, and you are a better ground man than I am by virtue of being in the Senate but I work in the local level and I travel and speak to people all over the country and in my position in the bar and in Georgetown and other groups and what I find is enormous interest and an enormous ground swell on the part of the people that it is about time we stop treating these people like animals.

Senator BURDICK. But I have to deal with 100 Senators and 435 House Members in passing legislation and I am wondering if that ground swell has been communicated to the Congress?

Mr. MILLER. I hope to be involved very specifically in efforts to get that ground swell going nationally.

Senator BURDICK. That I understand, sir.

Mr. MILLER. I understand the problem but what I am going to do is give you the benefit of my thinking on it with the understanding that you may have many problems.

Now, section 4 concerns provisions relating to the invalidating of a conviction through a review or collateral attack or a pardon on the grounds of innocence.

I question the need for this section primarily because in my view if there is a reversal of the conviction on review or if the conviction is vacated by virtue of a collateral attack, in my view that person I believe could probably say he has not been convicted. He would have to be retired in order for there to be a conviction on the record and I rather suspect unless we held that view you could almost say that person was suffering double jeopardy and in my view if it is invalid or reversed, there is in fact no conviction.

As far as a pardon goes, if the President or any Governor issues a complete, unconditional pardon on the basis of my thinking, the effect is to wipe out the record as if it never happened and the person is innocent.

Now, if a conditional pardon is granted, it will have conditions of its own which the President has the power to impose under the

Constitution and I am not sure by statute that you could take this power from the President. Because of this reason I think the only thing I would like to see in that section is if there is a reversal or an invalidification through collateral attack, that there be a provision in the bill which requires some notification to be sent to those agencies which might have the record of conviction such as the FBI to inform them that it has been vacated and to state that the effect is to render the entire conviction nullified.

Senator BURDICK. In other words, it would be still on the record?

Mr. MILLER. I am suggesting that it be taken off.

Senator BURDICK. The reversal is not a conviction anymore than an arrest is a conviction.

Mr. MILLER. Still there is an arrest record and I am going to get into that also.

Senator BURDICK. What I am saying is that a conviction that has been reversed is no more of a blot on a man's character than an arrest is.

Mr. MEEKER. Excuse me. With respect to a pardon, isn't there a line of cases, beginning with the *Burdick* case—and I don't have the citation here—in which there is implicit in the acceptance of a pardon an agreement that the individual accepts the fact that he was guilty and has now been pardoned for that guilt?

Mr. MILLER. Well, I believe there is a Supreme Court case in which a complete pardon—and I don't have the citation either—the effect of such a pardon is to wipe the record completely clean.

Senator BURDICK. Isn't it an admission of guilt?

Mr. MILLER. No, sir. It's as if he was completely innocent. I will get that case for you.

Mr. MEEKER. There is another case that goes exactly in the opposite direction.

Mr. MILLER. Now, section 5 relates to those arrested and indicted and subsequently criminal charges were dropped. Again, this bill would authorize individuals to make application for nullification on the grounds that presumption of innocence still applies. I would suggest that that section be completely automatic, that a nullification order be entered completely automatically without any application in all cases where there has been no conviction.

Senator BURDICK. Very interesting.

Mr. MILLER. Section 6 restricts the application of the act to first offenders and here again I raise the issue what is the basic purpose of this bill?

My feeling is if a person gests his first offense nullified and he is subsequently arrested for a second offense and is convicted, to go through the process again is going to create a lot of paperwork and it may require notices to go out to many agencies that now have that record in their book and I think you are creating a lot of paperwork and secondly though that first conviction has been nullified, he has the second conviction and I would like to see a provision that would require him to apply to the court for nullification of the second conviction and for the court to then have the option of granting or not granting that nullification depending on the start of rehabilitation for the person and again I say if we take away his right to work

merely because he is a second offender, we may be making a third and fourth offender out of him and I don't consider this protection of the public.

Senator BURDICK. You say take away the right to work. What have we been doing for centuries?

Mr. MILLER. Well, I am suggesting that we change that.

Senator BURDICK. That is what we are trying to do.

Mr. MILLER. Section 7, which I think is almost the heart of the bill, defines the meaning of nullification.

Section 7A, subparagraphs 1 and 2 spell out the fact that it prohibits the use of the conviction which I think is an excellent provision and paragraph 2 spells out restoration of civil rights; voting and jury. I have problems with subparagraph 3 which states that it wouldn't be admissible in court. It restricts its use. I believe that the conviction record in all cases should be available to courts where the fact of the conviction is otherwise admissible and I refer to two specific cases where it might otherwise be admissible for impeachment purposes particularly involving cases of fraud, conflict of interest cases, and for instance, I worked for the Department of Justice and prosecuted these cases involving Government employees who were using their power in such a manner as to cause damages to innocent individuals, financial damages, and it was always my tactic never to permit them to reply nolo contendere.

I would always insist that the court take either guilty or not guilty because if they pleaded guilty or were found guilty and the innocent party wished to sue civally, the fact of the admission was in the record. I think this should be preserved and I think under your bill that would not be available to the injured party.

I turn now again to the purposes for which I think the record should otherwise be preserved: Law enforcement purposes, sentencing purposes, and national security purposes in order to adequately protect the public interest.

On section 7B provides that perjury will not be committed by an individual who denies a criminal record which has been nullified.

I agree completely with that approach. I would suggest a possible alternative and the alternative would be to require job application forms to have this question "And have you ever been convicted of a crime which has not been nullified?"

Senator BURDICK. I was going to say, Mr. Miller, that in the two previous hearings we have had this has been more or less a consensus of the way we should approach the question. As adult people we are also mindful of the subtle ways that somebody might get at this conviction too.

Mr. MILLER. I agree with you, Senator. I would like to see the statute include a provision saying this is the question that will be asked on the job application form.

Senator BURDICK. Why not ask any place? Why just the job application form.

Mr. MILLER. Yes, any place where there is that question asked. I agree. I would like to move on. There are a few other minor comments about the bill which are in my testimony. I would like to discuss the question of the arrest record which I discussed in my last testimony

before you, Senator. I might say that the study that my institute has been conducting for the Department of Labor is now at the printers and hopefully within 2 weeks will be available.

I will certainly make copies available to your subcommittee because it discusses in some details the question of the arrest record. I might also add in conjunction with the institute, the Georgetown Law Journal is preparing an extensive article on arrest records which I think in at least in my mind justifies congressional action in this field.

I want to discuss the key basis upon which congressional action could be justified and this is the Civil Rights Act.

Senator BURDICK. I think you are so right on this.

Mr. MILLER. One thing, the Civil Rights Act of 1964, title 7 of that act was construed recently by a Federal district court—and some witnesses may have alluded to this case—in the case of *Gregory* v. *Litton*—as cited in my testimony—this is where the court held if Litton is permitted to continue obtaining information concerning the prior arrests of applicants for employment which did not result in convictions, the possible use of such information as an illegal discriminatory basis for rejection is so great and so high that in order to carry out the policies of the Civil Rights Act, that Litton should be restrained from obtaining such information.

The court held that the question is per se discriminatory as it applies to blacks. My feeling is if you cannot ask it for blacks, you can't ask it for anybody and there should be separate job applications for blacks and whites. This case is on appeal.

Subsequent to Litton the Equal Employment Opportunity Commission issued three opinions in which it said as to private employers that they cannot ask that question because it is discriminatory. In one opinion it even held a question concerning a minor gambling conviction would also be impermissible and discriminatory and that is the first time I have seen that where they have gone beyond the arrest record to minor misdemeanor charges of gambling because they found that approximately 75 percent of the people arrested and convicted for gambling are blacks.

Therefore, to ask that question is discriminatory.

Senator BURDICK. At this point what would you recommend as a remedy for a situation in which someone does ask about the arrest record?

Mr. MILLER. Well, my remedy, I talked with EEOC people on this and I believe they have the authority under existing law right now to issue a rule as to private employers. My understanding is they could not issue a rule as to State and local government employers but as to private employers they could issue a rule saying that the question itself is illegal under the Civil Rights Act.

This is the arrest record question I was talking about. However, I have reason to believe they will not do that and for this and other reasons I am asking Congress to take a hard look at this question.

The second case, which I think is the fundamental case, is the 1971 Supreme Court case *Griggs* v. *Duke Power Co.* As stated in my previous testimony, which is also an interpretation of the Civil Rights Act, in this case the Power Company had the requirement for a high school education for initial employment and promotion and this was

contested that it was discriminatory and I want to read the language of this case. Speaking for a unanimous court Chief Justice Burger wrote:

> The objective of Congress in the enactment of Title VII was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissable classification. The act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.
>
> The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. Far from disparaging job qualifications as such, Congress has made such qualification the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

I submit a criminal arrest record has no ability to do a person's job.

Senator BURDICK. Would you put the name of that case and the citation in the record.

Mr. MILLER. It is in my testimony. The *Litton* case, which I have previously cited, and this case are very powerful applications for Congress to simply provide that as to private and State and local employers, the question simply cannot be asked. There is an aboslute prohibition. And I have strong feelings on this that we can't sit around and wait for the courts to do this because we don't know exactly how the courts may circumscribe any particular decision.

I cited another case here in the District of Columbia where 75 people were arrested in front of the White House while they were praying for pace. They were charged with disorderly conduct. This was in Lafayette Square, and six were found not guilty. The charges for the others were nolle prossed.

Now, the District of Columbia has a rule that anybody who is arrested but not convicted, they will not divulge that record. That is a District of Columbia record rule. They should not divulge it. I can tell you that 12 months after that case was nolle prossed that record was still being made available. And it was only until 18 months after that that they finally stopped divulging that record. I assume it is just administrative slowness.

Further, most people don't know about the rule and that the District of Columbia is one of the few jurisdictions that has such a rule and if a person is asked that question, even if he knows the rule, if an employer says have you ever been arrested, can he lie and say no I have never been arrested with the assurance that it won't be divulgd?

Well, if he is found out to lie, then he is through I think this dilemma should not be presented to people who are applying for jobs. The only way is to simply prohibit the asking of the question.

Senator BURDICK. I think you are absolutely right. There is a better approach.

Mr. MILLER. To me, this would in one sweep accomplish a great deal. And I am not sure of the exact statistics but certainly uniform crime reports now show at least a quarter to a third of the people arrested every year of crimes reported to the FBI are not convicted. How many more there are I don't really know. Certainly it is in the tens of thousands of people who do have arrest records but no convictions. Our study shows substantial numbers of State and local government employers do in fact consider arrest records as far as government employment.

Senator BURDICK. It is ironic that an arrest record can't be used for the impeachment of a witness but it causes all sorts of trouble in credit ratings.

Mr. MILLER. And I might add the American Bar Association has recommended that courts do not even consider an arrest record for presentence purposes. That is a specific recommendation of the American Bar Association that the court not have arrest records on that rap sheet when the judge is looking at the file for purposes of sentencing.

Senator BURDICK. But it does have a bearing on a credit rating?

Mr. MILLER. Yes, Senator. It does.

Senator BURDICK. And it does affect his employment?

Mr. MILLER. It does.

I might add that in studying this we have developed a wide range of other interests in which Congress can get into this field of due process, the fifth amendment and the right to privacy and we are now developing a valid argument to show that even under the interstate commerce clause, Congress can enter this field.

I concluded simply that there is no legal barrier that Congress can't come in. That concludes my presentation, Senator.

Senator BURDICK. You have been very helpful as in the past and we are going to take your suggestions and recommendations very seriously. I think most of them are very good. The only question about shortening the period and applying it to more than first offenders is simply a question of how we proceed. We are breaking new ground. I don't know how far we can go. I think there is a lot of merit to what you say. We have to sell the program.

Mr. MILLER. I might add, Senator, as a result of this study we conducted for the Labor Department that is now at the printers, the Labor Department has made a substantial grant to the American Bar Association of almost $200,000 to implement the findings of this study at the State level and this implementation program is just getting underway now and I am participating in it.

The purpose of it is to encourage State Bar Associations in every State and the District of Columbia to see to it that legal and administrative restrictions in the law and in rules and regulations of civil service commissions are so modified that that record is not an obstacle to the person who seeks to find gainful employment.

I might also add that a national citizens organization I am hopeful will shortly get involved in this area and provide very substantial grassroots support and help where needed to do something about

this problem. This is why I feel strongly that some kind of breakthrough has come about when you get the American Bar Association so heavily involved and a very important national citizens' organization also involved so I think there is going to be movement.

Senator BURDICK. We appreciate your statement. Thank you.

The next witness is Congressman Rangel. We are sorry we had to start before you got here but we tried to get to you as fast as possible.

STATEMENT OF THE HON. CHARLES B. RANGEL, A REPRESENTATIVE IN CONGRESS FROM THE 16TH CONGRESSIONAL DISTRICT OF THE STATE OF NEW YORK

Mr. RANGEL. Thank you very much. I would like the opportunity to have my full statement put into the record and touch on some of the highlights most of which I gather already have been before this subcommittee. I can fully appreciate the fact that this is new and exciting legislation which perhaps would run against the conscience of many people within both Houses. I appreciate this because as a recent member of the New York State Assembly, I find myself coming before your committee and asking you to do what many members of my former body refused to do.

Senator BURDICK. Your statement will be placed in full in the record without objection.

(The statement of Congressman Charles Rangel in full follows:)

TESTIMONY OF CONGRESSMAN CHARLES B. RANGEL

I appreciate this opportunity to appear before the Subcommittee on National Penitentiaries and testify on the Offender Rehabilitation Act (S.2732).

Although I am pleased that hearings are now being held on this long-neglected aspect of our criminal justice system, the impact of criminal records on employment opportunities and civil rights in the United States. I believe that the legislation before you is only a partial answer to this critical problem.

As a member of the House Select Committee on Crime and as a former Assistant United States Attorney, I am well acquainted with the complete failure of our correctional system to prepare the inmate for his return to society. That system has simultaneously failed to reduce crime in our country. Our policy had degenerated into vengeance and retribution, not rehabilitation. This is especially obvious in the difficulties former convicts face upon their release.

In our society, the ex-offender is not a full citizen. He cannot vote in most States or serve on juries. He finds occupational doors shut in his face because of his record. In my home State of New York, for example, former prisoners are barred from working in a place selling alcoholic beverages, in a bank or in an insurance adjuster's office, among others. The goal of a civil service system is to hire individuals on the basis of ability, but ex-offenders in New York are prohibited from being licensed for such occupations as auctioneer, junk dealer, pharmacist, dental hygienist, undertaker, real estate salesman, and physiotherapist. California can refuse or revoke licenses for 39 occupations. What this means is that many well-paying jobs are off-limits to these men and women.

VOTING RIGHTS

We proudly proclaim how the people democratically choose their lawmakers in the United States. We stress the civic responsibility of registering and voting. Yet at the same time most States disenfranchise former felons. A few States do not perpetuate the injustice of disenfranchisement; one such State is Colorado which automatically re-enfranchised 657 former felons in the past five years as they fulfilled the sentences imposed upon them. Most, however, seem to believe that punishment must continue all the days of the ex-offenders life—

unless he is willing to go through a long and often arbitrary process of having his civil rights restored. As a result, there are an estimated 20,000–25,000 disenfranchised ex-felons in the District of Columbia alone. I have introduced The Re-Enfranchisement Act of 1972 in the House of Representatives (H.R.13123) which would automatically restore the voting rights in Federal elections of all citizens who lost those rights on or after the date he:

(1) Completes every period of imprisonment imposed upon him as a result of each conviction on account of which such rights were denied;

(2) Successfully completes every period of parole or probation granted him in connection with each such conviction;

(3) Pays all fines levied, or otherwise satisfies any other penalties imposed upon him as a result of each such conviction; or

(4) Receives a pardon with respect to each such conviction; whichever last occurs.

This is only just. It is unfair and inequitable to continue the punishment of ex-offenders by abridging one of their fundamental and most sacred rights. I recommend that the Subcommittee adopt a provision guaranteeing the automatic re-enfranchisement of former felons upon their meeting the simple conditions which I have just described. The ballot is not a piece of candy to be withheld as from an erring child as punishment; it is an integral part of our democratic system of government.

WHY ONLY FIRST OFFENDERS?

I do not believe that the nullification of criminal records procedures proposed in S.2732 should be limited only to first offenders. If our goal is truly to help the inmate fit into the world outside of the prison walls, then it makes no sense to deny him either his rights of citizenship or occupational opportunities. To require any former convict, whether he be a first offender or not, to wear the yoke of a criminal record around his neck as he searches for employment is to insure that most employers will discriminate against him in hiring. We should not be surprised at the amount of recidivism among ex-offenders who are thus unable to find jobs which pay enough to support themselves and their families decently.

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eight times as great for black defendants as for whites. A recent *Washington Post* series on prisons in America showed that:

"Of nine Americans found guilty in a court, fewer than four actually serve time in a prison. Here, too, whites more often get probation or suspended sentences. In the Stamford study, the rate of commitment to prison per capita for each racial group was ten times more for guilty blacks than for guilty whites.

"Once in prison, blacks stay there longer, partly because they get longer sentences and partly because they get from 10 percent to 14 percent fewer paroles . . . Median time served for all white prisoners in the United States is 20 months; for blacks it is 23.5 months..

This means that the double standard proposed in S.2732 would serve only to further spread the effects of discrimination. This means that the proposal would guarantee that a disproportionately larger number of minority and disadvantaged releasees will have to wait an additional two years under the bill to have their records annulled and their rights restored. That is not justice.

THE RIGHTS OF THOSE NOT CONVICTED

There is no question in my mind that we should enact legislation to nullify the criminal records of those who have been acquitted, pardoned on the grounds of innocence, released from arrest or whose indictment was dismissed. To do otherwise would be to guarantee punishment without conviction. But the provisions in S.2732 which would authorize such action have a fatal flaw. The individual must "make application to the appropriate United States district court to nullify, in all records, all recordations relating to his arrest, indictment, or trial."

Instead, the nullification should be made automatically upon the defendant's acquittal, pardon, release from arrest or dismissal of indictment. It is unreasonable and unjust to put the burden of applying for nullification upon the shoulders of a man who is innocent in the eyes of the law.

The Fourteenth Amendment to the Constitution was ratified in 1868 to insure all citizens "equal protection of the law." Yet to make nullification dependent on the efforts of the innocent individual is to make sure that some innocent men and women will not be given equal protection under the law because of their failure to undertake what may be an expensive, time-consuming, complex or arduous—and at the least, inconvenient—process of applying for that nullification. If we are to protect the rights of all our citizens, we should provide for an automatic nullification of the criminal records in such cases.

POTENTIAL ABUSE OF DISCRETIONARY POWERS

There are two types of situations in the legislation before you which could lead to an abuse of court power to the detriment of the ex-offender. I believe that the language in S.2732 should be amended to safeguard the former convict's rights against such potential abuse.

First, Section 3 of the bill requires that even the first offender who is applying for nullification of his criminal records and who is not at that time on trial or under arrest or indictment must show to the District Court "evidence of his rehabilitation." This requirement is in direct conflict with the intent of the legislation since it threatens to withhold what Senator Burdick has described as "an incentive to an offender to try harder to live lawfully"—a tool of rehabilitation. Under the discretionary powers granted to the district court judge, then, the ex-offender's application could be rejected on the grounds that he does not have a satisfactory job—even though he is barred because of his conviction from acquiring such a job. Or the application for nullification may be denied on the grounds that the judge finds the applicant has not showed sufficient activity in civic affairs—despite the fact that he may be disenfranchised because of that conviction, thus feeling alienated from the government process. The wording and intent are equally hazy and unclear.

Secondly, Section 7(c) states that "notwithstanding any other provisions of this Act, any court issuing an order pursuant to this Act may, if it determines such action to be necessary in order to protect the public, qualify or otherwise limit the effect of such order to the extent to which it determines necessary to assure such protection." This provision not only opens up the

nullification process to regional, racial and economic disparities, but it also violates the intent of the bill. We would be hypocrites to say on one hand that a man has been rehabilitated by our correctional system, has paid his so-called "debt to society", and on the other hand may only enter the contest for jobs and economic opportunity with one leg shackled. Our commitment to economic and political rights for the ex-offender must be a total commitment, not hedged with ifs and maybes.

From the administrative point of view, our courts are currently overworked. Court calendars are backlogged. Defendants often wait months and even years for the settlement of their cases. The discretionary aspects in the bill mean more work for the U.S. district judges since they will have to review each application for nullification and evaluate both the degree of rehabilitation and the possible harm to the "public" if all of a former felon's rights are restored.

Furthermore, there is no provision in the legislation for an appeal or review by a higher court if a district judge denies the application or restores only part of the ex-offender's rights. This is certainly a violation of the due-process concept.

For these reasons, I recommend to the Subcommittee that the discriminatory provisions I have discussed be removed from the legislation. This is desirable in terms of both the ex-offender's rights and the administrative difficulties which the courts would face.

In conclusion, I would like to reiterate my support for the concept and objectives of this legislation. Passage of a bill to nullify criminal records and give ex-offenders an equal chance to compete in our political and economic system is, I believe, absolutely vital if we expect to make any substantial progress in prison reform. It is time for us to review all that we have done to—not for—the ex-offender. It is time to end the injustice which sentences him to perpetual punishment and at the same time fails to protect society.

Senator BURDICK. So, you understand the problems we have?

Mr. RANGEL. No question about it. Nevertheless, I think that the Congress has the ability to bring to the attention of the American people, and especially to each other, the cost of running our prisons and of allowing people to return to the prisons. The fact that we have failed to rehabilitate and to allow prisoners to reenter society is very important. And unlike the New York State Legislature which is burdened with the minor prejudices of one small community, I believe that your committee and both Houses would be able to provide leadership to the American people, to show that not only is it fair and equitable, but that in the long run what we are doing is saving the taxpayers' money. By continually ignoring this problem, it only leads to more and more crime.

I think the committee should be further commended because we are living within a political atmosphere—and I certainly hope that I am wrong—where prisoners and exconvicts, certainly in terms of political priorities, have not received the attention of legislative bodies throughout our country. For these reasons I am fully prepared to accept your bill; the things that I may suggest here I hope will be considered. Perhaps the best way to handle it is to attempt to provide amendments on the floor but nevertheless, given this opportunity, I would like to bring some suggestions which I hope to put in amendment form to your attention.

Society has continued to allow the ex-prisoner's record to follow him. In New York State we find that after a person has paid his debt to society, many times being trained for a profession, we turn around and say that he cannot be licensed for these jobs.

Some of the things that are prohibited in New York State in addition, of course, to the normal civil service exclusions, are: licensing

as an auctioneer, as a junk dealer, as an undertaker, as a real estate operator; and of course I think the extreme is as a barber.

And I understand in California they have at least 39 occupations which are considered off limits to men and women who carry the burden of saying that they are ex-cons. One area, however, which I don't think Congress should delay in dealing with is the hypocrisy that centers around voting rights.

As I earlier knocked my New York State Assembly, I must praise it now in providing legislation which automatically re-enfranchises an ex-prisoner as soon as he has completed whatever sentence society has placed upon him. It seems to me that, while most citizens don't really have too much confidence in the right to vote, one of the duties that we have as legislators is certainly not to deny it as you would deny candy to a child, but to say if in fact a prisoner has paid his debt to society, then he should be given the opportunity to participate in the elective process. I have introduced legislation to this effect. And it seems to me that if your committee saw fit to include this in the bill, would not provide any political problems.

Even those who come from communities where they do have a problem of employment, with ex-convicts getting scarce jobs, could be indeed the beneficiaries of an attempt to show that they are concerned with this large number of disenfranchised voters. It is my understanding we have upwards of tens of thousands of such people in the District of Columbia alone.

Senator BURDICK. Would you apply that to anyone who has served his sentence and released, so that his citizenship is automatically restored for voting purposes?

Mr. RANGEL. Senator, I certainly would. As a lawyer, as a former U.S. prosecutor, and as a lawmaker, I fail to understand why, when we say that a person has paid this debt, that he cannot leave prison in a manner which permits him to participate in a society in which more and more people are losing faith. And I don't see what we gain by punishing him and removing this very important constitutional right.

At the same time, it is clear it is no deterrent to his repeating criminal acts. In my community, many times I have found that an ex-convict has no interest in registering and voting, but I am able to sell him on the idea because I tell him that in white America they think it is important. So I tell him to carry his registration card because this is something they claim is important for you. And if you don't find the type of candidates that you believe in or that you would like to vote for, at least this is something where you show that you are attempting to work within the system.

And so there are people I have been able to convince that if America says this is the right thing to do, then at least they carry their registration cards with them. Now, this is not really what I would call dramatic legislation. I mean, if a prisoner has completed his term, paid his debt and is paroled or has obtained a pardon, these are really American rights.

It is really so that we can say "You have violated the rules of society, we have now made you pay your debt to society, and now we are going to give you a chance to participate within the rules of society."

So, if New York State, which is certainly not the pioneer State in this area, is able to pass this type of legislation, I believe that the Congress could also see fit to do it.

Senator BURDICK. Well, we are certainly going to give that consideration but you understand the thrust of this legislation is primarily in the economic area in trying to get jobs and we find that rehabilitation depends upon jobs.

Mr. RANGEL. I couldn't agree with you more.

Senator BURDICK. There is no reason that I think of why we couldn't expand it to include political rights and civil rights and just plain rights.

Mr. RANGEL. Perhaps if they could get the right to vote they could exercise a little more political clout on the bills that come before these bodies.

I won't go into detail, as I have in my written testimony, as to why repeaters as well as first offenders should be considered eligible. I do recognize that this would bring about a problem. It is my suggestion that we could make it automatic for the first offender and have a 2-year waiting period for second offenders, that if not now than perhaps later we could look into this as we test the climate of our colleagues.

Senator BURDICK. This presents a very difficult problem because on an individual case basis you might find that a three-time offender might be more apt to be rehabilitated than the first offender. So, we are taking the first layer to start with.

Mr. RANGEL. I hate to admit we in New York are trying to get legislation passed related to nullification of records for misdemeanors after the defendant has not been found guilty of a misdemeanor within a 10-year period.

For me to come here and ask for automatic nullification is idealistic because I recognize the political difficulties involved, but I don't understand why there would be such a different way of handling those that have been in prison as opopsed to those who have received a suspended sentence. And really to go into any criminal court in the State of New York, Senator—well, it is difficult to understand how long we are going to project this hypocritical attitude that people are equal under the law.

The fact of the matter is—that it is known by all—that judges participate in a conspiracy called plea bargaining and at the same time have the audacity to ask the defendant whether or not any promises have been made to him. Now, our court calendars are extremely crowded, to such an extent that the Commissioner of Correction almost calls the shots as to which defendants go to jail and which are released because of the overwhelming crowding of the institutions. This has led time and time again to rebellions and disturbances because it is impossible to maintain control in overcrowded prisons.

What does this mean? It means that the degree of offense which the defendant has been charged with or found guilty of has nothing to do with whether or not he goes to jail. It merely means that the court has to take into consideration whether there is any space in the jail and that the defense counsel only discuss this with the district attorney's Office. The outcome of this is really shocking.

The New York State Joint Legislative Committee on Crime has just revealed in a report that, from January 1970–May 1971, of the defendants who have been arrested for felonious sale of drugs, few have been sntenced to 1 year or more in the five counties that we have in New York City. For instance in New York County—and District Attorney Frank Hogan certainly is the image of a crime fighter and has been for the last 32 years—the committee found that of this group of defendants only 2.4 percent have been sentenced to 1 year or more. In Brooklyn it was 3.3 percent and in the Bronx it was 12.5 percent which was the highest.

So what does this mean? Either you are looking at the racial composition of the defendants or the economic ability of the defendants to get counsel, but certainly if for a very serious crime such as this when you find that those arrested for felonious sale of heroin can receive less than a year, you can imagine what happens when we start taking the other felonies into this.

So for the convenience of the court and because of the overcrowding of the penal institutions, we find some defendants quilty of serious crime receiving no sentence at all and some receiving a very tough sentence, I just don't understand why we must assume that because a judge sent the man to jail or found that he should receive a suspended sentence that this has any relation in reality to the seriousness of the crime for which the defendant has been convicted.

Senator BURDICK. What you are saying is the vacancy rate has a bearing on the sentence to be administered?

Mr. RANGEL. Make no mistake about it; that is one effect of the vacancy rate in the jails.

And I am not suggesting that I am revealing this for the first time. I am saying it is known by the judges and by the defense counsels. And really the thing that bothers me as an officer of the court is that question which is asked by the judge, the question "have any promises been made to you in order to induce you to plead guilty" when the judge knows he was a part of that promise.

In addition to that you have the case of the defendants who say they are innocent and who make the State go through the expense of a trial—and of course you can imagine the trial calendar we have in the State of New York. This frequently results in a situation where the defendant must be willing to pay up to 2 years extra in incarceration waiting for trial.

The judge lets it be known through the district that if the defendant is found guilty of the offense, he is going to throw the book at him. This is the method openly used in cleaning the calendar, so that for me to come from the State of New York and say there is no plea bargaining would be difficult.

I think you would agree with me that if in fact you are innocent until proven guilty—which is something I could go into and prove why you are not—but if in fact this is something we want the people to believe, why a person who has not been convicted should have to go through a process of proving to the world that he deserves to be treated as innocent as provided in the bill is difficult for me to understand—even though I am prepared to accept whatever political realities are necessary in passing any legislation of this type. But

there are some of these things that I don't believe we would have too much difficulty with, Senator.

Senator BURDICK. In other words, you don't think we should make a distinction between those on probation as to those who served sentences in an institution?

Mr. RANGEL. First of all I believe that there should not be any distinction at all because it is unrealistic as relates to States like New York. There is no probation officer who can tell you that he determines the ability of the person to be rehabilitated by whether he went to jail or whether he didn't go to jail. It is most unfair to have the dual standards because the method of deciding whether he goes to jail or stays on the street is a mechanical and technical administrative one.

Senator BURDICK. If a person had been on probation and he was out in the world and got in no further trouble, there is some evidence that he is more rehabilitated than perhaps the person who is incarcerated.

Do you think that is true?

Mr. RANGEL. If you go into New York State, most prisoners recognize that it depends on what time of year he was sentenced rather than the crime as to whether he should be on the street or whether he should be put away for 6 months.

Senator BURDICK. What you are saying is if I was a smart defense lawyer—after all I am just a country lawyer—if I was a smart defense lawyer in New York, I would see that my case didn't come up until I knew that the jails were filled.

Mr. RANGEL. In addition to that, as a smart city lawyer, you should select your judges very carefully—which, again, is accepted in New York. I mean, you can adjourn the cases. Attorneys are part of the reason why the court calendar is being flooded; but there is no question that there are some judges with certain attitudes, and if you pick the summertime, rest assured that your defendant for an equal crime convicted during the winter, if the sentence comes up during the summer, can get some instant "rehabilitation" through the court.

Another problem which is a nationwide problem is: What is rehabilitation and what standards are you going to use in order to have a judge fulfill his discretionary powers?

And it seems to me that this is a problem in section 3 of the bill before the committee; as evidence of rehabilitation, if a judge going to use whether or not he acquired a job, then of course he comes in with the impediment of being an exconvict and one of the reasons he may not have a job is because of this.

A second aspect of this bothers me more because sufficient activity in community affairs as a sign of rehabilitation would certainly depend as to what community you are talking about. We had in Governor Rockefeller's attempt to implement the yet to be passed H.R. 1 bill a provision which was subsequently deleted by the Health, Education, and Welfare Department that a welfare recipient in an attempt to—well, first, the welfare recipients would be stripped to $2,400 a year for a family of four but they could build back up to their present $3,600 if the family showed concern to get off welfare or if it showed community concern and one of the things that this bill was asking is that the children cooperate with the teachers, as defined by a caseworker. The family would then receive an additional $12.50 more twice a month. If the child was in the Boy Scouts or if the child belong to the Four H Club, they would get more money. And I can see where we are all trying to be very American about this and to get some very broad standards as to how the fellow does rehabilitate himself.

When you go into the communities from which these men and women come from, I find that the community doesn't offer them the ability to do these things and thereby come before a judge and say, "Judge, I have tried." So it seems to me that very broad discretionary powers are given to the judges and again what the lawyers will have to do—whether they are from the towns or villages or cities—is to start selecting judges that have more familiarity with problems facing people who live in the inner cities. And I think the administrative burden that you would put on the judges as attorneys attempt to select courts and judges who understand the problems better than others would probably congest our calendars further.

There is no provision for appeal or review once the judge decides that you haven't joined the right clubs or that you haven't done the right things.

But again I would like to say to this committee that I am delighted that we in the Congress have taken the courageous first step to face this problem.

It seems to me it is a very unpopular cause but, nevertheless, I am convinced that if we follow the leadership which certain people have given to us, we will be able to show them that not only are we concerned with the people, not only are we concerned with giving someone an opportunity after he has paid his debt to society, but, in the long run, society itself would be better off—and certainly the taxpayers will not continuously send people to jail and burden themselves with the terrific expense it costs to keep them there.

Senator BURDICK. Well, Congressman, you have been very helpful this morning and I appreciate your contribution. Bear in mind, you are aware of the fact that the introduction of the bill is just a starting point. It is going to be refined, it is going to be changed no doubt. As I said earlier, we are breaking new ground and the contribution that you and other witnesses make will be taken seriously.

We have already come to some conclusions that some of these sections need changing already. We are in the pioneer process in a new field that has been neglected.

Our next witness will be Mr. Sol Rubin, counsel for the National Council on Crime and Delinquency, NCCD Center, Paramus, N.J.

I am very pleased to see you this morning, Mr. Rubin.

STATEMENT OF SOL RUBIN, COUNSEL, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, NCCD CENTER, PARAMUS, N.J.

Mr. RUBIN. Thank you very much, Senator.

Senator BURDICK. You may proceed any way you wish.

Mr. RUBIN. I did submit a very brief statement. I have a packet of copies of them. I am not sure they were distributed.

I have listened to Mr. Miller and Congressman Rangel and I think that the message that they have given and probably the message you have gotten from others is that there are so many additional aspects of this problem that should be added to a bill of this kind that although they don't say it, I would like to say that I think a bill that did not include much of what they recommended would be inadequate, it isn't enough.

Ten years ago the agency that I represented then and now represent, the National Counsel on Crime and Delinquency, published a model act that I think was the origin of a lot of thinking with respect to the problem of a criminal record. The question of enabling an offender to get employment as other citizens do arose then and it is the origin of a lot of the things that went into this bill.

It was a model act to authorize courts to annual a record of conviction and some of the language in this bill I think came from this act.

I would conclude that the experience in the 10 years since then would support the need for a bill of that kind and that scope. And for us to do less is simply inadequate. As I say, it is rather inconsistant with your findings that have already appeared in the record.

I am very well aware that you are most sympathetic to the points that have been made and certainly those that I have listened to this morning were extremely well qualified to speak on this and I support their statements on this subject.

I certainly feel, as I said in my correspondence and in my statement, that to defer for several years the application of the remedies would almost wash out the benefits that you are looking for.

I have some comments to make on the notion of rehabilitation. I would like to point out that our own model act spoke of the need for this kind of remedy or these remedies to assist in rehabilitation. If a man comes out of prison, he needs help. He doesn't have to establish himself as a paragon of virtue before he can get a job as a janitor or other things.

Senator BURDICK. Do you think there should be any period of delay before the application is made after serving sentence?

Mr. RUBIN. I do not.

Senator BURDICK. On what basis would the judge have to go on to indicate that the man has changed his criminal way of life?

Mr. RUBIN. I don't think that this is the issue. I think the issue is that if we have as many people with a criminal record as we know we do, the presumption is that we want to restore the person who has been convicted to full citizenship. The presumption should also be that he is able to go out in that fashion unless you can establish that he is dangerous or that it would be dangerous if he did. And that is why in my statement I said this.

Senator BURDICK. I see; the State is removing a blotch upon his record and isn't it reasonable to assume that he would have to assure the court that he is going to do something in consideration for that?

Mr. RUBIN. I don't think so. I think that comment has been made this morning—and this is all I know about the testimony on the bill—that our criminal justice process is so defective, so artificial, that the record does not presume to speak with accuracy as to what has happened or even as to guilt.

I think that I heard Congressman Rangel correctly. The process of negotiating pleas is such that the threat of a very great penalty might impel an innocent man to make a plea of guilty. I think that these things are sufficient for us to put the presumption the other way; that unless the State or the Government can establish that the individual is dangerous in a real sense, all of these rights should be his; the rights of citizenship. He is a citizen; he is back in the community. We are attempting to do something favorable for him. A bill of this kind, even if it were to pass, would leave so many obstacles to his behaving successfully as a citizen, that it is inadequate.

Senator BURDICK. Well, Mr. Rubin, you have just testified that you had a model bill 10 years ago. What has happened to it?

Mr. RUBIN. I am afraid that what has happened to it is what may happen to this here.

Senator BURDICK. Well, the point is that if you ask for too much and you go too far, you might get nothing.

Mr. RUBIN. Actually that is the point I want to speak to next. I might say that I have been involved to a limited extent with legislation in the penology field and time and time again I have encountered the argument that we have so far to go we ought to take the problem one bit at a time and make what progress we can.

There are several things wrong as far as I can see with that and I speak as a reformer and not a politician. I understand the life of a politician and that is why I am a reformer and not a politician.

Senator BURDICK. Right now, Mr. Rubin, we are legislators.

Mr. RUBIN. Forgive me. Most legislators will say to men I am a legislator but I am a politician." Perhaps you wouldn't in which case I think that you will adopt many of the remedies that have been suggested.

But the point is that when minimal reforms are proposed, the proponents are themselves surrendering things that they believe. They are saying to the legislature, as you would be saying to the Congress, this is what we propose as a remedy—knowing that it is an inadequate remedy.

And it implies something else. It implies that to enact a bill that would really meet the requirements of the problem would be a danger to the society. It would be a danger to enact a bill with these limitations because the implication is that we must have far more evidence than we have that it is safe to go further; and that isn't so.

I think one good illustration is the reference to voting. What on earth is the danger of people with a record voting? In my opinion people in prison while they are serving a term should vote. Voting booths should be brought into the prisons. What is the danger?

In the same way I say what is the danger in adopting the recommendations that have been made for strengthening the bill coming closer to our 1962 act which would even then only begin to meet the problem.

I am encouraged by your having said—and I know this is true—that you are listening with great keenness to all of the testimony and that you propose to make changes.

Senator BURDICK. Well, I share your hopes but doesn't the fact

that nothing has been done to date indicate that you can't have everything?

Mr. RUBIN. It would not to me.

Senator BURDICK. This is the first bill that I know of.

Mr. RUBIN. I understand; so make it a good one.

Senator BURDICK. But it is the first bill.

Mr. RUBIN. Then make it a good one because if you, sponsoring the first bill, produce a bill that you yourself acknowledge does not go far enough, then we are in a bad way. How many years and decades do we wait?

Senator BURDICK. Because it has only been in the last few years that the citizenry of this country have been aroused by our penal conditions and penal reform. Do you realize this committee up until 3 years ago had an annual appropriation of $5,000?

Mr. RUBIN. I really don't think that is true.

Senator BURDICK. It is true.

Mr. RUBIN. I am referring to the impact on the public and not to the appropriations for the committee. I came into this field over 25 years ago and one of the first things I encountered were riots in the prisons. A riot is simply a demonstration to the public that people are being treated like brutes. This is not a new phenomenon.

Senator BURDICK. I know the problem is not a new phenomenon but the awareness of the problem is new. Otherwise we would have legislation by this time.

Mr. RUBIN. The course of legislation is something I would not propose to discuss except in pessimistic terms. What is needed is determined legislators who are not anxious to compromise and take less than is needed.

Senator BURDICK. Well, to conclude in summary, if it wasn't improved, you would be against this bill?

Mr. RUBIN. That is correct.

Mr. MEEKER. Mr. Rubin, could you speak on one technical point, that is, substituting the evidence of rehabilitation with the degree of dangerousness as the standard for a court to consider nullification?

Mr. RUBIN. Yes; that is a specific recommendation I made with respect to the bill.

Mr. MEEKER. Could you discuss that for a few seconds?

Mr. RUBIN. Well, I think that the presumption should be that the relief being proposed should be given routinely, presumptively, and the only occasion for denying the relief would be to establish that it is unsafe to grant it. I can't imagine actually many instances in which it would be possible to prove that but I think that should be the test, that is, that it is too dangerous to do that.

That is the whole basis on which people should be judged who have lost certain realms of action including employment, that is, is it too dangerous for them to do it.

That would be what I would recommend and what I would argue should be done.

Senator BURDICK. Even the tiniest first step of removing arrest records, isn't that a start?

Mr. RUBIN. So far as the arrest records, our model did not speak to it and I think that would be fine. I would, if a separate bill to cure

the problem of arrest records floating around destructively was suggested, support it. I think that would be great but if it is built into a bill that purports to cover the territory that this does——

Senator BURDICK. This doesn't purport to cover the territory. This is a first step and I am a bit afraid if you wait until you get a bill that covers the territory, you will be back 10 years from now with nothing done.

Mr. RUBIN. Well, that has been the experience we have been exposed to so far and that may be the reality.

Senator BURDICK. Thank you for your presentation. Your statement in full will be inserted in the record without objection.

(The statement of Sol Rubin and a biographical sketch follow:)

STATEMENT OF SOL RUBIN, COUNSEL, NATIONAL COUNCIL ON CRIME AND DELINQUENCY

S. 2732—NULLIFICATION OF CRIMINAL RECORDS

The existing law fails to protect persons with a record from abuse of their past history. The present Bill recognizes the need to ameliorate this situation, but its effort at correction does not go far enough, in my opinion.

Section 3 requires the passage of several years before a man may make his application, even though he has already been discharged from probation or parole. I suggest it is quite safe to not require this interval, a very substantial period of time in which an extremely difficult situation may well exist for the person who has already completed his sentence. If the kind of relief this Bill offers is to be of most use, it should be done promptly. We need not fear giving a court this authority at once. The courts are fully responsible to exercise any needed caution.

It may seem only a matter of words, but in the same section, subdivision (b) speaks of the need for the findings of "evidence of rehabilitation." I suggest that the language would be better if it substituted a reference to the dangerousness of the offender. In other words, rehabilitation is a fairly vague, amorphous concept, and it may be difficult to establish. But dangerousness, which is probably easier to bring evidence to bear on, is really the issue before the court.

But basically, the goal should be to go further. A man's record should not dog him once he has served whatever term (of imprisonment or probation—or none) is imposed. A statute should protect against use of the record after that. This Bill fails to do so.

One may compare the civil service practice in the Province of Ontario, Canada, where applications for employment *do not inquire* into the criminal record of the applicant, although it permits him to submit a confidential statement on the subject if he wishes.

BIOGRAPHICAL SKETCH—MR. SOL RUBIN

Mr. Sol Rubin, who has served as counsel to the National Council on Crime and Delinquency since 1945 is author of a standard legal text on the law of corrections. Surveys and consultation on correctional problems as well as the drafting of legislation for consideration by state legislatures have been a major part of his work.

STATEMENT OF PASCO L. SCHIAVO, ESQ., ATTORNEY AT LAW, HAZELTON, PA.

Mr. SCHIAVO. Thank you very much. Senator, first I would like to say that it is a privilege and honor to appear before you with regard to your bill today. I feel that what you are doing here is monumental.

What you are attempting to do here by the way of legislation is very very vital.

I have personally been involved with this problem from the standpoint of both defending people, that is, accused who have criminal records and who were faced with criminal prosecutions on the one side and also on the other side of prosecuting them but not at the same time of course, but previously in my career as an assistant district attorney in our county which embraces approximately one half a million people.

We are very concerned about this and when I say we, I mean member of the legal profession are very concerned about this because now people are being faced more and more every day with the prospect of having this criminal record thrown up in their face and having their careers stymied. And what you are attempting to do, Senator, what your committee is attempting to do here is to pass legislation similar in many respects to emancipation legislation; emancipating some 50 million or more people, that is, a full quarter of our population or more from the stigma of criminal records.

There are approximately 50 million Americans today who at one time have been arrested or convicted. Of these 50 million or more Americans certainly the great majority of them have just been arrested and their prosecutions have been dismissed or they have been found subsequently not guilty.

You are freeing these people if your legislation goes through. You are allowing them to come into society again and take a part in society which has been denied them and it really is nothing less than that.

Everybody I have spoken to from clients to fellow members of the Bar to legislators and so forth, tend to dismiss the problem of criminal records unless I ask them what they thought an arrest record or a record of conviction would do to them and how they would feel about it if they were ever faced with the situation where a person from out of the blue came in and arrested them on a crime that didn't sound so nice or any crime for that matter. Then of course it becomes real. I asked them if a relative of theirs or a dear friend of theirs had been arrested by someone for a particular crime out of maliciousness or anger, what they would do and how they would remedy it. When they can't come up with an answer, they then begin to take a more serious view of this problem of criminal records because contrary to what most law enforcement officials believe, an arrest record is a criminal record and just as powerful as a conviction. When an arrest record is brought before a person whether in public confrontation or not, whether an arrest record is aimed at a person to hit him in the newspapers or not, it is a conviction record in the eyes of the people that see it and all that a subsequent jury or a judge has done does not erase the stigma. The same stigma exists.

So, arrest records are very real and perhaps the first thing that could be treated by this type of legislation. The problem begins with there being too many people with too easy accesibility to these records. Number one, the public at large. All of these records are lodged in the county courthouses, in the sheriff's office, in the local police stations, on police blotters and so forth, and be it arrest records or

conviction records, anybody can go in there and pull them out 50 years afterwards and bring up something that happened to your grandfather or to you and he can use it not only against you or your grandfather but against your whole family and all of your friends or the victims family if they were involved with the particular offense.

This is how far this particular problem of criminal records goes. We should not have such accessibility. It should be at least limited or curtailed to begin with. The modern electronic world with which we are faced today makes indelible the arrest and criminal records. It is becoming more computerized and electronic as each day goes by. I think that whenever a person is arrested or convicted today there must be 200 copies made of this record or 200 you might say communications sent out about it to various agencies; Federal, State, and local agencies for them to keep on their records.

And of course there is the special problem of the person with an arrest or conviction record who applies for a job or the younger person with a juvenile record who wants to apply for university or college or training school matriculation or for military service enlistment. And they must answer to that end, of course, every time they put down the information which is so badly and bluntly asked of them, they also spread it upon a dozen other blotters and folders and it also is spread out like oil on water, and this person's record becomes more and more indelible and widespread as time goes on.

That is one of the bad effects of asking whether you were ever arrested or convicted. This thing just spreads and spreads. And that is another reason too why we must act now on it because as time goes on, it spreads even more and of course there are more records to be kept and more records to be opened up that hold such information.

The problem of civil disobedience I think has already been well covered with regard to that. Certainly these should be removed with regard to arrest records. In fact, the proposition that I see is that anybody who was under arrest and who has received a permanent disposition in his favor of the particular charge for which the person has been arrested should have this arrest record removed and destroyed immediately. If we are going to assume in our society (as we must under the constitutional precepts of our great American society) that a man is presumed innocent until proven guilty beyond a reasonable doubt, then we must assume that the effect of an arrest record lingering afterwards is violative of this and perhaps is unconstitutional.

While it may be unconstitutional for an arrest record to so exist, legislation is really the only clear answer to this problem.

Senator BURDICK. At this point, why should the question ever be asked whether he was arrested?

Mr. SCHIAVO. It should never be asked.

Senator BURDICK. A conviction question is more basic but why should a question as to whether the person has ever been arrested ever be asked?

Mr. SCHIAVO. It shouldn't be. You are right. It is asked I would say in a majority of applications. I know it has been removed from Federal application and some state questionnaires for employment but it is still asked indiscriminately and particularly with regard to employment by private industry.

There is where the big problem occurs and this applies to colleges as well. It should be removed, and it should be a misdemeanor to ask such a question. You might ask were you ever arrested for a charge which has not been disposed of at this time and maybe that could be asked but even there we are running into problems because of course maybe the charge will be disposed of shortly and the person is stuck with that record.

Senator BURDICK. That can be handled by asking if there are any charges pending.

Mr. SCHIAVO. Right.

Senator BURDICK. And just forget about the question about any arrests?

Mr. SCHIAVO. Exactly. That is a good way to deal with that particular problem. And certainly there should be a blanket prohibition against blankstly asking whether or not a person has ever been arrested. Now, I think too that much reliance is place upon these records by not only employers and people in private industry but also by educational institutions. And here is another thing we must consider the problem of juvenile offenders. Wherever you have the thought of conviction records in mind in absolving or nullifying records, I think that special consideration must be given to juvenile offenders. They are at a particular period in their life when they don't have the time, that is they don't have the time for the 10 years or the 7 years probationary period necessary for the record of their particular offense to be nullified by virtue of good behavior over that period of time.

And let's say a juvenile offender is maybe 16 or 17 years of age when something happens. Most of the juvenile crimes I think do occur between the ages of let's say 14 and 17.

Senator BURDICK. Do you mind suspending this for about 4 minutes?

[Recess.]

Senator BURDICK. You may proceed.

Mr. SCHIAVO. Thank you. I was speaking about juvenile offenders and when we consider nullification or expungement of their records, Senator, I think shorter time periods must be considered because of them being in the critical period of their lives when they will be applying to schools, the military, and for gainful employment. This is the critical point in their lives.

It is during this period of their youth when crucial decisions must be made that will influence strongly the rest of their lives. It is therefore at this particular period that their earlier record might keep them out of society or from making the proper start necessary for a successful and well adjusted life.

Senator BURDICK. What has been your experience, does the juvenile court permits the records to be scattered around the country?

Mr. SCHIAVO. For the most part, yes. The juvenile court records in most jurisdictions can really as a practical matter be looked into and examined even though there are statutes in states limiting the investigation of such records to proper court officers and to parents and guardians and so forth, but still and all it is broad enough so that really any law enforcement officer can look at it and anybody

from some agency or subagency can look at these records and use them against any particular offender and, of course, the juvenile must answer the same questions on arrest and conviction.

Senator BURDICK. You mean to say that a juvenile who skipped school and is taken before the old fashioned truant officer and juvenile commissioner and lectured, that that record is then dispersed around the country?

Mr. SCHIAVO. It is in some jurisdictions. It is sent around in some situations where perhaps this is the second time the offense has occurred. Now, In Pennsylvania, for example, the first time that a juvenile appears in juvenile court, most courts take the unofficial position that it will not make a record of it. The judge talks to the individual and sees what can be done but if it is the second time, then a record is made and it is lodged, and if a juvenile is sent to a reform or correction institution as you would call it, then of course the record goes with him there.

The problem is there is no law on this first time, unofficial hearing but this is how it is handled as a practical matter, that is, there is usually no record made. Of course with the recent Supreme Court decisions on juveniles having to have lawyers and so forth, this is a deterent because then a record must be made in just about all of these situations and so that is something that has sort of backfired.

Here is something that spreads itself. A record is made and it is indelible and follows the juvenile offender everywhere. In summation I would ask that your committee especially consider shortening the period of time of probation for juveniles and not keeping it the same as you would for adult offenders.

Senator BURDICK. What do you think about the time period for adults in the bill?

Mr. SCHIAVO. I think perhaps the time period in your bill it might be a little too short on this particular point. I think that the bill itself is a fine bill. I think that perhaps what we should do is give consideration to making it 7 years instead of 5 years in the situations you have outlined in your bill until we see how the bill does work out in practice as a law, how it is used and how people take to it and how it proves itself.

It is a simple matter to reduce the period but the important thing —and I definitely agree with your thoughts on this—I think is that you get something through now that is workable and that will make at least a stride forward in an area that is totally lacking. I don't know if you can get in something that is completely comprehensive in the way of reform. Certainly you should take a big step right now in the area of arrest record. I think that is the first area you should deal with.

Senator BURDICK. One of the previous witnesses stated we ought to enpunge the record as soon as they leave the gates of the jail.

Mr. SCHIAVO. I wouldn't agree with that because I say that the best evidence of what a person is like is how a person acts and how he behaves under certain circumstances. You have sentencing procedures by different judges in different, let's say, State courts indicating is a great disparity in sentencing and I say in my arguments before the judges when I represent a client to consider what this

person has done out in free society without anybody confining his activities or behavior or holding his behavior to a certain norm. While he use out in society, consider whether he was doing civic work and whether he was really an active member and a constructive member of our society. That is real proof and the best indicator of what he is really like. A person out in free society with no special restrictions on his activities who proves himself and who has proved that he is a rehabilitated person—and I am speaking of the convicted person—then that person definitely does deserve to have his record nullified and has deserve to be released of all civil disabilities but he must be given this trial period out in free society and at liberty and away from the arm of the probation department or the law enforcement agency. To leave the prison gates and then have his record automatically nullified is no good because we don't see how he is really going to behave on his own on the outside. This approach of immediate and automatic nullification also removes another thing —the fact or of incentives, something you have built into the present bill. I feel that incentives are necessary for people. If a person has no incentive to go straight or be a good member of society, then that person should not have his criminal record nullified because the object of nullification or expunging of criminal records is to free the basically good person, the person who was guilty of an aberation of behavior, who went wrong once or maybe one and a half or two times, but who is basically good and can contribute to society and so we don't want to penalize him.

It is not meant to apply to everybody under all circumstances. And we have to give that person who is basically good or who can be basically constructive member of seventy an incentive. You do this by having him prove himself for a period of time as through this bill.

And a person who knows that he only has a year or 2 to go until he can get his record nullified or expunged, may watch himself a little more closely than a person who says well "what the heck, the way the law is now I am finished! Under the proposition of automatic expungement or nullification a person might similarly say, What does it matter if I am convicted of another crime because the next time I leave prison my record is going to be nullified automatically." I think both extremes are bad.

Senator BURDICK. You put your finger on the theory of the bill. In my colloquy with the former witness I readily admitted if he was successful, it might be expunged, but it is at least a starting point for the individual——

Mr. SCHIAVO. It definitely is and its a great starting point. I think it is something long overdue at this time. I think it will pass. I would like to bring to your attention, Senator, an act that has been passed by our neighboring country to the north and this act—it is chapter 40 of the Statute of Canada, 1969-70—is a Federal act passed in Canada which deals with nullification and expungement of criminal records.

This is certainly a good act to use in your arguments with your colleagues because this was passed——

Senator BURDICK. Do you have a copy there?

Mr. SCHIAVO. I do.

Senator BURDICK. Could you supply that to the committee?

Mr. SCHIAVO. Yes. And Senator, I just want to touch on a couple of particular examples of people whose arrest records should be nullified and expunged and I think it is relevant to what your bill contemplates. I had a client who was arrested 30 years ago and convicted of a crime in a local court with a judge that you would not have the highest esteem for today. This client was 18 years old at the time. His friend, the one who actually committed the crime, was a 30-year-old man who was a strong influence upon him and talked him into waiting in front of a store while he went in and burglarized it, and when he came out, this young fellow didn't know what he had done. The authorities hauled them both into court and convicted them. They had the young fellow in jail for 18 months before he was actually tried. This case today would not get to first base from a constitutional or legal procedural point of view.

It was definitely an unlawful arrest and conviction. It is this sort of situation too that is meant to be corrected by your bill. I had another client who applied for a liquor license in Pennsylvania and was turned down because he had an arrest record. The issuing authority gave no particular reason, but we all know he had to put down the fact that he was arrested for assault and battery by somebody who had it in for him, and for which he, incidentally, was found not guilty.

Another person called me who was in a very hot contest for the presidential spot of a large corporation, and he had an arrest record in Missouri dating back about 25 years previously. He knew that this was going to be used against him at the board of directors election meeting and so forth. He knew the opposition could bring in copies of this arrest record. He asked what could be done under expungement procedures of Missouri law, and I told him as with most states not much could be done. He was the best qualified person, if what I understand is true, but he was ruled out anyway due to his record which finally was disclosed.

Also, there was an accountant from Philadelphia who spoke to me and who was convicted of soliciting with regard to a woman that he had been with this woman for an evening was undeniable, but he hadn't paid her or something of the sort and she arrested him for solicitation to retaliate. He was convicted in Philadelphia County several years ago and he has this on his record.

This is a middle-class American you see. He sees this happening to others and can sympathize with them, for now he is a person who has to go through life with this particular arrest and conviction record and it is the only one he has ever had. He is definitely hurt by it and hurt permanently. We have one more example. I have a clipping here from the New York Times, dated December 6, 1970, showing a fellow, a black from a slum in New York City, 20 years old who was arrested mistakenly.

This fellow has been trying for 2 to 3 years to get his arrest record removed from police blotters and removed from the county clerk of the courts' record. And he can't do it. I say not only should his arrest record be removed completely but for this man here, even if he were convicted of a misdemeanor and years had passed, the fact

that first he has behaved well and been a constructive and contributing member of society during this period of time of two to three years, and is so interested in nullifying his record leads me to believe he probably will become a permanently good member of our society. He is a person who should be given help in this type of situation. This type of person is being drawn into the other corner of the habitual offender, the recidivist.

Some help or relief should be provided for the habitual offender too. But I don't know what at this point. Senator, I feel that when the person is not allowed the opportunity of an incentive, then that goes to the root of his behavior and serves to dampen his will to be a law abiding citizen. He must have this incentive and must seize on this incentive. Thus all convicted persons who have shown definite evidence of rehabilitation should have an opportunity for nullification of their records or perhaps just having their records maintained, but sealed off from public scrutiny in the more serious offenses. The arrested person should have his records automatically wiped clean and no record except a certified copy showing it was disposed of should be made so that he won't be in danger of double jeopardy. Such certified copies should be put in the hands of such a person alone.

The convict should always be allowed a chance to come forward and should himself take the step to come before the particular court and make the initial move for nullification or sealing if he is that interested, and a person like that I believe would definitely benefit himself and society. A person like that should not be hurt by a criminal record.

So, I say that if you have to pass a law that would engender a lot of instant controversy, then maybe you should pass a law first prohibiting any employer in interstate commerce or where Federal jurisdiction would lie from asking bluntly whether you were ever arrested. From that law you can then move along with the larger package of legislation you have proposed here.

I also would like to, if it is at all possible, to make this proposed legislation apply to State as well as Federal convictions and arrests.

I think we are denying the citizens of this country equal protection and due process under the 14th amendment if you have one realm of Federal activity that is protective of citizens' rights and another of the State, which involve maybe 95 percent of all crimes committed which is not protective, I think we must have this bill or subsequent law serve as a model for States and must also examine the distant possibility of this proposed law being extended directly to the States and to the State courts.

I think that with all this you might be standardizing a procedure which will give equal protection under the law. I would like now to just point to some of the aspects of the legislation which I think might be helpful outside of what I have already sent into you; some things I have since thought of.

First, I think the application hearing should be private, that is, the application hearings where the person would apply for nullification or expungement or sealing off. I think the hearing should be private. I don't think the door of the courtroom should be open so

that people and reporters can come in. Otherwise, the procedure defeats the purpose of the proposed law.

I think that the applicant person should be allowed to come in and show that he has behaved well during this required period of time or that his conviction has been annulled and then have the record nullified from that point.

Senator BURDICK. In other words, the hearing itself might be a proliferation of the information?

Mr. SCHIAVO. Yes, definitely I feel it would be. I think also that there should be you might say a better definition of nullification or expungement or sealing off. In other words, does this go just to the complaint filed against the person or does this go to all of the testimony etc.

Perhaps one of the ways would be to seal the record from any public scrutiny in the case of a convict whose conviction has been nullified, for example, to microfilm it, destroy what was microfilmed and deliver the microfilm to a security location.

Section 9 of the bill could be simplified by leaving the former order of nullification stand but exempting the second or subsequent offenses from any of the benefits of the bill.

Now, in the Canadian legislation, the whole record is delivered to the Solicitor General. It is lifted out of the police blotters and the county courthouses and it is lifted from the federal agencies that are involved and brought to the Office of the Solicitor General and there filed. It is really a sealing off process.

Perhaps this might be considered in a better definition of expungement.

Senator BURDICK. We assume when you quiet a record, that the whole record is quieted.

Mr. SCHIAVO. Fine. I didn't know if that was clear. I assumed that you were working along those lines too, Senator.

I feel that our society of course is one that is one of great flux, of many peoples, and of many different classes of different peoples who pass from one class to another across socio-economic or other lines in their lives or their children's lives or whatever. This is the greatness of the American Society, but such flux and conflict have brought more trouble, including arrests and convictions, to certain groups of people at certain times than to other groups.

Here in the United States we need this legislation more than any other country with waves of immigration and social unrest—and as you know, these rise and fall—but you have more activity at various times which might fall into the realm of violation of law and which really does not indicate that these people or groups would normally violate the law.

In the American society more than any other society is where there are so many of these waves and conflicts and problems, more so than any other country, of what I would call abnormal aberrations in violating the law, that is, which are not typical of these people under settled circumstances. I feel again that you should try to get some part of this bill passed and to do it as soon as possible. Every day that passes I think is lost especially if it means passing part of the bill now and part of it later. As I stated before, you

could get by with a part of the bill enacted into law now. And as I mentioned in my June 1969 article in the American Bar Association Journal which you have noted, there are some States that have passed some legislation along these lines but this legislation is not as good in the present bill. In any event such state legislation does herald a step forward and indicates that they, the states, are trying to do something.

I think your bill is perhaps clearer than most of these other bills and I think that we should examine some of these statutes too to see if something can be done to use them to help refine this bill where and if needed.

In Pennsylvania through the Senate we have already introduced a bill making it a misdemeanor to ask if a person was ever arrested on any employment questionnaire or military service questionnaire with regard to the National Guard or on any educational institution questionnaire. This is also another first step.

We have tried and are trying. There is a resolution, introduced by us through State Senator Murray, into the Pennsylvania Senate concerning this whole issue of criminal records and asking for a full study of the problem. It is necessary to seeing what could be comprehensively handled with regard to this entire problem. It is my understanding that this was how the Canadian legislation was born. And I will make a copy of that legislation for your subcommittee.

Senator BURDICK. When was that adopted in Canada?

Mr. SCHIAVO. June 11, 1970.

Senator BURDICK. So they would have a little experience in it now?

Mr. SCHIAVO. Yes, I think the importance of this too, Senator, is here is a country who had adopted a Federal law just like this and of course our societies are quite similar in a sense.

Senator BURDICK. We might inquire of Canada, if we can at this early date, what experience they have had. Of course a year and a half or 2 years isn't much of a test but I appreciate your bringing it to our attention and we will follow it up too. Thank you very much for your contribution today.

Mr. SCHIAVO. And my statement——

Senator BURDICK. Will be placed in full in the record.

(The statement of Pasco Schiavo and a biographical sketch follow:)

STATEMENT OF TESTIMONY OF ATTORNEY PASCO L. SCHIAVO

I. The problem of criminal records as it relates to the first time offender, the convict capable of reform and the recidivist is a very real and modern day problem.

A. The criminal record has unjustly and permanently damaged and deterred the character and progress of innumerous citizens who could and would make valuable contributions to American society.

1. There are approximately fifty million Americans who have at one time or another been arrested or convicted for offenses and which events have been permanently logged to their detriment. The great majority of these people are basically good citizens who are adversely affected either directly or indirectly by their criminal record. An arrest record is a criminal record, and it is very easy for anyone to arrest or bring charges against anyone else whatever this motives.

2. There is too easy accessibility for any and all persons and parties with any motives whatsoever to such criminal records. Such records are easily obtained from our local courthouses, police forces and any other governmental agencies. This alone can lead to blackmail, extortion and threats against people who would normally enter controversial and competitive situations to the benefit of society in general. This acts as a deterrent for such a qualified person to improve himself by seeking and securing political office, jobs, promotions, military service and education.

3. The victim himself and the family of the criminally accused also are adversely affected by such records which impugn them and to a more serious degree as the crime becomes more serious in scope.

4. With modern electronic and computerized record keeping and information storage centers and with most questionnaries asking if the applicant has ever been "arrested or convicted", the adverse effect of the criminal record is spread and preserved even more. This situation will worsen as modern technology improves.

5. Those arrested and/or convicted and who have lead subsequent exemplary and law abiding lives still face certain civil disabilities as being confronted with their record for impeachment purposes by a cross examining party in a legal proceeding or trial by the loss of voting, professional, employment, hunting, fishing, etc. privileges and rights to say nothing of the misuse of such information by prospective employers, lending institutions and insurance companies as a poor excuse for denying jobs, loans and insurance protection. There is also the added problem of criminal registration statutes.

6. Particular examples of the injustice of criminal records will be given at this point and as the undersigned has personally represented these parties.

B. Severe injustice is done to those arrested or convicted under statutes and laws that have since been repealed, reduced in degree, or held invalid or unconstitutional; furthermore, many past convictions were procedurally and constitutionally defective, illegal, unlawful and invalid in light of modern Supreme Court decisions and legislative enactments.

C. The juvenile offender presents a somewhat different problem in that his record was created at a time when he was young and in many instances irresponsible or immature and when the consequences of his record will have the most devastating effect on his life. It does not matter whether or not this young offender subsequently becomes a fine and integral part of society; his criminal record still holds him down and especially at such crucial times in his life as when he applies for matriculation into military service or for admittance into academic or trade school institutions.

D. The recidivist or habitual offender cannot benefit by many proposed criminal record reforms but must still have some incentives to mitigate (if not reform) the rashness of his antisocial behavior.

II. There is a sound philosphical, legal and social basis which presently cries out for reform in the field of criminal records.

A. Our constitutional system is predicated upon the presumption of innocence until an accused is found guilty beyond a reasonable doubt.

1. With this in mind the argument of many people that an arrest record is necessary to "contain" certain accused parties is totally invalid and violative of our constitutional law.

B. A party with an arrest or minor conviction record, knowing that the passing of certain years without a subsequent offense would erase and nullify his record, would have a definite incentive to become a law abiding citizen and to watch his own behavior closely, especially as the time limit for such a period closely approached.

1. People with conviction and arrest records are reluctant to better themselves in that they actually have little or no possibility of starting over without the stigma of a criminal record. What is more, they feel this way.

2. Our law has already accepted part of the foregoing principle in the way of adoption by many states of the point system for traffic violations and the like and which points are removed year after year as the driver drives more safely without subsequent offense and in accordance with the law. The law cannot recognize an incentive here and no incentive in the field of criminal records.

C. The law will not permit double legal jeopardy but ironically fosters multiple social jeopardy by supporting and making permanent the criminal record.

III. Reforms in the area of criminal records need to be comprehensive, uniform, and instituted immediately by legislative enactment at the federal and state levels. See June 1969 Article "Condemned By The Record" by the undersigned appearing at page 540 in the *American Bar Assocoiation Jounal*. The following comments also refer to Senate Bill 2732.

A. This is the one area of law where absolutely little or nothing in the way of reform has been instituted or nurtured; yet, it is this area of criminal records which has the most widespread, inhibiting, prejudicial, and adverse effect on more Americans than any other area of criminal law.

B. Arrest records of people subsequently found innocent or where the charges have been dropped and so forth should be destroyed with no vestige or trace left thereof except a meaningless docket or term number at the most and perhaps a certified copy of the proceedings delivered to the arrested party for his protection from any double jeopardy prosecution.

C. Those convicted of misdemeanors and lesser felonies and who have not shown any recidivist or rash behavior for five or ten years thereafter should have their criminal records either destroyed, nullified or sealed from public inspection upon either a hearing or application on the matter or automatically after a certain statutory period (See said June 1969 article "Condemned By The Record). Laws should be passed prohibiting the keeping and maintaining of any copies or notes of such nullified or sealed records or of the records themselves; and the application to destroy, nullify or seal the same should itself be sealed off in order not to defeat its purpose.

D. All juvenile criminal records except in the case of serious or first degree or common law felonies should be automatically destroyed several years following the entry of said person into the realm of adult jurisdiction of the courts provided said person has not committed any further offenses for which he has been found guilty. A shorter period of time should apply to the record nullification probationary period for juveniles than for adults except as in the case of said more serious crimes.

E. Heavy consideration should be given to the right of application for nullification by the person convicted of a more serious crime or felony where the conviction of such a crime would not otherwise qualify him but where a great length of time has nonetheless passed and proven him to be a law abiding citizen and where his conviction can be shown to have been procured under dubious or illegal processes and procedures, especially on the face of the record of such proceedings. This could come after a full and private hearing for the applicant before the court to which he applies.

F. Serious consideration must be given to all the testimony, pleadings and other filed documents relative to the accused whose criminal record is subsequently nullified or removed since the whole aura of the proceedings (and every part thereof) is about his crime or violation, thus defeating the removal of nullification of his criminal record. For this reason, the nullification or removal or sealing off of a criminal record must run to the entire proceeding and all the pleadings and testimony therein.

G. Nullification of criminal records should occur automatically with the granting of a pardon. Sealed criminal records should be automatic for any party who has become deceased and for the protection of his family from the derision and stigma caused thereby.

H. Civil causes of action should exist in tort (apart from slander and libel) for damages against any party or parties who publish facts about a nullified criminal record and in favor of the applicant (or his family where he would be deceased) to the extent that said damages can be established and with punitive damages being a part thereof. A civil cause of action should also exist in favor of such a successful applicant and against any decision making party or parties who shall discriminate against the applicant in any occupation, promotion, grant or other such application because of his criminal record.

I. There should be a general legal prohibition against anyone asking bluntly on any application or in any interview if a person was ever arrested or convicted of any offense. Such a question should go only so far as to ask if a person was ever convicted of an offense the record for which has not been nullified or whether or not a person is presently under arrest or indictment for a yet undisposed of criminal offense or charge. No questions or inquiries should be made as to whether or not an application for nullification or expungement was ever filed or processed by said party. It should be noted that "nullification" and "expungement" are interchangeable in definition; moreover, the actual effect to be given to these terms must be determined with great precision and clarity by legally enacted procedures and without sacrifice to the res adjudicata or single jeoparty protection which is afforded the criminally accused or said applicant hereunder through the disposition of said initial proceedings.

J. Once a person's criminal record has been nullified, he should have all of his civil rights fully restored to him.

K. There is no sense in having one state with such criminal records reform protection and other states or the federal government without it in the face of our highly transient society and population; furthermore, this would amount to a denial of equal protection under the law and an uneven result which should be avoided at any cost.

Dated: February 17, 1972.

BIOGRAPHICAL SKETCH—MR. PASCO L. SCHIAVO

Mr. Pasco L. Schiavo, who is a practicing attorney in his home town of Hazleton, Pennsylvania, has long advocated reform in the handling of criminal records in bar journal articles and through appearances before the Pennsylvania Legislature.

Mr. Schiavo, who has served as an assistant district attorney, was named an Outstanding Young Man of America in 1970.

Senator BURDICK. Would it be convenient for you, Mr. Kittrie, to come back after lunch? We are running a little late.

STATEMENT OF NICHOLAS N. KITTRIE, PROFESSOR OF LAW AND DIRECTOR, WASHINGTON COLLEGE OF LAW, INSTITUTE FOR STUDIES IN JUSTICE AND SOCIAL BEHAVIOR, THE AMERICAN UNIVERSITY, WASHINGTON, D.C.

Mr. KITTRIE. It would be somewhat difficult. I could present the main points of our statement and submit the rest.

Senator BURDICK. All right. Your entire statement will be made a part of the record at this point.

(The statement of Nicholas N. Kittrie and a biographical sketch follows:)

STATEMENT OF DR. NICHOLAS N. KITTRIE, PROFESSOR OF LAW AND DIRECTOR OF THE INSTITUTE FOR STUDIES IN JUSTICE AND SOCIAL BEHAVIOR, THE AMERICAN UNIVERSITY LAW SCHOOL

Mr. Chairman, Members of the Committee: My name is Nicholas N. Kittrie and I am a professor of criminal and comparative law at The American University. I also serve as director of the Institute for Studies in Justice and Social Behavior. Together with me here are Mr. Joseph Trotter, who is the administrator of the Institute, and Mr. George Vince, who is a participant in our law school's Seminar on Law and Social Deviance and has done the major work on the attached memorandum.

The Institute for Justice and Social Behavior is a multidisciplinary organization dedicated to research, instruction and community services. One of our major undertakings is the Lawcor Project (Lawyers in Corrections and Rehabilitation) which for several years now has been rendering legal assistance to D.C. prison inmates and their families in civil matters. The major aim of Lawcor is to contribute to the rehabilitative effort of offenders by demonstrating to them that the law can serve them too. Recently we initiated a new experiment, designated Project Cope, to help prepare soon-to-be released inmates for problems they will face in society. Consequently, we have long standing experience and interest in the inmate's preparation for reentering society. We also have much concern with the existing roadblocks in his return path to a lawful existence.

Let me point out initially that we are not wild eyed reformers who are unaware of the realities of crime and criminality in this country. Neither do we believe that rehabilitation is the sole aim of the criminal process. In enforcing the laws of this country and in subjecting people to legal sanctions, we must continue to be aware of the need to protect society by incapacitating (through confinement and otherwise) those who threaten it. We must likewise be pre-

pared to rely on the hopeful utility of the criminal process in deterring both those who have once offended the law and many other potential offenders. Reading recent statistics from New York City, for example, where some 74,000 robberies were reported in 1971 and only some 300 of these resulted in prison confinement, it becomes abundantly clear that the crime problem of that city would not be resolved even if all these 300 inmates were rehabilitated.

Fully aware of the need to look at crime and punishment as complex problems, we nevertheless approach the proposed bill with few doubts or misgivings. We believe that the bill now pending before this committee, S. 2732, is a major step towards putting a true meaning into the rehabilitative aim of the Federal and state correctional effort. In our opinion the single question that needs to be answered in connection with S. 2732 is as follows: Once an inmate has paid his debt to society and been released back to it (which means that somehow society's incapacitation and deterrence grips over him are released) what social advantage is to be derived from imposing upon him continued disabilities which hinder him in his effort to demonstrate that he can live a normal and lawful life?

It is our conviction that the lack of access to employment opportunities and the denial of labor market mobility are by far the most critical problems faced by the ex-offender, because on these depend his status and viability as a non-criminal member of society. When it is evident that many offenders—especially those with the lowest post-release success probabilities—are already handicapped by lack of manpower skills, inadequate education and other personal disabilities, to add to these the burden of an indelible criminal record is to nurture, as Senator Burdick has pointed out, a self-fulfilling prophecy of failure.

The magnitude and the economic and crime control ramifications of this problem are brought sharply into focus by estimates in the tens of millions of citizens with criminal records and as many as 50 million with arrest records. The access of this population group to both the public and private employment sectors is severely and effectively restricted, both directly—through statutory and constitutional exclusions—and indirectly through the exercise of discretionary power by licensing, bonding, and hiring authorities.

Amelioration of this tragic situation is clearly an area for federal leadership. Although about one-fourth of all the states have statutory or constitutional provisions for expungement of criminal records and thirteen states have provided for automatic restoration of civil rights of a rehabilitated convicted person, legislature- and court-decreed restrictions as to the effects of such procedures have substantially diluted their impact on employment restrictions. The bill being considered here surpasses, in its scope and potential for improving ex-offender labor force participation, any existing domestic legislation in this area. At the same time, the very fact that the bill is an innovative and serious attempt to promote the best interests of society by facilitating the ex-offender's absorption into community life underscores the importance of assuring that its provisions are adequate to realization of the legislative intent.

I would like to comment on two provisions of the present bill which we feel detract from its purpose and diminish the potential benefits to be derived therefrom. The first of these is the mandatory waiting period before eligibility to apply for a nullification order, as specified in Section 3 (a) [1 and 2]. Our objections to this requirement are both philosophical and pragmatic.

Philosophically, we find it difficult to resolve the ostensible contradiction between the bill's stated purpose of mitigating the employment problems faced by ex-first offenders and its requirement that they wait 3-5 years *after* completion of sentence before being able to nullify their criminal records. The employment problems these men face and the hindrance these problems pose to their stability in the community begin when they *return* to the community. If they must prove that they can successfully cope with these problems for 3-5 years before being able to remove the major impediment of a criminal record, then the bill's force is primarily that of a reward rather than the rehabilitative tool that we feel it is intended to be.

Pragmatically speaking, if community performance is the major factor in establishing eligibility, then those offenders who have served their sentence on parole or probation would be able to point to successful community performance during that period as indicative of their suitability to obtain a nullification order.

With these objections in mind, we respectfully submit that the following eligibility criteria would better serve the rationale and objectives of the bill, assuming that evidence of successful community adjustment is an essential prerequisite for receiving the benefits of nullification:

(1) For convicted persons who were fined or who received a suspended sentence, a waiting period of 12 calendar months after imposition of sentence.

(2) For convicted persons who were placed on probation: if the probationary period was more than 12 months, upon successful completion of sentence; and, if probation was less than 12 months, upon the lapse of 12 calendar months from the time sentence was imposed and including the period of successful probation.

(3) For convicted persons mandatorily released from prison, upon the expiration of 12 calendar months after release.

(4) For convicted persons released on parole, upon the successful completion of the parole period.

We believe that these eligibility provisions would provide an ample time frame and sufficient documentation upon which to evaluate the community performance of released offenders. Probation and parole officer reports would be the basis for determining the suitability of applicants whose sentences were completed under those conditions, and 12 months after release from prison is a long enough period to permit a fairly reliable reading on the rehabilitation status of mandatorily released inmates, while keeping to a minimum the time they must carry the burden of their criminal record into the labor market. These procedures would also decrease the rather substantial investigative burden the bill places upon the executive and judicial branches under the present time-lag provisions.

An even more desirable modification of these provisions would be to have no waiting period at all for nullification of the criminal record and restoration of the civil rights of first-offenders who have completed their sentences. This recommendation, of course, is based on the assumption that the penalty imposed at time of sentencing is the *complete* penalty for the particular offense, imposed by the judge within the parameters of legislatively prescribed sentencing limitations, and that the socio-economic disadvantages attendant on having been convicted are simply coincidental, non-officially sanctioned consequences of the conviction. Under these assumptions, the need for a period of community performance to prove that one has been "rehabilitated" before being eligible to have his criminal record sealed and his civil rights restored is obviated. Also, if these assumptions are valid, there would be no need for an application procedure and investigation; reinstatement to full citizenship and sealing of the record could be made automatic upon receipt by the District Court of a certification of completion of sentence by the correctional unit having final supervision or custody of the defendant, or by the court clerk upon payment of a fine or expiration of a suspended sentence.

By requiring the former offender to petition the court for a nullification order, we may be asking him to do too much. It may be placing a burden on him that he is unwilling or unable to meet. Many states as well as several foreign countries now employ automatic restoration procedures. In this manner the offender is not required to meet the burden of going to court. Automatic restoration would have the same effect as a nullification order but it would take effect after a statutory period of time.

The focus of the present bill on limited categories of first-offenders, the most "reachable" offender group, and the bill's provisions for automatic revocation of a nullification order upon commission of a subsequent offense, makes it the ideal vehicle for low-risk implementation of truly meaningful and effective offender rehabilitation legislation.

A second major difficulties of the present bill is the absence of penalties for private circumvention of a nullification order. Sanctions for private sector employment discrimination based on criminal record information which has been sealed by court order is essential to the bill's effectiveness and purpose as an employment and bonding aid. In addition, the existence of criminal sanctions for illegal utilization of nullified criminal record information would mitigate the problems caused by situations in which the ex-offender would have to admit to a period of incarceration (or lie) because of gaps in an employment or residential history, and the problem presented by those circumstances in which a prospective employer obtains information about a criminal record through non-official or casual sources.

It's ironic that this legislation places the burden upon the person being discriminated against rather than on those who discriminate against him. If the former offender was released from the bonds of discrimination, the purpose of nullification would be accomplished in a straight-forward, direct manner.

By asking a former offender not to admit to his record, we are asking him to lie. Furthermore, we cannot be assured that the lie will stay hidden. A more direct and honest approach would be to direct remedial measures at the source of the discrimination. We desparately need legislation that will preclude employers and licensing authorities from using a man's record as a basis for excluding him, particularly if he is a one-time offender.

To summarize, we feel that S. 2732 would be an extremely worthwhile and important piece of legislation from the points of view of both crime control and offender rehabilitation. In addition, its relatively limited scope has the advantage of providing a foundation upon which to analyze and develop additional and perhaps broader legislation in the area of offender rehabilitation. Our comments on the sanctions and time-lag provisions of the bill are deeply felt, but does not preclude our endorsement of it as it now stands for fear that too much time may elpase before this nullification procedure is available to the rehabilitated offender.

I will be happy to answer any questions committee members have with respect to my preceding comments or to any other aspects of the proposed legislation.

Summary of Research on Matters Relating to Expungement of Criminal Records—Institute for Studies in Justice and Social Behavior

THE NEED

Of the 200,000 persons in American prisons on any given day, 96% will eventually be released. Of these, two-thirds will be rejailed for new offenses.[1] Society suffers obvious penalties for its inefficient reabsorption of the former offender. The prospects are not encouraging when those who have served terms are reinserted into a competitive society. Their reinsertion carries with it numerous disabilities that force the former offender into a status that is distinct from that of a private citizen.

The former offender is inflicted with both legal and social consequences. There are numerous statutory restrictions that inhibit his ability to fully participate in the society. There are also the social consequences of conviction, those that do not attach by virtue of a legal norm, but rather on account of societal disapprobation. The line between social and legal consequences of conviction is somewhat tenuous.

DISABILITIES

Loss of Civil Rights—A direct consequence of conviction is the restrictions placed upon a former offender's civil rights. Most states have constitutional and statutory provisions directly or indirectly disqualifying persons convicted of certain crimes from holding all or most public offices, but these provisions do not apply to federal offices.[2]

A majority of states provide that citizens convicted of serious crimes, usually felonies, lose their right to vote until their civil rights are restored pursuant to the appropriate state law. Several jurisdictions deny voting rights to persons convicted of either an infamous crime, a felony, or specified crimes.[3]

Most states have express provisions that exclude convicted citizens from jury service unless their civil rights have been restored. About three-fourths of the states expressly exclude from jury service persons who have been convicted of certain crimes. In addition, several states have separate statutes providing that a criminal conviction is a ground for challenge for cause.[4]

About half of the states provide that a witness who has been convicted of "a crime" or "any crime" may have his testimony impeached.[5] A few states

[1] Sultan and E. G. Ekmann, *The Employment of Persons with Arrest Records and the Ex-Offender* (1971).
[2] "Special Project: The Collateral Consequences of A Criminal Conviction", 23 *vand L. Rev.* 929, 987 (1970).
[3] Id. at 975.
[4] Id. at 1051.
[5] Id. at 1040.

automatically preclude him from testifying if his conviction is for perjury or a related offense.[6]

In addition, the citizen with a criminal record may find it impossible to obtain adequate life insurance coverage at reasonable rates.[7] Automobile insurance from a company that is authorized to write at higher rates.[8] He is also discriminated against by housing and welfare services.[9]

Employment—Daniel Glaser's study of released federal prisoners supports the contention that employment is usually a major factor making possible an integrated "style of life" which includes non-recidivism.[10] Unfortunately, employment is one area in which the former offender significantly suffers the consequences of his past.

The type of job procured by the newly released offender is a major factor contributing to the steadiness of employment. Newly released men do not obtain much skilled labor or white collar employment. Most frequently, job attainment is in the category of "operative", consisting predominantly of unskilled and semi-skilled machine tending in factories, and various types of warehouse and storageroom work. Next in frequency are service workers, unskilled heavy labor, and menial or odd jobs.[11]

The various types of unskilled and semiskilled jobs include the most unstable types of employment and together constitute 83% of the first jobs obtained by releasees and 88% of all jobs obtained in the first six months after release.[12]

Public Employment—The convicted offender is the subject of many restrictions in public employment, which severely restricts his access to a major segment of the job market. Federal, state and local governments employ more than twelve million people. One out of every six civilian workers is a public employee. Three-and-one-half million men and women currently serve in the armed forces.[13]

Although exclusion of individuals with criminal records from public employment is most often a discretionary matter with the hiring authority, it is not unusual to find constitutional and statutory provisions barring convicted criminals from a wide range of routine public occupations. In over half the states, public employment is closed to a person with a record of criminal conviction.[14]

The U.S. military generally refuses or strictly conditions the enlistment of persons with criminal records. Certain labor union activity by ex-criminals is prohibited by the Labor-Management Reporting and Disclosure Act of 1959 and private employers working on Defense Department contracts are sometimes required, as a security precaution, not to hire former offenders.[15]

Licensed Occupations—Licenses are required before one may engage, not only in professional occupations, but in many forms of semiskilled and unskilled employment as well. Laws of the federal government, every state and countless municipalities single out the former offender for possible exclusion from the majority of regulated occupations. Generally, if a position requires licensing, conviction of any serious crime may disqualify the offender from obtaining or holding a license.[16]

Access to licensed employment is most often a matter of administrative determination through application of moral character standards. Such standards are particularly susceptible to unreasonable exclusion of former offenders. In many instances, a criminal conviction has been held conclusive evidence of unsatisfactory character.[17]

For a significant number of former offenders, the barriers to employment created by licensing laws may be unsurmountable. It is likely that judicial relief is not sought by many former offenders barred from licensed employment because of the prohibitive expense of litigation.

[6] R. Cohen and D. Rivkin, "Civil Disabilities: The Forgotten Punishment" *Federal Probation*, vol. 2, no. 35 (June, 1971), 19, 21.
[7] 23 *V and L. Rev.* 929, 1110.
[8] Id. at 1121.
[9] Rubin, *The Law of Criminal Corrections*, 643 (1963).
[10] D. Glaser, *The effectiveness of a Prison and Parole System* (1939).
[11] Id. at 220.
[12] Id.
[13] 23 *Vand L. Rev.* 929, 1013.
[14] Portnoy, "Employment of a former criminal", 55 *Cornell L. Rev.* 306, 310 (1970).
[15] Id.
[16] 23 *Vand L. Rev.* 929, 1002.
[17] Id. at 1166.

Private Employment—It is generally concluded that substantial discrimination is practiced toward ex-offenders by private employers. Although often related to license denials or other consequences, it also stems only from the status of the individual. More job applicants are being required to submit to fingerprinting in order to disclose a criminal record. Many employers flatly reject applicants with criminal records. Most avoid hiring released offenders if other applicants are available. Some men are able to gain employment only because they were more fortunate or skillful in hiding their criminal records. Most fidelity insurance companies refuse to bond convicted offenders, resulting in ineligibility for employment in those positions that require bonding.[18]

REFORM MEASURES

There exist a number of alternative treatment measures that are directed toward relieving the stigma that a criminal conviction places on an individual. Such measures include; probation without verdict, suspended sentence conditioned upon satisfactory fulfillment of probation, and delay in passing sentence, with no sentence imposed upon good behavior. In addition, there have arisen diversionary programs that also seek to avoid a record of conviction.

There still remains a significant number of criminal offenders that need relief from the disabilities which exist as a result of their records.

State

One attempt by the states to remove disabilities is the pardon. Although it restores most civil rights that were forfeited on conviction, a majority of courts have held that a pardon neither obliterates the conviction nor re-establishes the offender's good character. Most courts hold that a pardoned offender is ineligible for an occupational or professional license that, by statute, can be issued only to persons without a criminal record.[19]

Another method employed to facilitate restoration of the criminal's civil rights is automatic restoration. Employed in thirteen states, these automatic procedures restore the offender's civil rights automatically upon the fulfillment of certain conditions such as completion of the prison sentence, probation or parole. Significantly, the procedure does not restore his eligibility to receive occupational or professional license.[20]

One fourth of the states employ expungement or annulment procedures. A primary objective of these procedures is to eliminate the penalties of public opinion as well as those imposed by the law. Besides the restoration of civil rights, these procedures seek to obliterate the record altogether. Unfortunately, the record is not cleansed as exceptions have made expungement somewhat ineffective in the area of licensing.[21]

The expungement and annulment procedures come closest to restoring to the former offender the rights and privileges possessed by other citizens but falls a good deal short of that goal. An example is the procedure provided by California.

California law [22] allows anyone sentenced to probation or convicted of a misdemeanor to have the court set aside the verdict of guilt and enter a dismissal of charges against him after the completion of his sentence. It directs the court to make an entry in the record that the conviction has been sealed but does not destroy the record, nor does it limit public access to the record as a whole.

The provision that the offender is thereafter "released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." [23] has been riddled with exceptions by the legislature and the courts. Of the sixty occupations that require state licenses, thirty-nine are susceptible to denial, revocation, or suspension of a license for conviction of a felony or an offense involving moral turpitude.[24] This is not isolated but indicative of similar situtations in the other states.

The various state procedures are a step in the right direction but are not enough. If the goal of society is to have the former offender behave as an ordinary citizen it must first treat him as one. The proposed federal legislation surpasses state procedures in attempting to accomplish this goal.

[18] Id. at 1001.
[19] Id. at 1146.
[20] Id. at 1148.
[21] Id. at 1149.
[22] §1203.4.
[23] §1203.4, 1203.4a.
[24] Portnoy at 315.

Model Acts

The model act proposed by the National Council on Crime and Delinquency [25] provides that all persons discharged from probation, parole, or imprisonment have both their civil rights restored and their conviction annulled. It also limits the discretion of licensing boards to deny licenses on the basis of criminal conviction. The only question that can be asked of a licensed applicant is "Have you ever been arrested for or convicted of a crime which has not been annulled by a court?"

The Model Penal Code [26] does not go as far. It provides that the release from all disqualifications and disabilities is available to all young adult offenders, to any offender who has completed his sentence and has not committee another crime for two years, and to probationers and parolees who successfully complete the conditions of their probation or parole. Annulment of the conviction is provided for the offender who has not committed another criminal act for five years. Significant in the Model Penal Code is that restoration or annulment does not justify the offender's denying the conviction, nor does it preclude licensing boards from denying him a license because of his past conviction.

INTERNATIONAL RECOGNITION OF THE PROBLEM

More than a decade ago, the VIIth International Congress on Criminal Law (Athens, 1957) recognized the problem of disabilities resulting from conviction. A passage of the final acts said " . . . . all legal consequences of conviction. motivated by the sole goal of degradation should be abolished." [27]

More recently, at the Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Kyoto, Japan, 17–26 August, 1970) proposed the standard Minimum Rules for the Treatment of Prisoners in the Light of Recent Developments in the Correctional Field. In response to Rule 61 several countries stated recognition of deleterious effects of collateral consequences of imprisonment or rehabilitation. The largest problem in the area is the prohibition of ex-prisoners from certain types of employment.

The Soviet Union—A discussion with Professor Harol Berman of Harvard University Law School established that employment discrimination against former offenders is also a problem in the Soviet Union.

In an apparent attempt to minimize such discrimination the Soviets have provided that the record of conviction may be cancelled in certain instances. Article 57 of the Criminal Code of the RSFSR [28] provides for cancellation of record of conviction. The article establishes that the following shall be deemed not to have a record of conviction:

(a) Persons conditionally convicted, if during the probation period they do not commit a new crime;

(b) Persons sentenced to social censure, imposition of the duty to make amends for harm caused, dismissal from office fine, deprivation of the right to occupy certain offices or to engage in certain activity or correctional tasks, if during one year after serving the punishment they do not commit a new crime;

(c) Persons sentenced to deprivation of freedom for a term less than three years if during three years after serving the punishment, they do not commit a new crime;

(d) Persons sentenced for a term between three and six years if during five years after serving the punishment they do not commit a new crime;

(e) Persons sentenced for a term between six and ten years if during eight years after serving the sentence they do not commit a new crime;

(f) Persons sentenced for a term exceeding ten years if during eight years after serving the punishment they do not commit a new crime and in addition the court establishes that the person has been corrected and that there is no necessity to consider him as having had a record of conviction. If the punishment is reduced or the offender released early, the period for cancelling the record shall be calculated on the basis of the term actually served. In addition, the court may remove the record of conviction before the terms indicated

[25] National Council on Crime and Delinquency, "Annulment of a Conviction of Crime", *Crime and Delinquency* 97, 100 (1962).
[26] *Model Penal Code* §306.6 (Proposed Official Draft, 1962).
[27] Damaska, "Adverse Legal Consequences of Conviction and Their Removal; A comparative Study", 59 J.C.L.C. & P.S. 347, 354 (1968).
[28] Oct. 27, 1960 as amended July 3, 1965, in *Soviet Criminal Law and Procedure. The RSFSR Codes.* Intor. and analysis by Harold J. Berman Translation by Harold Berman and James Spindler (1966).

above if during that time the person displays exemplary conduct and an honorable attitude.

Article 370[29] of the Code of Criminal Procedure, Consideration by Courts of Petitions to Cancel Record of Conviction, provides that in the event the court refuses to cancel the record, a new petition may be initiated not less than one year after the ruling.

Damaska notes that vacated sentences are said on principle to be considered as nonexistent and the ex-convict is not considered as having a record.[30]

France—Article 794 of the French Code of Criminal Procedure states that "réhabilitation" vacated the judgement of conviction and puts an end to all disqualifications flowing therefrom.

In France, each criminal file has three separate sheets. Th first sheet is reserved for judicial authorities, the second for various administrative officials and agencies and the third as the basis for extracts from the record. Following reinstatement, the conviction must not be mentioned in any extracts from the criminal record. Nor can information on convictions covered by reinstatement be obtained from the second sheet. Judicial authorities will, however, be able to obtain information on convictions covered by reinstatement. A note is inserted into the first sheet indicating that the judgement has been vacated. It becomes a legal fiction that the offender has a clean slate.[31]

Yugoslavia—In Yugoslavia, general release from various adverse legal effects stemming from conviction can be obtained by court decision following the lapse of at least three years from the date of execution of the sentence. (Article 87, P.C.)

Problems of criminal records are divorced from reinstatement. Sentences to imprisonment for terms exceeding three years always remain on the record. All other criminal convictions are expunged after a statutory lapse of time. The conviction is not actually removed from the record but the accessibility of information from it is drastically limited. As a practical matter, it may be obtained only by courts and law enforcement agencies in connection with a new criminal prosecution.[32]

Other Countries—West Germany provides that after a period of time following release from an institution (five to ten years depending on punishment), the former offender is entitled to a clean extract from the record for official and nonofficial use. He is also entitled to state that he has not been convicted of a crime, save for his relations with the prosecutor and in court proceedings.[33]

A broad form of reinstatement also exists in Austria, Egypt, Italy, Japan and Ethiopia. Article 245 of the Ethiopian Penal Code provides that reinstatement causes the sentence to be deleted from the convicted person's police record and for the future be presumed to be non-existent. However, if within five years after reinstatement a fresh sentence is imposed, reinstatement is revoked.[34]

CONTRA

In an article entitled "Sealing and Expungement of Criminal Records—The Big Lie" by B. Kogan and D. Loughery, Jr.,[35] the authors raise several points in opposition to expungement. They contend that the system is unworkable. The record will still be retrievable through secondary sources such as police departments or the F.B.I. It is simply not possible, physically or literally either to expunge or seal a record.

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 best be forgotten or repressed, as if it had never existed at all.

In essence, they argue that it is not the offenders guilt that should be made the focus of attention but the societal attitude that refuses o accetp him.

Regarding the legislation requiring the court to issue an annulment order, it seems that one without means would be less apt to secure an attorney to initiate the requisite petition and not gain the advantages of expungement.

[29] Id.
[30] Damaska at 566.
[31] 782–99 *Fr. Code of Cr. Pro.* in Id. at 5665.
[32] Id. at 567.
[33] Id. at 547.
[34] Id. at 566.
[35] 61 *J.C.L.C. & P.S.* 378 (1970).

BIOGRAPHICAL SKETCH—DR. NICHOLAS N. KITTRIE

Dr. Nicholas N. Kittrie, who is professor of law and Director of the Institute for Studies in Justice and Social Behavior, has served as a counsel to a sister subcommittee on Anti-trust and Monopoly. Dr. Kittrie has written books and articles in criminal law and is vice president of the American Section of the International Association for Penal Law as well as the American Society of Criminology.

Mr. KITTRIE. I will undertake to read this as fast as I can.

Senator BURDICK. I don't want to foreclose your full testimony. You can come back if you prefer.

Mr. KITTRIE. I think since we are here, Senator, let us proceed. I will condense my prepared remarks.

My name is Nicholas N. Kittrie and I am a professor of criminal and comparative law at the American University. I also serve as director of the Institute for Studies in Justice and Social Behavior. Together with me here are Mr. Joseph Trotter, who is the administrator of the Institute, and Mr. George Vince, who is a participant in our law school's Seminar on Law and Social Deviance and has done the major work on the attached memorandum.

The Institute for Justice and Social Behavior is a multidisciplinary organization dedicated to research, instruction and community services. One of our major undertakings is the Lawcor project (lawyers in corrections and rehabilitation) which for several years now has been rendering legal assistance to District of Columbia prison inmates and their families.

The major aim of Lawcor is to contribute to the rehabilitative effort of offenders by demonstrating to them that the law can serve them too. Recently we initiated a new experiment, designated Project Cope, to help prepare soon-to-be released inmates for problems they will face in society. Consequently, we have long-standing experience and interest in the inmate's preparation for reentering society. We also have much concern with the existing roadblocks in his return path to a lawful existence.

Let me point out initially that we are not wild eyed reformers who are unaware of the realities of crime and criminality in this country. Neither do we believe that the rehabilitation of the offender is the sole aim of the criminal process. In enforcing the laws of this country and in subjecting people to legal sanctions, we must continue to be aware of the need to protect society simply by restraining and incapacitating those who threaten it. We must likewise be prepared to rely on the hopeful utility of the criminal process in deterring both those who have once offended the law and many other potential offenders.

Fully aware of the need to look at crime and punishment as complex problems, we nevertheless approach the proposed bill with few doubts or misgivings. We believe that the bill now pending before this committee, S. 2732, is a major step towards putting a true meaning into the rehabilitative aim of the Federal and State correctional effort. In our opinion the single question that needs to be answered in connection with S. 2732 is as follows: Once an inmate has paid his debt to society and been released back to it, what social advantage is to be derived from imposing upon him continued disabilities which hinder him in his effort to demonstrate that he can live a normal life?

The magnitude and the economic and crime control ramifications of this problem are brought sharply into focus by estimates in the tens of millions of citizens with criminal records and as many as 50 million with arrest records. The access of this population group to both the public and private employment sectors is severely restricted, both directly though statutory and constitutional exclusions and indirectly through the exercise of discretionary power by licensing, bonding, and hiring authorities.

I would like to comment on two provisions of the present bill which we feel needlessly diminish the potential benefits to be derived therefrom. The first is the mandatory waiting period before eligibility to apply for nullification orders. Our objections to this requirement are both philosophical and pragmatic. Philosophically we find it difficult to resolve the ostensible contradiction between the bill's stated purpose of alleviating the employment problems facing exfirst offenders and the requirement that they wait 3 to 5 years after completion of sentence before being able to nullify their criminal records. The employment problems these men face begin immediately with their return to the community.

If these men, unaided, have to cope with these problems from 3 to 5 years before being able to remove the major impediment of a criminal record, then the bill's force is primarily that of a reward rather than the rehabilitative tool we feel it is intended to be. I think that is a very important question as far as we can concerned. Is this bill really intended to facilitate rehabilitation or is it a legislatively endorsed reward for a specified number of years of post release good behavior.

Senator BURDICK. Would you have any waiting period?

Mr. KITTRIE. Very little. We see in this bill, Senator, the need for two changes. We would like to cut the waiting period. We would like to cut it and say that at most it should be 12 months after the sentence has been satisfied. At most. But the main point is that we really suggest that maybe there should be no waiting period at all, and that the nullification be automatic for the first offenders covered by the bill.

Let me try and summarize this briefly since the statement will go into the record. We are very much concerned with the fact that the bill requires an inmate or exconvict to go and get counsel to aid in his nullification effort. He must get legal assistance to start this whole process. We know from our experience that even if the motivation is there, it is a rather heavy burden to tell him to go and find himself a lawyer. Then the question is does he have to pay the lawyer or will he be entitled to court-appointed (and court-paid) counsel? If ex-offenders covered by this bill have to obtain their own lawyer and pay for their legal assistance, it is our fear that a very small percentage of them will avail themselves of its provisions.

Senator BURDICK. I would think it would be typical for the legal aid society.

Mr. KITTRIE. Maybe, but legal aid societies are already overburdened. We feel that the basic aim of the bill is to help reintegrate the ex-offender into society as quickly as possible. Because of this, we are indeed raising two questions. The first is, do we want to relieve him of his disabilities in order to make this process easier, and the second is, should we separate total record expungement from

granting relief of his disabilities. There is a need to protect the ex-offender against unreasonable discrimination and to accomplish this there ought to be an attempt to deal specifically with employment discrimination when he returns to society and, these individuals maybe years later, you ought to give him the final reward, which is total expungement.

There is really not much that is being done about the marketplace which discriminates against the ex-convict. The goal we have stated here is rather high, it will take specific legislative intent and action to try and achieve it, and you don't really know how effective it will be. We are suggesting to you, to the members of the committee and the staff to look at it from a systems point of view: What is the direct baring between what is being proposed here and actually making is possible for the rehabilitated offender to get a job and not to be discriminated against.

Indeed, we may assert, Senator, that part of the problem with our criminal justice system is that we have never clarified and placed priorities upon the goals of the system. We talk about rehabilitation, and we talk about deterrence and incapacitation, and so on. But with regard to the released inmate, at least, can't we concentrate on the realization that since we have already released him and decided that we don't need to keep him in prison for control, and for deterrence—for him, shouldn't our main thoughts be focused on rehabilitation?

When a prisoner was sentenced originally, there may have been a conflict as to the purpose of the sentence. I am not one to say that the only aim of our justice system is rehabilitation; but once a man has served his debt to society and you have released him, if at that time you don't make it possible for him to get a job and to help him in whatever way you can to restore him to normalcy, then in a way you are contributing to a syndrome of failure. I do not believe that it is a daring proposition to say that once an offender has paid his debt to society he immediately ought to be given a chance for employment as much as anybody else. When a man is released, we have officially admitted that his sentence has been completed satisfactorily. If indeed we are not satisfied that he is ready to go out, we should keep him under control, but if we let him out, we should concentrate on his rehabilitation.

Senator BURDICK. Sometimes you let him out because his term has expired.

Mr. KITTRIE. Senator, it is then either a legislative mistake or the mistake of the judge who did not impose a severe enough sentence.

Senator BURDICK. A previous witness said a waiting period should be used to grant incentive to a man to prove himself so to speak.

I see that you agree with the theory although you differ with the term. You say 12 months are enough to prove himself.

Mr. KITTRIE. I think incentive is an important point and I would prefer it in two stages. I think it would be an incentive for a convicted offender to know that once he has paid his official debt he'll in effect be granted a certificate which is to protect him against job and other discrimination. But I am not sure that protection against discrimination and a certificate of expungement are the same. In my own mind I think there is a need to look at the realistic problems of curing discrimination against ex-offenders in society, vis-a-vis record.

expungement which is almost in the nature of saying "you have been reborn." That is something else again. Prevention of discrimination must take place immediately upon release. Expungement can be a later reward.

Senator BURDICK. We just have the practical approach because we know that there are literally dozens of laws in the various States that close the door to people with any kind of a record. We heard the testimony this morning that even in some States he is unable to get a barber's license. We are trying to remove these barriers as fast as we can but if we are going to wait for 50 States to do it, it is going to take a long time.

Mr. KITTRIE. We are fully aware of that. The one thing we want to stress is that expungement may be an inadequate means to attain the stated goal. Let's assume an ex-offender's sentence is expunged. If an employer says give me references to places of employment during the last three years and on the basis of that answer he then refuses to hire the applicant, the bill does not prevent his doing so. In other words, unless you address this bill more directly to the realities of discrimination in hiring practices, with some realistic acknowledgement that certain jobs may justify a special sensitivity —for example a bank teller position vis a vis a convicted embezzler —it may be ineffective. It becomes very easy to find out that a man has been out of circulation when you say to him let me have your last three places of employment or where have you lived for the last three years. And, when he says oh but my record has been expunged, the employer is still gong to say well that is fine but I don't want to hire an ex-offender, and he'll not be violating the provisions of this bill by so doing.

The expungement does not necessarily deal with discrimination realities.

Senator BURDICK. Maybe we better tighten up the rules with regard to discrimination.

Mr. KITTRIE. Right. There was one additional comment I wanted to make. We wanted to stress that, we think this is extremely important legislation. We want to commend you and your staff for showing an interest in this problem. We are convinced this type of legislation is necessary and we wanted to be sure that the related problems are looked at in terms of the future development of this bill.

Senator BURDICK. Do you mind if we call you back later?

Mr. KITTRIE. We would love to come back.

Senator BURDICK. I am embarrassed this morning we had so short a period of time. I would like to have you come back again.

The committee stands adourned.

(A copy of the Grand Forks Herald; statement from Joan Stewart; a statement from Senator Metcalf and an exerpt from the Congresional Record dated Wednesday, October 20, 1971 were inserted in the Record at the request of the chairman.)

TEANECK, N.J., *January 14, 1972.*

Hon. Q. BURDICK, *Chairman,*
U.S. Senate Committee on the Judiciary,
Washington, D.C.

Re: S. 2732—*The Offender Rehabilitation Act*

DEAR SENATOR BURDICK: I have reviewed a copy of the subject proposed bill, and would like to take this opportunity to express my opinions.

Firstly, I am pleased to note that some attempt is being made to effect changes in the present system of punishment and vengance against the citizen who breaks a law. There must come a time when society is satisfied that a person has paid his or her debt to that society and when punishment ends. Under the present system of records and their availability to the casual inquirer, this is impossible. So, of course a change is long overdue. However, I believe it is important that any new law should be constructive and a real change, not merely ineffectual lip-service that would only result in frustrating and hindering any real desire for penal and court reform.

The proposed bill in its present form is too weak and not specific enough to be effective in certain areas. I would like to make the following recommendations:

1. That the new bill make provision for *complete* eradication of the first offender's record after the given period of time in which he or she has proven rehabilitation and adjustment to society. This should include investigation law enforcement agencies as well as any other inquiring party. I can think of no useful purpose a person's prison record of five or more years in the past would be to an investigation. Here's why: if we believe, in fact, a person is rehabilitated after having lived through the hardships of a three to five year added sentence of public censure (as indeed they now must live for the rest of their lives), and is subsequently granted total re-entry into society, and if the occasion arose on a future date to question such a person's actions or if he is suspected and/or accused of a crime, there is ample reason to pursue the situation on its own merits without bringing forward the so-called "forgiven and forgotten" past to prejudice a current case. In other words, the exoffender is either forgiven and restored, or he is not. There need be no exceptions to this fact.

2. The period through which a person must go to prove himself or herself eligible for the quieting of their record should begin simultaneously with the parole period, inasmuch as the parole itself is a test of the convicted person's willingness and ability to "go straight".

3. I question whether this "period of grace" is not, in fact, too long to be effective. I agree that an exconvict should prove rehabilitation, but it is possible that five years would be an impossible goal especially in a case where a person is routine brought in for questioning, etc. and generally harrassed *because of his record.*

4. I see no reason to exclude first offenders because their crime was homicide, rape, treason, or assault with a deadly weapon. Again, a person has either paid for his or her crime, has proven readjustment and worthiness to rejoin society during the additional probationary period provided by this bill, or else he is still in need of retainment or correctional supervision by the institutions and agencies set up for that purpose;. but certainly after such a period, he or she should not be subjected to eternal punishment and harrassment by the public or law enforcement agencies, as is the present situation.

It is my hope that your committee with consider the suggested revisions and put forth a strong bill that represents real change in our antiqudated system.

Very truly yours,

I. JOAN STEWART.

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C., February 4, 1972.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on National Penitentiaries,
Senate Judiciary Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: I would be most appreciative if my enclosed Statement in Support of S. 2732, the "Offender Rehabilitation Act," could be made a part of the hearing record.

Thank you.

Very truly yours,

LEE METCALF.

STATEMENT BY SENATOR LEE METCALF IN SUPPORT OF S. 2732 THE "OFFENDER REHABILITATION ACT"

I welcome the opportunity to appear before this Subcommittee as one of the thirteen cosponsors of S. 2732, the "Offender Rehabilitation Act," a bill that

would give the federal criminal justice system a greater opportunity t rehabilitate persons convicted of non-violent crimes. Not only the guilty would directly benefit from this bill. The hundreds of persons who are wrongfully arrested for a federal crime or who are acquitted could have the damaging arrest records nullified and thus removed as a barrier to employment and credit, among other disabilities.

Under concepts of modern penology, a person convicted of a crime is expected to be punished for his offense against society but more importantly to be rehabilitated during his imprisonment so that once released he can return to the streets as a person who will become a useful citizen or at least will have been persuaded not to continue a life of crime. Unifortunately, the ideal has not been realized. Far from reforming criminals, our prisons appear to have become schools for crime. The Administrative Office of the United States Courts has reported that in fiscal 1969, the most recent year for which complete statistics are available, 64 percent of all persons convicted of federal crimes had prior criminal records. Of the criminal defendants receiving prison sentences, 82 percent had prior records and 89 percent of all defendants receiving mixed sentences had records.

As this subcommittee has shown, much of the fault lies with the prisons themselves. The tragedy of Attica has made us all aware of the need to reform our reformatories if they are to serve as more than revolving doors for the convicted criminal to leave only to re-enter again and again for other, possibly more serious, crimes.

Although the prisons, together with revision of our criminal code, have received the most attention, the problem goes beyond the prison, the punishment, and the crime itself. Although we expect a person who has served his time to readjust to his life outside the prison and be able to pick up the pieces of his previous life just as anyone who had been away for a long period, our laws make it impossible for him to remove the scars of his criminal conviction. When we continue to treat him long after his sentence has been served as less than a citizen, as someone not to be trusted, he will often reciprocate our distrust and rejection by returning to a life of crime thus fulfilling the frequently stated prophesy for him that once a criminal—always a criminal.

The Federal Government and most of the states have adopted statutes providing various forms of civil disabilities for convicted criminal defendants, not the product of American jurisprudence but of the feudal Roman heritage of English law. The existence of such laws is self-defeating since they limit the possibilities for a released convict to succeed in his attempts to go straight and increase the likelihood of recidivism. They are in the class of laws whose time has passed and would fit Oliver Wendell Holmes' classification of laws for which "the custom, belief, or necessity disappears, but the rule remains." (O. Holmes, Jr., *The Common Law* 5 (1881)).

Although some forms of disability that existed in ancient times such as attainder, forfeiture of estates, corruption of blood, and civil death have been eliminated in recent years, the status of the ex-convict or even a person with an arrest record has worsened. Fingerprinting is used against non-criminals as well as criminals, and, as we have become increasingly security conscious, more and more job applicants or employees are being required to submit to fingerprinting so that the existence of a criminal record may be discovered even though the prospective employee may never have been convicted of a crime. The assumption of the Federal Government and many private employers is that a criminal record should and usually does disqualify a person from employment.

As occupations have become more specialized, the number of jobs requiring the applicant to obtain a professional license has dramatically increased. In California, for example, approximately 60 occupations require state licenses, with 39 of these laws specifically authorizing denial, revocation or suspension of a license for conviction of a felony or of an offense involving moral turpitude. California's laws are typical of the rest of the nation. A recent comprehensive survey by the *Vanderbilt Law Review* on "The Collateral Consequences of a Criminal Conviction" found that:

"Laws of the federal government, every state, and countless municipalities single out the ex-convict for possible exclusion from the majority of regulated occupations. In general, if a trade, profession, business, or even an ordinary job requires licensing, conviction of any serious crime may disqualifying the offender from obtaining or holding a license." (23 *Vanderbilt Law Review* 929, 1002–1003).

The licensing procedure provides the public or private licensing authority ample opportunity to investigate an individual to determine whether a person has a criminal record and to disqualify him from employment if he does. The result is counterproductive. Although some degree of public protection is necessary to keep persons of doubtful character out of certain professions, the barring of a person convicted of a non-violent crime for the rest of his life from certain fields, or a person arrested for his role in a demonstration, may force him to a career in crime since no other path may be open.

In addition to the economic handicaps imposed on the ex-convict in the job market, in most states persons convicted of serious crimes cannot participate in state and federal elections both during and after imprisonment. Denial of the right to vote to a harmless ex-offender may prevent him from assuming his role in society as a responsible citizen and may lower his respect for a society in which he has no part.

The ex-convict is disqualified in many states from holding public office. Some federal laws reach the same result. Persons with criminal records are often barred from any form of state employment. If federal and state governments restrict employment of ex-convicts, how can we expect private employers to be any more generous in their hiring practices?

Some states also impair an ex-convict's right to execute and enforce valid legal instruments including wills, and, in a few states, all or certain contracts. He may be barred by law from serving as a juror and, in a few states, if his offense was related to perjury, he is automatically precluded from testifying in court.

Probably nothing is more humiliating to the ex-convict than the disintegration of his family that laws often encourage. North Dakota, Virginia and Washington even prohibit the marriage of "habitual criminals." (*N.D. Cent. Code* §14–03–07; *Va. Code Ann.* §20–46; *Wash. Rev. Code Ann.* §26–04–030). Most states make a criminal conviction or imprisonment a ground for divorce. An ex-convict may also lose his children if, as a result, the children are found neglected or dependent, and a few states permit adoption of a convict's children without his consent.

These are examples of a few of the many direct or indirect disabilities incurred by persons convicted of crime that often make rehabilitation an empty promise. S. 2732 can restore hope and the opportunity for a resumption of a normal life after imprionsment for thousands of first-time criminal offenders who have committed non-violent crimes and whose freedom offers the least threat to society. It offers the individual who has demonstrated his rehabilitation the opportunity to deny the existence of a criminal record in situaations involving bonding, employment and licensing. It also denies any agency or business considering an exconvict or arrestee for employment, bonding or licensing public or quasi-public means of obtaining information. The bill would not destroy any records but would nullify them as far as the outside world is concerned and give the ex-convict the power to deny the existence of a criminal record without subjecting himself to perjury penalties. Nullification of these criminal records would have no effect on law enforcement agencies because no legitimate use in connection with investigating any crime or apprehending any alleged offender would be affected. Should an individual whose records had been nullified subsequently return to criminal ways, the record of a previous offense would be available to the court to determine the proper sentence and the privilege of quieting the records of the first offense and any subsequent offenses would be revoked upon conviction of a second crime.

The "Offender Rehabilitation Act" contains many additional safeguards to reduce the threat of nullification of records to the public:

First, certain violent crimes are specifically exempted from coverage of the act such as murder, manslaughter, the killing of the President and certain other federal officials, kidnapping, rape within the special maritime and territorial jurisdiction of the United States, assault in commission of a bank robbery, and others.

Secondly, waiting periods from three to five years are provided for persons convicted of a federal crime before they can apply to a district court for nullification order when the conviction was not reversed on appeal because of his innocence, which is ample time to determine if an ex-convict had renounced his former criminal ways and provides an added incentive for avoiding further criminal activity.

Third, its application is restricted to persons with no previous state or federal record prior to the conviction for which records are sought to be nullified.

Finally, the district court retains authority to limit the effect of a nullification order "if it determines such action to be necessary in order to protect the public."

The person applying for a nullification order has the opportunity to list agencies which he believes have copies of his criminal records, each of which would receive a copy of the subsequent court order as notice that the record has been quieted. Criminal penalties are provided for dissemination or use of nullified records by an employee or officer of the United States Government if the use was in connection with employment, bonding or licensing and if the use was not authorized by an exemption provided under this act.

All civil rights or privileges lost or forfeited as a result of conviction would be restored to the subject of a nullification order. Use of the records for impeaching the testimony of the order recipient in any civil or criminal action would also be prohibited.

The President's Commission on Law Enforcement and the Administration of Justice recognized that civil disabilities for ex-convicts have harmed society as much as the convict when they wrote:

"As a general matter (civil disability law) has simply not been rationally designed to accommodate the varied interests of society and the individual convicted person. There has been little effort to evaluate the whole system of disabilities and disqualifications that has grown up. . . . As a result, convicted persons are generally subjected to numerous disabilities which have little relation to the crime committed, the person committing it or, consequently, the protection of society. They are often harsh out of all proportion to the crime committed." (*Task Force Report: Corrections* 88 (1967)).

I should like to call the Subcommittee's attention to an area which this legislation will affect. That is the security of the records, particularly automated criminal records.

The recent trend in the computerization of criminal files makes it necessary to consider the impact on the nullification process as proposed by the legislation. As both Federal and local governments begin to automate their criminal record files, they must be encouraged to examine the problems inherent in the systems they develop. Both manual and automated files are subject to penetration by unauthorized sources. Safeguards must be considered which would minimize the invasion of individual privacy.

The use of computers to store and retrieve criminal records has distinct advantages as well as some problems that should be considered in light of this legislation. Among the disadvantages are unauthorized accessibility to an individual file and potential indiscriminate dissemination.

The automated file can be designed with the necessary restrictions to protect personal privacy and to ensure the intent of the legislation (S. 2732). For example, it is possible to design an "audit trail" which would provide a list of all those who have had access to the individual file. This listing would be helpful in notifying those who would be required to know of the nullification order. A system may be designed so that those who control or have access to the files may automatically be notified of all transactions, changes and notifications.

Another possible advantage of automation is the relative ease with which potential candidates could be notified that they may be eligible to have their records nullified. In a manual system, the task of sorting possible candidates is expensive and time-consuming. Automation makes it possible to consider notification of eligible candidates through the quick search capability inherent in the system. In a computerized file system, nullification of records can be accomplished in a number of ways depending on the design and formatting of the record. If the proposed legislation is to have full impact, those responsible for the criminal records file must be encouraged to ensure personal privacy while not placing undue restrictions on the nullification procedure.

It must be recognized that with sufficient effort both manual and automated files may be compromised. Therefore, it is essential that the security of the data becomes the responsibility of *all* authorized users of the file. Once notified of a nullification, the individual file must be consigned a special designation so that only special authorized sources will have access to that nullified file.

I would call the Subcommittee's attention to safeguards which would serve to insure privacy. Eight such safeguards are listed in the multilith, "The Federal Data Center," prepared by the Library of Congress' Legislative Reference Service. The safeguards starting on page LRS–15 represent some of the key problems essential to developing viable systems while preventing indiscriminate disclosure of information.

I further call your attention to S. 2546, introduced by Senator Hruska, which calls for some basic safeguards in the handling and distribution of criminal records. The bill and other proposals outline significant restrictions that may have some impact on the legislation under consideration. In brief, there is a growing interest in the centralization and automation of criminal records. The concern of many in Congress as well as in the private and public sectors is to urge the establishment of sufficient safeguards without restricting authorized agencies in the performance of their duties. This critical balance must be maintained from the design and implementation of information systems to the authorized users initial inquiry into criminal records.

I am not specifically urging an amendment to the bill to provide for these problems in records keeping, but it may be that the Subcommittee will decide after its deliberations that an amendment is in order.

I believe the legislation introduced by Senator Burdick is vitally needed, if we are serious about wishing to rehabilitate men and women convicted of non-violent crimes. We pay lip service to the concept that the debt to society is repaid through imprisonment. The truth is we continue to extract the toll after they are released and returned to society. This legislation will restore such people to society and provide for their legitimate participation. I urge passage of the bill.

[From the Grand Forks Herald, Jan. 3, 1972]

GOOD BURDICK BILL

Our guest editorial for today is from the Bismarck Tribune:

"Senator Burdick of North Dakota is the sponsor of legislation which won't get a whale of a lot of attention, but which should be regarded as important by everyone concerned with justice.

"The Burdick bill deals, among other things, with the arrest records of persons who may have been charged with crimes but subsequently found innocent.

"An extremely important point is involved.

"Take the case of John J., who was arrested on a charge of theft, the first time in his life of 40 years he had ever been even remotely suspected, let alone charged, with any criminal act.

"Subsequent investigation revealed that another person was guilty of the theft of which John J. had been charged. The other defendant confessed to the crime and charges against John J. were dropped.

"But the record of his arrest remained, to his great damage.

"An unusually able and energetic man, he was interviewed for a top executive position with another company. Investigators checking into his personal history ran across the fact of the arrest. He didn't get the job, though he was innocent of wrong-doing as a new-born babe.

"The fact that John J. has been arrested, and that he thus had an arrest record even though he had no conviction against his name, raised enough doubt to deny him the sensitive position for which he was being considered.

"According to a study made by a Georgetown University professor, questions relating to arrest ecords are asked on job forms used by 26 of 46 states studied, 94 of 170 counties and 172 of 224 cities. Even when only the conviction record is requested the record sheet obtained from local police departments or the FBI frequently includes arrests where there has been no conviction, it was discovered.

"This is patently unfair and unjust since it works to the detriment of innocent persons. It may discriminate against them not only in employment but also in bonding and licensing.

"Senator Burdick's bill would permit an arrested person who was never convicted to have his police records expunged. In the interest of true justice, this is the way it ought to be."

Opinions expressed by syndicated columnists and other contributors on this page are their own and are not necessarily in agreement with those of the Herald. This newspaper's viewpoint is expressed, in its own editorials printed above.

[From the Congressional Record, Oct. 20, 1971]

SENATE

By Mr. Burdick (for himself, Mr. Bayh, Mr. Brooke, Mr. Cook, Mr. Gravel, Mr. Harris, Mr. Hart, Mr. Mansfield, Mr. McGovern, Mr. Metcalf, Mr. Moss, and Mr. Williams):

S. 2732. A bill relating to the nullification of certain criminal records. Referred to the Committee on the Judiciary.

THE OFFENDER REHABILITATION ACT

Mr. BURDICK. Mr. President, I introduced today, for myself and Mr. Bayh, Mr. Brooke, Mr. Cook, Mr. Gravel, Mr. Harris, Mr. Hart, Mr. Mansfield, Mr. McGovern, Mr. Metcalf, Mr. Moss, and Mr. Williams, legislation to quiet old criminal records of rehabilitated offenders, to prevent these records from being a bar to lawful employment, or to pursuing a trade or profession. This proposed legislation is a small step. It deals only with the one-time offender convicted of a nonviolent offense. It is, however, a vital step we must take because of its potential for facing the problem of recidivistic crime.

As chairman of the Subcommittee on National Penitentiaries, I have had some new opportunities to try to analyze not just prisons themselves, but the pressures and experiences of the men who come and go through the criminal justice system—to see what it is that makes so many of them come back. I am convinced that it has something to do with hope—not just the individual's hope for himself, but the hopes of all people.

When a judge pronounces sentence, it would seem that the law is saying to the offender: At some certain time, such as 10 years from now, you will be returned to society with your debt paid. You should then be ready to assume an honest and upright life. But this is a fiction, because the debt to society continues to be collected.

I do not believe that the offender should forget what he has done, that is part of his rehabilitation. But there is a time when the records of his crime cease to have any value in determining his eligibility for employment, bonding, and licensing.

The criminal record that follows an individual for years and decades after his release prevents him from entering the economic community as a full partner. It destroys his hope that he may again earn the opportunity for advancement in his job or profession. The ex-offender's failures destroy society's hopes that offenders can be rehabilitated, and becomes a self-fulfilling prophecy.

The possibility that a past criminal record can be nullified would be an incentive to an offender to try harder to live lawfully. It would be the light at the end of the tunnel. It would also be a stern reminder of how much he stands to lose by returning to crime.

The idea of quieting old criminal records, of providing a final relief, is one this Nation has been growing toward in recent years. In its passage of the Youth Corrections Act in 1950, the Congress took a first step by recognizing the value of setting aside convictions of youthful offenders who have shown their readjustment and rehabilitation.

The last Congress established further precedents to the confidentiality of past criminal records. In the District of Columbia Court Reform and Criminal Procedures Act, Public Law 91–358, a method was set out for preventing the disclosure of juvenile records, except upon court order. In the Organized Crime Control Act, Public Law 91–452, individuals who cooperate by giving information can not only have their past record quieted, but may be assisted by the Government to assume a whole new identity. In the Comprehensive Drug Abuse Prevention and Control Act, Public Law 91–513, it is possible to have the offense of possession of narcotics completely expunged.

The legislation being proposed today goes beyond the limit number of situations covered by these four enactments, but it establishes a substantial safeguard not a part of any of them, which is the passage of a substantial period of time between conviction and the quieting of the records. It gives society a proper chance to judge the rehabilitation of the offender.

Many States have also recognized the problem of criminal records as a barrier to rehabilitation, and have passed varying statutes, to meet the problems.

In a number of States, including North Dakota, it is possible for an offender, upon successful completion of probation, to have his case reopened and the court records appear that either there had been no conviction, or the charges were dismissed—see, for xample, North Dakoto Century Code 12–53–18. This same type of provision exists in nine other States.

fornia statute. In addition, there are 13 States which provide a means of preventing misuse of records of arrest where there was no conviction.

There does not appear, however, to be any States that have brought these two facets together to achieve the degree of nullification required to affect employment, bonding and licensing. From the study of cases law and legal com-

mentary regarding use of criminal records, it is obvious that an effective statute must go beyond anything we have at present.

First, if recognition of rehabilitation is to any significant impact, it must cover as many situations as possible—not just misdemenaors or juvenile crimes, but felonies in situations where the integrity of society would not be affected.

Second, the procedure for granting relief must be difficult so that the benefits will not be taken lightly by the applicant, the Government, or by society.

Third, the quieting of the record must be as complete as it possible, so as to accomplish what is to be accomplished. The means must be provided to stop the distribution of criminal records that have outlived their validity.

The answers to this last challenge can only be met by closing both routes of access to criminal records. First, the individual who has demonstrated his rehabilitation must be able to deny the existence of the record in situations involving employment, bonding, and licensing. Second, the agency which is considering the individual, for employment, bonding, or licensing must have no other public or quasi-public means of obtaining the information.

The effect of a complete remedy would be great upon the rehabilitated offender, but because of the safeguards built into the legislation it would not have a negative effect upon those with whom he must deal.

The applications for orders to quiet records would not significantly affect the work of the U.S. courts, because the record which would be under consideration would not be a hearing record in many instances, but an investigative report made available by an agency such as the Federal Bureau of Investigation or the U.S. Probation Office.

Nullification of certain criminal records would have no effect on law enforcement agencies, because no legitimate use in connection with investigating any crime or apprehending any alleged offender would be affected. The record of a previous offense would be available to the court to determine the proper sentence, if an indiviudal did subsequently return to crime.

The likelihood that an offender who has earned the benefit of nullification will return to crime is not great. We need only look at the experience which the Department of Labor has had in underwriting money bond for former offenders who needed it to gain employment. The loss experience of offenders under this program is less than commercial companies have with nonoffenders.

The effect of nullification on the ex-offender, however, would be great. He could be restored to hope—to the hope that he could seek and gain employment with promise for the future.

No one could be certain this is the only key to recidivism, but I do know that people without this hope are more likely to commit crimes, and that people who have hope are more likely to return to an honest and upright lifestyle. I believe that society deserves to hope that ways can be found to terminate the terrifying cycle of recidivism, and I believe that nullification of criminal records has the potential of doing a part of the job.

SECTIONAL ANALYSIS OF THE OFFENDER REHABILITATION ACT

Sec. 1. The short title is "The Offender Rehabilitation Act."

Sec. 2. The Congress hereby finds that the rehabilitation of criminal offenders is essential to the protection of society; that gainful employment is significant to the rehabilitation of criminal offenders: that misuse of past criminal records is a substantial barrier to employment and to the bonding and licensing necessary to secure employment; and hereby declares that the proper use of criminal records will aid the rehabilitation of offenders and protect the interests of society.

Sec. 3. (a) This section contains the basic operating language, authorizing a rehabilitated offender to make application to the U.S. District Court where he was convicted for an order that would quiet the record of his conviction for purposes of employment, bonding and licensing in connection with any business, trade or profession. In order for sufficient time to have passed for an individual to demonstrate that he has been rehabilitated, no application may be made until three years after the end of a sentence of probation and five years after expiration of sentence if imprisonment is involved. For example, if an individual was given a sentence of three years probation, an application could not be submitted until at least six years after the date of conviction. For an individual given a five year sentence with two years served in prison and three years on parole, it would be at least ten years from the beginning of the

sentence before he would be eligible to apply. An individual who does not live in the District may ask to transfer his application to his home district.

Sec. 3 (b) The court is authorized to grant an order when the individual has shown evidence of his rehabilitation. The court would be given procedural latitude in each case to fit the circumstances presented. The United States attorney would be informed of each application, and the principle evidence might consist of a background investigation by the Federal Bureau of Investigation requested by the U.S. Attorney. The court would also have available the resources of the U.S. Probation Officers for investigation and evaluation.

Secs. 4 & 5. The language of these two sections, similar to Section 3, extends the benefit of quieting a criminal record to the individual who has been released from arrest, had charges against him dismissed, or demonstrated his innocence of the crime for which he was charged, either by acquittal or pardon based on innocence. A procedural flexibility is given to the court to meet the circumstances of individual cases.

Sec. 6. The benefit of being able to quiet the record of a criminal conviction would be available to only the one-time offender. This language provides that a person convicted of two or more crimes, or against whom any charges are pending, cannot apply for a nullification order.

Sec. 7 (a) The scope and meaning of an order quieting a criminal record restores to the individual civil rights and privileges unrelated to law enforcement that he may have lost as a result of his conviction, such as voting, jury service, and testifying in a civil case without impeachment of testimony. It specifically prohibits the use and distribution in any manner of criminal records that have been quieted in situations related to employment, bonding or licensing in connection with any business, trade or profession.

Sec. 7 (c) An individual may deny the existence of records which have been properly nullified by a court order. A court may recognize the public interest and national security, and an order quieting a record may be qualified or limited in any way.

Sec. 7 (d) The application for an order would provide the individual with an opportunity to list agencies which he believes have copies of criminal records, and each of these agencies would then receive a copy of the court order as notice that the record had been quieted.

Sec. 8. The dissemination or use of criminal records by an employee or officer of government after a court order had been granted would be a misdemeanor if the use was in connection with employment, bonding or licensing, if the use was not permitted by an exemption provided under Sec. 7(c). Use for any legitimate law enforcement purpose would not be covered.

Sec. 9. A court order quieting a criminal record of a first offender would be wiped out by a second conviction. It is a self-operating procedure, in which conviction of a second offense is all that is required to have the previous court order completely erased. Such things as traffic offenses and petty misdemeanors would be exempted from consideration.

Sec. 10. All individuals who may in the future be eligible to have a criminal record quieted would be informed of the procedure and be given copies of the application form.

Sec. 11. This section codifies the application of the Full Faith and Credit provisions of the Constitution to state orders of annulment or expungement of criminal records,[1] and also would, if the criteria are met, provide that the benefit of any state order could be extended to cover any records of state convictions being maintained by Federal agencies.

Sec. 12. This language is required to protect the provisions of the Drug Abuse Control Act of 1970 which provides for the expungement of the records of conviction of certain drug offenses.

Sec. 13. The definition of "state" includes convictions under state law as well as county and municipal ordinances, and the definition of "indictment" includes charges made in the form of an information.

Sec. 14. Conviction of certain heinous crimes, including homicide, rape, assault with a dangerous weapon, treason, kidnapping and hijacking on an airliner would make an individual unable to obtain an order quieting a criminal record.

[1] Smith v. Smith, 1961, 288 F.2d 151, 109 U.S. App. D.C. 367; People v. Terry, 1964, 390 P.2d 381, 71 C.2d 137, 37 Cal Rptr. 605 cert. denied 85 S. Ct. 132, 379 U.S. 866, 13 L. Ed. 2d 68.

SOME QUESTIONS AND ANSWERS ABOUT THE OFFENDER REHABILITATION ACT

What's the purpose?

To stop the use of old criminal records as barriers to hiring, bonding and licensing one-time offenders who have demonstrated their complete rehabilitation.

How does it work?

If an individual can prove to the court that convicted him that he has been completely rehabilitated, the court issues an order limiting the use of his record.

Who protects the public?

The offender must wait three to five years after he has finished his sentence to prove that he has been rehabilitated. Any order issued under this act can require disclosure of the record when the circumstances require it. There would be no effect on police or national security.

Who can apply?

A first offender of a non-violent offense may apply, and explanations and application forms would be given to all who may be eligible.

What good would it do?

The first offender would have a strong new incentive to go straight. Once he passed the hurdle, many new opportunities would be opened to him to live a lawful and meaningful life. He would have an added reason to stay out of trouble because a second offense would automatically wipe out the order.

What happens when charges are dropped or people found innocent?

The use of arrest records where there has been no conviction could be limited so they would not be a barrier to hiring, bonding or licensing.

But most convictions are in state and local courts?

A Federal order could recognize a State action limiting the use of a criminal record. This would broaden application of state law, and encourage states to pass their own laws.

CONDEMNED BY THE RECORD

(By Pasco L. Schiavo)

The law will not permit double jeopardy, yet it ironically fosters "multiple social jeopardy" by maintaining the permanent criminal record. What incentive is there for the individual who has been convicted to "go straight" if he knows he will never again share the opportunites of his fellow citizens? What is worse, the person who is erroneously arresed and subsequently released or acquitted must ever after account for his arrest. It is time more states followed the lead of those that have enacted expungement statutes.

The list of federal and state appellate court decisions over the past fifteen years expanding the rights of defendants in criminal cases is a long and well-known one. While the changes in the law wrought by these decisions have been revolutionary, they have been well accepted generally as being in line with our modern concepts of justice in a democratic society. Yet there remains an area of criminal law that has not progressed since the days of the Star Chamber.

This is the area of the "criminal record" as it applies to those who have been arrested for but not convicted of a crime or have been convicted of a crime but totally rehabilitated. This group includes both adults and juveniles, all cruelly branded with indelible "criminal records." Those persons who have been improperly convicted of a crime or innocently involved in the murkier details of a criminal offense also fall into this general category. The habitual criminal or criminal recidivist is excluded.

These innocent or rehabilitated persons remain among the condemned of our society. Wherever they go and whatever they do, they are held, both formally and informally, to repetitious and humiliating accountings for their "criminal records." Although the law does not permit double jeopardy for a single crime, it ironically fosters a multiple social jeopardy by allowing the permanent criminal record. Persons with an undeserved or irrelevant record are the forgotten of our society in being bypassed by every liberal and progressive movement in the realm of criminal law.

I have been unsuccessful in finding any valid reason for the present system of recording criminal proceeding. What few proponents I have met are more retribution minded than anything else, and the retribution argument lost its validity around the turn of the century.

Under Pennsylvania law, which is typical of most states, criminal arrests and charges must be docketed in a permanent public records in the office of the clerk of courts in the county where the arrests or charges are made. Records of all arrests, charges and convictions must be permanently retained, and, as they are public records, anyone may see them.

The qualified exception to this public availability of criminal records is in the juvenile courts. A statute specifically provides for keeping juvenile court records separate from all other proceedings and from indiscriminate public inspection. Yet even this additional protection for juvenile offenders is emasculated by the corollary provision that parents, representatives of the person, institution, association or society concerned and "other persons having a legitimate interest" may inspect the records.[1] This allows prospective employers, governmental agencies and a host of others access to these records.[2]

The growing federal and state repositories of individual records, combined with advanced methods of storage, recall, microfilming and reproduction, guarantee immortality for past offenses.[3] The harsh and injurious stigma resulting from permanent records of past criminal proceedings has prevented many qualified and law-abiding citizens from serving in the Armed Forces,[4] from pursuing occupations commensurate with their skills, from seeking public office and governmental service, from contributing as constructive members of their society and even from enjoying many rights of citizenry available to others in our society. How can a convicted individual make a good faith effort toward rehabilitation if he is forced to face his peers with a lifetime stigma?

A CRIMINAL RECORD IS A HANDICAP

According to one study of employers' attitudes toward prospective employees with criminal records, over half of the employers interviewed answered that a criminal record is definitely a handicap.[5] Eighty-four percent of those interviewed stated that they thought that this discrimination fostered further criminal activity. In another interview of some 250 men with criminal records, 94 per cent agreed with the conclusions of the majority of the employers. A survey of forty-four business and professional employers revealed that not one of them would place a person with a criminal record in a position of trust, that is, as an accountant, cashier or executive.[6]

Practically every military, governmental or school questionnaire and employment application asks the following question: "Were you *ever* convicted or arrested for a criminal offense other than for a minor traffic violation? If so, explain in detail." One party I know was convicted of burglary in 1925 at the age of 19. It was his first and last offense, prompted primarily by the smooth persuasion of his 30-year-old coconspirator, who split the $15 booty with him, although it was never established that the 19-year-old had indeed participated in the actual burglary. What resulted was a quick trial without a jury, wherein the 19-year-old was not represented by counsel, was never advised that he had any rights and was in effect coerced into pleading guilty. Yet his record stands to this day, and he must answer the above question in the affirmative or be subjected to humiliation and subsequent discharge for lying should his employer learn the truth. On the other hand, by answering the question truthfully, the applicant must again regurgitate the unpleasant details of a moment's

[1] Purdon's Pa. Stat. Ann. tit. 22, § 245 (1965.)

[2] See dissent of Musmanno, J. in In re Holmes, 379 Pa. 599, 612–613, 109 A.2 523 (1954): "A most disturbing fallacy abides in the notion that a juvenile Court record does its owner no harm. . . . In point of fact it will be a witness against him in the court of business and commerce, it will be a bar sinister to him in the court of society where the penalties inflicted for deviation from conventional codes can be as ruinous as those imposed in any criminal court, it will be a sword of Damocles hanging over his head in public life. . . . And when I see how the intended guardian angel of the Juvenile Court sometimes nods at the time that the most important question of all—innocence or guilt—is being considered, I wonder whether some of these . . . may not have been unjustly tainted in their childhood."

[3] Rule 55 of the Federal Rules of Criminal Procedure provides for the keeping of records by the clerk of the district courts and United States commissioners as the Judicial Conference may prescribe. An amendment of 966 made it specifically mandatory for the clerk to keep a book called the criminal docket in which, among other things is entered each order of judgment of the court and the date of entry thereof.

[4] The standard statement of personal history required for enlistment in the Armed Forces asks if the applicant was ever "detained, held, arrested, indicted or summoned into Court as a defendant in a criminal proceeding." If he answers affirmatively, the applicant will be accepted only after special inquiry by the director of personnel of the respective service.

[5] Wallerstein *Testing Opinions of Causes of Crime*, 28 Focus 103. (1949).

[6] Melichercik, *Employment Problems of Former Offenders*, 2 N.P.P.A.J. 43 (1956).

deviation from society's standards of conduct, long ago and far away. The record is once more revived and perpetuated, with the details ready for presentation to another audience in another forum. The fact that his conviction might have been thrown out by an appellate court today in light of recent decisions will hardly matter to a prospective employer. As a matter of fact, this particular man was refused two jobs after having filled out the applications and without any explanation for the refusals.

And, of course, there are always the classical cases of the would-be suitor and the lady fair in trouble, resulting in distasteful paternity prosecutions in which both names are forever linked to each other as a matter of record. Most of these cases are settled amicably and are hardly of a true criminal nature, but because of the sexual frame of reference, the violated lady fair and the child will probably suffer more than anyone because of the glowing charges and accompanying notes of testimony which are so carefully preserved in the local clerk of court's office for all to see—future spouses, the child and the general public.

Another related problem is that of convictions for violations of statutes and laws that have later been declared unconstitutional or altered in the degree of their application by the courts or subsequent legislation. Recently, the Supreme Court struck down state antimiscegenation statutes, under which a host of convictions and records had been amassed in many of the Southern states.[7] The Court of Appeals for the Fourth Circuit recently struck down the offense of public drunkenness.[8] Consider all the court records that involve the crime of drunkenness or violations of unconstitutional segregation statutes.

In Pennsylvania the relatively minor offense of "shoplifting" has recently been recognized as a minor crime by intelligent legislation which contrasts with that of states which equate shoplifting with burglary and larceny.[9] Again consider, for example, the number of people in Pennsylvania who previously were convicted of burglary and larceny, which connote crimes of great moral turpitude and even violence, when the charge should have been "shoplifting". Yet the record still stands, always ready to be summoned forth.

An even greater injustice occurs when a person is arrested for a crime and the charges against him are later dropped, a verdict of "not guilty" is returned or his conviction is upset by an appellate court. He still bears for all time the stigma of having had criminal proceedings instituted against him, no matter how ludicrous or ill-based they were.

Another person with whom I am personally acquainted applied for a state liquor license and was faced with that familiar question: "Were you ever arrested?"[10] He thought back fifteen years to a time when he had been maliciously arrested (the charges later were dropped) by an angry party from whom he was lawfully repossessing an item sold through a previous business. The truthful response resulted in considerably more red tape than would ordinarily be encountered in processing such an application. It also dramatized the hard fact that anyone can blacken the name of another by maliciously having him arrested. A lawsuit for malicious prosecution is of little consolation when the damages are irreparable.

The person branded with a criminal record has a well-founded reluctance about taking an active part in community or public affairs for fear that his record will come to light and become a public issue. It would be the rare political campaign that would not publicize the word-for-word record of arrest or conviction of the

[7] *Loving v. Virginia*, 388 U.S. 1 (1967).

[8] *Driver* v. *Hinnant*, 356 F. 2d 761 (4th Cir. 1966). The court released the petitioner on a writ of habeas corpus after his conviction under a North Carolina statue making public drunkenness a crime. The court stated that addiction to alcohol is universally accepted as a disease or "disorder of behavior." It went on to say that "the State cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of disease. However, nothing we have said precludes appropriate detention of him for treatment and rehabilitation *so long as he is not marked a criminal*" (emphasis added) 356 F. 2d at 765. *Contra, Powell* v. *Texas*, 392 U.S. 514 (1968).

[9] Purdon's Pa. Stat. Ann. tit. 18, § 4816.1 (1965).

[10] Harsher yet is the usual state statute (and relevant court decisions) dealing with such administrative matters. A Pennsylvania statute concerning liquor licenses. Purdon's Pa. Stat. Ann. tit. 47, § 4–404, states that the Liquor Control Board must be satisfied "that the applicant is a person of good repute" before granting a license. *In re Appeal of Kuhns*, 47 WESTMORELAND COUNTY L. J. 41 (1964), held that it was not an abuse of discretion for the Liquor Control Board to consider a person's past *criminal involvement* in determining his fitness for a license even though the last involvement of the applicant was more than three years earlier. The court stated that while past specific acts are not admissible in criminal prosecutions, they are admissible in such a civil action as this and are sufficient to sustain a finding by the board of unfitness to hold a liquor license. 47 WESTMORELAND COUNTY L. J. at 45.

opposing candidate. Little consideration would be given to the possibility that the offense was maliciously charged or occurred during teen-age or college years.

Taking any proper but controversial stand in the community also creates the possibility of such unjust revelations by the other side, and when these revelations are made from the printed record, permanent damage is done to the individual, his family and the cause which he champions.

The findings of Nussbaum are that 50,000,000 people in the United States have records of offenses, yet the greater number of these do not become recidivists.[11] It is clear that the problem of the criminal record is a very real one, directly affecting friends, relatives, neighbors and perhaps even ourselves. Our courts and social reform groups are becoming increasingly aware of the problem, for both juveniles and adults are speaking out in increasing numbers.[12]

REMEDIAL LEGISLATION IS NEEDED

The legislatures can do much in this neglected area by enacting expungement statutes and statutes which substantially curtail inquiries about a person's remote past. Several states, including Alaska, Arizona, California, Indiana, Kansas, Michigan, Minnesota, Missouri, Utah and New Jersey, have already enacted progressive legislation aimed at the expungement of criminal records and annulment of the related conviction. This article is not attempting to evaluage the relative merits of each of these statutes or to draft a model code,[13] but is intended to bring out the more salient aspects of this remedial legislation.

Most of the statutes designate five years after an adult offender has been released as the time of expungement of his record and annulment of the conviction if no other crimes have been committed during the interim. It is only common sense that one of the surer ways of measuring the man is by allowing him a reasonable time in which to prove himself as a useful and upright citizen. There seems to be no basis for a period shorter than five years except in the case of a juvenile offender who may receive some deserved benefit if the record is expunged and conviction annulled at the age of majority, provided there has been no recidivism in the meantime. In contrast, a common law felon or a recidivist may be required to present a longer period of time as proof of his good intentions and rehabilitation.

Relief for those individuals might also come in the form of "sealing-off" their records, as one has been done in California;[14] however, complete destruction of the records (including the petition for expungement relief itself, with a certified copy thereof for the offender to prevent rearrest where the statute of limitations has not yet run) is the better alternative. The latter and more desirable proceeding would be initiated by a petition to the court wherein the records of the petitioner lie, supported by a single and substantiated affidavit. Only when the court finds a discepancy in the facts or when a statute permits earlier relief at the court's discretion would there be a hearing on the facts. The local probation office would serve in an important advisory capacity at these hearings. Once relief was granted, any and all civil disabilities and adverse legal effects attendant upon the original connection would be annulled, much as is the case with a pardon. Of course, record expungement relief should come automatically with a pardon, as the present legal effect of a

[11] Nussbaum, First Offenders, A Second Chance 8–11 (1956); also see Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147.

[12] "Of course the record of a conviction for a serious crime is often a lifelong handicap. There are a dozen ways in which even a person who has reformed, never offended again, and constantly endeavored to lead an upright life may be prejudiced thereby. The strain on his reputation may at any time threaten his social standing or affect his job opportunities." *United States* v. *Morgan*, 346 U.S. 502 (1954); also see Gough, *supra* note 11:

"We would never go so far, I am sure, as to say that because a man had been in prison he remained a criminal all his life. Some men, as we know, with no criminal propensities at all have made mistakes, been overtaken by temptation and paid the penalty the State demands. We would not add to their burdens by saying or even intimating that they shall be shunned or classed as criminals." *New York* v. *Piere*, 269 N.Y. 315, 323, 199 N.E. 495 (1936).

[13] See National Council of Crime and Delinquency, *Annulment of a Conviction of Crime: A Model Act*, 8 Crime and Delinquency 100 (1962).

[14] Cal. Penal Code § 1203.4; CAL. WELFARE AND INSTITUTIONS CODE §§ 781, 1179, 1772. California has experienced so many problems with its record-sealing statute that this remedy might best be thought of as only a second choice. Sec. 40 So. Cal. L. Rev. 127 (1967).

pardon is to annual a conviction[15] anyway. In addition to provision for expungement of the record, legislatures should enact prohibitions against inquiry as to whether a person has been convicted of a crime unless there is the qualifying clause—"which has not been annulled or has occurred within the past five years." Questions as to "arrest" only should be completely prohibited.

All records of arrests which are subsequently withdrawn, dismissed by the grand jury or trial court or which result in a verdict of "not guilty" should be destroyed immediately. Just how far expungement should go is a difficult question to answer. It certainly should go as far as the records of the clerk of courts and all other governmental agencies holding this information as a matter of public record. There are many valid arments for extending expungement to all governmental and law enforcement agencies in order to accomplish its purpose of complete personal redemption effectively.

With expungement statutes in force, law enforcement officers would experience more co-operation from the person who is afraid of pleading guilty for fear of acquiring a record and the witness or the victim who does not want a permanent connection with a criminal proceeding. Along with the rest of society, law enforcement officers could take comfort from the fact that many offenders and convicts would have an incentive to remain on the straight and narrow. Would not a once-convicted misdemeanant or felon be extra careful about his behavior as the time drew even nearer for the completion of his probationary expungement period? What a far cry from the familiar present refrain of: "I already have a record. What difference does it make?"

Legal reform has grossly neglected the criminal record. No more time can be wasted before steps are taken to remedy this falling, at both the federal and state levels. Once legislative hearings are held to examine the need for reform, our lawmakers will be immediately propelled by their findings to institute the comprehensive criminal records reform legislation needed to give the rehabilitated, the first offender and the unjustly accused the second chance they deserve.

THE EXPUNGEMENT OF ADJUDICATION RECORDS OF JUVENILE AND ADULT OFFENDERS: A PROBLEM OF STATUS*

(By Aldan R. Gough**)

Over the past half-century, American correctional law has focused increasingly on the rehabilitation of the individual offender and the development of means and practices appropriate to that end.[1] Realistic appraisal compels the conclusion that the system of penal law must fulfill a complex of functions pointed toward a single ultimate goal: the ordering of society in such a manner that each member has the fullest opportunty to realize his human dignity through community life.[2] The law must at once serve the reconstruction of the offender, the incapacitation of the intractable criminal, the deterrence of others from criminal conduct, and the exaction of retribution and expiation, for the offense[3] (Though often decried in theory and rather less ofter disavowed in practice, the punitive aspects of correctional policy remain an obvious reality.)[4] If the offender reoffends, none of the purposes is served.

It is clear that any program for reform must create the institutions necessary for its realization, and that the sanctions it imposes must be functionally

[15] Its effect is not only exemption from further punishment when unconditional, but it relieves from all legal disabilities resulting from conviction. *Pennsylvania* ex rel. *Banks* v. *Cain*, 348 Pa. 581, 28 A. 2d 897 (1942).

* The author is indebted to Professor Lloyd L. Weinreb of the Harvard Law School for his helpful commentary on this article.

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[1] For a critical appraisal see Allen, Criminal Justice, Legal Values and the Rehabilitative Ideal, 50 J. Crim. L., C. & P.S. 226 (1959–60).

[2] Snee, Leviathan at the Bar of Justice, in Government Under Law 96 (Sutherland ed. 1956). See also Laswell & Donnelly, The Continuing Debate Over Responsibility: An Introduction to Isolating the Condemnation Sanction, 68 Yale L.J. 869, 876 (1950).

[3] Tappan, Contemporary Correction 4–13 (1951).

[4] The imposition of punishment by the state is frequently justified as the political counterpart of individual vengeance. Sir James Stephen is quoted as remarking that "criminal procedure is to resentment what marriage is to affection: namely, the legal provision for an inevitable impulse of human beings." Sutherland & Cressey, Principles of Criminology 287 (5th ed. 1955); see Bloch & Geis, Man, Crime, and Society 568–71 (1962).

For an articulation of unconscious motivations operative in our treatment of lawbreakers see Goldstein & Kaltz, Abolish the "Insanity Defense"—Why Not?, 72 Yale L. J. 854, 856 n.11 (1963).

apposite to the end it seeks.[5] There have 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.[6] The late Paul Tappan has observed that when the juvenile or adult offender has "paid his debt to society," he "neither receives a receipt nor is free of his account:"[7] His status is that of "ex-offender"—an anomalous position lying somewhere between the poles of social acceptance and social condemnation, though obviously closer to the latter. There is considerable evidence to indicate that the failure of the criminal law to clarify the status of the reformed offender impedes the objective of reintegrating him with the society from which he has become estranged.[8] The more heavily he bears the mark of his former offense, the more likely he is to reoffend.

Despite relatively widespread judcial recognition of the perdurability and disabling effects of a criminal record,[9] scant attention has been given by lawmakers and behavioral scientists to means whereby the law might in a proper case relieve the first offender or juvenile miscreant from this handicap. In recent years, a handful of jurisdictions have enacted legislation allowing the expungement of an adjudication record of a juvenile or a conviction record of an adult first offender. This paper will attempt to survey the need for such legislation, to examine existing and proposed statues on both adult and juvenile court levels, and to make some evaluation of their effectiveness. It is the writer's view that providing institutional means of restoring status after reformation is an appropriate way to harmonize "the sanctioning activities of the democratic body politic with the ultimate value—human dignity."[10]

At the outset, it is necessary to limn with some particularity what expungement is and what it is not. By an expungement statue is meant a legislative provision for the eradication of a record of conviction or adjudication upon fulfillment of prescribed conditions, usually the successful discharge of the offender from probation and the passage of a period of time without further offense. It is not simply a lifting of disabilities attendant upon conviction and a restoration of civil rights, though this is a significant part of its effect.[11] It is rather a redefinition of status, a process of erasing the legal event of conviction or adjudication, and thereby restoring to the regenerate offender his *status quo ante*.

The systematic study of expungement acts is hindered by the extreme lack of uniform terminology, even within a single jurisdiction. The functional process of deleting the adjudication of guilt upon proof of reformation is variously

[5] Fuller, The Morality of Law 166 (1964).

[6] Rubin, Welhofen, Edwards & Rosenzweig, The Law of Criminal Correction 694 (1963) [hereinafter cited as Rubin *et al.*]

[7] Tappan, *Loss and Restoration of the Civil Rights of Offenders*, in National Probation and Parole Association 1952 Yearbook 86, 87.

Professors Schwartz and Skolnick have shown that conviction works a degradation of status which "continues to operate after the time when, according to the generalized theory of justice underlying punishment in our society, the individual" 'debt' has been paid." Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 Social Problems 133, 136 (1962). Aaron Nussbaum, Assistant District Attorney of Kings County (New York), has written that "a theory of law which withholds the finality of forgiveness after punishment is ended is an indefensible in logic as it is on moral grounds." Nussbaum, First Offenders, A Second Chance 24 (1956).

[8] Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543 (1960).

[9] *E.g.*, United States *ex rel.* Caminito v. Murphy, 222 F.2d 698, (2d Cir. 1955); *cf.* Parker v. Ellis, 362 U.S. 574, 593–594 (1960) (Warren, C.J., dissenting); United States v. Morgan, 346 U.S. 502 (1954) (Minton, J., dissenting).

Of course the record of a conviction for a serious crime is often a lifelong handicap. There are a dozen ways in which even a person who has reformed, never offended again, and constantly endeavored to lead an upright life may be prejudiced thereby. The stain on his reputation may at any time threaten his social standing or affect his job opportunities . . . *id.* at 519.

On the effect of juvenile court adjudication see *In re* Contreras, 109 Cal. App. 2d 787, 789–90, 241 P.2d 631, 633 (1952); Jones v. Commonwealth, 185 Va. 335, 341–42, 38 S.E.2d 444, 447 (1946).

[10] Laswell & Donnelly, *supra* note 2, at 876.

[11] Civil rights lost on conviction are usually regained, if at all, by pardon or by statutes providing automatic restoration upon completion of sentence. Extensive analysis of these restorative mechanisms will be found in Rubin et al, 613, 632; Rubin, Crime & Juvenile Delinquency 152 (2d ed. 1961); Tappan, *supra* note 7, at 96–104.

For a thorough discussion of the particular disabilities attendant upon conviction see Green, Post-Conviction Disabilities Imposed or Authorized by Law, 1960 (unpublished honor paper on file in Harvard Law Library).

designated expungement;[12] record sealing;[13] record destruction;[14] obliteration;[15] setting aside of conviction;[16] annulment of conviction;[17] amnesty;[18] nullification of conviction, purging, and pardon extraordinary.[19] Because many of these terms have wider use in other legal contexts, it is suggested that the term expungement be adopted to avoid confusion.

In particular, the usual denotations of amnesty and pardon must be distinguished from expungement. The former are exceptional and specific acts of grace, usually granted by executive power, rather than processes of regular and widespread application available through legislative provision.[20] Despite confusion engendered by murky decisional language, it seems clear—and has been widely held—that a pardon remits punishment and removes some disabilities, but does not erase the legal event determinative of the offender's status *qua* offender, *i.e.*, the conviction itself.[21] It is the status resulting from the adjudication of guilt, more than any punishment imposed, which is characteristic of conviction; if the disabilities of conviction are to be removed effectively and the reformed offender restored to society, the remedy chosen must reach the genesis of the status.[22]

I. AN EXAMINATION OF NEED

The consequences of conviction are wide in form, some authorized expressly or implicitly by law, others attached by subtle attitudes of community rejection. Commonly, the law provides for the deprivation or suspension of political and civil rights upon conviction of a certain class of crimes, usually felonies. These explicit disabilities include the loss of the right to hold any public office or trust, to serve as a juryman, and to practice various ocupations and professions.[23] In at least forty-six states, conviction of crime may serve as a ground for divorce.[24] Many of these disabilities persist beyond the termination of sentence.

Every state and the federal system has some means of restoring civil and political rights.[25] Usually this takes the form of a pardon granted at the discretion of the governor or the board of pardons appointed by him.[26] In some

[12] Cal. Welfare and Inst'ns Code § 781; Utah Code Ann. § 55–10–117 (Supp. 1965).

[13] Cal. Pen. Code § 1203.45; Cal. Welfare and Inst'ns Code § 781. Technically, expungement imports physical destruction of the records rather than sealing. Andrews v. Police Court, 123, P.2d 128 (Cal. App. 1942), *aff'd*, 21 Cal. 2d 479, 133 P.2d 398 (1943): 40 Cal. Ops. Att'y. Gen. 50 (1962). As used in this paper, the term expungement includes both destruction and sealing unless otherwise specified.

[14] Ind. Ann. Stat. § 9–3215a (1956).

[15] *Ibid.*

[16] Mich. Stat. Ann. §§ 28.1274(101), (102) (Supp. 1965). Statutes permitting the setting aside of convictions are not true expungement acts, and have much more limited effect than the latter. See text *accompanying notes 30–34 infra*. The Michigan enactment would appear to be of the former type, save for the provision of § 28.1274 (102) that upon entry of an order setting aside a conviction, the person "for purposes of the law" shall be deemed not to have suffered any previous conviction. Because of its uncertain scope and the possibility that the broad language may reach the status of the conviction, it is included here as an expungement act, albeit a deficient one.

[17] National Council on Crime & Delinquency, *Annulment of a Conviction of Crime: A Model Act*, 8 Crime & Delinquency 97 (1962) [hereinafter cited as N.C.C.D. Model Act].

[18] State of N.Y. Ass'y Bill, Int. No. 233 (3d Rdg, 547, Print 5363, Rec. 703) (1965).

[19] Minn. Stat. Ann. §§ 242.31, 638.02 (Supp. 1965).

[20] Korn & McCorkle Criminology & Penology 600–04 (1959); Sutherland & Cressey, *op. cit., supra* note 4, at 544–49.

[21] Carlesi v. New York, 233 U.S. 51 (1914) (state may charge as prior crime offense pardoned by President); People v. Biggs, 9 Cal. 2d 508, 71 P.2d 214 (1937) (offense in sister state deemed prior conviction despite pardon); *In re* Lavine, 2 Cal. 2d 324, 329, 41 P.2d 161, 163 (1935) (pardon "implies guilt, and does not wash out the moral stain" or restore the offender's character); People *ex rel.* Jobissy v. Murphy, 224 App. Div. 834, 279 N.Y. Supp. 762 (1935); State v. Edelstein, 146 Wash. 221, 62 Pac. 622 (1927). See also Burdick v. United States, 236 U.S. 79 (1915). For language to the contrary see *Ex. Parte* Garland, 71 U.S. (4 Wall.) 333, 380–81 (1867).

On the general history and scope of executive clemency see Welhofen, *Effect of a Pardon*, 88 U. Pa. L. Rev. 177 (1939); Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv. L. Rev. 647 (1915). For a discussion of pardon in its modern context see Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 Chi.-Kent. L. Rev. 13 (1965).

[22] Rubin *et al.* 690. One who has received a pardon must nevertheless disclose his conviction upon inquiry. 1953 N.J. Ops. Att'y Gen. 206.

[23] Rubin *et al.* 611–32; Tappan, *supra* note 7.

[24] A tabulation of states which regard conviction as a ground for divorce is contained in Green, *op. cit: supra* note 11, at 64–66. See also Rubin *et al*, 614–15.

[25] Rubin *et al.* 632–37 Green, *op. cit., supra* note 11, at 75–77.

[26] There is wide variation in practices from state to state. For example Rhode Island reserves the restoration of civil rights apart from a grant of pardon to the legislature, R.I. Gen. Laws Ann. § 13–6–2 (1956); and Mississippi permits it alternatively to the governor or legislature. Miss Const. art. 5, § 124; art. 13, § 253 (restoration of suffrage by legislature only); *cf.* Miss. Code Ann. § 4004–27 (1956) (governor may restore civil rights on completion of probation).

states, the courts are empowered to restore civil rights.[27] A number of states provide for the automatic restoration of civil rights either upon completion of a term of probation or parole or upon termination of a prison sentence.[28] Both pardon and automatic restoration revive the more formal civil rights, but they are unable to remove the stigmatic disabilities attaching in such crucial social areas as employment.[29]

Some nine states have statutes providing that upon satisfactory completion of probation and "evidence of reformation," the offender may petition the court to have his conviction and the plea of verdict of guilty "set aside"; he is thenceforth released from all "penalties and disabilities" attendant upon the conviction.[30] The Federal Youth Offender Act contains essentially similar provisions applicable to youth offenders; however, under the federal statute, the issuance of an order setting aside the conviction is automatic upon the unconditional discharge of the offender before the expiration of his sentence.[31] The effects of such statutes are not entirely clear, and they have been subjected to interpretations quite at variance with the post-conviction relief they purport to provide.[32] Though the scope of alleviation provided by them is said to be broader than that provided by pardon,[33] they are clearly not statutes of expungement and do not in fact restore the offender's former status among his fellow men despite some judicial language to that effect.[34]

[27] *E.g.*, N.C. Gen. Stat. §§ 13–1 to –10 (1953); Tenn. Code Ann. §§ 16–504, 40–3701 (1955).

[28] See the tabulation and discussion in Rubin *et al.* 633–34. The archetypal automatic restoration statute appears to be 9 Geo. 4, c. 32, § 3 (1828), which provides that completion of sentence in case of a felony conviction shall have the same effect as a pardon ". . . to prevent all doubts respecting the Civil Rights of Persons convicted. . . ."

[29] See authorities cited note 28 *supra*.

[30] Cal. Pen. Code §§ 1203.4, 1203.4a; Del. Code Ann. tit. 11, § 4332(1) (1953); Idaho Code Ann. § 19–2604 (Supp. 1965); Nev. Rev. Stat. § 176.340 (1959); N.D. Cent. Code § 12–53–18 (1960); Tex. Code Crim. Proc. Ann. arts. 42.12 § 7, .13 § 7 (1965); Utah Code Ann. § 77–35–17 (1953); Wash. Rev. Code Ann. § 9.95.240 (1961; Wyo. Stat. Ann. § 7–315 (1957) (statute uses term "parole," but seemingly refers to probation or "court parole" only). For an invidious use of the Utah statute see State v. Schreiber, 121 Utah 653, 245 P.2d 222 (1952), where the conviction had been vacated on the condition that defendant "permanently leave the state on account of his ill health." Model Penal Code § 206.6(2) (Prop. Official Draft, 1962) permits discretionary vacation of conviction if the offender is discharged from probation or parole before expiration of the maximum term, or if he has led a law-abiding life for five years after expiration of sentence.

Cal. Welfare & Inst'ns Code §§ 1179, 1772 provide that a person honorably discharged from the control of the Youth Authority shall be released from all penalties and disabilities resulting from the offense. Section 1179 operates automatically, while § 1772 requires the discharged offender to petition the court for relief, which may be denied. The apparent overlap of the two sections is not clarified by the statutory language, but it is the interpretation of the Youth Authority that § 1179 applies only to juvenile court commitments and § 1772 only to commitments from criminal courts. Baum, *Wiping Out a Criminal or Juvenile Record*, 40 Cal. S.B.J. 816, 821 (1965). Model Penal Code § 6.05(3) allows vacation of the conviction of a young adult offender as an alternative to providing that his conviction shall not constitute a disability.

[31] 18 U.S.C. § 5021 (1964).

[32] For example, note the interpretation of Cal. Pen. Code § 1203.4 in Garcia-Gonzales v. Immigration & Nationalization Service, 344 F.2d 804 (9th Cir.), *cert denied*, 382 U.S. 840 (1965). Despite the language of the statute that the setting aside of the guilty plea and the dismissal of the information "shall . . . [release the petitioner] from all penalties and disabilities . . .," the court ruled that the conviction was not expunged for purposes of 8 U.S.C. § 1251 (1964), authorizing deportation of an alien convicted of a narcotics offense. 18 U.S.C. § 5021 (1964) was similarly treated in Hernandez-Valensuels v. Rosenberg, 304 F.2d 639 (9th Cir. 1962). See Adams v. United States, 299 F.2d 327 (9th Cir. 1962) (discusses Cal. Welfare & Inst'ns Code § 1772).

[33] 18 U.S.C. § 5021 (1964) acts to "expunge the conviction" while pardon only removes disabilities and restores civil rights. Tatum v. United States, 310 F.2d 854, 856 n.2 (D.C. Cir. 1962). *But see* 1957 N.J. Ops. Att'y Gen. 143 (expungement of record has less effect than a pardon).

[34] If the conditions of probation are fulfilled, the pleas or verdict of guilty may be changed . . . [and] the proceedings expunged from the record. . . . He has then . . . received a statutory rehabilitation and a reinstatement to his former status in society insofar as the state by legislation is able to do so. . . . Stephens v. Toomey, 51 Cal. 2d 864, 870–71, 338 P.2d 182, 185 (1959) (dictum).

Contra, In the Matter of Phillips, 17 Cal. 2d 55, 61, 109 P.2d 344, 348 (1941).

[I]t cannot be assumed that the legislature intended that such action by the trial court under [Penal Code] section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime.

The *Phillips* case involved a lawyer disbarred upon conviction of a misdemeanor involving moral turpitude; the court held that relief under Cal. Pen. Code § 1203.4 did not work reinstatement. It is not entirely clear whether the decision turned upon the non-obliteration of the judgment or upon the fact that the court viewed disbarment as outside the "penalties disabilities" clause of the statute. Model Penal Code § 306.6 (Prop. Official Draft, 1962) provides that the order vacating the conviction does not, *inter alia*, preclude proof of conviction whenever relevant to the exercise of official discretion, nor does it justify a defendant in denying conviction unless he also calls attention to the order.

It is not the explicitly articulated disabilities which are most troublesome to the reformed offender. It is rather the less-direct economic and social reprisals engendered by his brand as an adjudicated criminal. The vagaries of public sentiment often discriminate against persons with a criminal past, with very little regard for the severity of the offense, and they do not frequently distinguish between persons arrested and acquitted or otherwise released and persons convicted.[35] This is particularly true in the vital matter of employment, which perhaps as much as anything else influences a man's concept of himself and his worth, and accordingly influences the values which guide his conduct.

A recent study found that only eleven per cent of employers who were seeking to hire were willing to consider a man convicted of assault.[36] Only one-third would consider a man who had been charged with the same crime and acquitted. Despite the small sample used (25 employers, of whom 9 had need of employees), the crippling effects of the stigma ensuing from criminal adjudication are immediately apparent.

Not only will the offender have trouble finding unskilled employment, but his difficulty will increase directly with the skill level of the job sought. In a study of the employment experiences of 258 men with criminal records, the participants were asked whether a criminal record truly handicaps a person in seeking employment, and whether criminal conduct is stimulated by discriminatory rejection of those with past records to offense. Ninety-four percent of the men replied affirmatively to each question. When the same questions were put to 223 businessmen, 57% responded affirmatively to the first query and 84% to the second.[37] Another oft cited study surveyed 44 business and professional employers: 16% expressed a policy of total exclusion of persons with any criminal past, while 84% would hire a former offender for unskilled labor.[38] However, only 64% would consider such a person for a skilled labor position; only 40% for clerical work; and only 8% for sales jobs. None would consider a person with a record of criminality for a position as an accountant, cashier, or executive.[39] The principal determinants in the policy of complete

[35] *cf.* Rubin *et al.* at 630–31. As a partial solution to the problem, some states require the destruction of fingerprints and arrest data upon acquittal or discharge without trial, *e.g.*, Iowa Code Ann. § 749.2 (1950), or their return to the person involved, *e.g.*, Ill. Ann. Stat. ch. 38, § 206–5 (Smith-Hurd 1964). Often the fingerprints are not returned unless requested. *E.g.*, Conn. Gen. Stat. Rev. § 29–15 (1958). Absent a statute, return or destruction has been denied even when the arrest has been found patently improper. In Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962), a woman was arrested under a city ordinance prohibiting the defrauding of a taxicab operator when the driver refused to change a twenty dollar bill. Despite her judgment against the cab company for false arrest and malicious prosecution, return of the fingerprints and "mug shots" from police files was denied. See generally Note, 42 Ill. L. Rev. 256 (1947); Note, 27 Temp. L.Q. (1954); Annot. 83 A.L.R. 127 (1933).

[36] Schwartz & Skolnick, *supra* note 7, at 134–38. In conducting this portion of the study, the authors prepared four hypothetical application files, which were submitted to prospective employers by an employment agent. Three of the files reflected an arrest for assault: the first file showed a conviction and satisfactory completion of sentence, the second an acquittal, and the third an acquittal with a personal letter from the judge verifying the finding of not guilty and stressing the legal presumption of innocence. The fourth file made no mention of any criminal record. All applications were for lowest-level positions as unskilled laborers.

[37] Wallerstein, Testing Opinion of Causes of Crime, 28 Focus 103 (1949), cited in Tappan, *supra* note 7, at 89.

[38] Melicherick, Employment Problems of Former Offenders, 2 N.P.P.A.J. 43 (1956). See also Rubin, *op. cit. supra* note 11, at 151–54.

[39] In the course of several informal interviews with personnel administrators of companies located on both the east and west coasts, the writer gained the impression that personnel officers regard the picture given by this study as unrealistic. Most said that they had no definite policy of exclusion, but wanted full disclosure of the details of the offense in order to weigh each case "on the merits" and to match the individual to the job. Several expressed distrust of an expungement procedure, and indicated that they would not look favorably on someone who had invoked it. As one man put it: "We probably wouldn't fire the guy outright [*i.e.*, in the event of subsequent discovery of the offense], but I think we'd be rather hurt that he didn't feel he could come and tell us about it."

Administrators of two of the concerns (a major university and a nationwide temporary-help service) indicated that they did not ask the applicant about prior offenses, but relied exclusively upon the recommendations of former employers. (This would effectively foreclose those who had been incarcerated and could not "account for their past.") On the other hand, firms in the electronics field typically made searching inquiry of all applicants, even those applying for the most menial positions. Presumably, this practice deflects the companies' concern over security risks, but in some cases the probing exceeds relevant inquiry. In one firm, an applicant for the position of microwave tube assembler (two dollars/hour) was required to list all arrests or convictions and give full details, indicate in detail any other "misconduct" with which he or she had been charged (presumably relating to employment but not clearly), account for all past absence from work, explain all garnishments or other credit impairment, and sign an "agreement" that he or she could be immediately discharged without resource if any information given was found to be "false or misleading." (Application form in possession of the author.)

exclusion may have been the assumptions, first that any former offender was by definition untrustworthy, and, second, that the engagement of such a person would undermine the morale of the present employees.[40]

The ex-offenders chances of employment by public or governmental agencies—even in the most ordinary positions—are no brighter. One study has concluded that nearly one-half of the States, and the federal government, do not automaticaly exclude a person with an adjudication of criminal guilt from consideration for public employment.[41] This is by no means indicative of the extent of former-offender employment, because denial of hire usually results from the exercise of administrative discretion by the examining or certifying agency.[42] Only one state expressly provides that a rehabilitated offender shall not be barred from public employment by his conviction.[43] Exclusion from employment may result either from rejection because of a former offense or from dismissal because of the commission of a present offense. Surely these situations are different, and different policies should apply.

It would be naive in the extreme to suggest that the governmental employers of our nation drop their bars and become a haven for unregenerate brigands, and no such proposal is put forth here. The public good demands the utmost probity of its servants. It also demands, however, the reassimilation into full social status of all who have offended against it. The removal of the stigma of conviction by annulling it upon proof of reform would open large areas of public employment now closed to the rehabilitated offender.

It is necessary to differentiate, moreover, among the kinds of positions sought. This need applies to licensing mechanisms as well as to direct employment, and in general it is not met. Surely the considerations that require exclusion of former offenders from law enforcement and public safety positions do not thrust with the same force in the case of a truckdriver, or an engineering aide, or a forest firefighter. There are valid an necessary reasons for permanently foreclosing those with records of violative conduct from certain critical and highly sensitive positions in the public service, but surely some account must be taken by the law of the gravity of the offense, and some reasonable criteria—other than the shopworn dichotomy of felony and misdemeanor—must be developed.[44] Not infrequently the disability of a record for even a single offense bars military enlistment, though the selection standards vary with the national need for service manpower.[45]

The effects of criminal stigma are felt perhaps even more strongly in the area of licenses and government-regulated occupations than they are in the sector of public employment. Green lists some fifty-nine occupations, from accounting to yacht selling, in which a license is required and from which a reformed offender may be barred; his list is only illustrative, not exhaustive.[46] The relevance of an offense of petty theft to the practice of the profession or trade may be immediately apparent, as in the practice of law, or may be recondite in the extreme—if there at all—as in the case of barbering. Even

[40] Melichercik, *supra* note 38, at 48–49.

[41] Rubin *et al.* at 628–30; see Wise, *Public Employment of Persons with a Criminal Record*, 6 N.P.P.A.J. 197, 198 (1960). Rubin's figures are based largely upon Widdifield, The State Convict, 1952 (unpublished doctoral thesis on file at Yale Law School Library). Variant results were reported by Green in a study conducted in 1960: forty-two states were reported as having no rule completely prohibiting employment of exoffenders. However, only twenty-eight states indicated that they did in fact hire such persons, usually in positions of unskilled labor. Green, *op. cit. supra* note 13, at 74. This survey also included a limited inquiry into municipal hiring practices. *Id.* at 73.

[42] Rubin *et al.* at 626, 628.

[43] Md. Ann. Code art. 64A, § 19 (1957). The appointing authority may consider the conviction in granting employment.

[44] For discussion on the need for an expungement statute to make some differentiation on the basis of the gravity of the offense and the criticality of the purposes for which the information is sought see text accompanying notes 132–44 *infra*.

[45] Broadly speaking, persons convicted of felonies are excluded. Major commanders may grant waivers to persons convicted of lesser offenses if they have been free of all forms of civil control for at least six months. Adjudicated juvenile and youthful offenders may be granted waivers by main station commanders, who may delegate their authority to recruiting main station commanders. The latter may grant waivers for certain single minor offenses such as drunkenness and truancy. 32 C.F.R. § 571.2(e)(5) (1962). See generally MacCormick, *Defense Department Policy Toward Former Offenders*, National Probation and Parole Association 1951 Yearbook 1.

[46] Green, *op. cit. supra* note 11, at 26. For a more enlightened example of statutory exclusion from occupation see § 504 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 504 (1964), which bars persons convicted of specified crimes from holding various positions in labor unions. It should be noted that even in so "high-risk" an occupation, the ban is not perpetual but extends only five years from conviction. The statute recognizes the possibility of reformation.

though the offense may be relevant, this is not to say that it should be determinative of entry into the trade or profession.

A few years ago a young man of twentyone celebrated his college's basketball victory with more enthusiasm than good sense, and with two cohorts—all in a happy state of bibulosity—broke into the rear service porch of a vacant apartment, from which he abstracted a large metal garbage can. When the police arrived shortly thereafter, he was busily engaged in rolling it up and down the rear stairs of the apartment, to the vast annoyance of the building's occupants. His comments to the police were not of the politest sort. He was arrested on charges of burglary, malicious mischief, disturbance of the peace, public intoxication, and contributing to the delinquency of minors (his companions were below the age of twenty-one). The burglary charge was dropped; he pleaded guilty to the other counts, and was granted probation conditioned upon replacement of the battered garbage can and suitable apologies to its owners. His probation was satisfactorily completed; he graduated from college went on to a large law school and graduated with honors near the head of his class. Save for this casual and unfortunate incident his record is otherwise without blemish. Would it really make sense to require that for the rest of his life he be foreclosed from the practice of his profession?[47] The labels of "malicious mischief" "disturbance of the peace" "drunk in public" and "contributing to the delinquency of a minor". (this last particularly opprobrious and connotative of moral turpitude) are surely not properly descriptive of his offense or his moral character. Yet he must bear them the rest of his life, listing them on credit and job applications and otherwise having them dredged up in a host of ways.

Should such persons—and no one can estimate successfully how many there may be—be forced to bear forever the stain of their immature and impulsive conduct? To take a few examples: someone in the shoes of this young man, if he were a barber, would likely lose his license in Michigan or California.[48] Apparently, he could not work as a physical therapist or practice optometry or chiropractic in Minnesota.[49] He could be denied a license to breed or raise horses or to process or sell horsemeat in Illinois,[50] and might lose his cosmetologist's license in Wisconsin.[51] Without the aid of an expungment statute, he would be compelled to bear the mark of his past mistake. Statues permitting the setting aside of convictions are no help here;[52] it is not uncommon for the law to provide that despite the vacation of conviction under such an act, the conviction may nevertheless be considered for licensing and disciplinary purposes.[53]

In ways more indirect than employer rejection or legal restriction, the stigma of a former offense is likely to militate against successful employment of the redeemed offender. He may be denied union membership, although apparently no union admits to a hard-and-fast policy of exclusion. Moreover, many positions require bonding as a precondition of hire, and former offenders are generally not bondable, whatever the relevance of their offense to the risk covered by the bond. One young man who fights another on the street over the latter's interference with his lady fair, and who is convicted of assault and battery or disturbing the peace as a result of his passions, should not *necessarily* be marked thereafter as an employment risk, unworthy of trust. The problem is particularly acute in companies using low-cost "blanket bonds" which commonly contain provisions voiding protection if the employer hires

[47] This roughly describes a case known to the author. The young man in question was admitted to the bar examination after giving a full explanation and now enjoys a successful practice.

[48] Cal. Bus. & Prof. Code § 6576 (disqualification on conviction of crime of moral turpitude); Mich. Stat. Ann. § 18.106 (1957) (disqualification upon conviction of any crime).

[49] Minn. Stat. Ann. §§ 147.02 (optometrist), 148.10 (chiropractor), 148.75 (physical therapist) (Supp. 1965).

[50] Ill. Rev. Stat. ch. 56½ § 242.2 (Supp. 1965) (disqualification on conviction of felony or "any crime opposed to decency or morality").

[51] Wis. Stat. § 159.14 (1961) (disqualification on conviction of any crime).

[52] See text accompanying notes 30–34 *supra*.

[53] See, *e.g.*, exceptions to the stated effect of Cal. Pen. Code § 1203.4 in Cal. Bus. & Prof. Code §§ 1670 (dentists) 2383, 2384 (physicians), 2963 (psychologists), 6102 (attorneys). 6576 (barbers), 10177(b) (real estate brokers), 10302(b) (business opportunity brokers), 10562(b) (mineral, oil, and gas licensees); Cal. Educ. Code § 12910 (teachers); Cal. Vehicle Code § 13555 (revocation of driver's license). See also Epstein v. California Horse Racing Board, 222 Cal. App. 2d 831, 35 Cal. Rptr. 642 (1963).

any person with an offense record, at least without the prior consent of the surety.[54]

Similarly, a person with a record of criminal conduct may experience substantial difficulty in obtaining automobile liability coverage (or in getting inclusion under his employer's liability policy), and may be foreclosed from any work requiring the use of a car either in the course of the job or in getting to and from his place of employment. Alternatively, he may not be precluded from coverage but may be treated as an "assigned risk," whatever his offense.[55] Although this has the advantage of giving the former offender access to insurance, it has the disadvantage of subjecting him to perhaps prohibitive expenses at a time when he can least likely afford them. Further, a person with an arrest or conviction record may in some jurisdictions be denied a vehicle operator's license (or even, apparently a fishing license).[56]

Typically, a former offender who is called as a witness is subject to impeachment of his credibility on the basis of his prior conviction.[57] This may be so despite an order "setting aside" or vacating a conviction and releasing him from "all penalties and disabilities." [58] Once a person has been cast as an offender, he seems always to be suspect as a liar.[59] Let us suppose that the young purloiner of garbage cans, whose fate is recounted above, observes a traffic accident some five years after his conviction and is asked whether he has pertinent testimony. It is not beyond the bounds of reason to suppose that he would be strongly tempted to deny that he had seen anything, that he would do whatever he could to avoid the witness stand and the possibility of public exposure and humiliation. Last, but as usual not least, the former offender becomes a target for future investigation and suspicion. This is simply a fruit of his error, and he should bear it—up to a point. Unfortunately, that point may be passed, and the former offender may be subjected to unwarranted harassment by a law enforcement agency whose standards of courtesy and professional practice have not caught up with its zeal.[60] It is not all all unreasonable for a young man who burglarized a service station one month before to be quizzed regarding a burglary perpetrated by similar *modus operandi* at another station—providing his rights are respected and he is handed with the the courtesy incumbent upon a police officer. It is highly unreasonable for him to be "rousted" on a service station break-in five years later, when the events of the interim indicate that he is comporting himself as a law-abiding citizen.

The point distills to this: should we permanently maintain, as a matter of social policy, the stigmatic ascriptions of a single adjudication? How long is enough? In the recent case of *DeVeau v. Braisted*,[61] the Supreme Court of the

[54] Frequently, it is said that hiring of an offender will void all coverage. See Frym, *The Treatment of Recidivists*, 47 J. Crim. L., C. & P.S. 1 (1956). The following is a typical liberal "blanket bond" provision:

The coverage of this bond shall not apply to any employee from and after the time that the Insured or any partner or officer thereof, not in collusion with such employee, shall have knowledge or information that such employee has committed any fraudulent or dishonest act in the service of the Insured or otherwise, whether such act be committed before or after the date of employment by the Insured. Lykke, *Attitude of Bonding Companies Toward Probationers and Parolees*, 21 Fed. Prob. 36 (1957).

This study suggests that the surety companies may be willing to examine individual cases and permit the employer to assume the risk himself, and the wording of the bond would import that the cancellation of protection would apply on to the individual and not to the concern as a whole. This is preferable to blanket invalidation, but it nevertheless requires uncommon understanding and effort on the part of the employer and there is no guarantee that the consent of the surety will be given. The bonding firms interviewed in the course of Lykke's study felt that their alleged unwillingness to give coverage was more often than not used as an excuse to mask the employer's hostility toward hiring persons with an offense record.

[55] Footnote omitted.

[56] See the commentary to the N.C.C.D. Model Act, *supra* note 17, at 98.

[57] McCormick, Evidence 89–94 (1954). There are very great variations among the states as to the crimes that will serve as a ground of impeachment.

[58] *E.g.*, People v. O'Brand, 92 Cal. App. 2d 752, 207 P.2d 1083 (1949); People v. James, 40 Cal. App. 2d 740, 105 P.2d 947 (1940). The new *California Evidence Code* (to take effect on January 1, 1967 codifies in § 788.(d) the dictum of People v. Mackay, 58 Cal. App. 123, 208 Pac. 135 (1922), that a conviction set aside under Cal. Pen. Code § 1203.4 cannot be used to impeach unless the person is the defendant in a subsequent criminal proceeding. The present state of the law is by no means clear, and the *Mackay* case has been seriously eroded by later holdings; these cases are discussed in Comment, 2 Stan. L. Rev. 222 (1949).

Even under the new *California Evidence Code* the offender who has erred in a state lacking a vacation or expungement statute would be open to attack in a California court.

[59] Griswold, *The Long View*, 51 A.B.A.J. 1017 (1965).

[60] *Id.* at 1021.

[61] 363 U.S. 144 (1960).

United States sidestepped this question in affirming the exclusion of petitioner from the position of secretary-treasurer of a longshoreman's local under § 8 of the New York Waterfront Commission Act of 1953.[62] Petitioner had pleaded guilty to attempted grand larceny thirty-five years before his removal from office and had received a suspended sentence. Though terming the result "drastic," the Court noted the long history of abuses on the New York waterfront and upheld the application of the Act. While one cannot quarrel with the Court's assessment of the "high risk" of the occupation, one must regret the Court's failure to confront the problem of how long disqualification resulting from an adjudication of criminal guilt should endure.[63]

It is not for the confirmed recidivist that primary concern about restoration of status is due, but for the first offender—the "accidental" criminal, if you will—whose violative conduct never reoccurs. Though an accurate count is impossible, the number of such persons is staggering. Nussbaum has estimated that in the United States today there are nearly 50,000,000 persons with offense records; he concludes that between 15,000,000 and 20,000,000 are first offenders who do not recidivate.[64] His calculations are based upon extrapolations from the number of arrests per 100,000 population as determined by the Federal Bureau of Investigation's *Uniform Crime Reports* in 1953 and 1954 (assuming a recidivism rate of 63%), projected over one generation of 30 years. He places the number of first-time offenders arrested each year at roughly 1,600,000.[65]

It is beyond the present capacity of the social sciences to verify these estimates; adequate statistical information is not available. Nussbaum's totals may be faulted for assuming too high a recidivism rate,[66] yet one study being conducted by the Federal Bureau of Investigation indicates that the rate may be as high as 76% in the case of persons who commit major crimes.[67] Further, it is apparent that the Federal Bureau of Investigation's base figures are not accurate indices of the incidence of crime and arrest; many police agencies do not report at all, or do so sparsely. The totals commonly exclude vagrancy, drunkenness, peace disturbance, and other low-order offenses, and they generally do not include arrests of juvenile offenders. The imprecision of our count is obvious, but however imprecise it may be, the conclusion is surely apt that there are millions of persons in the United States who bear the opprobrium of a criminal record despite their reformation and avoidance of further crime.

To say that the prevention of crime is served by the resocialization of the offender is to utter the obvious, and yet the proposition is largely gain-said by present penal practice. From the nearly impenetrable morass of conflicting theories regarding the etiology of crime, we may at least—without pretending causational expertise—extract the common sense principle that if a man is permanently marked a criminal outcast, he will be isolated from social groups whose behavior patterns and values are anticriminal. Sutherland and Cressey have stated—

"When he is effectively ostracized, the criminal has only two alternatives: he may associate with other criminals, among whom he can find recognition, prestige, and means of further criminality; or he may become disorganized, psychopathic, or unstable. Our actual practice is to permit almost all criminals

[62] N.Y. Unconsol. Laws § 9933 (McKinney 1961).

[63] For a suggestion that the problem is one of due process see Green, *op. cit. supra* note 11, at 31–35. It must be remarked that petitioner had not obtained a certificate of good conduct. N.Y. Executive Law § 242, following his discharge from sentence; if he had, he would have escaped the bar of § 8. There is no indication that he was aware of the availability of this relief.

[64] Nussbaum, First Offenders, A Second Chance 8–11 (1956). The arrest rate per 100,000 population in 1953 is given as 4,231.6. 1954 FBI Uniform Crime Rep. 52–53 (table 17). The most recent rate (for the year 1963) is shown as 3,460.4 .1964 FBI Uniform Crime Rep. 106–07 (table 18). Frym estimates that there are 10,500,000 persons with offense records exclusive of traffic matters. Frym, *supra* note 54, at 3. While Nussbaum's estimate seems excessive, Frym's seems too low, in the light of the F.B.I. figures.

[65] Nussbaum, *op. cit. supra* note 64, at 9. The F.B.I. indicates that 41% of the arrests reported nationally are of persons under the age of 25. 1964 FBI Uniform Crime Rep. 108–09 (table 19) (1,919,641 arrests out of 4,685,080 below age of 25).

[66] Note 65 *supra*.

[67] 1964 FBI Uniform Crime Rep. 26–29. Of a special study group of 92,869 offenders, 76% had a prior arrest record. On the other hand, any statistical measurement of rehabilitation is extremely difficult, because it involves the determination of a negative factor, that is, the absence of arrest or conviction over a given period of time. *Cf.* Glaser, *Differential Association and Criminological Prediction*, 8 Social Problems 6 (1960).

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." [68]

If the offender is to be rehabilitated, two things must be done: he must be made a part of groups emphasizing values conducive to reform and law-abiding conduct, and he must concurrently be alienated from groups whose values are conducive to criminality.[69] Neither of these goals is furthered by the failure of the law to provide means of restoring status.

In sum, there has been insufficient recognition of the responsibility of the penal law in alleviating the corrosive effects of the stigma its application necessarily creates. Dean Joseph Lohman of the University of California School of Criminology, a former sheriff of Cook County, Illinois, has written:

"There is too little concern with the stigmatizing and alienating effect of arrests of such violators [minor offenders, especially first offenders]. We equate them with bank robbers and murderers. Once a youngster has a police record, this fact, in the eyes of the law—and potential employers—is more real than the person himself. People stop looking at a young man. They look at his record, his 'sheet' as it is called. Over and over boys told me, 'It isn't me; it's the sheet. They won't listen to me.' We have pushed these boys on the other side of the law. They may well stay there." [70]

In a very real sense, the problem is one of the "self-fulfilling prophecy": the offender initially moved toward reform becomes what we condemn him to be. The failure of the law to treat the former offender as a person with the potential to become a law-abiding and useful member of society, by omitting means of removing the infamy of his social standing, deprives him of an incentive to reform. To the extent that this shortcoming contributes to the repetition of criminal conduct, it renders the system of penal law a "monument to futility" and tends to erode public confidence in the legal order.[71]

II. THE ANNULMENT OF ADULT CONVICTIONS

To date, few jurisdictions have adopted expungement laws permitting the annulment of conviction upon proof of reform, and, of those that have, fewer still provide truly effective relief.[72] Because so little information on such statutes is available, a summary survey of existing laws may be helpful; the outline below excludes statutes dealing with juvenile court adjudication, which are discussed in part III.

California: Cal. Pen. Code § 1203.45 provides that a person under the age of twenty-one committing a misdemeanor may petition the court for an order sealing the record of conviction and other official records in the case, including records of arrests resulting in the criminal proceeding, and including records relating to other offenses charged in the accusatory pleading, whether defendant was acquitted or charges were dismissed.

If the order is granted, the "conviction, arrest or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence."

[68] Sutherland & Cressey, Principles of Criminology 318 (5th ed. 1955).

[69] Cressey, *Changing Criminals:* The Application of the Theory of Differential Association 61, American J. Sociology 116 (1955).

[70] Lohman, Upgrading Law Enforcement, 9 Police 19 (1965). For psychiatric comment to the same effect see Erickson, *The Problem of Ego Identity*, 4 J. American Psychoanalytic A. 56 (1956).

[71] Correctional policy must be viewed not only in terms of its direct effect upon criminal activity but also in terms of its effect upon other value systems of society. Cf. Bloch & Geis, Man, Crime & Society 494 (1962).

[72] The first offender's need for expungement has been recognized in at least two other legal systems. Japanse law provides that after five years in the case of a minor crime and after ten years in the case of a serious crime, the "sentence (conviction) loses its effect" if there has been no further offense. Penal Code of Japan, art. 34-2, 2 E.H.S. Law Bull. 10 (Ministry of Justice transl. 1961).

Interestingly, among the most comprehensive provisions for the cancellation of offense records are those of the Soviet Union. The law specifies various probationary periods, based on the severity of the original sentence, during which there must be no new offense. Upon cancellation of the record of conviction, the offender reverts to his former status; the relief is not necessarily limited to first offenders. RSFSR Crim. Code art. 57, in Berman, Soviet Criminal Law & Procedure: The RSFSR Codes 172–75 (1966). The cancellation is initiated by petition of the offender or of a social organization, and the cause is heard by the district people's court at the offender's place of residence. Notice must be given to the procurator, and the presence of the offender at the hearing is apparently jurisdictional. If the petition is denied, a new petition may not be filed for one year. RSFSR Code of Crim. Procedure, art. 370, in Berman, *op. cit. supra*, at 402.

The section is expressly inapplicable to traffic violations, registrable sex offenses,[73] and narcotics violations. It seems further to be limited to persons who (1) were not convicted on the charge they seek to have expunged, or (2) if convicted, were eligible to have the conviction set aside under section 1203.4 or section 1203.4a of the Penal Code (respectively, satisfactory completion of probation or satisfactory completion of misdemeanor sentence where probation was denied). It is not wholly clear whether the relief is available to one who has had a prior conviction, though the thrust of the less-than-pellucid language and the history of the statute would suggest that it is not.[74] It is also not clear just how the operation of section 1203.45 overlaps that of the "setting-aside" provisions, sections 1203.4 and 1203.4a. The latter provide for the abolition of all "penalties and disabilities" resulting from a conviction; section 1203.45 does not so specify, but the provision that the arrest or conviction shall be deemed never to have occurred must surely include this, if the language is to have any consistency of meaning.

Notable in this statute is the lack of any provision directing the court's order of sealing to the attention of arresting or repository law enforcement agencies who may have records of petitioner on file. The expungement statute relating to juvenile courts [75] so provides, and experience has shown it to be necessary, in order to give the law full effect. If one agency retains unsealed an arrest or crime report, fingerprint card, "mug shot," or other record naming petitioner, a check is likely to reveal it, and the expungement will be rendered nugatory.[76] Further, section 1203.45 does not provide for examination of records so sealed upon subsequent petition of the person who is their subject; the juvenile court expungement statute has such a provision.[77] At first examination, this would seem highly anomalous, probably derogative of the intent of the enactment. It has become apparent, however, that there may be situations in which the person who has had his record sealed has made disclosure—such as in security clearance applications—and finds it impossible to prove that his record was in fact expunged.[78] The order of the court sealing the records is by common practice sealed with the other material in the case.

A further point may be noted with respect to the California enactment which is equally applicable to the other acts discussed, save for the National Council on Crime and Delinquency Model Act.[79] Though such an action would quite evidently be in conflict with the spirit of the act, an employer or licensing agency is apparently able to compel a former offender to disclose whether he has ever sought the relief provided by the statute.[80]

A major consideration in evaluating the effectiveness of any expungement statute is its realistic use: does it in fact afford an accessible relief, actually invoked, or does it simply sit as dressing upon the statute books? It is impossible to determine the proportion of eligible offenders who utilize section

[73] Persons convicted of specified sex offenses are required by Cal. Pen. Code § 290 to register with local police departments.

[74] See Baum, *supra* note 30, at 823.

[75] Cal. Welfare & Inst'ns Code § 781.

[76] The author was informed of a recent case in which a young man had been granted relief under § 1203.45 following his conviction for gasoline theft. The arresting police agency had learned of the sealing order and had closed its files, as had the State Bureau of Criminal Identification and Investigation. However, in the particular county where the young man was arrested, the booking of all prisoners is handled at the county jail and separate records are kept by the sheriff's department. The booking record reflecting the theft came to light in a record check prior to a military appointment. Because the military authorities not unnaturally raised the question of wilful concealment of the record, the young man was in a worse position—at least until full explanation could be given—than he would have been had no sealing order been entered.

[77] Cal. Welfare & Inst'ns Code § 781.

[78] On the desirability of full disclosure of record in applications for certain critical positions, see text accompanying note 135 *infra*.

[79] N.C.C.D. Model Act, 8 Crime & Delinquency 97, 100 (1962). Of the existing or proposed enactments found in the course of this study, only the Model Act prohibits employers or licensing bureaus from inquiring into the fact of expungement. Cal. Pen. Code § 1203.45 has been interpreted, however, to require any official agency with records which have been sealed to answer any inquiry: "We have no record on the named individual." 41 Cal. Ops. Att'y Gen. 102, 104 (1963); *cf.* 40 Cal. Ops Att'y Gen. 50 (1962).

[80] Baum, *supra* note 30, at 824. Several California probation officers indicated to the author that they had encountered instances of such questioning, and as expungement becomes more widely invoked one would expect the practice to spread. The inquiry may take various forms, from "Have you ever had an offense record expunged?" to "Have you ever appeared as a moving party in any court? Explain fully." *Cf.* Note, 79 Harv. L. Rev. 775, 880 (1966).

1208.45 but there appears to be a steadily rising use of the section, 1,066 actions being received by the Department of Justice during the last fiscal year.[81] Of these, 862 were reported to have been processed to completion. During the last six months of 1965, 732 such closures were completed, as compared to 243 in the period from July 1962 through June 1963. On the basis of these figures, the conclusion that the relief is relatively accessible is not inappropriate.[82]

Michigan: Mich. Stat. Ann. § 28.1274(101) (Supp. 1965) provides that any person who pleads guilty to or is convicted of not more than one offense occurring before he is twenty-one (other than traffic violations and crimes punishable by life imprisonment), may, when five years have elapsed from the time of conviction, move the court to set aside judgment. As previously indicated,[83] this alone would not be considered as an expungement statute without the provisions of Mich. Stat. Ann. § 28.1274(102) (Supp. 1965), which specify that upon entry of such an order vacating judgment, the applicant shall "for purposes of the law" be deemed not to have been previously convicted. This language is broad but has not yet been subjected to interpretation. Insofar as this section fails to indicate the disposition of the records and on its face omits to cover the problem of proper answer to inquiry, it fails as an effective expungement statute.

Under these provisions, notice must be served upon the prosecuting attorney, who must be given the opportunity to contest the setting aside of the judgment. Since the statutes were enacted in 1965,[84] no statistical information relative to their invocation is available.

Minnesota: Under Minn. Stat. Ann, § 638.02(2) (Supp. 1965), any person convicted of a crime may upon discharge from his sentence petition the Board of Pardons for a "pardon extraordinary." This the Board may grant if it finds that he is a first offender (" . . . not convicted of [any crime] other than the act upon which [his present conviction was] founded") and determines that he is of good character and repute. The pardon extraordinary restores all civil rights and sets aside and nullifies the conviction, "purging" the offender. The statute specifically provides that petitioner shall never thereafter be required to disclose the conviction at any time or place other than in subsequent judicial proceedings. Since the judicial proceedings in which the conviction may be raised are not limited to those in which petitioner is a defendant, it would seem that the record might be revived for impeachment purposes in a later civil or criminal proceeding where petitioner is a witness.

The statute does not treat the problem of police and arrest records, fingerprint cards, and the like, and it is probable that a routine check of enforcement agencies would turn up the fact of arrest, thus frustrating the enactment's intended end.[85]

Prior to 1963, the law applied only to those under twenty-one years of age.[86] There is apparently no limitation as to kind or type of offense for which expungement may be had, although the statute has been interpreted to be inapplicable to traffic violations.[87]

The Minnesota law is distinctive in providing for expungement by administrative action rather than judcial order. Since an effective expungement process requires the sealing of court and agency records, court action would appear preferable.

New Jersey: N.J. Stat. Ann. § 2A:164–28 (1953) permits the court to order expungement when petitioner (1) has received a suspension of sentence or a fine not exceeding $1,000 and (2) has suffered no subsequent conviction. Ten years must elapse from the date of conviction before application for expungement can be made, and the remedy is unavailable to persons convicted of treason or misprision thereof, anarchy, and capital offense, kidnapping, perjury,

[81] Letter from Ronald H. Beattey, Chief, Bureau of Criminal Statistics, California Department of Justice, to the author, January 17, 1966. The Bureau reports 2,917 actions filed under section 1203.45 in the period from July 1962 through December 1965. Of these, 2,379 were processed to completion and the identification files closed; in the remaining cases, the Bureau was unable initially to identify the defendant, and the order had therefore to be returned with a request for more information.

[82] Whether it is accessible enough, and how it might be made more accessible, is considered in part IV below.

[83] Note 16 *supra.*

[84] Mich. Laws 1965, tct 213, at 1134.

[85] See note 76 *supra.*

[86] In 1963, the law was extended to all first offenders regardless of age. Minn. Sess. Laws 1963, ch. 819, at 1441–42.

[87] 1949 Minn. Ops. Att'y Gen. 328–B.

any crime involving a deadly weapon including the carrying of such a weapon concealed, rape, seduction, aiding or concealing persons convicted of high misdemeanors, aiding the escape of prisoners, embracery, arson, robbery, or burglary. The petitioner must pay all costs of the expungement proceeding, and notice must be served upon the prosecutor and police department(s) concerned. No provision is made for the expunging or sealing of police and enforcement agency records.

The exact utility of this statute is open to much doubt. No figures as to its invocation could be found, but the long period of time before relief is possible (ten years) and the fairly extensive catalogue of ineligible offenses restrict both the efficacy of the relief and the likelihood of its being sought. More to the point, the statute has been construed as "lacking the force and effect of a full pardon" (whatever that may be), apparently on the basis that to grant the law any greater effect would be to impinge upon the pardoning power of the governor.[88] Since New Jersey has taken the position that a pardon does not permit the recipient to respond in the negative to questions about his conviction,[89] it would seem *a fortiori* that a successful petitioner under section 2A:164–28 would also be constrained to disclosure. In terms of restoring the essential status of the former offender, the relief afforded by this enactment is limited at best and illusory at worst.

There is one further provision of New Jersey law upon which comment must be made: after five years (presumably from the date of entry), the records of "disorderly persons" on file in the office of the county clerk *may* be destroyed.[90] This appears to be a "housekeeping" provision rather than an enactment designed to affect the status of such "disorderly persons"—which is doubtful, to say the least. A "disorderly person" has been defined as one guilty of a "quasi-criminal act," something below a misdemeanor, who is spared "the brand of being adjudged a criminal with all of its political, business and social implications. . . ."[91] It is hard to see how he is so spared when he is subject to immediate arrest without process,[92] may be summarily tried without indictment or jury,[93] and may be imprisoned.[94] Since "being a disorderly person" is something less than committing a crime, such person is apparently ineligible even for the meagre relief of section 2A:164–28.[95]

Texas: Though not an expungement act insofar as it fails to provide for the destruction or sealing of records, Tex. Code Crim Proc. Ann. art. 42.13, § 7 (1966) deserves mention if only because it does not classify easily. Subsection (a) provides that upon completion of probation following conviction of a misdemeanor, the court shall enter an order setting aside the finding of guilt and dismissing all accusatory pleadings. By subsection (b), the offender's finding of guilt may not be considered *for any purpose* (italics in the statute) except to determine entitlement to probation in a trial for a subsequent offense. The relief is available only to misdemeanants.

It will be noted that the statute appears to be (like the Michigan enactment discussed above) simply a "setting-aside" provision, which does not reach the status of an offender.[96] However, provisions similar to subsection (b) are not found in article 42.12, section 7, the cognate statute permitting the setting aside of felony convictions. It is thus inferable that the legislature intended the broader relief of article 42.13, section 7 to extend to the status itself. The section may well go farther in giving the reformed offender protection against forced divulgence of his record to employers and licensing agencies than would

[88] 1951–53 N.J. Ops. Att'y Gen. 143.

[89] *Id.* at 206.

[90] N.J. Stat. Ann. § 47:3–9(1) (Supp. 1965).

[91] *In re* Garofone, 80 N.J. Super. 259, 271, 193 A.2d 398, 405 (1963), *aff'd*, 42 N.J. 244, 200 A.2d 101 (1964) (possession of barbiturates).

[92] N.J. Stat. Ann. § 2A:169–3 (1951).

[93] *In re* Garofone, 80 N.J. Super. 259, 193 A.2d 398, (1963), *aff'd*, 42 N.J. 244, 200 A.2d 101 (1964).

[94] N.J. Stat. Ann. § 1A:169–5 (1951).

[95] Parenthetically, the scope of the disorderly person classification is disturbingly broad In one startling case, a disgruntled husband procured a revolver, jimmied the screen of his long-estranged wife's bedroom with a putty knife, and shot her lover when the latter attacked him with an axe. His argument of self-defense was denied on the ground that by carrying implements of entry (the putty knife) and the revolver, he was a "disorderly person" who was subject to immediate arrest, which the deceased was simply trying to effect—with the axe. State v. Agnesi, 92 N.J.L. 53, 104 Atl. 299 (1918), *aff'd*, 92 N.J.L. 638, 106 Atl. 893, 108 Atl. 115 (1919). Just what are the bounds of "quasi-criminality"?

[96] See text accompanying notes 30–34 *supra.*

most expungement acts. The great lack of his hybrid statute—in terms of its efficacy—lies in its failure to provide for the closure of court and agency records.

III. EXPUNGEMENT AND THE JUVENILE COURT

A. The need

Every state, most territories, and the United States have provided special adjudicative and dispositive procedures in the case of juvenile offenders. It is truistic to say that the juvenile court is *not* a criminal court, and that adjudications, since not convictions, are not productive of criminal disabilities. Nearly every jurisdiction so provides.[97] All but a handful of states expressly prohibit public access to records of the juvenile court,[98] and many extend the restrictions to the files of law enforcement and social agencies.[99] Commonly, the fact of adjudication in juvenile court and any evidence given in connection therewith are inadmissible against the minor in any other court,[100] and a large number of states provide that such adjudication is no bar to future military service or public employment.[101]

In the face of this panoply of statutory insulation to shield the youthful offender from the criminalization that would normally attach to him, the question must be put: are expungement procedures needed for juvenile records, and if so, why? One may conjecture that those jurisdictions which have provided for the annulment of adult conviction records and have omitted such provision for juvenile adjudications—such as Alaska, Minnesota, and New Jersey—have done so because it was believed such protection was unnecessary and superfluous.[102]

The plain fact is that expungement provisions *are* necessary to effectuate the intent of the juvenile court acts, because society does not make the fine semantic distinctions attempted by the law. As a recent survey put it, "the results of . . . [statutory classification of juvenile court records as confidential] have been so unsatisfactory that it may fairly be characterized as a failure."[103] In the public eye, an offender is an offender, be he juvenile or adult. The cliches of noncriminality and lack of stigma attendant upon the juvenile court process[104] have so often been repeated that we have become piously obtuse to the fact that the enlightened instrumentality of the juvenile court is frequenty not as felictious in practice as it is in theory.[105]

Recognition of the stultifying effect of juvenile court adjudication was forcefully given in the much-cited case of *In re Contreras:*

> While the juvenile court law provides that adjudication . . . [as] a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. Courts cannot and will not shut their eyes to everyday contemporary happenings.
>
> It is common knowledge that such an adjudication . . . is a blight upon the character of and is a serious impediment to the future of such minor. Let him attempt to enter the armed services of his country or obtain a position of honor and trust and he is immediately confronted with his juvenile record.[106]

The considerations set forth in the preceding discussion of the adult offender's plight of status apply with equal force to a juvenile. In fact, they may thrust with more force in his case, because he may more surely be foreclosed from the education and training needed to fit him for a useful and productive life.[107] As well, he may more likely be discouraged from applying for military service.[108]

Additionally, there are three factors in juvenile cases which especially compel an expungement statute reaching not only police and arrest records but *all* juvenile records, including those of dependency and neglect.

First, the arrest records of the referring enforcement agencies are the principal source of knowledge of a minor's past. Because the court records are

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[97] Ala. Code tit. 13, § 378 (1958); Alaska Stat. § 47.10.080(g) (1962); Ariz. Rev. Stat. Ann. § S-228A (1956); Cal. Welfare & Inst'ns Code § 503; Colo. Rev. Stat. § 22-8-1(3), 13 (1963); Conn. Gen. Stat. Rev. § 17-72 (1958); Del. Code Ann. tit. 10, § 982(b) (1953); D.C. Code Ann. §16-2308(d) (Supp. IV, 1965); Fla. Stat. § 39.10(3) (1961); Ga. Code Ann. § 24-2418 (1959); Hawaii Rev. Laws § 333-1 (1955); Idaho Code Ann. § 16-1814(5) (Supp. 1965); Ill. Rev. Stat. ch. 37, § 702-9 (1965); Ind. Ann. Stat. § 9-3215 (Supp. 1966); Kan. Gen. Stat. Ann. § 38-801 (1964); Ky. Rev. Stat. § 208.200(5) (1962); La. Rev. Stat. § 13-1580 (1952); Me. Rev. Stat. Ann. tit 15, § 2502(1) (1964); Md. Ann. Code art. 26, § 54 (1957); Mass. Gen. Laws Ann. ch. 119, § 53 (1958); Mich. Stat. Ann. § 27.3178 (598.1) (1962); Minn. Stat. Ann. §§ 242.12, 260.211(1) (Supp. 1965); Miss. Code Ann. § 7185-08 (Supp. 1964); Mo. Rev. Stat. § 211.271(1) (1959); Mont. Rev. Codes Ann. § 10-611 (Supp. 1965); Nev. Rev. Stat. § 62.100(3) (1963); N.H. Rev. Stat. Ann. § 169.26 (1955); N.J. Stat. Ann. § 2A:4-39 (1951); N.M. Stat. Ann. § 13-8-65 (Supp. 1965); N.Y. Family Ct. Act § 781; N.C. Gen. Stat. § 110-24 (1959); N.D. Cent. Code § 27-16-21 (1960); Ohio Rev. Code Ann. § 2151.35 (Page Supp. 1965); Okla. Stat. tit. 20, § 891 (1961); Ore. Rev. Stat. § 419.543 (1963); Pa. Stat. Ann. tit. 11, §§ 261, 269-417 (1965); P.R. Laws Ann. tit. 34, § 2011 (Supp. 1965); R.I. Gen. Laws Ann. § 14-1-40 (1956); S.C. Code Ann. § 15-1202 (1962); S.D. Code § 43.0327 (1939); Tenn. Code Ann. § 37-267 (Supp. 1965) (by implication); Tex. Rev. Civ. Stat. Ann. art 2338-1, § 13 (Supp. 1965); Utah Code Ann. § 55-10-105(2) (Supp. 1965); Vt. Stat. Ann. tit. 33, §§ 601, 627 (1958) (by implication); Va. Code Ann. § 16.1-179 (1950); V.I. Code Ann. tit. 5, § 2506 (1957); Wash. Rev. Code Ann. § 13.04.240 (Supp. 1965); W. Va. Code Ann. § 4904(83) (1961); Wis. Stat. § 48.38(1) (1961); Wyo. Stat. Ann. § 14-109(d) (1957). The federal provision is found in 18 U.S.C. § 5032 (1964).

[98] Only Iowa, Maryland, Nebraska, and Vermont appear to lack statutes explicitly governing juvenile court records. In these states, the matter may be covered by court rule. Cf. Md. Ann. Code art. 26, § 64 (1957). Miss. Code Ann. § 7185-20 (1942) prohibits divulgence of the names of minors for statistical reporting purposes, but does not expressly protect police or court records from public inspection. Mont. Rev. Codes Ann. § 10-633 (Supp. 1965) limits disclosure of identity and opening of hearing to cases where the minor is charged with a *felony*. See Geis, Publication of the Names of Juvenile Felons, 28 Mont. L. Rev. 141 (1961). In several states, only the probation officer's reports are withheld from public access. E.g., N.M. Stat. Ann. § 13-8-66 (1953); *cf.* Mo. Rev. Stat. § 211.321(3) (1959) (discussed pages 177-78 infra). In Ohio the exclusion of persons other than parents, child or counsel of record is implicit rather than express. See Ohio Rev. Code Ann. § 2151.18 (Page Supp. 1965).

[99] Ill. Rev. Stat. ch. 37, 702-8(3) (1965); Minn. Stat. Ann. § 260.161 (Supp. 1965); and N.Y. Family Ct. Act § 784 are typical statutes requiring police department segregation of juvenile files and prohibiting public disclosure. The Minnesota statute has been interpreted as forbidding the furnishing of police records to governmental agencies, at least without court order. 1965 Minn. Ops. Att'y Gen. 268-L. A number of states have statutes regulating the taking and transmission of fingerprints and identification photographs in juvenile cases. See Myren & Swanson, Police Work With children 77-80 (1962).

[100] On the use of juvenile court adjudication records in later adult proceedings are Annot. 96 A.L.R.2d 792 (1964); Note, 32 So. Cal. L. Rev. 207 (1959).

[101] E.G., Mass. Gen. Laws Ann. Ch. 119, § 60 (1965) (no disqualification for public service either under the Commonwealth or in any political subdivision thereof); Utah Code Ann. § 55-10-105(2) (Supp. 1965) (no disqualification for any civil or military service appointment). Several Massachusetts probation officers informed the author that the law is ineffective as a real aid to employment because it fails to cover private hiring. An attempt to deal with private employment would probably be ineffective unless it restricted the scope of permissible questioning of an applicant. Some jurisdictions expressly preserve the right to examine juvenile records when application is made for a law enforcement position. E.G. Ill. Rev. Stat. ch. 37, § 702-9(3) (Supp. 1965).

[102] *Cf.* Alaska Stat. § 47,10.060(e) (1962) which provides for expungement of the record of any minor tried as an adult on a waiver of juvenile court jurisdiction. No comparable provision is available for juvenile court adjudications. See also Minn. Stat. Ann. § 242.31 (Supp. 1965).

[103] Note, 79 Harv. L. Rev. 775, 800 (1966).

[104] E.G., In re Holmes; 379 Pa. 599, 604, 109 A2d 523, 525 (1954): "No suggestion or taint of criminality attaches to any finding of delinquency by a juvenile court."

[105] Matza, Delinquency and Drift 73 (1964). The problem is not limited to the United States. In Great Britain, expungement procedures were proposed in 1960; these were rejected by the Committee on Children and Young Persons on the ground that there was not "a record" in the case of a juvenile delinquent, but in fact many records. While the Committee was sympathetic to the need, it apparently felt an expungement law would be ineffective. Committee on Children & Young Persons Report, Cmd. No. 1191, at 74-75 (1960-61).

In Finland, on the other hand, the law permits the "abolition" of all accusatory pleadings and adjudication records where a punishable offense occurred before the offender's eighteenth birthday. Dolling, "Finnish Juvenile Penal Law" (Das Finnische Jugendstrafrecht, rechtd. Jugend [1961], 9/21, at 325-28), abstracted in 2 Excerpta Criminologica 501-02, No. 1221 (1962).

[106] 109 Cal. App. 2d 787, 789-90; 241 P.2d 631, 633 (1952); *accord*, Jones v. Commonwealth, 185 Va. 335, 341-42, 38 S.E.2d 444, 447 (1946). In a mordant dissent in *In re* Holmes, 379 Pa. 599, 612, 109 A.2d 523, 529 (195), Musmanno, J. terms the notion that a juvenile record does its owner no lasting harm a "most disturbing fallacy" and a "placid bromide." He colorfully describes a juvenile record as a lengthening chain that its riveted possessor will drag after him through childhood, youthhood, adulthood and middle age. . . . It will be an ominous shadow following his tottering steps, it will stand by his bed at night, and it will hover over him when he dozes fitfully in the dusk of his remaining day.

[107] Nussbaum, First Offenders, A Second Chance 4 (1956), quotes the application form of a leading university as asking, "Have you ever been placed on probation or parole, or had any other penalty, scholastic or disciplinary imposed?" The application for graduate fellowship assistance under Title IV of the National Defense Education Act requires full reporting and certificatiol of all crimes other than those committed before the applicant's sixteenth birthday and minor traffic violations. U.S. Dep't of Health, Educ. & Welfare, form OE 4149. The NDEA application, however, provides that all information will be "treated confidentially" and will be weighed "only as to the suitability of the applicant as a . . . Fellow."

[108] For a discussion of military regulations see note 45 *supra*.

commonly made confidential by statute or court practice,[109] employers, licensing agencies, and other persons seeking information usually resort to police files, where they all too often gain access.[110] The effect on an adult of arrest without conviction has already been remarked.[111] It is apparent that the devastation of arrest may well be much greater in the case of a juvenile, because the confidentiality of court records may preclude verification of non-involvement. The inquirer is more likely to stop with the arrest record and draw his own conclusions regarding guilt.[112] Even if the dismissal by the juvenile court is reflected (as it should be) upon the police record, the observer is likely to conclude that the minor did *something*, at least, and the court "let him off light."

Further, many—if not most—juvenile cases are disposed of at the police level, without referral to juvenile court.[113] Of those that are referred, many are "settled at intake," or are placed on informal supervision in lieu of immediate adjudication. Because of widely varying practices and policies, no meaningful national figures can be given, but California has reported that only 42.5% of boys and 42.2% of girls referred to the juvenile courts for delinquent acts are handled by court hearing.[114] In virtually all cases, police arrest or contact records exist.

The second factor making the need for an expungements statute particularly acute in juvenile cases is closely tied to the first: the labels or offense designation on the police department's records (or even the juvenile court's, for that matter) may not fairly reflect the minor's conduct. While this is true for adult offenders, it is even more the case in juvenile matters. Not uncommonly, the more serious of two possible crime classifications will be selected, either in honest doubt as to which is applicable or in an effort to make the clearance rate for the more serious offense appear higher.[115] There is less chance that the officer will be called in a juvenile case to account either for his judgment or the evidence to support it.

Extreme cases, while they may make bad law, can be apt examples, and two may serve to illustrate the point. In one case handled in 1958 by the author as a probation officer, an eleven year old boy was placed in juvenile hall for burglary: he had stolen a package of bologna from a grocery store to sustain himself while running away from home, because of conflict with his present "Uncle." The California definition of burglary technically includes entry into an open place of business with intent to steal,[116] and when the young man told the policeman he had gone into the store intending to shoplift the meat, the officer (under some pressure from the ired shopkeeper) concluded he was indeed a burglar. The minor was presented to the court as a dependent child, but there nevertheless remains an apprehension record for burglary in the police files.

In an even more ludicrous case, the author was informed of a highly respected and capable police juvenile sergeant who had contacted the juvenile court for assistance in shedding a record of apprehension for "child molesting," which had occurred when he was fourteen years old. While walking home from school with his thirteen year old inamorata, he had succumbed to his vernal urges and kissed her—in public view upon the street. His heinous conduct was espied by the city's sole juvenile-aid-officer *cum* pursuer-of-truants, and he was hustled to the police station, where appropriate forms were filled

[109] Note 98 *supra* and accompanying text.
[110] *Cf.* Note, 79 Harv. L. Rev. 775, 785–86 (1966).
[111] Note 35 *supra* and accompanying text.
[112] Authority cited note 110 *supra.*
[113] The F.B.I. estimates that 51.5% of all juvenile cases are settled without referral to the court, either within the police department itself (47.2%), referral to a welfare agency (1.6%), or referral to another police agency (2.7%). 1964 FBI Uniform Crime Rep. 102 (table 13). On the informal handling of delinquents see Tappan, *Unofficial Delinquency*, 29 Neb. L. Rev. 547 (1950).
[114] Cal. Dep't of Justice, Delinquency and Probation in California 92–94 (1963).
[115] A common example is the choice between "grand theft auto" (commonly a felony) and the lesser offense of "joyriding" (commonly a misdeameanor). The author was informed by officials of the Office of Economic Opportunity on the West Coast that this was a particularly troublesome dichotomy, since some police agencies and juvenile courts classified all automobile thefts by minors as felonious, while others classified them as joyriding unless there were aggravating circumstances. The net effect of these disparate policies is to exclude some youths from Job Corps placements while permitting the admission of others who committed precisely the same act but did so in a more lenient jurisdiction.
[116] Cal. Pen. Code § 459.

out before he was sternly admonished and his parents called. The section under which he was "charged" deals with conduct arousing or tending to arouse the passions of a child under the age of fourteen years!"[117] The arrest record remained in the police department's files. He obviously had little trouble in obtaining public safety employment by divulgence and explanation, but the significant point is that the record was there, buried in some dust-covered bin, and that it turned up and *needed* explanation.

Manifestly, the moral of these tales is not that outlandish results occur in juvenile cases and that we should therefore protect their subjects. It is rather that records of very real offenses do exist in a variety of places from which they can be retrieved, and that without the protection of an expungement statute reaching them, the bromidic recitals of the juvenile court's non-punitive philosophy will not save the juvenile from the records' stigma.

The third reason underlying the especial need for expungement in juvenile cases is shortly stated. The distinction between delinquency and dependency is blurred enough in theory and frequently not drawn at all in fact. The public often identifies the juvenile court with delinquency and assumes a child under its care to be an offender.[118] Further, even a status of dependency or neglect carries its own special measure of opprobrium which the child should not have to bear.

B. The existing law

In recognition of the need, a few states have enacted expungement provisions of varying efficacy. As in the case of the acts applicable to criminal convictions, some extended comparison may prove helpful.

Alaska: Alaska Stat. § 47.10.060(e) (1962) permits a minor who has been tried as an adult after waiver of juvenile court jurisdiction to petition the court for the sealing of his record. The petition may not be filed until the sentence has been successfully completed and five years have elapsed. (It is not clear whether this period is to be measured from the date of conviction or from the date of completion of the sentence.) The petition may be made by the Department of Health and Welfare on his behalf, and the order restores all civil rights. The statute provides that no person may ever use the records so sealed for any purpose, but is silent on the appropriate response to questions regarding the past offense.

No comparable provision exists for actions under the juvenile court law, and the section does not reach police records.

Arizona: Ariz. Rev. Stat. Ann. § 8–238 (1956) provides for mandatory destruction of the court records upon the expiration of the period of probation or after two years from the date of discharge from an institution, unless before that time the minor has been convicted of another offense. By implication, this relief is not available to dependent or neglected children, and the law is silent as to the effect, of the sealing. The language ("records of the proceeding") would not seem to reach police records.

California: Under Cal. Welfare & Inst'ns Code § 781, any person who has been the subject of a petition in juvenile court or of a citation to appear before a probation officer, or who has been taken to a probation officer, may petition for the sealing of his records. The section does not apparently cover the minor whose case has been concluded by the police without referral. The relief extends to children referred for dependency and neglect as well as to those referred for delinquent conduct. Either the person involved or the probation officer may file the petition, which cannot be done until five years have elapsed from the termination of jurisdiction (in cases of court disposition) or from the date of referral (in informal dispositions).[119] The relief is mandatory if the court finds that the petitioner has not since been convicted of any felony or misdemeanor involving moral turpitude, and has attained rehabilitation "to the satisfaction of the court."

[117] Cal. Pen. Code § 288. The municipality in question, it may be noted in passing, seems to have displayed singular concern over the osculatory activity of its citizens. Reportedly, it had upon its books until recently an ancient ordinance prohibiting any two persons from kissing unless each first wiped the lips of the other with carbolized rosewater.
[118] Report of Cal. Special Study Comm. on Juvenile Justice, pt. 1, at 19 (1960).
[119] In a number of countries it is the practice for the probation department to offer to file the petition for expungement. This reflects recognition of the need to make the persons involved aware of the possibility of such action and to minimize expense and red tape.

The sealing is expressly extended to records and files in the possession of other agencies, and the application for the order requires the applicant to list agencies he thinks may possess records. The order is directed to each such agency, and requires it to seal its records, advise the court of its compliance with the order, and then seal the order of sealing itself.[120] The law specifies that after sealing, the events shall be deemed never to have occurred, and the person "may properly reply accordingly" to any inquiry. The statute does not preclude inquiry as to the fact of expungement, nor does it specify whether official agencies may disregard its provisions and press for information, though its plain wording would seem to compel the conclusion that they could not. The statute has been interpreted to require an official agency whose files have been sealed to respond to any inquiry: "We have no record on the named individual." [121]

The statute uniquely provides that the person whose records are sealed may at a later time petition the court to grant the right of inspection to persons named in the application, apparently to effectuate security clearances and other investigations for high-risk employment.[122]

Far less utilization has been made of this relief than that afforded by Cal. Pen. Code § 1203.45 to misdemeanants under twenty-one. The records of the Bureau of Criminal Statistics indicate that for the period July 1962-December 1965, 791 requests for file clearance were received by the Identification Bureau; 545 were processed to completion.[123] The possibility that this is due to a large number of juvenile referrals who become recidivists and are ineligible does not seem to be borne out in fact; probably the best guess is that somewhere between 60% and 85% of delinquents do not become adult violators.[124] A more plausible explanation is threefold: minors are not as aware as more mature offenders of the possibility of expungement; they less frequently have the advice of counsel; and there is no required lapse of time before relief is possible under section 1203.45. It is likely that by the time five years have elapsed since the jurisdiction of the court was terminated (frequently if not typically at age eighteen) the person involved may feel the relief is too delayed to be worth the effort.[125]

Indiana: Ind. Ann. Stat. § 9-3215(a) (Supp. 1966) empowers the court to order the destruction or obliteration of the record of any child adjudged a delinquent but never committed to a public or private institution, provided he has not been arrested for a delinquent act or "cited for any offense," is reformed, and has been of good behavior for at least two years after judgment. The order of obliteration may be made upon the court's own motion or upon the motion of the probation officer, either with or without formal hearing. The court, at its discretion, may order law enforcement agencies to produce their records for destruction, and may continue the case for one year before ruling on the motion for obliteration. The section is not applicable to children handled for dependency and neglect and is silent as to the effect of destruction.

[120] The intricacies of these provisions have not insured their uniform success, and a number of ploys have been developed to circumvent them. In one police department surveyed by the writer, the "sealing" is accomplished by stamping "sealed" upon the face of the master index card (the so-called "alpha card") and then replacing it in the file. Los Angeles County reportedly interprets the statute as narrowly as possible and seasonly the records of the particular offense or situation which resulted in wardship or adjudication as a dependent child, leaving untouched any prior or subsequent entries. Where the case has been transferred between counties, Los Angeles county—and apparently others following its lead—allegedly will not honor an expungment order from another juvenile court, but will require the institution of new proceedings in its own jurisdiction. (It has not been possible to verify these practices because the writer's inquiries to the county in question have gone unanswered.)

Upon occasion a minor if first brought to municipal court and then is certified to juvenile court when his age is established. The author was told of two instances where the municipal court refused at first to honor the sealing order of the juvenile (superior) court.

The probation department personnel interviewed indicated, however, that such evasive tactics are relatively rare, and from the author's observations, the general level of cooperation has beem quite high.

[121] 40 Cal. Ops. Att'y Gen. 50, (1962).

[122] *Cf.* text accompanying note 78 *supra*. Only Utah has a similar provision. See Utah Code Ann. § 55-10-147 (Supp. 1965) (discussed in text accompanying notes 128-31 *infra*).

[123] See note 81 *supra*.

[124] Matza, *op. cit supra* note 105, at 22.

[125] "[T]he period of time that must elapse before the procedures are available is often that in which the existence of the record is most important—the time of higher education, military service or initial employment." **Note, 79 Harv. L. Rev. 775, 800 (1966).**

Kansas: Kan. Gen. Stat. Ann. § 38-815(h) (1964) provides that when a record is made of any public offense committed by a boy under sixteen years of age or a girl under eighteen, the juvenile court in the county where the record is made may order either a peace officer or a judicial officer having such records to destroy them. A unique feature of this law is that it provides for use of the contempt power to enforce compliance. It does not reach dependency or neglect records, but does reach records of police agencies even where the child was not referred to the court.[126] The statute requires any person making a record to notify the juvenile court both of the fact of the record and its substance. The law sets down no criteria for the exercise of the court's discretion, and this is one of the most troublesome facets of expungement acts. It must be presumed that a "standard of reformation" guides the judge in his decision.[127]

Minnesota: Minn. Stat. Ann. § 242.31 (Supp. 1965) permits the "nullifying" of adjudication records if a minor is committed to the care of the Youth Conservation Commission and discharged before the expiration of his maxiuum term, or is he is placed on probation. In the former case, the nullification is at the discretion of the court. The order of nullification has the effect of "setting aside" the conviction and "purging the person thereof." The conviction shall not thereafter be used against him except when "otherwise admissible" in a subsequent criminal proceeding. The precise scope of the section is unclear, and the relief available under it apparently overlaps that afforded by Minn. Stat. Ann. § 638.02(2) (Supp. 1965), discussed above.

While this enactment applies to juveniles, by its terms it does so only upon conviction of crime. Under Minn. Stat. Ann. §§ 142.12, 260.211 (Supp. 1965), juvenile court proceedings are not criminal in nature and do not result in conviction. Thus, the anomalous conclusion is compelled that a minor can have his record nullified only if he commits an act sufficiently grave to warrant waiver of juvenile court jurisdiction and trial as an adult. *A fortiori*, the law does not reach neglect adjudications.

The section makes no provision respecting police or other agency records, and it is not clear whether the conviction is actually to be removed from the judgment record.

Missouri: Though it is sometimes referred to as an expungement statute, Mo. Rev. Stat. § 211.321(3) (1959) does not have the full effect of wiping the slate clean and should not properly be so termed. It provides that the court may destroy, in January of each year, the social histories and information *other than* the official court file pertaining to any person who has reached the age of twenty-one. Though other subdivisions of this section impose confidentiality on both court and law enforcement records, it is apparent that the statute leaves untouched the essential adjudication of status.

Utah: Utah Code Ann. § 55-10-117 (Supp. 1965) permits anyone whose case has been adjudicated in a juvenile court (seemingly including dependents) to petition the court for sealing of records after one year from the termination of court jurisdiction or release from the state industrial school. The section provides that the court shall order the sealing if petitioner has not since been convicted of (and does not have pending) any felony or misdemeanor involving moral turpitude, and if the court is satisfied as to his rehabilitation. The language of the statute appears quite similar to that of the California law, specifying that upon entry of the order, the proceedings are deemed never to have occurred and the petitioner may so respond to inquiry. The sealing order may be extended to law enforcement records, and subsequent inspection of records is permitted only upon request of petitioner. Since the statute was enacted in 1965,[128] it is too soon to assess its effects. There is indication, however, that the courts regard the relief afforded by the section as exceptional, rather than viewing it as regularly to be given absent some affirmative reason to the contrary.[129] The latter position is apparently taken by the California courts.[130]

[126] The Attorney General has ruled that a sheriff or county attorney cannot desclose information from juvenile records even before expungement. See 6 Kan. L. Rev. 396 (1958).

[127] The difficulties in application of such a standard and the Gordian question of who should be excluded from expungement are taken up in greater detail in part IV.

[128] Utah Code Ann. § 55-10-117 (Supp. 1965).

[129] Note, 79 Harv. L. Rev. 775, 800.

[130] *Ibid.*

In some states, physical destruction of court records may be effected at the court's discretion, but there is no indication that such destruction affects the status or nullifies the adjudication.[131]

IV. TWO PROPOSED LAWS AND SOME THOUGHTS FOR THE FUTURE

Two recently proposed acts represent especially significant attempts to readjust the status of the reformed first offender: the New York "Amnesty Law for First Offenders" proposed in 1965[132] and the National Council on Crime and Delinquency's Model Act for the Annulment of a Conviction of crime.[133] The two proposals adopt different means of achieving roughly the same end. Taken in comparison, they point up three of the most pressing considerations of policy that must be met in constructing an expungement law: whether the relief should be automatic or a matter of discretion; whether the record should be required to be revealed in some circumstances; and by what means the purpose of the statute is best achieved.

The New York bill very nearly became law. After passage by both the Assembly and Senate of New York, the act was vetoed by Governor Rockefeller on the ground that it was "unsound" because "too broadly conceived."[134] The enactment provided for the automatic amnesty of all first offenders—adult, youthful, or juvenile—who had not been convicted of a felony or misdemeanor involving moral turpitude during a "probationary interval" immediately following to file an affidavit of eligibility in the court of original conviction.[135] The proing completion of sentence. Before amnesty could be granted, the offender was bationary period was established as five years in the case of felony, three years in the case of misdemeanor, and one year in the case of an adjudication as a youthful offender, wayward minor, or juvenile delinquent.[136]

The act specifically restored to the amnestied first offender in his accreditation as a witness, his right of franchise, his right to hold public office, and his right to have issued or reinstated any license granted by federal, state, or municipal authority (provided, of course, that he were otherwise qualified).[137] The amnestied offender was granted the "absolute right to negate" the fact of his arrest or conviction whenever inquiry was made by either private persons or public authority.[138] All records including fingerprints, photographs, and the like would be sealed against disclosure by the grant of amnesty, but express provision was made for retention, use, and disclosure by law enforcement personnel actually engaged in investigation of crime.[139] Expungement was extended to the records of persons arrested and released without charge or acquitted after the lapse of a probationary interval of one year.[140] Provision was made for acceleration of amnesty for first offenders released on probation or parole, at the discretion of the sentencing court,[141] and the amnestied status of any first offender granted relief under the statute was to be forfeited on subsequent offense.[142]

[131] *Compare* Wash. Rev. Code Ann. § 13.04, 230 (Supp. 1965), *with* Va. Code Ann. § 16.1–193 (1950). The latter permits destruction of juvenile and adult records at the clerk's discretion, after the passage of varying periods of time depending on the seriousness of the offense.

[132] State of N.Y. Ass'y Bill, Int. No. 233 (3d Rdg. 547, Print. 5363, Rec. 703) (1965).

[133] Crime & Delinquency 100 (1962). The Model Act was drafted in response to recommendations of the National Conference on Parole. Nat'l Probation & Parole Ass'n, Parole in Principle and Practice 136 (1957).

[134] New York Times, July 23, 1965, p. 1, col. 7; p. 32, col. 6. A revised version of the bill has been intdoduced in the 1966 legislative session. State of N.Y. Sen. Bill, Int. No. 1146 (Print. 1159) (1966). It removes the "automatic amnesty" provision of its predecessor, and provides for the initiation of proceedings by a verified petition. Unded this modified bill, the petitioner would be entitled to amnesty if he "reasonably establishes" to the court's satisfaction that amnesty "would best serve and secure his rehabilitation and would best serve the public interest." *Id.* at § 91. Cf. note 147 *infra* and accompanying text. This bill was reported passed by the Senate on March 8, 1966. New York Times, March 9, 1966, p. 30, col. 2. To avoid confusion, all references in the text are to the 1965 bill.

[135] State of N.Y. Ass'y Bill, *supra* note 132, at §§ 90–91.

[136] *Id.* at § 90(6).

[137] *Id.* at §§ 92(3)–(6).

[138] *Id.* at § 92(2).

[139] *Id.* at § 93.

[140] *Id.* at § 99.

[141] *Id.* at §§ 97, 98.

[142] *Id.* at § 95. Enforcement of the bill was vested in the State Commission for Human Rights, and specific penalties were provided for violation of its provisions, *Id.* at § 94.

The N.C.C.D. Model Act differs from the New York bill in several ways. The relief of annulment of conviction is not restricted to first offenders, as it is under the New York legislation.[143] The Model Act provides that the order may be entered immediately upon discharge from sentence; the proceedings may be initiated either by the individual or the court.[144] The granting of the relief is discretionary rather than automatic, though it is submitted that this is a difference somewhat more illusory than real: the New York bill in effect provided automatic issuance after the court's discretion had been exercised. It is nevertheless true that the New York approach makes the grant more a matter of right. The Model Act by implication permits the court to withhold some or all civil rights, though it provides that the person shall be treated in all respects as if he had never suffered conviction.

The most striking feature of the Model Act is its provision to protect the offender whose record has been expunged from the bind of disclosure of his past. In any application for employment, license, or "other civil right or privilege," or in any appearance as a witness, a person may be questioned about his previous criminal conduct *only* in language such as the following: "Have you ever been arrested for or convicted of a crime which has not been annulled by a court?"[145] This approach to the very difficult balance of disclosure against denial has not been adopted in any existing enactment, and seems eminently sound. As will be later discussed, it lends itself to the solution of the problem of high-risk employment.[146] To date, no jurisdiction has adopted the Model Act.

In vetoing the New York bill, the Governor remarked its failure to distinguish among the various grades of crime, and its apparent grant of relief regardless of the individual's efforts at rehabilitation.[147] In part, these criticisms are pertinent; in part, they miss the mark of the bill. A significant aspect of the bill was its express reservation to the court of the power to deny amnesty in the case of a "dangerous offender," defined as one deemed by the court "to be suffering from a serious personality disorder indicating a marked propensity towards continuing criminal conduct or activity."[148] For the realistic protection of the community, such a provision is indispensable, and this standard of classification seems far preferable to differentiation on the basis of felony versus misdemeanor, or even on the basis of crimes against person versus crimes against property. The young man who, on impulse, attempts to hold up a candy store with a toy pistol and is charged with armed robbery may be far less a menace to the community's safety than the would-be cat burglar who sets out to "hot prowl" an apartment, is found loitering on the rear stairs under suspicious circumstances, and is charged with disorderly conduct (very likely on the agreement that he will "cop a plea"). Under the usual grade-of-crime standard, the former would (it is assumed) be ineligible for amnesty or expungement, and the latter would be qualified.

Manifestly, some safeguard must be built into an expungement statute against the erasure of criminal records in improper cases but the safeguard must be grounded on rational criteria. The vice of the "dangerous offender" standard adopted by the New York bill is in its vagueness, but therein may be precisely its strength as well. The legislature cannot fix with exactness every case that it wishes to exclude from the operation of the law. If the law is to work realistically and effectively, the enactment must enunciate the standard and leave its application to the courts.

In the author's view, the yardstick of the "dangerous offender" as a measure of exclusion would be improved by eliminating the "serious personality disorder" term and expanding the "clear and present danger" test embodied in the standard of marked propensity towards continuing criminal conduct." The test of serious personality disorder requires a finding that the trial court is ill-equipped to make, at least without more effective psychiatric assistance than is presently available. The expansion of the standard of clear and present danger to the community would require that the court be empowered, in the case of specified serious crimes (murder, forcible rape, vicious assaults and the

[143] 8 Crime & Delinquency 100 (1962).

[144] *Ibid.* Presumably, the offender would be required to file a petition in either case.

[145] *Ibid.*

[146] See p. 183, *infra*.

[147] New York Times, July 23, 1965, *supra* note 134.

[148] State of N.Y. Ass'y Bill, *supra* note 132, at § 90(2).

like), to find the person a "dangerous offender" ineligible for expungement simply on the gravity of the offense, without specific finding on the likelihood of further criminality.

Such a standard would permit a more realistic discrimination between offenses than can be gained by the use of a felony-misdemeanor formula. Practically speaking, the likelihood of a person committing a crime of such serious magnitude seeking expungement seems small.

The assertion that the New York bill granted expungement without regard to rehabilitative effort is chimerical and overlooks the presumption obviously indulged in by the legislature; *i.e.*, that if the person has completed the probationary interval without conviction, he has in fact made efforts toward rehabilitation. If the requirement were added that the judge could not grant expungement without a finding of "sincere effort toward rehabilitation," by what other criteria would this be measured and by what other evidence could it be proved? Surely the best evidence of rehabilitative effort is the avoidance of future criminality.

Two examples are frequently chosen to illustrate the unrealistic "do-gooder" spirit and visionary blindness to danger often claimed for those who advocate expungement statutes: the embezzler could deny his past in seeking a position at a bank, and a school teacher could conceal a sex offense. These illustrations of the breadth of the proposed New York law were used by Governor Rockefeller and the point is by no means invalid. There is no easy answer to it. What it comes to is this: are we willing to run the risk of the embezzler's resumption of his larcen[illegible]s habits in return for the opportunity to restore a very large number of persons to a useful social state? The risk of the repetition of the school teacher's offense upon one of his charges? Surely it is immediately apparent that these risks are of vastly different magnitude and cannot be singly answered. In order to have any sensible assessment of the risk, the offense cannot be viewed *in vacua*, but only in terms of the individual who committed the offense and the circumstances in which he committed it. It is precisely here that the "dangerous offender" discretion of the court is essential.

Beyond this, however, is another consideration: we cannot lose sight of overriding values society wishes—and needs—to protect. We value so highly the sacrosanctity of the child's person that we may very well wish to preclude a former sex offender from again dealing with children, on the off chance that he may reoffend. The possibility of serious harm is too great, though the probability of reoffense might be small, By the same token, the harm caused by a repetition of embezzlement is more easily insured aginst and more easily borne, and this risk we may wish to assume.

As a matter of policy in view of the risk, we may deem it necessary to bar a prior offender from police employment because he may be unable to withstand the stresses of his position; the risks to the public from his defalcation are too great. (But again, the risk cannot be intelligently weighed in abstraction from the offense and the offender. Some of the most compassionate and effective policemen of the author's acquaintance have had rather besmirched pasts. Lacking any sure calculus of risk, we are remitted to the sound and understanding discretion of the hiring agency, and it would seem necessary to have full disclosure.) To require a former offender to divulge his past offense in seeking police employment is not to say that he cannot reform, or even that he will likely reoffend. It is rather to say that by his past difficulty, he has indicated possible instability and lack of judgment, and the appointing authority must be made aware of the risk before it places him in a position requiring coolness of head and firmness of self-control to accompany the loaded sidearm. This is a very different thing from forever holding him a social outcast because of his past.

Even greater risks exist in the area of the national security and defense, and here too full disclosure seems essential. Consider the position of an airman charged with responsibility for a missile or other vastly lethal piece of modern armament. To prevent an unauthorized detonation or launch, it is imperative that the personnel chosen for control operate at a continued high level of reliability. Those who are *possibly unreliable* must be excluded.[149]

[149] On the compelling need for personal stability in a "dispenser of lethal power" see U.S. Dep't of the Air Force, *Guidance for Implementing the Human Reliability Program*, AFM 160–55 (1962), in Katz, Goldstein & Dershowitz, Materials of Psychoanalysis & Law 577–92 (5th temp. mimeo. ed. 1955) (cited with permission of the authors).

Since a prior unlawful act may be indicative of an impulsive character, and an individual who possibly could not cope with the tremendous pressures of such an assignment, its commission must be divulged.

The antagonistic *desiderata* of abolition of record on the one hand and required revelation of it in particular circumstances on the other are not as irreconcilable as they seem. If an expungement statute only authorizes a response denying any record, it fails to meet the problem and throws the whole matter upon the person whose record is expunged. *Per contra*, if the statute adopts the "limitation on inquiry" mode of the Model Act, it is possible not only to permit the regenerate offender to take advantage of his new status, but also to protect the overriding interests of public security. This might feasibly be done with provisos, excepting from the limited inquiry enjoined by the statute any cases where the person granted expungement makes application (for example) for a position involving the supervision of children, for a position in law enforcement, or for a position sensitive in terms of national security. The use of the limited inquiry would do much to facilitate employment and would eliminate the circumvention of the expungement order save in the few excepted cases.

The contrast of the New York bill and the Model Act is instructive in raising another difficult point: should expungement be wholly automatic, mandatory upon fulfillment of the prescribed conditions as the New York bill sought to make it; or wholly discretionary, as the National Council on Crime and Delinquency recommends?[150] Bluntly put, if the grant of expungement is wholly automatic, some will get it who should not; if it is wholly discretionary, some will not get it who should have it. Closely tied to this problem is another *desideratum*: effective accessibility. Consideration of the latter issue may help to illumine the former.

It makes no sense whatever to provide statutory means for redefinition of status and then surround their utilization with such procedural obstacles that they are not invoked. Really, the problem is twofold: the reformed offender must be made aware of the remedy (else its incentive value is lost), and he must be able to invoke it with a minimum of difficulty. Quite similar to the expungement problem is the matter of restoring competency following discharge from hospitalization for mental illness, and experience with such procedures is of significance to this inquiry.

A recent study in the District of Columbia restoration: automatic restoration on certificate of discharge from the hospital superintendent, and petition for restoration upon conditional release.[151] Of 329 persons studied, 327 were "officially restored" to competency by certificate (mandatory on discharge as cured). Only one had gained restoration by petition following conditional release. One other person had filed an application, but after six months it had not been processed. The study concluded that although the precise reasons for the extremely small number of applications for restoration on conditional release were unknown, "lack of knowledge of the necessity for taking such action is probably a factor."[152]

On the other hand, the California statistics on the invocation of the youthful offender expungement statute[153] suggest that requiring the offender to petition for the relief does not necessarily deter him from procuring it. His awareness of the existence of expungement and the means of achieving it, and his expectation that it may be gained without undue trouble, humilitation, and time would seem far more significant factors.

Typically, the reformed offender may hold a dim view of the law and its processes, and be chary of invoking their aid. On the other hand, he *has* committed an offense, and it is surely not unreasonable to expect him to take some steps to initiate the process of expungement. It will be recalled that even the "automatic" New York act required the offender to commence the amnesty by filing an affidavit. The procedures necessary should be kept to a high degree of simplicity and a low degree of cost. It would not be inappropriate to permit the court to hold the hearing informally, in chambers, after appropriate notice to the agencies involved.

[150] 8 Crime & Delinquency 99 (1962).
[151] Zenoff, *Civil Incompetency in the District of Columbia*, 32 Geo. Wash. L. Rev. 243 (1963).
[152] *Id.* at 249.
[153] Cal. Pen. Code § 1203.45. See note 81 *supra* and accompanying text.

A satisfactory resolution of these points can be reached if the court is required to inform the first offender at the time of impostion of sentence of the possibility of expungement. Notice should be included in any copy of the sentence order given him. At the termination of his sentence, a letter informing him of the availability of the expungement remedy and of the probationary interval should be sent by the clerk of the court to his last known address. It would seem desirable to have the probation department assist in the preparation of the simple petition and any necessary supporting documents, and the offender should be informed of this in the clerk's letter and instructed to contact the probation department for assistance.[154]

The statute authorizing the expungement should be mandatory rather than directory; that is, the court should be required to order expungement *if* the person has not suffered further conviction during the probationary interval *unless* the court finds strong affirmative cause to deny it (a finding that the person is a "dangerous offender"). In that sense, the process should be "automatic," and the filing of a simple request with a supporting document should be prima facie entitlement to expungement.

For yet another reason it seems wise to require that the offender initiate the proceedings, and that is the reason of incentive. As this paper has attempted to show, our penal law, in its present state is one-sided, providing only negative motivation for reform—the avoidance of future incarceration.[155] If the offender is provided with a positive stimulus and is given an initiating role in the process by which the readjustment of status is achieved, it is likely that he will regard it as more meaningful.[156] As a means of social control, reward for achievement of the conduct which punishment was designed to attain is more effective than punishment alone.[157] If the transgressor is forgiven by the law as he was condemned by it, he may hold the legal process in better esteem and be less impelled to violate its dictates.[158]

Since the expungement procedure here proposed requires a certain discretion and since the sealing process should extend to agency records, it is preferable that it be a matter of judicial order rather than administrative direction. The court is likely more accessible than an administrative body and its power is better known.[159] The National Council on Crime and Delinquency has concluded that authorization of expungement by judicial order should produce wider and more uniform invocation of the power, while allowing for sound discretion to take individual circumstances into account.[160] The regular purgation of police department files is desirable from several standpoints,[161] but for the foregoing reasons it seems unwise to expect that expungement can be accomplished by such agency action alone.

V. A SUMMING UP

Creating a "model" statute is more often a matter of conjury than of construction, and it will not be attempted here. However, as a starting point for future discussion, it may be useful to summarize the requisites of an effective

[154] While this suggestion might seem unrealistic in view of the fact that probation departments are often overworked and understaffed, it must be pointed out that the required documents are very largely *pro forma* and the task is essentially a clerical one. Pre-printed petition and affidavit forms may be helpful. The restoration of the reformed offender to his place in society is the goal of any probation program, and the specialized skills of probation personnel would seem particularly useful in assisting the eligible former offender to avail himself of the relief. The availability of expungement can be a powerful asset in a casework plan.

[155] Professor Gresham Sykes has aptly pointed out that the system of punishment implies a scheme of reward, and that it is precisely upon this point that our system of penal law founders—at least from the point of view of the individual it seeks to control. Though he spoke in particular of the prison and its administration, his remarks are germane to the correctional law as a whole. Sykes, The Society of Captives, 50–52 (1958).

[156] *Cf.* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543, 590–92 (1960).

[157] *Cf.* Mannheim, Man and Society in an Age of Reconstruction 281–83 (1940). This observation assumes, the point that we punish with a purpose of rehabilitation, and not solely to satisfy our urge for vengeance.

[158] Professor Matza observes that delinquency is facilitated when the "moral bind of the law is neutralized." Matza, Delinquency and Drift 98 (1964). A sense of injustice (*i.e.*, that even if one reforms, one will not be forgiven and cannot rid oneself of the stigma of the crime) supports the processes by which the neutralization occurs.

[159] 8 Crime & Delinquency 99 (1962).

[160] *Ibid.* The same conclusion was reached by the commendators to the Model Penal Code. Model Penal Code § 6.05, comment at 30–31 (Tent. Draft No. 7, 1957).

[161] Myren & Swanson, Police Work With Children 79, (1962).

expungement statute and some of the means by which those requisites are most likely to be achieved, and to add a few interstitial remarks.

If it is to serve its purpose, the action of expungement should be complete, accessible, realistic, and at least acceptable to the public taste. To that end, the following observations are offered.

(1) The expungement of the adjudication of guilt of a juvenile delinquent or an adult first offender should be made mandatory, upon petition of the offender, if the court finds that he has not reoffended, unless strong affirmative reason exists for denial. The court should have the power to deny expungement upon a finding that the person is a "dangerous offender," either because there is a likelihood of further criminal conduct or because the offense was sufficiently grave. A judgment denying expungement should be made appealable.

(2) A probationary interval following the completion of sentence as a precondition to expungement is a wise precaution. There is no magic in a metric of time, but what we are seeking is the man who can remain stable in his community life without the need even of minimal correctional restraint or supervision. He must be able to succeed "on his own," and expungement immediately upon discharge seems ill-conceived.

Unfortunately, there is evidently no period of time beyond which social scientists can say there is any given likelihood that the offender will not reoffend, and so we must strike a balance of common sense. An apt selection would seem to be two years (after termination of supervision) in the case of a juvenile delinquent or in the case of a misdemeanor, and five years in the case of a felony, with the court empowered to acclerate the expungement in its discretion. Whatever time selected should not be so long as to render the relief useless. (In the case of a dependency or neglect adjudication in the juvenile court, expungement should be made available immediately upon attainment of majority.)

(3) The expungement statute (or statutes) should include juvenile and adult offenders, and extend as well to dependent children of the court. On the juvenile court level, expungement should not be limited to first offenders, since a minor may commit a number of misdeeds before "straightening out" through maturation.

(4) At both adult and juvenile levels, the statute should reach not only the officially adjudicated case but cases of arrest-release and cases of acquittal as well. It should extend the order of sealing to all law enforcement and other agency records, including those in cases disposed of *intra muros*. Because the petitioner may wish to permit limited inspection of the records at a later time —for example, in making application for a security-critical job—the statute should provide for sealing rather than destruction of the records. Records so sealed should be required to be removed from the main or master file and kept separately.

The widespread dissemination of records is an aid to effective law enforcement, but it poses a problem for effective expungement. The order of sealing should be directed to each enforcement agency having a record of the petitioner, and should be sent as well to all central indices and repositories. As one commentator has put it: "It seems that when the Moving Finger writes these days, a dozen Xerox copies likely are made."[162] In this respect, consideration must be given to records and identification data forwarded by the police department to the Federal Bureau of Investigation. These submitted materials are considered by the Federal Bureau of Investigation to be the property of the transmitting agency, which must authorize any changes or deletions.[163] When a card reporting an arrest is returned to the contributor at the latter's request, the arrest entry is deleted from the individual's identification record at the Federal Bureau of Investigation. Therefore, the order of expungement should direct the local enforcement agency to request the return of any transmitted records.

Provision should be made for certification of compliance by the agencies named in the order, and, upon receipt of the certifications, the judgment recit-

[162] Baum, Wiping Out a Criminal or Juvenile Record, 40 Cal. S.B.J. 816, 824 (1965).

[163] Information on the policy of the F.B.I. regarding submitted records was obtained from identification division administrators in Washington, D.C., through the help of special agents of the San Jose, California, field office. The author gratefully acknowledges their assistance.

ing the order of sealing should itself be sealed, to remove any chance of unauthorized public access.

(5) The statute should expressly set forth the effects of the order in restoring the civil rights of the redeemed offender, and it should expressly annul the conviction and the offense. In addition to specifying that the person will thereafter be regarded as never having offended, it should provide that in all cases of employment, application for license or other civil privilege, examination as a witness, and the like, the person may be questioned only with respect to arrests or convictions not annulled or expunged. Exceptions should be set out in cases of high-risk employment where very great interests are at stake, such as law enforcement positions and those directly involving the national security.

The adoption of the "limited inquiry" provision will do more than enable the accommodation of the conflicting needs of the individual and the overriding public good; it will remove much of the public objection to this type of statute. In commending Governor Rockefeller's veto of the New York bill, the District Attorney of Manhattan is reported to have said that the bill was unrealistic because "it permitted a person to lie about his former conflict with the law."[164] It is perhaps hard to articulate but there is—to the writer's mind, at least—something objectionable about legalized prevarication even though one can rationalize the point by the worthiness of the end. It impairs the law's integrity by creating a fiction where none is needed. To only allow the offender to deny his offense leaves the burden on him; to restrict the questioning about his offense places the focus where it belongs, on the attitudes of society.[165]

(6) Because of the differences in kind and the overwhelming need for records in the control of thoughtless and irresponsible drivers, the privilege of expungement should not be extended to traffic offenses. Moreover, these violations are regarded by society in an entirely different light than the usual order of crimes and leave no such residue of stigma; hence, there is no compelling need for their inclusion in the scope of an expungement provision.

(7) The statute should provide that upon subsequent conviction, the expunged record of an an adult violator may be considered by the court for the purposes of sentencing or appropriate disposition.

In conclusion, most offenders do not remain criminals all their lives, and we should not treat them as if they do. It is manifestly not the purpose of the penal law to ascribe permanent criminality to a first offender, though that is largely its effect.[166] This article is not intended as a panegyric for a soft-headed penology. It is rather an attempt to point up a serious flaw in our present legal system: the failure to provide means for redefining the status of the rehabilitated transgressor. It is submitted that an expungement process will not serve to hamper effective law enforcement, but will stand as an adjuvant to the goal of the correctional law. It should provide a potent incentive to reformation, and should render our response to criminality less febrile and more effectual. At the very least, it is deserving of serious trial.

We would do well to bear in mind that it is a legal principle that correctional law is forgiving. Forgiveness is part and parcel of rehabilitation, whether of criminals or anyone else who has erred, or who has, in fact, what all of us have—the defects of being human.[167]

(Whereupon, at 12 noon the subcommittee was recessed, subject to the call of the Chair.)

[164] New York Times, July 23, 1965, p. 1, col. 7; p. 32, col. 6. The objection that expungement and vacation of conviction laws permit the "rewriting of history" is frequently raised. See, *e.g.*, Model Penal Code § 6.05, comment at 30 (Tent. Draft No. 7, 1957).

[165] The adoption of a "limited inquiry" rule does not solve all the former offender's employment problems or insure that the employer will not discern the offense. It merely blocks the route of direct inquiry, and its virtue in so doing is that it makes much more clear the spirit of the statute by cutting off the main source of forced disclosure. Total compliance with that spirit can never be assured, and employers will be able to learn by indirection what they cannot learn directly. Customarily, inquiry is made about past employment; personnel officials desire to know when, where and why no longer. Thus, an employment gap because of a jail sentence may be all too apparent. While questioning of this kind can allow the employer to evade the statute's intended end, it is neither realistic or desirable to attempt to foreclose all questioning about past work. The "limited inquiry" mode can substantially reduce the potential for forced disclosure of offense, but it cannot wholly eliminate it.

[166] People v. Pierl, 269 N.Y. 315, 327, 199 N.E. 495, 499 (1936).

[167] Reuben *et al.* at 694.

S. 2732, RELATING TO THE NULLIFICATION OF CERTAIN CRIMINAL RECORDS

WEDNESDAY, MARCH 15, 1972

U.S. SENATE,
SUBCOMMITTEE ON NATIONAL PENITENTIARIES OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:1; a.m., in room 1202, New Senate Office Building, Senator Quentin N. Burdick presiding.

Present: Senator Burdick (presiding).

Also present: James G. Meeker, staff director, and Mrs. Judy Snopek, chief clerk.

Senator BURDICK. The hearing this morning resumes on S. 2732.

Our first witness will be Charles P. Eastland, who is a native of Tennessee and has a record consisting of several prior convictions, dishonorable separation from the military, and dismissal from employment twice on the basis of a prior criminal record. Since, then, he has achieved a master's degree in the field of social work, has advanced in job and professional qualifications, and today is director of Dismas House, a halfway house in Louisville, Ky., which provides contract care for Federal releases, as well as those convicted of State and local offenses.

We are pleased to have you with us this morning, Mr. Eastland.

Mr. EASTLAND. Thank you, Senator.

STATEMENT OF CHARLES P. EASTLAND, EXECUTIVE DIRECTOR, DISMAS HOUSE OF LOUISVILLE, INC., LOUISVILLE, KY.

Mr. EASTLAND. The opportunity to appear before this commitee is greatly appreciated, and particularly so since I myself have entries on both sides of the ledger of life.

The loss side of the ledger is self-explantory. It is a matter of record today and will be in the future.

The plus side is one that required help from many individuals of varied walks of life. But few offenders are this fortunate.

The fact that several starts were made before some measure of success was attained gives rise to the importance of Senate bill 2732 and its value as a rehabilitation tool in restoring individuals to a productive, law-abiding way of life.

In applying for employment, one must list health patterns for a specified time, yet list arrest records from date of birth, and many

individuals take the risk of concealing their past criminal records when applying for employment, and, to their chagrin, days or weeks later, regardless of their work habits, find themselves summarily dismissed. I can vouch for this type of occurrence from personal experience.

As director of the Commonwealth of Kentucky's only community treatment center, we see the value of much legislation as S. 2732 and feel that its passage will produce evidence of its merits in restoring men to becoming taxpayers instead of tax-takers.

An added value would be automatic restoration of citizenship on the successful completion of parole, such as the State of Ohio is now doing, and at this particular point this committee might consider this as the optimum time to implement this proposed legislation.

One forgotton individual still stands outside the pale. This is the young man who enters the Armed Forces and is punitively discharged for infraction of the Armed Forces regulations though later may become a productive citizen but who, all too often, ends up a number in either a State or Federal penitentiary or prison. I think this is particularly most important when our Nation is planning to turn to a Volunteer Armed Forces complex—this is the man that is overlooked.

These are the youths who have long been the feeders into the prison system and are the men with whom I have come in contact with either in the disciplinary barracks, the prison system, or as a worker with AFDC families and the approximately 250 men who have been served through our center. They really have no place to turn, except to the lengthy and time-consuming requests for waiver when trying to return to the Armed Forces, reaching into the high echelons, and which more than likely are doomed to receive the notation "Not Favorably Considered."

Again, I speak from personal experience where, only after two professional degrees and 9 years had elapsed, was I able to return to the Armed Forces, and, then, only in grade E–1, private in the Army Reserves.

With the concept of "It takes courage to be free," this proposed legislation will offer an essential ingredient to this theory, namely, hope,—hope that the steel of the past can be broken not only in attitude, behavior, and productivity but in the necessity to always be shadowed by the written record of the past.

S. 2732 represents an important and vital step forward.

Thank you for sponsoring this bill and granting me the opportunity to speak in its behalf.

Senator BURDICK. At this time, if you have no objection, I would like to have your resume placed in the record.

Mr. EASTLAND. Fine, sir.

Senator BURDICK. It shows a considerable background in this area we are talking about.

Mr. EASTLAND. Right, sir.

(The document referred to, entitled "Vitae—Charles Pendleton Eastland," follows:)

VITAE

Charles Pendleton Eastland—Date of birth: 2 June 1923; place of birth: Nashville, Tennessee; married: Alice Griffin—2 July 1945; divorced: 20 May 1960—remarried: 3 October 1960; one child—two grandchildren.

Completed high school—1940; Columbia Military Academy, Columbia, Tennessee.

Entered US Army—19 April 1941. Served with 2nd Troop Carrier Sq.; China-Burma-India—1943–44–45; discharged 3 October 1945—rank cpl.

Re-entered US Army—4 October 1945—discharged—17 March 1947. Member 121st Inf. A Co. Bn GA Natl Guard, 1 April 1947–20 December 1947—Rank E–4.

Employed Scott Paper Company, Brunswick, Georgia—20 March 1947–20 December 1947.

Enlisted US Air Force—20 December 1947. Attended Personnel Management Course—1953. Graduated Statistical Management School—1949; Lowery AFB—Denver, Colorado.

Served 3 years Wheelus Field, Tripoli, Libya. Analyst—Air Craft Control Section. Promoted—Technical Sgt.—E–6—14 August 1953.

Discharged 25 May 1954—Undesirable. Reduced to E–4. Confined to Ware County Jail, Waycross, Georgia—8 January 1954–15 March 1954. Confined Warner Robins AFB—15 March–1 April 1954. Confined Elgin AFB, Florida—2 April–10 April 1954. Escaped custody—10 April 1954. Returned to custody—15 April 1954. Escaped custody—21 April 1954. Returned to custody—29 April 1954.

Employed Western Auto—Assistant Manager—June 1954—Waycross, Georgia. Discharged July 1954 (concealment of prior record).

Employed Container Corporation of America—Fernandina, Florida. July 1954—Production Analyst. Discharged—October 1954 (concealment of prior record).

Arrested charged with fraud—Jacksonville, Florida. Three (3) days 18–21 November 1954—Duvall County Jail. Convicted.

Employed Goldblatt—Chicago, Illinois—January 1955 (Distributed Hand Bills)

Admitted Western State Hospital—February 1955. Discharged—April 1955 (alcoholism).

Entered business—Wholesale auto parts—June 1955—Hopkinsville, Kentucky. Business failed—December 1957.

Fraudently enlisted US Army—25 April 1958. Sent to Stuttgart, Germany—7th Army. Honorably reinstated to Service per authority letter—Commanding General USAUER—August 1958. Tried by General Court Martial—11 February 1960. 57 counts grand larceny. Sentenced to one (1) year—DD—Forfeiture of all pay allowances. Served one (1) month USAUER Stockade—Mannheim, Germany. Transported to U.S. via Prison Brig—General Alexander M. Patch. Served four (4) months, three (3) eys. Branch US DB—Fort Jay, Governors Island, New York, New York.

Educational background is as follows:

Austin Peay State College—1961–64—Bachelor of Science Degree.

University of Georgia (Southeastern) School of Alcoholic Studies—July, 1964 Certificate.

University of Minnesota—Juvenile Officer's Institute of Minnesota—June 14–August 18, 1965—Certificate—(grant from NIMH for this course).

University of Louisville, Kent School of Social Work—Master of Science in Social Work—1966–68.

Professional background is as follows:

Western State Hospital—Hopkinsville, Kentucky—Psychiatric Aide—11 August 1960–2 October 1962.

Department of Economic Security (Division of Public Assistance)—Hopkinsville, Kentucky—1962–64—Field worker and social worker.

Department of Corrections—Russelville, Kentucky—1964–65—Parole officer.

Department of Child Welfare—Hopkinsville, Kentucky—1965–66—Juvenile Probation Officer.

Department of Corrections—Eddyville, Kentucky—1966–68—Institutional social worker—Kentucky State Penitentiary.

Department of Economic Security (Bureau of Public Assistance—Hopkinsville, Kentucky—1968–69—Programs analyst.

Reinstated—United States Army Reserve—29 August 1969 by authority of Secretary of Army, Robert Lovett and endorsement of Commanding General 1st United States Army, in Grade E–1. Presently serving Grade E–4, 5010th USAH (500 Bed) US Army Reserve, Louisville, Kentucky.

Union College—Barbourville, Kentucky—Director of Appalachian semester—Assistant Professor of Social Work—1969–70.

Upper Kentucky River Mental Health, Mental Retardation Comprehensive Care Center—Special Consultant—part time—1969–70—Hyden, Kentucky.

Position—Project Director of the Appalachian Semester and Assistant Professor of Social Work Education at Union College. Organized the program, set up academic requirements, selected students, made contacts with other agencies and helped assist Union College in becoming an ongoing part of the community and regional activities in the field of general welfare. Also served one day a week as special consultant at the Leslie County Comprehensive Care Clinic staffing patients, seeing hard core patients on an individual basis and advising in such matters as were brought to my attention.

Presently serving as Executive Director for Contractural Community Treatment Center for male ex-offenders. Re-opened a closed facility, hired Staff, set-up admissions procedures, established network of local services for community, did public relations, established contract with Federal Bureau of Prisons, set budget at $125,000.00, introduced concept of "It Takes Courage to be Free," established contact with Colleges and Universities for student and facilty participation, obtained grant from Crime Commission and local resources, participated in fund drives of Knights of Columbus, established *Gestalt* culture, maintained good working relationship with News Media, formed Advisory Committee from Professional, Business, Religious Leaders and Lay Citizens of community to discuss, advise and critique strengths and problems of facility, introduced use of ex-offender in program to help ex-offenders.

Teaching Experience is as follows:

Hopkinsville Community College—Spring Semester—1966 (noncredit course to professional members of the community. Subject was "Alcohol, Alcoholism, and the Alcoholic".

Instructor—Jefferson Community College—Criminology—1970–72.

Involvement—related activities include the following:

Chairman and Charter Member of Hopkinsville—Christian County Inter-Agency Health, Education and Welfare Council.

Chairman, Inter-departmental Liaison Committee for White House Conference on Children and Youth, Area 1—Paducah, Kentucky—1969.

President, District II, Kentucky Welfare Association—Hopkinsville, Kentucky—1965–69.

Chairman, Regional Conference held 6th of June, 1969 at Hopkinsville Community College of the Kentucky Welfare Association.

Chairman, Alcohol Problems and General Welfare, Louisville Conference, Board of Social Concerns, United Methodist Church—1968–72–Louisville, Kentucky.

Member of Board of Pennyrile Action Agency, Inc. (OEO), Chairman of Planning Committee—1968—Hopkinsville, Kentucky.

Served as Chairman, Social Concerns Commission, St. Johns Methodist Church, 1964–68—Hopkinsville, Kentucky.

Past President, Western Kentucky District, Louisville Western Kentucky Chapter, National Association of Social Workers, Hopkinsville, Kentucky.

Chairman, Programs Committee NASW, Louisville, Kentucky—1970.

Chairman, 1970 Kentucky Welfare Association State Wide Conference, Louisville, Kentucky.

Chairman, Finance Committee Kentucky Welfare Association—1972.

President, Kentucky Council of Chapters—National Association of Social Workers—1972.

Consultant—Vermont Department of Corrections—January 1971.

Memberships are held in the following organizations:

National Council on Crime and Delinquency, American Civil Liberties Union, Kentucky Welfare Association, American Correctional Association, International Half-Way House Association, National Association of Social Workers, and Kentucky Council on Crime and Delinquency.

Civic and Fraternal Memberships include: Members of Rizpah Shrine Temple AAONMS, Madisonville, and allied Masonic organizations.

Publications: Master's thesis and research project, "Factors associated with Success or Failure of Adoptive Placements," Commonwealth of Kentucky 1947–67, Eastland and others, research project and group thesis.

References are as follows:

Dean Kenneth Kindlesperger, School of Social Work, University of Denver, Denver, Colorado.

The Reverend Paul Keneipp, The Methodist Church, Columbia, Kentucky.

The Honorable J. C. Taylor, Retired, Deputy Commissioner, Federal Bureau of Prisons, Department of Justice, Frankfort, Kentucky.

The Honorable Joseph G. Cannon, Assistant Commissioner of Corrections, St. Paul, Minnesota.

The Honorable Edward T. Breathitt, Attorney-at-law, Planters Bank Building, Hopkinsville, Kentucky.

James L. Hurd, Chief, U.S. Probation Officer, 225 U.S. Court House, Louisville, Kentucky.

Senator BURDICK. Did you have any suggestions for an amendment at this time?

I know that you would like to include something in regard to the military.

Mr. EASTLAND. Right. I think this is the man that is always overlooked. We forget that there are military prisons as well as State and Federal prisons.

We are finding, in looking back at the backgrounds of many of the men who come into our center, and in interviewing men in the institutions, that there is a bad conduct and an undesirable or dishonorable discharge somewhere in the background, and this has led, in some way, as a feeder to the prison system.

Senator BURDICK. Had this legislation been law earlier so that it might have affected you, how would it have affected you?

Mr. EASTLAND. Probably, 10 years ago, when I received my first undesirable discharge, I would have had an opportunity to have cleared that discharge at a time when I was young enough to have been an active soldier and probably would have kept me employed at the two places where I was discharged by reason of prior records. I think it would have helped in that way.

Senator BURDICK. And this point would have been the critical point in your life?

Mr. EASTLAND. Right; right.

Senator BURDICK. And it can be a critical point in the lives of many offenders?

Mr. EASTLAND. This is right, it is the critical point at the first offense, and if he has hope at the first offense then you are not feeding back into the prison system for 20, 30 years and making him a burden on the State and Federal governments.

Senator BURDICK. Well, thank you. You have been very helpful to the committee.

Mr. EASTLAND. Thank you, sir.

Senator BURDICK. Our next witness will be Mr. Francis Dale, president, The Cincinnati Enquirer, Cincinnati, Ohio.

Mr. DALE. Good morning, sir.

Senator BURDICK. We do not have any other data on you.

If you care to supply it, we will put it in the record.

Mr. DALE. Well, I am hoping that who I am is not as important as what I have to say.

Senator BURDICK. That is always true.

STATEMENT OF FRANCIS L. DALE, PUBLISHER, THE CINCINNATI ENQUIRER, AND MEMBER, EXECUTIVE COMMITTEE OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY

Mr. DALE. I am the publisher of the Cincinnati Enquirer, Senator, but I appear today as a member of the Executive Committee of the National Council on Crime and Delinquency which, perhaps, as you know, is the oldest and most prestigious independent organization working in this field for over 60 years.

I appreciate very much this opportunity to appear before the Subcommittee on National Penitentiaries and testify on the Offender Rehabilitation Act, S. 2732.

As a businessman, lawyer, publisher, and member of the National Executive Committee of the National Council on Crime and Delinquency, I am pleased that hearings are now being held on a bill to nullify the criminal records of former offenders and reinstate their civil rights. In principal, I see this bill as an important first step toward the total rehabilitation of offenders and their meaningful reintegration into society. Unfortunately, however, I also see several areas of this bill which need strenghtening before it can effectively carry out its intended spirit.

I find that section 3 severely limits the benefits that a bill of this nature could provide. To begin with, the offender making application for nullification of his criminal record must wait until 3 years have passed after his dismissal from probation or 5 years after release from parole or institution. It is inconceivable to me why any man must wait for any time beyond his period of correction to be eligible for legitimate job opportunities and civil rights. The employment needs of the offender are at least as great, if not greater, at the time of discharge from prison, parole, or probation as they are several years later. To require him to wait 3 or 5 additional years beyond the period of correctional services is to further handicap him in his attempts to become a contributing member of society. It could, in fact, drive him back into criminal activities as legitimate employment opportunities close their doors on him.

Perhaps the question, here, lies in the term "correction." If the correctional system really does correct the offender, then a 3- to 5-year waiting period is superfluous. If not, then we should begin with the correctional system to ensure that it performs its mission. This, of course, leads us into the portion of section 3 which requires that the applying offender show evidence of his rehabilitation. Not only does this become difficult while carrying a criminal record around but such rehabilitation is really the responsibility of the correctional system to ensure. If annulment of an individual's criminal records will be dangerous to the society at large, then let us say so. That would be far more realistic and honest than asking for evidence of rehabilitation.

Sections 4 and 5, covering annulment of records for those who have been released from arrest, had charges dismissed, or have been acquitted or pardoned due to proof of innocence, impresses me as a very necessary judicial procedure, and one which is long overdue. Unfortunately, S. 2732 requires that formal application be made by

the individual seeking annulment. Why should not annulment of such records be made automatic?

To punish a man for charges for which he was found innocent hardly seems justified in our society.

Sections 6 and 9 restrict eligibility for annulment to first offenders. Is there any reason why second- or third-time offenders are any less in need of legitimate employment opportunities than the first offender? The prison record is a tremendous impediment to job opportunities. Restricting this act to first offenders only ensures that many second- and third-time offenders will become fourth- and fifth-time offenders as they try to earn their livelihood with unerasable criminal records.

These sections further point up the fact that this bill really provides for temporary sealing of records, rather than actual annulment. Perhaps destruction of criminal records really defines my position. The annulment concept in this bill is too temporary and too limited in scope. It does not afford a real escape from the impediment of the prison record toward future success. The would can always be reopened.

Section 14 excludes offenders convicted of such crimes as homicide, rape, assualt with a dangerous weapon, treason, kidnapping, and airline hijacking from eligibility for annulment of criminal records. Here, we must question why these particular crimes make an individual any less qualified for legitimate employment opportunities than those offenses covered under the bill, such as forgery, robbery, fraud or burglary.

Legislation of this sort is long overdue, and I am impressed that your subcommittee has asssumed the leadership in taking this momentous step. I do hope that, as a result of these hearings, a stronger, more effective, and more comprehensive bill can be developed which will truly incorporate the spirit of an "Offender Rehabilitation Act." To do less would be to prempt the passage of a stronger bill later.

Senator BURDICK. Well, thank you very much.

You have raised several very important questions.

There is the school of though that we cannot get everything when we start in this area and we are starting with what we think we can get. And bear in mind we have gone along many, many years now without any type of legislation, and this is more or less a groundbreaker, and it was the feeling of those of us who put this bill together, that this was the starting point; this was not the finished product but something to discuss.

One point you have raised here is an exceptionally excellent point—in fact, I think they are all good points, but the one that is particularly impressive to me is that why should an offender, an alleged offender, who has not been guilty of anything, have to go into court and ask for an application to suppress certain arrest records where, in fact, there should not be any records at all. I think this point is well taken, and perhaps we could approach this bill from the point of view of just making it unlawful to use arrest records and require no overt action on the part of the man involved. I think that is an excellent point, and I am sure that we will go over that suggestion very, very carefully.

Mr. DALE. Senator, I wonder if I could, informally, give you an impression that I have, as a result of some recent experiences?

Senator BURDICK. Yes.

Mr. DALE. On behalf of the National Council on Crime and Delinquency, we have been meeting with leaders of top business corporations in this country to try to interest them in our work and in the whole field of criminal justice, lawenforcement, court procedures, as well as the field of corrections.

We have found enormous response. On three different occasions, we have now had meetings of top corporate executives in which they have spent all day with our people to understand this problem, and, to impress you with the importance of this, they did not send their vice presidents in charge of public relations: they did not send their vice presidents, they came themselves. These were top corporate executives, and they spent all day.

They have now encouraged us to move into an area—as the Justice Department and many of the Federal agencies—to move into the area perhaps where we can do something in making the public more aware. I have the feeling and the impression, from my experience, that perhaps it is the time that you can take a bolder step. I recognize your problem of "Let us get it started and see what we can come up with," but I have the feeling that this is the moment perhaps where we can take that bold step; I have the feeling that the people of our country now feel that this is long overdue and that something like this would fit into the present thinking. I would urge you to be as bold as you can in this, because I believe you will find that the response is much more favorable than what you might think—or certainly would have thought several years ago.

That is why I was so presumptuous as to be so bold and ask you to strengthen it all the way.

Senator BURDICK. Well, that is the kind of testimony we want.

Bear in mind that it has just been in the last 2 years that people have really taken hold of this issue and that the American Bar and various civic organizations have just recently taken hold of this. And, you know, there was a great thought in this country—and much of it still persists— that you should put them in jail, get them out of sight and care naught for what happened.

Mr. DALE. You might be interested—if I may take another moment, sir?

Senator BURDICK. Yes.

Mr. DALE. In this movement, we have been pushed to take— why, really this is not our field. Our field has been one in expertise and trying to be ahead of the times for 10 years, and we have not been a public-oriented, citizen-level action group program but we have been compelled to do this by the people that are interested in our work, and now by business organizations. We have a research laboratory in Davis, Calif., that serves our organization with about 30 scientists there, social service scientists. Under the impetus of this push from business, we are now being asked to design a test package, and, as business would approach its problem, it is saying "Go out and test this." We are now going to test in two States in the United States a design package in which we will first test the awarenesss and the understanding that the general populace has of the criminal justice problem; what do they know about it, and [illegible]t really impress them; is it at the top of their priorities. T[illegible]e will design a package of citizen action.

I am not talking about "Let us turn on the pu[illegible]ight at night." I am talking about things they can understand, things they can get involved in; What can the Chamber of Com[illegible]erce do; what can the Jaycees do; what can the churches do? And then give them these programs of some significance and, after a reasonable period of time, at least 6 months, again, measure the level of awareness and see whether or not that awareness can be translated into action. Can it really mean something significant in support of the crirainal justice system? And I am not talking about attacking; we are talking about support and the primary objective of returning the services in the criminal justice field, all such services, to community-oriented service agencies. This is being done in mental health, and it is being done in many, many other fields, and the philosophy of this is catching hold.

Business men believe in it; the top business men in this country understand this problem now. They are becoming aware, and they are pushing very hard, to the extent that they have asked us to do this, and they are raising the money to do this separately as a test program.

And after the program is tested in two States—we have already started in California—we will then look at it, standing back as you would in introducing a new product, and ask "Is this worthwhile?" If it is not, we will try something else.

But I thought you would be interested to know that that kind of interest is avilable in this country now, and that the top business men are certainly pushing us to do this.

Labor organizations are also working with us on this.

Senator BURDICK. Well, this is heartening news, and I certainly hope that you and the other groups will keep the committee advised, because we are trying to translate this into legislation——

Mr. DALE. Yes, sir.

Senator BURDICK (continuing). To be meaningful.

Now, getting back to the records. Both you and I agree that an arrest record does not prove anything.

Mr. DALE. Right.

Senator BURDICK. And should not be an albatross around anybody. The problem we have had in devising this legislation, as I said a few minutes ago—and I am strongly in support of what you say, that a man should not have to take any overt action himself to have cleared something that really should not be there—but what do you do?

And I am talking to you as a lawyer now, too. What do you do about a case where a man has been arrested and his case has not been disposed of, it just laying in the files of some district court or the court's office, laying there and has not been processed or dismissed or anything?

Would we not have to use some kind of procedure to get that one off the records?

Mr. DALE. Yes, I would think so. We need this kind of pressure on our court system, too, and I realize that you cannot do it all at once in this instance, but perhaps it would remain automatic after a certain passage of time that that would come to the top of the stack and somebody would have a calendar marked and it is nullified unless some action is taken. There would be a deadline, and perhaps this would also help the court system to get those things off their dockets.

If something is about to happen to that file, I have the feeling that somebody is going to look at it and do something about it.

So, I would suggest, perhaps, that in that area, after the passage of a certain amount of time, it would automatically happen.

Senator BURDICK. Well, different court calendars are different in different parts of the country, and we have to deal with a national problem here. I know that a court calendar out in North Dakota is not as crowded as calendar is in New York City, for example, and would have to use a time period that would accommodate the most crowded, and that would be a considerable period of time. This is the area I have been thinking about. How do you get at this one? Maybe your time factor will do it.

Mr. DALE. Perhaps the time factor will do it. I suspect if we could get that into such a bill that we may find that the court calendars can adjust more easily than we think they can or have been told they could. Certainly, there would be nothing more important than a man's freedom that we ought to relate this to.

Senator BURDICK. This is why we have public hearings like this, to refine this legislation. After all, this bill is just at the starting point. You probably will not recognize it when we report it out, when we do. So, this is very helpful.

Mr. DALE. I realize that.

Senator BURDICK. Now, you say why do we limit this to certain types of crimes.

I had hoped that we would have the benefit of your surveys before this, but we get the feeling that it would be very difficult to erase a premediated, first-degree murder—for the public to accept that at this stage of the game.

Mr. DALE. I think there is a problem there. My only feeling in that is—and, again, I am relating all of this to recent experience with businessmen—that businessmen are pushing and labor people are also working in this field and, now, they are pushing us to make certain that we refine the decision as to who is incorrigible and who is rehabilitatable. That is the key question. Nobody is suggesting that we put out on the streets incorrigible people.

Senator BURDICK. Yes, but how about the man who has got a sentence of 20 years and he serves it and he is still incorrigible, he is incorrigible when he gets out on the streets?

He would be entitled to have this suppressed, too, would he not?

Mr. DALE. The point I was trying to make there is: Perhaps, the crimes of violence that are excluded are not as important to an employer as perhaps some of the other crimes that you have included.

For example, if I am going to be hiring somebody in my own business——

Senator BURDICK. Embezzlement, for instance?

Mr. DALE. I may be more concerned about his crime being one of fraud then I am about his crime being one of passion at one time.

If I have some belief that he is rehabilitative, the fraud thing would bother me, as a business operator, perhaps, more than some of the others.

Senator BURDICK. Well, it was our thinking that the assault-type, serious assault-type crimes would have to remain for a while until we get some experience. That is the theory behind the bill.

Mr. DALE. It is a very delicate question, obviously.

As a matter of fact, recently in California, they had the same problem. They were working on 72-hour release programs, which have been very effective. It has reduced the costs and the need for jails tremendously. It has been a great program. Well, as these things will happen, somebody is on a 72-hour pass and he murders someone. That is going to happen. We are going to have some of that. But is that going to be the thing that is stopping us from doing something still worthwhile? We have to weigh that.

My own judgment would be that employment is such a rehabilitation itself that we dare not deny that if we can help it.

Senator BURDICK. We feel that is the core of the problem.

Mr. DALE. No question about it.

Senator BURDICK. We feel that strongly.

Now, the other question, the third area that you opened up, is why should there be any waiting period. Would you reduce the waiting period or would you eliminate it entirely?

Mr. DALE. I would urge that you eliminate it entirely.

I think, obviously, that I am speaking for something that is true or it is not true. The man is rehabilitated or he is not rehabilitated. Now, we ought to be able to take the risks. It may be that we will make a mistake in judgment, but, in my own judgment, the risks are not that great. But if your correction system is doing the job—and I understand that that is the problem and a different problem than you are dealing with now, but I do think we are making some progress in that area. In fact, just such hearings as this, and this bill, are evidence of the fact that we are concerned with this now.

And my own feeling is that I urge that you consider eliminating the waiting period.

Can we not just say that our corrections system and our whole law say that when a man is given a specific period of time in which he should pay for his misdeeds, that that should end, that there should be an end to it. There should be an incentive. There should be a time when he walks across the bridge and he is free. And it seems to me that that would encourage good behavior while he is serving, and it would encourage a whole set of other fringe benefits that we could get out of this. I would urge the stronger bill.

Senator BURDICK. Well, if I took all of the recommendations together, we would have a situation where everybody who walked out of the prison gates would leave the record behind.

Mr. DALE. If he can quality in this field, yes, sir, I urge that.

Let us make it—let us be honest about it. This is a 10-year sentence, and let us not continue it for 15 years; let us make it 10. If

it is supposed to be 15, let us make it 15 the first time, but, at the end of 10 years, a man has been through a correctional system and if we can refine that judgment that he is now rehabilitated—as it says in this instance—if he can qualify—and this is why you have the court procedure. If this is it, why, let us just stand up and say it, "Welcome back, and be one of us." I think it is awfully important to the general feeling and the general attitude. We are coming to this, and I think now is the time to do it.

Senator BURDICK. That is a mighty forward step, in view of the issue of corrections.

Mr. DALE. It would be, and I believe it would open up a new day, and I think you would receive great support in the country for it.

Senator BURDICK. Do you not think that there is some merit in having some time period for evaluation of the man?

Mr. DALE. Well, perhaps I am missing something here, but I did not understand that the time period would be for evaluation. I would understand that the evaluation would be before that.

Senator BURDICK. It is a question of testing—not testing, but reviewing the actions of an individual after allegedly he has been rehabilitated.

Mr. DALE. Well, hopefully, we are coming to the point and it is growing where in the correctional period itself there is such tests. There is the 72-hour passes, and there is the job availability. There is the inside training, and there is the outside training. Perhaps, as you know, there is a great deal more being done to be sure that the offender has some ties with the community. We cannot put a person away for 10 years and say then "You come back and rehabilitate and reorient yourself to the society" where he has not been in it for 10 years. It is just an impossibility. And, so, the whole trend in corrections is toward community-oriented services, and with some ability of the offender who is showing rehabilitation tendencies and is receptive to this kind of service, that he will have continuing contacts with the community. There will be family contacts; there will be job opportunities. An you know, perhaps, some businesses are actually setting up training courses for future employment within the correctional system. If this is happening, as I believe it is—and is growing—then the testing period will be there before the end of the sentence. If that be so, then I would think the waiting period would be less necessary. If we are going to continue to "throw the key away" and not have any community contacts, then, obviously, some testing period would be necessary.

But I am under the impression that there is a growing trend in modern correctional philosophy that these contacts with the community are rehabilitative. They are being pushed; and with that kind of understanding perhaps the time will come when we will not need any further testing: the recommendation will already be there.

Senator BURDICK. Well, I do not want to draw any conclusions, but it seems to me that your testimony indicates that you will support a proposition that when a man leaves the institution the record dies right there.

Mr. DALE. Yes, sir.

Senator BURDICK. For everybody?

Mr. DALE. Yes, sir.

Senator BURDICK. And the question of prior incarceration or prior imprisonment should never be thereafter asked by anybody at anytime?

Mr. DALE. Well, it can be asked by a court if he comes back on another crime.

Senator BURDICK. But not by an employer or anybody like that?

Mr. DALE. We are not talking about habituals who are back in court, as you understand. This would also, I believe, put the burden and the case where it should be. The case should be in the correctional facility, and it would give great impetus, in my judgment, to the kind of rehabilitation services that are now being made available to our correctional institutions.

By following a much more aggressive, much more supportive probation system, for example, as in the State of California, following the recommendations of our National Council, we have saved the State of California $200 million. They are not building penitentiaries as they one time needed to do. They are spending about one-fifth of this money now on aggressive, supportive probation systems, and the crime rate is not increasing. The rehabilitation has increased and the recidivism rate is decreasing. This clearly is the way, and I would leave with you and the counsel a copy of a speech that I made to these businessmen about this and explaining how this started in an experiment in Saginaw, Mich., in 1958. And it is happening across the country. I think this clearly is the course and bills like this one would encourage—in fact, I believe it would force—a further improvement in the rehabilitation services during incarceration. That is the name of the game, it seems to me.

Senator BURDICK. Do we not have, in society, to answer the question as to whether or not we have an individual who has just been released who can live, roughly, on the streets and not immediately engage in some further illegal activities? Do we not have to have some period to find that out?

Mr. DALE. Well, there is no question that we must protect society. We must, and society must, have that confidence that the system is working enough so that when we release a person that he is then one of them and is a law-abiding citizen, and would be likely to be, and I agree with that. I am still pushing for the idea that judgment or testing should be made during the period of incarceration.

Senator BURDICK. Yes; but suppose he serves his time and the testing shows that he is not ready yet but he is still out?

Mr. DALE. Then he would be under probation.

Senator BURDICK. Not if he serves his full time.

Mr. DALE. No; that is true.

Senator BURDICK. He is a free agent, yet he may be a dangerous man to have at large.

Mr. DALE. That is true. What do we do now?

The fact that he has a criminal record does not stop him from going out and engaging in crime again. So, this billl is not going to stop that. What this bill is designed to do is to try to support those rehabilitative services that are available. This bill is not going to stop any fellow that wants to come out and commit a crime.

Senator BURDICK. No. This bill is aimed at the vital point that you and I agree on: put the man to work—jobs. That is vital.

Mr. DALE. I salute you for it, and I think it is a great step of leadership, and I am very impressed with it.

Senator BURDICK. Well, you have been a very refreshing witness and you have made a great contribution. Thank you very much.

Mr. DALE. Thank you, sir.

Senator BURDICK. Our next witness will be Mr. Aryeh Neier, executive director, American Civil Liberties Union, and Mr. John Shattuck, staff counsel, American Civil Liberties Union, New York City, N.Y.

[The biographical sketches of Aryeh Neier and John Shattuck follow:]

BIOGRAPHICAL SKETCH—ARYEH NEIER

Mr. Neier has been the Executive Director of the American Civil Liberties Union since 1970. He has been a member of the A.C.L.U. staff since 1963, serving first as development officer and for six years as executive director of the A.C.L.U.'s New York State Branch.

Mr. Neier has written and lectured widely on civil liberties. He has served on the faculty of New York University and has appeared as a regular lecturer at New York City Police Academy. Prior to joining the staff at A.C.L.U., Mr. Neier was associate editor of *Current* magazine.

BIOGRAPHICAL SKETCH—JOHN SHATTUCK

Mr. Shattuck is a staff counsel of the American Civil Liberties Union. He is a graduate of the Yale Law School and served as a law clerk to Federal District Court Judge Edward Weinseld, in the Southern District of New York.

STATEMENT OF ARYEH NEIER, EXECUTIVE DIRECTOR, AND JOHN SHATTUCK, STAFF COUNSEL, AMERICAN CIVIL LIBERTIES UNION, NEW YORK, N.Y.

Mr. NEIER. Thank you very much, Senator.

Senator BURDICK. Welcome to the committee.

Mr. NEIER. I am Aryeh Neier, executive director of the ACLU, and Mr. Shattuck is a staff attorney for the ACLU who has been involved in a number of important cases concerning arrest records.

We are very pleased to appear here today, and we are very pleased with the general thrust of your bill. We think that is is an important step but still a very small step toward eliminating the record prison that a great many Americans are trapped in because of their ciminal records.

Our statement is rather lengthy, and I do not think that we would want to take your time to read it all. We would like to submit it for the record and summarize its contents, and, then, respond to any questions that you may have.

Senator BURDICK. The fact that you wish to summarize your statement is received very well, as you know, in the committees; and your full statement will be made a part of the record without objection.

[The prepared statement of Aryeh Neier and John Shattuck reads in full as follows:]

STATEMENT OF ARYEH NEIER, EXECUTIVE DIRECTOR AND JOHN SHATTUCK, STAFF COUNSEL, AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union is a nationwide nonpartisan organization of more than 170,000 members devoted to the protection of the Bill of Rights. We strongly endorse the spirit of S.2732 as an important first step toward eliminating the "record-prison" which has grown up in the shadow of our criminal justice system. There are several ways, however, in which we feel the proposed bill could be strengthened.

While the purpose of maintaining and disseminating the records of criminal arrests and convictions is presumably to enable the nation's law enforcement agencies to control and reduce crime, it is increasingly doubtful that criminal records serve that purpose. In light of all the information now known about the effects of criminal records on those who bear them, the question arises: is crime controlled or reduced if large numbers of people are prevented from getting jobs, licenses, homes, credit, or admission to schools because of their records? The trapped situation of the person who has been convicted of a crime has been trenchantly described by an ex-convict:

Once you have a 'jacket'—a dossier with all the past details of your life, all the detrimental ones they can put together, that is . . . you are a criminal. The jacket does not disappear; it grows fat and follows you around wherever you go. Some day this sentence you are serving will chronologically run out, but society does not forgive; it keeps tabs . . . (William R. Coons, "An Attica Graduate Tells His Story," *New York Times Magazine*, October 10, 1971).

In the case of an arrested person, moreover, the dossier continues to haunt him even though he has not been proven guilty of any crime. According to the F.B.I., law enforcement agencies make some 7.5 million arrests a year for all criminal acts, excluding traffic offenses. Of those arrested, more than 1.3 million are never prosecuted, and another 2.2 million are acquitted or have the charges against them dismissed. But they cannot escape their arrest records. (*Crime in the United States*, F.B.I. Uniform Crime Reports, 1969).

The F.B.I. Crime Reports tell a grim story of rising crime rates and staggering rates of recidivism, and of the rearrest of persons previously arrested. Could it be that the rising crime rates and the recidivism and the rearrests have something to do with the rising efficiency with which criminal records are maintained and distributed? Are people forced into crime by their inability to escape the record-prison of things they have done and things they never did but are alleged to have done? These are disturbing questions for which definitive answeres are hard to find but they must underlie any consideration of Senator Burdick's bill relating to the nullification of certain criminal records.

SECTION 2: PROPOSED CONGRESSIONAL FINDINGS

We applaud the proposed Congressional finding that "the rehabilitation of criminal offenders is essential to the protection of society; that gainful employment is significant to the rehabilitation of criminal offenders; [and] that misuse of past criminal records is a substantial barrier to employment and to the bonding and licensing to secure employment. . . ."

Indeed, the widespread discrimination against persons with criminal records is so well documented that the finding is virtually indisputable. Of 475 private employers interviewed in New York City, for example, 312 stated unequivocally that they would never hire a former convict and 311 of those stated that they would fire an employee if they discovered that he had a criminal record. (Portnoy, *Emrloyment of Former Criminals*, 55 Cornell L. Rev. 306, 307 (1970)). Because of this discrimination the vast majority of persons with conviction records must accept what employment they can find, if any, at skill and pay levels considerably lower than those at which they were employed prior to their conviction. (Glasser, *The Effectiveness of a Prison and Parole System*, pp. 330–32 (1964)).

Nor is the private sector the only source of prejudice against persons with criminal records. Virtually all states and many municipalities have licensing laws like those in California, where thirty-nine of sixty licensed occupations permit denial, revocation, or suspension of a license for conviction of any felony or a misdemeanor involving moral turpitude.

(Note, *The Effect of Expungement on a Criminal Conviction*, 40 S. Cal. L. Rev. 127, 136–37 (1967); see also Affeldt and Seney, *Group Sanctions and Personal Rights—Professions, Occupations and Labor Law*, 11 St. Louis U.L.J. 382 (1968); Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201 (1937); Reich, *The New Property*, 73 Yale L. J. 733 (1964)). The scope of many such licensing laws is extremely broad. In New York, for example, the Alcoholic Beverage Control Law not only provides that former offenders cannot be licensed, but also forbids a licensee knowingly to employ "in any capacity whatsoever" anyone convicted of a felony or of certain enumerated misdemeanors, unless an exception is approved in writing by the State Liquor Authority. (N.Y. Alco. Bev. Control Law 102(2), 126(1) (McKinney Supp. 1969)). Employment in the public sector is even less available to the former offender than employment in a licensed occupation. In more than half the states there is a flat statutory prohibition against government employment of persons with criminal records, and in all other states administrative agencies are given the right to turn down a person with a record. (Rubin, *The Law of Criminal Correction*, pp. 613–14, 625–62 (1963)).

While it is entirely appropriate, therefore, for the Congress to make a finding that the existence of a criminal record is a substantial barrier to employment we suggest that this is not enough and that a more subtle finding should be made with respect to *arrest records*. Conviction records are the cause of invidious discrimination when they are misused, but since they at least reflect an adjudication of guilt within the criminal justice system, they have a certain integrity. This is not the case with an arrest record.

The probability of a black urban male being arrested at least once during his lifetime has been estimated to be as high as 90%. For white urban males, the figure is 60% and for all males, it is 47% (*President's Commission on Law Enforcement and the Administration of Justice, Task Force on Science and Technology*, Appendix J at p. 216 (1967)). Fewer than 25% of those arrested per year are found guilty of the offense for which they were arrested and only a little more than another 25% are found guilty of any crime at all. (*Crime in the United States*, F.B.I. Uniform Crime Reports, at Table 17, p. 103 (1969)). Despite their innocence before the law, persons with an arrest record are subjected to the severe, continuing and pervasive punishment that attaches to the commission of a crime, namely the lifelong disabilities of a "criminal record". Furthermore, that disability has the same damaging effect on a person's opportunity for employment and acceptance by society as a conviction record. (See, e.g., *President's Commission of Law Enforcement and the Administration of Justice*, at pp. 75, 77 (1967); Hess & LePoole, *Abuse of the Record of Arrest Not Leading to Conviction*. 13 Crime and Delinquency 494 (1967); *Report of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia* (hereafter "Duncan Report" (1967)). Unlike the conviction record, however, the arrest record is an illegitimate offspring of the criminal justice system, and poses a grave threat to the entire scheme of constitutional protection which our system of justice offers to citizens innocent of legal wrongdoing.

An additional finding therefore, should be made in Section 2 of S. 2732 to the effect that an arrest without a conviction cannot as a matter of law support any damaging inferences for employment, law enforcement, or other purposes in the case of the person arrested. Indeed, the Supreme Court has held that "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed . . . whatever probative force the arrest may have had is normally dissipated." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957). Furthermore, "arrest without more does not, in law any more than in reason impeach the integrity or impair the credibility of a [person]. It happens to the innocent as well as the guilty." *Michelson v. United States*, 335 U.S. 469, 482 (1948), See also *Pennew v. United States*, 313 F. 2d 524 (4th Cir. 1963).

SECTION 3: NULLIFICATION OF CONVICTION RECORDS

While we are in full agreement with the principle underlying the nullification of conviction records, we believe that Section 3 falls short of achieving its stated goal of eliminating barriers to the employment and meaningful rehabilitation of former offenders. This is so for two reasons. First, the three years waiting period in the case of persons who have served non-prison sentences [five years in the case of those who have been incarcerated]. Negates the effect of the statute at the time when ex-offenders are most in need of assistance in overcoming employment disabilities and other forms of discrimination resulting from their criminal record. Second, by placing the burden on the person with a record to prove to the court that he is eligible for expungement by, inter alia, showing "evidence of his rehabilitation" (subsection 3(b)) ,the bill introduces an administrative complication for the courts as well as the former offender which will serve drastically to reduce the availability of relief.

Apart from these shortcomings, discussed in greater detail below, the principle of Section 3 is sound and has been recognized both by the courts and by state legislatures. Although courts have traditionally taken the attitude that a criminal record is permanent and that an employer or licensing authority "may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law and of the absence of . . . good character," *Hawker v. New York*, 170 U.S. 189, 191 (1898); accord, *DeVeau v. Braisted*, 363 U.S. 144 (1960), there is a growing recognition that this Draconian principle is of dubious social value. Even in *Hawker*, the first Justice Harlan wrote a vigorous dissent, in which he was joined by two colleagues, pointing out that:

> The law under which this appellant was indicted does not deal with his present moral character. It seizes upon a past offense, and makes that, and that alone, the substantial ingredient of a new crime, and the conviction of it years ago the conclusive evidence of that new crime. . . . Clearly it acts directly upon and enhances the punishment of the antecedently committed offense by depriving the person of his property and right and preventing his earning his livelihood in his profession, only because of his past . . . offense against the criminal law. (170 U.S. at 204–05 (Harlan, J., dissenting, quoting from the court below at 43 N.Y.S. 516, 518 (1897)).

More recently, the Second Circuit Court of Appeals in holding that a labor arbitrator may order the reinstatement of an employee convicted of gambling on the premises of his employer, clearly stated what federal policy should be in this area:

> [I]n light of the important role which employment plays in implementing the public policy of rehabilitating those convicted of crime, there can hardly be a public policy that a man who has been convicted, fined and subjected to serious disciplinary measures can never be ordered reinstated to his former employment ... (*Local 543, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir.), cert. denied, 373 U.S. 949 (1963) See also *McDonnell Douglas Corp.*, 50 L.A. 274 (1968); *Kentile Floors, Inc.*, 57 L.A. 919 (1971)

In the same spirit many states have enacted statutes which provide varying degrees of relief from the stigma of a conviction record to former first offenders who have served their sentences. Some form of executive or legislative pardon is available in thirty-seven jurisdictions (Newman, *Sourcebook on Probation, Parole and Pardon*, pp. 43–44 (3rd ed. 1969)). While some statutes provide for the automatic restoration of certain rights upon satisfactory completion of a sentence or at some specified time thereafter (Id., at 45–46), most of the statutes have become entangled in administrative confusion which has counteracted their legislative intent.

S. 2732 has some of the symptoms of this potential administrative confusion. The requirement in Section 3 that an application be filed by a convicted person who will have the burden of showing "evidence of his rehabilitation" in a district court will create a new set of mandatory proceedings to add to the already crowded federal court dockets. In order not to overburden the courts and to make the statutory relief as widely available as possible, nullification should be automatic, unless the government affirmatively petitions the court to suspend or qualify it in a particular case by showing that nullification would be contrary to the purposes of the statute. If nullification were denied on the basis of a successful government petition, the convicted person should be entitled to bring his own petition after the lapse of a statutory period of time to have his record nullified by showing at that point new "evidence of his rehabilitation."

These recommendations reflect our disappointment with the burdensome procedures set up under otherwise promising state statutes. As on ecommentator has noted, "[e]xcept for those providing automatic restoration [of rights], . . .

little use is made of these laws. The generally complex mechanics of applying for pardon or restoration of rights may in part account for this...." Portnoy, *Employment of Former Criminals*, 55 Cornell L. Rev. 306, 313 (1970). The experience of New York State, which has had a statutory provision since 1966 for relieving ex-offenders from civil disabilities, is typical. Article 23 of the New York Corrections Law requires an affirmative application for relief by an ex-offender similar to the one contemplated by Section 3 of S. 2732. Because the availability of relief is generally unpublicized and the burden of applying is considerable, it has been estimated that fewer than 600 of the many thousands of persons eligible for a certificate of relief have applied in any one year.

New York commentators have deplored the lack of available "information as to the volume, types and disposition of the applications made to sentencing courts," and have urged that at a minimum the state "should devise some method of publicizing the availability of this relief and encouraging its appropriate use." Letter to the Editor, *New York Law Journal*, June 1, 1970. An effort to publicize the statute was made in May 1971 by the New York Urban Coalition, a private organization, in a ten-page pamphlet entitled, "How to Regain Your Rights." 80,000 copies have been distributed to potential applicants. Publicity alone, however, is not enough, and the availability of relief will continue to be limited so long as the operation of the statute is not automatic. Indeed, as the Supervising Parole Officer charged with overseeing the program has commented in reviewing the paucity of court applications, "I do not find these results surpirsing. The Courts are, in most cases, overwhelmed with their own calendars...." Yelich, "The Hidden Penalty," *New York Law Journal*, June, 1970.

While the application procedure contemplated by S. 2732 appears to frustrate the broad intent of the bill to enable former offenders to nullify their criminal records, the three year and five year waiting periods provided for in subsections 3 (a) (1) and (2) frustrate the broad rehabilitative purpose of the bill. We suggest that the time when an ex-offender is most in need of relief which the bill would extend to him is the time when he is first released from the jurisdiction of the court after a sentence of probation, or when he first emerges from prison after a period of incarceration. It is then that an employer is most likely to confront him with his record and fire him if he has been hired or shut the door on him if he is applying for a job. Since the Congressional finding of Section 2 so closely links the securing of "gainful employment" with the "rehabilitation of criminal offenders." It is illogical to condone employment discrimination against former offenders when they are first released, and only later to extend relief to them when they are secure in their jobs.

Furthermore, as a practical matter the principle which presumably underlies the waiting period provision—that recently released offenders are too great a risk to employers to justify the nullification of their record—is not supported by evidence. On the other hand, the work release programs which have been adopted by twenty-four states and the federal government have registered favorable reactions among the overwhelming majority of employers who have participated in them. (See *The Employees Who Got a Second Chance*, 55 Nation's Business, April 1967, at 90; Carpenter, *The Federal Work Release Program*, 45 Neb. L. Rev. 690 (1966)). Successful attempts to cut recidivism by using community pre-release employment centers have led to Congressional authorization of their expansion. (18 USC., section 4082 (Supp. IV 1968); see also *Hearings on H. R. 6964 Before Subcomm. Number 3 of the House Committee on the Judiciary*, 89th Cong., 1st Sess. 2–5 (1965) (statement of N. D. Katzenbach); Long, *The Prisoner Rehabilitation Act of 1965*, 29 Fed. Probation, Dec. 1965, at 3).

SECTIONS 4 AND 5: NULLIFICATION OF ARREST RECORDS

Sections 4 and 5 stand on an entirely different set of principles from Section 3. Here we are concerned with the presumption of innocence of persons who have *not* been convicted in a court of law; the nullification of their records is necessary not in order to rehabilitate them but in order to free them from a form of punishment entirely unwarranted by the criminal justice system and by the Constitution. In considering the magnitude of the constitutional injury which nullification of arrest records is aimed at redressing, it is necessary to

survey first, the effect of an arrest record on employment and second, the constitutional violations which occur when an arrest record is maintained and disseminated.

Examples of employment discrimination against persons with arrest records are legion. A study of the New York area employment agencies, for example, indicated that 75% would not accept for referral an applicant with an arrest record and no conviction. (Sparer, *Employability and the Juvenile Arrest Record*, at 5 (Center for the Study of Unemployed Youth, New York University), cited in *Menard v. Mitchell*, 430 F. 2d 486, 490 n. 17 (D.C. Cir. 1970); see also Herr, *Punishment By Record: A report to the Connecticut Legislature on First Offenders*, at I, 7 (1970); Note, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. Chi. L. Rev. 850, 864 (1970); Hess and LePoole, *The Abuse of the Record of Arrest Not Leading to Conviction*, vo Crime and Delinquency 494, 495 (1967)). Despite administrative attempts to prevent the dissemination of arrest records, it has been found, for example, that employers in the District of Columbia have often obtained records from police sources, and that as a direct result job applicants are not hired, (Duncan Report, at 6 (1970)). The Chief of the Employment and Employee Relations Section of the District of Columbia Personnel Office told the Duncan Committee that many interviewers, receptionists and employers automatically rule out arrestees whenever a risk is involved in the job. (Id., at 10). A representative of the Work Training Opportunities Center of the D.C. Department of Public Welfare declared that employers' attitudes engendered a defeatism among unemployed persons with arrest records. (*Id.*, at 12). The Director of the local U.S. Employment Service in Washington stated that many employers required a "clean" arrest record as a condition of employment, and that the Service was able to place only about 15% of applicants with records of convictions *or* arrests.

Since few employers are capable or willing to invest the time to investigate the circumstances surrounding an arrest, a policy of automatic rejection is a good excuse for an employer to avoid doing so. (Note, *Retention and Dissemination of Arrest Records*, 38 U. Chi. L. Rev. 850, 865 (1970); Note, *Discrimination on the Basis of Arrest Records*, 56 Cornell L. Rev. 470, 472 (1971)). Other employers have stated that an arrest record indicates bad character, and that applicants without arrest records are therefore better qualified for that reason alone. (Note, *Maintenance and Dissemination of Arrest Records versus the Right to Privacy* 17 Wayne State L. Rev. 995, 1005 (1971); Cornell Note, *supra*, at 471–72).

Persons with arrest records are discriminated against by public as well as private employers. A California legislative committee, for example, found that applicants for post office jobs who had arrest records were automatically disqualified because it was considered cheaper and simpler to hire applicants without records. (Hess and LePoole, *supra*, at——). A Chicago prison employee was suspended because of an arrest due to mistaken identity seventeen years earlier when his record came to the attention of his supervisor. (*Id.*, at 496).

Perhaps more disturbing than informal discrimination is the type of discrimination against arrested persons which is promoted by state law. In 1969 New York enacted a law requiring the fingerprinting of securities industry employees. Of the first 20,000 persons fingerprinted, 361 were found to have arrest records, and 54 lost their jobs. Approximately one-half of those with arrest records had never been convicted of any offense. (Wayne State L. Rev. Note, *supra*, at n. 18). An estimated 56% of all states, 55% of all counties, and 77% of all cities ask whether an applicant has ever been arrested on their civil service application forms. (Miller and Marietta, *Guilty But Not Convicted: Effect of an Arrest Record on Employment*, at n. 15 (unpublished study prepared at the Georgetown University Law Center, 1972). Many maore jurisdictions have vague character standards for civil service jobs which give hiring officials great discretion in rejecting applicants with arrest records. (*Id.*, test accompanying *Notes* 144–159d). Finally, arrest records have adverse consequences under state law on applications for professional and occupational licenses (*Duncan Report*, at 14–15; Cornell Note, supra, at 474–74; Chicago Note, *supra*, at 864; Hess and LePoole, *supra*, at 497), and on applications to surety companies for the bonding necessary for licensed employment. (Hess and LePoole, *supra*, at 495; Cornell Note, *supra*, at n. 26).

When these governmentally sanctioned discriminations are placed in a constitutional contest, the seriousness of the injury caused by an arrest record becomes even clearer. As a general principle it is indisputable that conduct which has not been proved illegal may not be made the subject of criminal punishment, and that no supposed public interest can justify the imposition of a criminal penalty on a person who has not committed a crime. In *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), for example, the Supreme Court struck down a statute authorizing juries to impose court costs on persons accused of a crime but acquitted at trial, Mr. Justice Stewart, concurring, recognized the simplicity of the principle governing the Court's decision:

The imposition of punishment upon a person who has not been found guilty violates the most rudimentary concept of due process of law. (382 U.S. at 405).

The unconstitutionality of punishment by arrest record is perhaps best illustrated by the facts and arguments in a leading case challenging the maintenance and dissemination of an arrest record by the F.B.I. In *Menard* v. *Mitchell*, 328 F. Supp. 716 (D.D.C. 1971), on remand from 430 F.2d 486 (D.C. Cir (1970), the plaintiff, Dale Menard, a 26 year old Marine veteran, had been arrested for "suspicion of burglary" but was never convicted, indicted or even charged. Indeed, it was never established that the "crime" for which he was arrested, following a telephone complaint about a prowler in the neighborhood where Menard was sitting on a park bench, was ever in fact committed by anyone.

Seeking removal of his arrest record from the files of the F.B.I., Menard was denied relief in the district court. On appeal it was held that since "information denominated a record of arrest, if it becomes known, may subject an individual to serious economic difficulties," 430 F.2nd at 490, Menard was entitled to a trial on the issue of complete expungement. Following the proceedings on remand in the district court, Judge Gesell ruled that while the F.B.I. may maintain the record of Menard's arrest for distribution to and use by federal, state and local law enforcement agencies for law enforcement and federal employment purposes only, all other distribution and uses of the record would be enjoined. Viewing the district court's decision as an inadequate protection of his rights, Menard has taken a second appeal in which he contends that he is being subject to punishment by arrest record, thereby depriving him of equal protection, constituting a cruel and unusual punishment for his status as an arrestee, violating the presumption of his innocence, and invading his privacy.

The equal protection argument is grounded on the simple claim that since Menard has not been convicted of a crime, he is entitled to be treated like other non-convicts. Instead, his arrest record classifies him with the guilty, and he is exposed to all the risks, disabilities and disadvantages that flow from maintenance and dissemination of his record. While Menard's own equal protection claim is strong, the burdens imposed by arrest records are likely to fall even more heavily and unfairly upon members of ethnic minorities, see *Gregory* v. *Litton Systems, Inc.*, 316 F. Supp. 501 (D.C. Cal. 1970) (judicial finding that blacks are arrested substantially more frequently than whites in proportion to their numbers), or groups whose unconventional life styles, unorthodox political views or social modes are offensive to community attitudes. See *Hughes* v. *Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968) (use of arrest records to harass hippies). Indeed, the D.C. Circuit in its opinion remanding *Menard* to the district court noted that "[hippies] and civil rights workers have been harassed and literally driven from their homes by repeated and unlawful arrests .... Innocent bystanders may be swept up in mass arrests made to clear the streets either during a riot or during political demonstrations." 430 F. 2d at 494.

The second element of the constitutional argument is that the maintenance of an arrest record constitutes cruel and unusual punishment. Since "the due process clause ... prohibits as cruel and unusual the punishment of status, "*Wheeler* v. *Goodman*, 306 F. Supp. 58, 62 (W.D.N.C. 1969) (three-judge court), statutes which impose punishment because of a physical condition, such as narcotics addiction (*Robinson* v. *California*, 370 U.S. 660 (1962)) or because of one's status as an indigent or a vagrant (*Wheeler* v. *Goodman*, supra) have been held unconstitutional. In Menard's case, there has been no legitimate judicial or other determination that his status as an arrestee resulted from any

affirmative misconduct on his part. Since he is even less accountable for his status as an arrestee than an addict or a vagrant, the injury to his character and reputation which stems from his arrest record is an even more cruel and unusual punishment than theirs.

Nor can a legitimate public interest in identifying the guilty overcome the denial of due process and equal protection and the infliction of cruel and unusual punishment caused by the stigmatizing identification of an innocent person. In *Boorda* v. *Subversive Activities Control Board*, 421 F. 2d 1142, 1143 (D.C. Cir. 1969), cert. denied, 397 U.S. 1042 (1970), for example, the D.C. Circuit invalidated the disclosure provisions of the Subversive Activities Control Act on the ground that the Act was "constitutionally defective in allowing public disclosure of an individual's membership to be made without a finding that the individual concerned shares in any illegal purposes of the organization to which he belongs." Citing *Boorda* in its *Menard* opinion, the D.C. Circuit held that "there is a limit beyond which the government may not tread in devising classifications that lump together innocent with the guilty." 430 F. 2d at 492.

Allied with the constitutional arguments advanced by Menard are two fundamental and closely related principles of criminal law. There are the presumption of innocence, "that axiomatic and elementary principle whose 'enforcement lies at the foundation of the administration of our criminal law,' "*Coffin* v. *United States*, 156 U.S. 432, 453 (1894); see also *Stack* v. *Boyle*, 342 U.S. 1 (1951), and the reasonable doubt standard of proof which "provides concrete substance for the presumption of innocence. . . ." *In re Winship*, 397 U.S. 358, 363 (1970). These principles occupy a pivotal position in our criminal justice system because of our belief that "a society that values the good name . . . of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *Id.* Invoking these principles, an appellate court in the State of Washington recently ordered an acquitted defendant's finger-prints returned on the ground that "few things have been as basic to our legal system as the presumption of innocence." *Eddy* v. *Moore*, 9 Crim. L. Reptr. 2463 2464 (Wash. 1971).

Finally, the maintenance and dissemination of an arrest record is an unwarranted invasion of privacy. It has been held that disclosure of arrest records to employers constitutes an "unjustified invasion of privacy, particularly where innocent persons are arrested." *Morrow* v. *District of Columbia*, 417 F. 2d 728, 742 (D.C. Cir. 1969). Other courts have gone so far as to hold that the mere retention of the criminal identification records of an acquitted defendant infringes on his right of privacy. *United States* v. *Kalish*, 271 F. Supp. 968, 970 (D.P.R. 1967); *Eddy* v. *Moore, supra; Schulman* v. *Whitaker*, 117 La. 704, 42 So. 227 (1906); *Itzkovich* v. *Whitaker*, 117 La. 708, 42 So. 228 (1906). In this spirit, the district court in *Menard*, relying on the landmark decision of *Boyd* v. *United States*, 166 U.S. 616 (1886), declared that "systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work and to move about in this land, . . . [and consequently that] the overwhelming power of the Federal Government to expose must be held in proper check." 328 F. Supp. at 726.

Since it is our view that the right to nullify an arrest record arises to constitutional dimensions, we are opposed to those provisions of Sections 4 and 5 in S. 2732 which place the burden on an arrestee to apply for nullification, as well as the provision in section 7(c) which gives the district court a broad discretion to deny or limit an arrest nullification order "if it determines such action necessary to protect the public." We agree, therefore, with the revision of Section 5 proposed by Herbert S. Miller in his testimony before this subcommittee on February 23:

If a person arrested, indicted or tried in connection with the violation of any law of the United States is found not guilty of the offense for which he was indicted, was released from such arrest, or his indictment was dismissed, the appropriate United States District Court shall issue an order nullifying all official records, and all recordations relating to such arrest, indictment, or trial as the case may be.

SECTION 6: FIRST OFFENDER LIMITATION

Subsection 6(1) would disqualify from relief any person who "has been convicted of any felony or misdemeanor (other than a petty offense) in any Federal or State court other than the offense with respect to which such application is made . . ." We urge the subcommittee to reconsider this provision in light of the express purpose of S.2732 to help persons with criminal records to reestablish themselves as functioning members of society.

It is important to bear in mind that the society as a whole will benefit greatly if persons with two or more convictions can be integrated into society. Therefore, instead of setting up a Draconian principle that recidivists cannot qualify for relief because they cannot be rehabilitated, we should extend to persons with more than one conviction the right to show evidence of rehabilitation sufficient to warrant the granting of a court order of nullification. Indeed, there is substantial evidence that recidivism can be reduced when employment opportunities are opened to offenders, see *Hearings on H.R. 6964 Before Subcomm. Number 3 of the House Committee on the Judiciary*, 89th Cong., 1st Sess.; Long, The *Prisoner Rehabilitation Act of 1965, supra*, at 3. Perhaps in the case of such persons, there should be an application procedure of the sort that we oppose for first offenders, but no person with a criminal record should be *automatically* excluded from the operation of the statute.

In the case of a person with a prior conviction who is subsequently *arrested* but not convicted for a different offense, we see no reason to depart from our analysis of the unconstitutionality of an arrest record and our proposal that the record of an arrest not resulting in a conviction should be automatically nullified.

SECTION 7: THE EFFECTS OF A NULLIFICATION ORDER

The heart of the remedy extended by S.2732 to persons with criminal records is the prohibition in subsection 7 (a) (1) of "the use, distribution, or dissemination of any such record so nullified in connection with any inquiry or use involving licensing in connection with any business, trade or profession of the person with respect to whom the order was issued."

It is impossible to overstate the importance of this prohibition. Surveying a vast array of evidence of the improper redissemination of arrest records received by state and local police departments from the F.B.I.'s Identification Division and from the new National Crime Information Center, Judge Gesell in *Menard* v. *Mitchell, supra*, observed that "the Bureau could not prevent improper dissemination and use of the material it supplies to hundreds of local agencies, [and that] the system is out of effective control." 328 F. Supp. at 727. Furthermore, "Congress never intended to or in fact did authorize dissemination of arrest records to any state or local agency for purposes of employment or licensing checks, . . . [and hence] the Bureau is without authority to disseminate arrest records outside the Federal Government for employment, licensing or related purposes *whether or not the record reflects a later conviction*." *Id.*, at 726X27 (emphasis supplied).

The record in *Menard* makes it abundantly clear that the F.B.I. is unable—and has made no effort—to control what happens to criminal records after they leave its files. The Identification Division has automatically accepted any and all law enforcement agencies, federal agencies, and state and local civil service commissions or identification bureaus as authorized recipients of criminal records without further investigation. (Deposition of Beverly E. Ponder, Chief, Technical Section, Identification Division of the F.B.I., I. at 43–45, 79–80; Trial Transcript, at 52–53, 238–39). Still other state and local agencies have been required, pursuant to F.B.I. policy, to conform with three requirements before being accepted as authorized recipients of criminal records: (1) there must be some official decree or statute designating fingerprints as a prerequisite to employment or licensisng; (2) such decree must require that fingerprints are to be submitted for search to the F.B.I.; and (3) a copy of the decree evidencing such requirements must be in the possession of the F.B.I. (Ponder Deposition I, at 49–50; Trial Transcript, at 133–34).

In fact, however, this policy has been loosely observed at best. An inspection of a sample of 64 state and local statutes, ordinances and resolutions presumed by the F.B.I. to authorize the dissemination of criminal data revealed that only 20 complied with the dual authorization requirements of fingerprinting and submission. (Trial Transcript, at 135). What is perhaps even more disturbing is that in the face of overwhelming evidence of the improper dissemination and unauthorized use of such data in recent years, the F.B.I. has withdrawn dissemination privileges from only six small town police departments in the last ten years. Examples of the more recent violations about which the F.B.I. has done nothing include:

The shockingly loose security and dissemination practices of the New York State Identification and Intelligence System which have been carefully documented by the State Comptroller (*Report on New York State Identification and Intelligence System*, Office of the State Comptroller, Division of Audits and Accounts, Report No. AL–St–29–71); —Free access to the District of Columbia Police Department's fingerprint and mug files which has been given to unauthorized persons, including newspaper reporters (International Association of Chiefs of Police. *A Survey of the Metropolitan Police Department*, Washington, D.C. p. 331 (1966); —the discovery in 1967 that the District of Columbia Police Department was routinely disseminating arrest records to a group of approximately 50 private businesses, on request (*Duncan Report*, at 5–6).

Redistribution in disregard of F.B.I. "rules" is by no means limited to these examples. The Duncan Committee found that in St. Louis and Baltimore, police records were regularly released for employment purposes, while in New York City, Los Angeles, San Francisco, Chicago, and Boston, influential employers could obtain records despite policies or regulations to the contrary. (*Duncan Report*, at 9; see also Hess and LePoole, *supra*, at 498). These indications of widespread dissemination of criminal records by *major* police departments are ominous in what they suggest about the more than 5,000 police departments and sheriff's offices that engage in daily exchange of thousands of arrest records with the F.B.I. Moreover, as set forth in the Appendix to this statement, the F.B.I.'s computerization of criminal records through the National Crime Information Center will greatly increase the potential for unauthorized dissemination and misuse of criminal records—a development which underscores the importance of the anti-dissemination provision of S.2732. We do suggest that it would be possible to make this anti-dissemination provision even more valuable if, in addition to prohibiting the use of records for "employment, bonding, or licensing," their use was also prohibited for inquiries relating to credit, purchase or rental of homes, or access to educational programs. The goal of rehabilitation would be substantially served by insuring that the beneficiaries of this legislation can secure these societal benefits which are so central to contemporary life. As with the restrictions on the use of records for employment, it is the society as a whole which will gain from the full integration into society of those persons with records of arrests or convictions.

The restoration to a person under subsection 7(a)(2) of "any civil rights or privileges lost or forfeited as a result of any conviction the records with respect to which were nullified . . . including he right to vote, and to serve on juries" is extremely important. The experience of state law again is instructive. Some form of executive or legislative restoration of rights to persons convicted of a crime was available in 1968 in thirty-seven states. (Newman, *Sourcebook, supra*, at 43–44 (3rd ed. 1968). The rights generally considered to be restorable by pardon or expungement are limited to those explicitly mentioned in state statutes—most commonly, the rights to vote, serve on a jury, and appear as a witness. (Rubin, *supra*, at 606 (1963); Note, *Restoration of Deprived Rights*, 10 WM. & MARY L. REV. 924, 926–28 (1969)). Where the statutes are general, the courts have restricted the effect of restoration. In California, for example, the statutory provision that after serving his sentence a former offender is "released from all penalties and disabilities resulting from the offense or crime of which he has been convicted" (CAL. PENAL CODE, §§1203.4, 1203.4a) has been riddled with exceptions by the courts. In *In re Phillips*, 17 Cal. 2d 55, 109 P.2d 344 (1941), and *Meyer* v. *Board of Medical Examiners*, 34 Cal. 2d 62, 206 P.2d 1085 (1949) it was held that expungement prevented neither disbarment nor revocation of a medical license because of the criminal conviction. These holdings were later codified by the legislature and extended to other occupations. (Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 315 (1970)).

Subsection 7(b) provides that a person whose conviction or arrest record has been nullified shall be authorized to deny that he was ever convicted or arrested. In the case of a person with an *arrest* record we suggest that there

are substantial policy reasons and constitutional grounds for going further and prohibiting employers and others from asking whether the person has ever been arrested. Indeed, if the nullification of an arrest record not resulting in a conviction is made automatic as we have suggested it should be, it would be illogical *not* to prohibit employers and others from asking the question. Both the policy reasons and constitutional grounds for this prohibition stem from the same documented fact:

Negroes are arrested substantially more frequently than whites in proportion to their numbers. The evidence on this question was overwhelming and utterly convincing. For example, negroes nationally comprise some 11% of the population and account for 27% of reported arrests and 45% of arrests reported as "suspicion arrests." Thus, any policy that disqualifies prospective employees because of having been arrested once, or more than once, discriminates in fact against negro applicants. This discrimination exists even though such a policy is objectively and fairly applied as between applicants of various races. A substantial and disproportionately large number of negroes are excluded from employment opportunities by ... [an employer's] policy of disqualifying ... arrested persons from employment.... (*Gregory* v. *Litton Systems, Inc.*, 316 F. Supp. 401, 402–03 (C.D. Cal. 1970).

Studies of the discriminatory effects of arrests and arrest records on racial minorities, including Mexican-American and Indians as well as blacks, substantiate the claim upheld by the court in *Gregory* that an inquiry about an arrest record constitutes an employment discrimination on racial grounds within the terms of Title VII of the Civil Rights Act of 1964. (See, e.g. *The Challenge of Crime in A Free Society*, A Report by the President's Commission on Law Enforcement and the Administration of Justice, at 44 (1967); *A Report on the Spanish Surnamed and Migrant Population in Iowa*, Iowa State Advisory Committee to the U.S. Commission on Civil Rights, at 30 (Sept. 1970); *Mexican-Americans and the Administration of Justice in the Southwest*, U.S. Civil Rights Commission, at 7 (1970).

As Herbert Miller pointed out in his testimony before this subcommittee on February 23, the Supreme Court last term gave a broad interpretation of Title VII's prohibition against discriminatory employment practices. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971), the Court speaking through Chief Justice Burger held that Title VII "Proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." In the case of an employment practice of inquiring into an applicant's arrest record, the court in *Gregory* found that "[t]here is no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed,to perform less efficiently or less honestly than other employees." 316 F. Supp. at 402.

In light of this analysis, we urge the subcommittee to amend S.2732 by adding a provision which would prohibit employers and others from obtaining arrest record information either directly from an applicant by requiring him to waive the effect of a nullification order, or indirectly from any other person or agency having access to such information. It should be noted that the State of Illinois adopted such a provision last year. (Illinois Fair Employment Practices Act, Public Act No. 71–1552, section 7(e), approved September 17, 1971).

Subsection 7(d)—which presently requires a person eligible for nullification to list all persons, offices and agencies which he believes have copies of his record—should be amended so that the primary burden of listing the recipients of a record is placed on the Attorney General and the Federal Bureau of Investigation. This is consistent both with the F.B.I.'s statutory authority to collect, maintain and exchange criminal identification records under 28 United States Code, section 534, and with the automatic nullification procedure which we have proposed for all arrest records, and for all conviction records except those for which the government successfully petitions a court to foreclose the operation of the Statute. It is virtually impossible for any person to know what happens to his criminal record. For example, one study made by the Oakland Police Department revealed that as many as 40 separate documents of an arrest record with a minimum of 71 copies are routinely made. (*Most Common Documents on Which a Defendant's Name will Appear from Perpetration to Disposition*, Report prepared by Oakland Police Department for California Assembly Committee on Criminal Procedure, June 18, 1964). A person eligible for nullification, of course, could supplement the F.B.I.'s list with the name of other persons or agencies, such as employers, who he has reason to believe have received a copy or report of his arrest or conviction record.

MISCELLANEOUS PROVISIONS

The criminal penalties provided in Section 8 for the release or dissemination of a nullified record are vital to the enforcement of the statue. We would propose extending such penalties to private persons or agencies who circumvent a nullification order by refusing to employ, bond or license a person in connection with a business, trade or profession solely on the ground that such person has a nullified conviction or arrest record, or who require the wavier of a nullification order as a condition of employment, bonding or licensing. Alternatively, a person with a nullified conviction or arrest record could be authorized by the statute to obtain injunctive relief or a cease and desist order against an employer or other private person or agency who attempts to circumvent a nullification order.

Section 9 provides that the subsequent conviction of a person with a nullified record shall have the effect of rescinding the nullification order. We do not believe that revitalizing a prior record serves any useful purpose when the subsequent conviction is recorded. The administrative burden of notifying "all appropriate departments, agencies, and other entities" that the prior nullification order has been rescinded is unnecessary, since it is far easier for the government to prevent nullification of the subsequent conviction by petitioning the court to show that the person convicted has not been rehabilitated.

Section 10 provides that an eligible person shall be notified of the procedure for applying for a nullification order. This should be amended to provide that when the government petitions the court to prevent nullification of a person's conviction record, that person shall be notified of the procedure for contesting the government's petition. In all other cases the operation of the statute would be automatic.

APPENDIX

One of the most important aspects of S.2732 is its attempt to control the dissemination of criminal records. Since we believe that the computerization of criminal records has greatly increased the potential for their unauthorized dissemination and misuse, we are setting forth below a portion of the appellant's brief in *Menard* v. *Mitchell*, *supra*, describing the operation of the National Crime Information Center and its impact on the injury suffered by Menard:

1. NATIONWIDE INSTANT DISSEMINATION OF ALL POLICE INFORMATION WILL GREATLY INCREASE THE SPREAD AND IMPACT OF ARREST RECORDS.

Once Menard's record is placed in the National Crime Information Center's computerized distribution system (hereinafter, "NCIC"), there will be an incalculable multiplying effect on the invasion of his privacy and on the accompanying potential for harm. This is due to three primary factors: (1) much greater dissemination; (2) more cryptic transmission due to the demands of computer coding; and (3) even greater vulnerability to unauthorized acquisition and use.

The impact of computer technology on the right to privacy will be profound unless legal restraints are placed on the kind of data that may be stored. Arrest records, the most harmful type of non-criminal data, are at the cutting edge of the confrontation between computers and privacy.[1] Privacy, according to one definition, is the freedom of the individual to choose the extent to which others gain access to information about himself.[2] The computer has sig-

[1] The number of computers in the United States has grown from less than 1,000 in 1956 to 30,000 ten years later and will total an estimated 100,000 by 1976. During this same period, the capability of the machines has advanced from twelve billion computations per hour to over 400 trillion computations by 1976. *Hearings on the Computer and Invasion of Privacy*, before a subcommittee of the House Comm. on Gov't. Operations, 89th Cong., 2nd Sess. (1966) at 300 (Statement of David Sarnoff). [Hereinafter *Hearings*].

[2] Arthur Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society*, 67 Mich. L. Rev. 1091, 1107–1108 (1969). [Hereinafter *Computers and Privacy*.]

nificantly altered the degree to which one can restrict the access of information about oneself to others because of its ability: (1) to collect and collate available data not otherwise worth the effort; (2) to record and store new data with unprecedented speed and economy; (3) to provide almost instant access to up-to-date information; and (4) the resulting ability to keep constant tabs on particular persons in our large and mobile population.

Soon after the district court refused to order the F.B.I. to expunge Menard's record, the F.B.I. computerized its records through the NCIC system.[3] A pamphlet published by the F.B.I. entitled "The NCIC and You" [3] contains the following summary of the NCIC (pp. 2–4):

"This Center serves as a nucleus of a vast law enforcement communications network which includes local, state and Federal agencies throughout the United States and Canada. . . . The National Crime Information Center's computer equipment is located at F.B.I. Headquarters in Washington, D.C. the equipment includes rapid access storage units, popularly known as the memory, with a capability of accommodating an unlimited number of records. . . . In a matter of seconds, stored information can be retrieved through equipment in the tele-communications network. Connecting terminals, placed near the radio dispatcher, are located throughout the country in police departments, sheriff's offices, state police facilities and Federal law enforcement agencies. . . . NCIC Headquarters with its computerized system might be compared to a large automated "file cabinet" with each file having its own label or classification."

As Professor Arthur Miller observed, the F.B.I.'s National Crime Information Center "has to be viewed as the initial element of a broader crime information network that may eventually link all of the nation's law enforcement agencies into a single data system." [4] Moreover, the NCIC's computers will also be interconnected in the future with the systems of other Federal agencies.[5]

2. THE MECHANIZATION, LOCALIZATION, AND CODIFICATION OF THE NCIC COMPUTER SYSTEM WILL ENORMOUSLY INCREASE THE INCIDENCE OF UNAUTORIZED DISSEMINATION AND ERRONEOUS INFORMATION.

The dramatically multiple level of dissemination will be a direct result of the economy, speed, and scope of this nation wide "criminal" data system. At the same time, opportunities for theft and unauthorized use will dramatically increase. For example, records are stored in machine-readable form when not in use, and are thus quite susceptible to theft—a possibility enhanced by their compactness—and to misuse, since these files can be duplicated without any trace of such intrusion.[6] Moreover, both the F.B.I. and the NCIC Advisory Board have emphasized that both the accuracy and the security of the data in the system depend entirely on each local and state participating agency.[7]

Finally, the technology of the computer demands a standardizing codification of all data fed into it, guaranteeing further de-refinement of arrest records and their use. The emphasis in computer technology is on the quantity of data stored, rather than on its quality. The whole thrust of the development of the system has been to create even more simplified schemes for classifying data so that all possible variations are eliminated in the interests of size and efficiency. The NCIC Advisory Board has emphasized the need of the many local and state agencies participating in NCIC to eliminate the enormous variety of descriptive matter arising from their many different local statutes, ordinances, and definitions:

"The development of offender criminal history for interstate exchange requires the establishment of standardized offense classifications, definitions and

[3] *New York Times*, Nov. 30, 1971, p. 30, col. 1.
[4] *Id.* at 1192. F.B.I. Director John Edgar Hoover testified before the House Subcommittee on Appropriations, March 17, 1971, as follows: "As of March 1, 1971, there were 104 control terminals tied to our computer which provide service to Canada and to all of the 50 states. The goal of NCIC from the very beginning has been to serve as a national index to 50 states and perhaps 20 to 25 large metropolitan area computerized systems. Through centralized computer systems all police agencies tied to a state or metropolitan area computer would have the capability of accessing their files and through the same system be switched into the NCIC. . . . It is gratifying to be able to report to you today that . . . 35 computer systems [are tied into NCIC] which enables an estimated 4,000 local law enforcement agencies to enter their own records into the NCIC and make inquiries directly from terminals located on their premises.
[5] *Computers and Privacy*, pp. 1186–1189.
[6] *See Computers and Privacy*, pp. 1207–1217.
[7] NCIC Operating Manual, Section 2.4 ("System Discipline")

data elements. . . . While the proposed formats and standardized offense classifications and definitions seem ambitious, to approach a system of this potential scope and size without a plan to substantially improve the identification, criminal history flow would be a serious error." [8]

Of course, such cryptic codification not only de-refines the material, it also highly intensifies the risk of error, since any slight digitary error can translate into a severe factual error. Furthermore, the mechanical fixing of a key or "cycle" number to each record is done not by computer nor by any central control method:

"The assignment of cycle numbers is *not* done automatically by the NCIC computer. The cycle number is a key number assigned for tracing actions and changes relating to an *arrest* through the subject's record." [9]

Just as the F.B.I. and the NCIC Board have recognized that only the local agencies can guard security, so too they have recognized that there can be no F.B.I. check on error.[10] The perils of the local control system are well illustrated by a colloquy in which Senator Ervin stressed the importance of encouraging local agencies to provide information as to the result of an arrest. The Government official testifying on the NCIC system responded that while such practices were being encouraged, "in many cases this is just not possible. . . ." [11]

3. MATERIAL IN THE NCIC SYSTEM IS UNCONTROLLABLE; THE ONLY EFFECTIVE PROTECTION IS TO LIMIT THE INFORMATION FED INTO IT.

Professor Miller, after reviewing the myriad of rules and regulations that the Federal government and others have imposed upon the use of computerized data, reports that "a regulatory scheme that focuses on the end use of the data by governmental or private systems might be a case of too little, too late." [12] "The most effective privacy protection scheme," he concludes "is one that minimizes the amount of potentially injurious material that is collected and preserved." [13]

This observation is particularly apt here, for the district court focused upon trying to regulate the end use of Menard's arrest record. However, as interagency and inter-governmental computer interconnections increase, such restrictions will prove even more unrealistic and unworkable.

Therefore, for the reasons described in this section, computer technology has not only rendered the remedy the trial court fashioned in this case meaningless but also has magnified the consequences of retaining Menard's arrest record in the F.B.I. files. Only removal of that arrest record from the F.B.I.'s computerized system will protect Menard against infringement of his right to privacy.

Mr. NEIER. Thank you very much.

I think it important to start by sketching dimensions of the problem with which we are faced.

The FBI reports that there are some 7.5 million persons arrested during the course of a year for nontraffic offenses. Of those, about 4 million persons are convicted, another 2.2 million are acquitted and another 1.3 million are never even prosecuted. The charges are dismissed without any prosecution. This adds up to a very large proportion of the total population of this country. In fact, a statistical survey that was compiled for the President's Commission on Law Enforcement 5 years ago provided some astounding estimates as to

[8] See e.g., *NCIC Advisory Policy Board Statement on Background and Concept of Computerized Criminal History Program* (3/31/71).
[9] NCIC Operating Manual, Sec. 2.4. (emphasis in original).
[10] The NCIC Operating Manual, *supra*, states that "[each] record in file is identified with the agency originating that record and that agency alone is responsible for the accuracy, completeness and correct status of that record at all times. *The F.B.I. cannot assume responsibility for the accuracy of any records other than those entered by the F.B.I.*" [emphasis in original].
[11] *Hearings on Data Banks Computers and The Bill of Rights* (Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary), March 17, 1971.
[12] Id. at 1221
[13] Id.

the likelihood that a person would acquire a record of arrest or conviction. The President's Commission estimated that some 47 percent of all males in this country would be arrested at some point during their lives, and that statistic rises to some 60 percent when we are dealing with white urban males and to 90 percent when one is dealing with black urban males.

Given those staggering statistics, I think it is possible to appreciate how large a problem we are faced with, there are also statistics available which are cited in our testimony as to the immense difficulties that are faced by people who do have records of arrests or conviction in securing access to various societal benefits, and principally in securing access to employment.

There is, I think, underlying any concern for this legislation, the fear that we are taking a risk. We are taking a risk in the sense that we are trying to wipe out records of persons and permit them to integrate themselves into society. We do so because of our concern with their individual lives despite the societal risk in engaging in that process. But we would argue that the thrust of this legislation is not to maximize the risk that society faces but rather to minimize the risk. We call for an extension and strengthening of this legislation on order to further minimize the risk that society faces. Society faces tremendous risks if there are huge numbers of persons who cannot integrate themselves into the life of the society. We are endangered by people who cannot gain access to licenses and employment and credit and homes and admissions to schools, because those persons are more likely to be dangerous to us than persons who can integrate themselves into society and become stable members of the society.

We seek to extend the application of this legislation very broadly not only to benefit the individual but also because we believe this is a necessary step that society must take in order to minimize the risks to itself. The grim story of rising crime rates and the rising rate of recidivism may have something to do with the numbers of persons who are so efficiently labeled today by their own past and cannot escape their own past.

It was part of the mythology of this country that one could turn over a new leaf and go straight. In the days of the pioneers one could move westward to get away from one's past. The frontier has now closed, and the ability for one to make a new life has been ended by the way in which people's records follow them wherever they go. Today that system of following people through their records has been elevated to an important industry within the United States.

We have credit bureaus which make large amounts of money by retailing information on people's records. The computer industry is a substantial service to the industry which is engaged in following people through their records.

The previous witness has commented on the difficulty of the application procedure and on the time which must expire before a person with a conviction record can secure the benefits of this legislation. We echo that testimony and echo the point that it is when one is first released from the custody of the criminal justice system when

one most needs employment and society most needs to have a person integrate himself into the life of the society rather than exist as a marginal member of society without access to such stabilizing influences as employment.

The difficulties in the application procedure can perhaps be illustrated by some of the experiences in various States which have provisions for the sealing and expungement of records.

The Federal Bureau of Investigation collects information from State and local law enforcement agencies. It collects a huge amount of information. Some 29,000 sets of fingerprints arrive in the FBI on an average working day, and some 13,000 sets of those fingerprints come from law enforcement agencies and involve people who have been arrested. The 29,000 figure projected over the course of the year means something like 7 million sets of fingerprints come in to the FBI during the course of the year, and something close to 3 million of those sets of fingerprints involve people who have been arrested.

The FBI also honors any local court action which expunges or nullifies any record of an arrest, and there are procedures for this in a number of the States. The total number of expungement orders that come into the FBI during the course of the year is in the neighborhood of 5,000. Contrasting that figure of 5,000 with the figure of 3 million arrest records and 7 million records of all kinds coming into the FBI during the course of the year, I think you can see how limited the relief is that is available within the various States. It is limited as this legislation is limited in that there are burdens placed upon the person who seeks to have a record expunged to make application to have it expunged on his own rather than to have any kind of automatic process. The difficulties that exist in State laws account for the very small number of instances in which people take advantage of this legislation.

Senator BURDICK. Now, at this point may I ask you a question?

Mr. NEIER. Yes.

Senator BURDICK. I believe you were in the hearing room when the previous witness testified, and he raised the point that we should not have an application at all on arrest records and then I responded by asking as to what he would do about the arrest records or the man who is charged with a crime and has not had a trial, where nothing has happened——

Mr. NEIER. Right.

Senator BURDICK (continuing). And the case having not been dismissed, is laying there and gathering dust.

Mr. NEIER. I still think that there can be a prohibition against dissemination of those records. It may not be nullified, and it has to be available for the purposes of prosecution but the man is presumed innocent until such time as he is convicted, and I think the legislation could bar the dissemination to potential employers or to other person who are capable of affording various societal benefits.

Senator BURDICK. Perhaps we could prohibit the dissemination of that material on any arrest record that had not ripened into either a conviction or a plea of guilty or something like that. Would not that take care of it?

Mr. NEIER. I think it would.

Senator BURDICK. Even though it has not been disposed of.

Mr. NEIER. The person is presumed innocent. We cannot saddle that person with the most serious consequence of crime, the consequence in terms of his possibility for employment, just on the basis of an arrest. In many cases a criminal conviction is not the largest punishment for any crime that is alleged or actually committed. It is the lifelong sentence imposed by the record and the way in which that record cripples a person in access to societal benefits, which is often the most serious consequence of any allegation of criminal activity.

The Federal Bureau of Investigation, which is the principal Agency for the gathering and the dissemination of records, has an extremely efficient systems for gathering of information about people who are arrested. It is a system that is not at all efficient when it comes to gathering records of disposition.

We are engaged in litigation challenging some of the FBI practices, and pretrial examination of the head of the Identification Section of the FBI elicited testimony that the FBI had no idea how often it received disposition records.

As far as I know, there is only one major police department in this country, the Detroit Police Department, which routinely furnishes disposition records to the FBI.

So, the records which are generally available and which get circulated indicate an arrest in the first instance and they do not generally let a recipient know whether a person has been convicted or not. The recipient is left to guess. Therefore, an arrest record, since it can mean that a person has been convicted, becomes as severe a disability as an actual record of conviction.

The sections on arrest records of this legislation, sections 4 and 5, are sections which, above all others, should operate on an automatic basis.

Senator BURDICK. And I think perhaps I have been persuaded this morning that this should apply on all arrest records, whether they have been disposed or not, because there still has been no crime committed. That is the way it appears.

Mr. NEIER. Right, and I think it is important to note that there have been increasing numbers of court decisions which point out that it could be cruel and unusual punishment to allow an arrest record, in and of itself, to punish a person because it punishes a person's status rather than punishing a person for something he actually did.

There are also court decisions which point out the racially discriminatory impact of basing employment on arrest records. There is a very important decision by a Federal District Court in California in the case of *Gregory* v. *Litton Industries*. In that case, the court has restrained Litton Industries from inquiring into arrest records as a condition of employment because blacks tend to be arrested with substantially more frequency than whites. That case only applies to arrest records. It does not deal at all with records of convictions.

Senator BURDICK. Well, suppose that this legislation should pass and we prevent the use of arrest records or the dissemination thereof. What would you recommend for enforcement?

Mr. NEIER. Well, I think that one way would be to prohibit the use of an arrest record as a condition of employment. An employer would be on notice that he could not inquire into an arrest record. I think it would dry up the private credit bureaus which have furnished a lot of this information to employers and which, in turn, have extracted this information from various governmental agencies. Simply limiting the prohibition to the Federal Bureau of Investigation might be a substantial problem, because, the FBI distributes information to law enforcement agencies and it would be very difficult to monitor every single law enforcement agency in the country. There are always leaks from them. They range from the practices of the D.C. police Department which apparently had a list of some 50 companies which regularly received arrest information to a practice in New York City in which a number of policemen apparently on their own were engaged in the sale of arrest data to credit companies. A year and a half or so ago, they were indicted by the New York County district attorney's office for their role in under-the-table sales of this information.

Senator BURDICK. Yes, but suppose you prove the dissemination. What kind of penalty, what kind of enforcement, do you suggest?

Mr. NEIER. I think that it would probably be best to extend the criminal penalties that are provided in this legislation to employers and not limit the application of the criminal penalties, as this legislation does, to the agencies of Government which may engage in the dissemination of information. As I read the bill, the bill prohibits the use of this information by anyone, but the only penalties that are specified are for Government agencies which engage in the dissemination of this information.

It is difficult to see, under the legislation, how the subrosa activities of low-level Government agencies could be very readily controlled if they furnish information to employers, and the employers go ahead and use this information.

Senator BURDICK. Well, of course, you make the employers liable for using matter that should not be in the public realm. Anybody who used the material from one of these law-enforcement offices, would be equally responsible.

Mr. NEIER. If that is the effect of this legislation——

Senator BURDICK. Well, what good would it do to suppress the records on arrests if a credit agency could say, "Well, I got this from the chief of police?" In other words, anyone who used it would be liable—anybody who repeats it should be liable, should they not?

Mr. NEIER. I think it would be helpful if it were quite explicit in this legislation that employers would be affected by the criminal penalties.

Senator BURDICK. Or anybody?

Mr. NEIER. Yes. Certainly, the legislation is explicit with regard to employees of the Government, but I think it can stand to be a little bit more explicit with respect to employers and, of course, credit agencies would have to be covered.

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Senator BURDICK. Or Mrs. Jones over the back fence?

Mr. NEIER. Well, when you speak of Mrs. Jones over the back fence, I think that raises another way in which the legislation could be strengthened. This prohibits dissemination for purposes involving employment, bonding or licensing. There are other societal benefits which are necessary for a person's full integration into society. Those include the availability of credit, the availability of homes for rental or purchase, and admissions to education programs, training programs or educational institutions. I believe that the bill could be further strengthened in its impact if were extended to those kinds of benefits, and not just to employment, while recognizing that employment is the most important of all of the societal benefits to which the bill should apply.

There is another section of the legislation which I think could be strengthened. That is the requirement in the legislation that the person who is the subject of a nullification order designate the various places which have received this information in order to know who would be notified or who would be covered by the legislation. It says "any application"——

Senator BURDICK. Where are you reading from now?

Mr. NEIER. I am reading from section 7(d).

> Any application made pursuant to this Act, or an order to nullify certain records, shall include a list of all office persons, offices, agencies and other entities which the applicant has reason to believe have such records or copies thereof under their jurisdictional control, and any such person, office, agency or entity so listed which received a copy of any such order so issued.

This is a very burdensome provision. There was a study conducted of the Oakland police department some years ago and at that time it was established that there were some 40 separate forms on which arrests were noted, and some 71 copies altogether of these were in circulation in some fashion or another.

Senator BURDICK. In other words, you would suggest that instead of naming them that that also be automatic?

Mr. NEIER. Right.

Finally, I think it is necessary to examine this entire legislation in terms of the impact of the newly established National Crime Information Center. It was established in late 1970 under the control of the FBI, and it has provided for the computerizing of the various law enforcement agencies around the country and their access to information. Prior to that, the FBI operated an enormous system but a purely manual system. The establishment of this National Crime Information Center has underscored the urgency of legislation in this area, because whatever inefficiencies there were previously in the dissemination of these records is being attacked very vigorously right now. I am afraid the way in which the Crime Information Center works seems to increase the accessibility of this information to large numbers of persons.

Our testimony contains a specific section which describes the operations of the National Crime Information Center, and I commend that to your attention because it underscores the urgency of action in this area.

Senator BURDICK. On the question of erasing convictions—we will leave the area of arrests for a minute, but on convictions, you would recommend no time period at all for assessment?

Mr. NEIER. That is right. We have to enable people to, become full members of society and not exist as marginal persons within the society who cannot get jobs, and, therefore, are a threat to the rest of us, an soon as possible after they get out of prison or get out of custody, I think the need to reduce the problem of recidivism is probably the largest problem facing this country in the control of crime.

Senator BURDICK. Well, I have developed some new ideas since the hearing started. What do you think about shortening the time period and make that automatic?

Mr. NEIER. I think it should be automatic.

Senator BURDICK. In other words, after he has been released and a year has gone by, or something like that?

Mr. NEIER. Senator, think of a person getting out of prison and think of that year's period of time. We want that person, if he has been previously engaged in criminal activity, to stay away from that criminal activity. We want that person to find work, find a method of becoming a stable and decent member of society. And a year, which looks on paper like a relatively short period of time, looks awfully long to a person who has not got a job and cannot get a job because of his record. I realize the deficiencies of our correctional institutions in rehabilitating people, but I think our goal has to be to see to it that they do serve a rehabilitation function, and that the rehabilitation process is speeded once the person is out of the institution by making it possible for that person to gain access to employment and to gain access to a decent place to live.

Senator BURDICK. Of course, we are living with a system now, and have been living with one, where the record lives forever to plague the man, and this would be a small beginning to do something about it.

Mr. NEIER. Sometimes I wonder how it is that we are surprised at our problem of recidivism, when a person getting out of prison is very often given a cash allowance of something like $40, and is turned loose upon the streets, without a job, and we somehow expect that person is not going to be engaged in crime again. Sometimes he has difficulty getting on welfare or difficulties in getting someplace to live.

Senator BURDICK. Oh, I undersand that that is the reason for the legislation, but, on the other hand, some employer would like to know that the man has been released, and he has been able to stay out of trouble even though he has had to take menial jobs for this period of time, that he stayed out of trouble and he has gone right. That might of value and be valuable information to the employer, too.

Mr. NEIER. Certainly, any employer wants to try to minimize the risk that he takes, and certainly there are risks in employing a person who has engaged in criminal activities. But, in trying to protect ourselves from the risks of the particular person, we are enlarg-

ing the general risks to ourselves because of those persons in our society who prey upon the rest of society because of their inability to become full members of society. I think it is not a question of taking the risk or not taking the risk; I think it is a question of weighing the two kinds of risks against each other, the risk of employing the person who has the criminal record with the risk of having that person unemployed, and preying upon the rest of society. If you weigh those two risks against each other, the risk of employing the former offender is the smaller of the two risks.

Mr. MEEKER. Could I ask you to give some additional detail for the record as to how the Identification Division of the FBI responds to State expungement orders which they receive? What happens on that.

Mr. NEIER. Yes. The FBI exchanges data on arrests and convictions with all those agencies which are authorized by State or local statutes to engage in this activity. If there is an ordinance or a statute in a given city which says that a given agency may exchange information with the FBI, that is enough as far as the FBI is concerned, and it will accept information from that agency and will supply that agency with the information that it has in its identification division on the person who is the subject of that agency's inquiry. The FBI will similarly honor the request of the agency which has supplied information in the first instance to expunge that information, and it will not expunge information under any other circumstances.

The principal litigation that is going forward right now challenging some of the practices of the FBI is in a case called *Menard* v. *Mitchell*. The *Menard* case involves a young man who had originally been arrested in Los Angeles and held by the police in Los Angeles for a period of about 2 days, and then was released when the Los Angeles police were satisfied that he had no connection with the crime they were investigating. But they had fingerprinted Menard and had the records forwarded to the FBI. A suit was brought by Menard in order to expunge the record that the FBI had in its possession on the ground that this was an arrest not followed by conviction and even further that it was an illegal arrest. The FBI resisted expungement and has said the only way it would honor a request to expunge the record would be if it came from the Los Angeles Police Department which supplied the record in the first instance.

That is the procedure generally followed by the FBI and results in only a total of about 5,000 expungements during the course of a year.

Do you want to supplement that at all?

Mr. SHATTUCK. No.

Senator BURDICK. Would we be making substantial progress in terms of the past if we had an automatic expungement of at least the first offenders after 1 year?

Would that not be quite a gain?

Mr. NEIER. Certainly, it would be a gain. I think this legislation as it stands would be a gain, and I think that would improve the legislation.

Senator BURDICK. You gentlemen have to understand—I think I mean I am sure you do—that we have to deal with what is possible,

and now maybe the country is far more advanced on this or maybe the Congress is far more advanced than we think. But we have to—we are trying to do something, and that is all I am trying to say.

Mr. NEIER. Certainly, Senator. I am delighted that you have gone as far as you have in introducing this legislation, and I certainly understand the resistance that it will encounter. I have been involved in some battles in State legislatures to push this sort of legislation, and I have seen the resistance that has been encountered there. I am sure you will encounter some here, but I do think it is important that you point out to the people who resist the thrust of this legislation and resists the strengthening of this legislation that they are not the protectors of society when they resist these efforts. They protect the society in fragmented portions and allow the society as a whole to suffer because of the injury that can be done by the people who are handicapped by their past records.

Mr. SHATTUCK. Excuse me. I might just point out, as a practical matter, Senator, that when employers have been canavassed when they have employed individuals who have been released from prisons within a period shortly after their release, it has been generally found that there has been no problem and that the risk has been minimal. So, as a practical matter I think a great deal of the concern underlying the possibility of immediate nullification is really greatly overblown.

Senator BURDICK. What sort of a survey was that?

Mr. SHATTUCK. Well, there are a number of Law Review articles that are cited in our testimony. There was one particular one that was cited in the Cornell Law Review. I think it is cited on page 4 or page 5.

Senator BURDICK. We will have reference to it in the testimony?

Mr. NEIER. It is entitled "Employment of Former Criminals," and it appeared in the Cornell Law Review in 1970, and it is cited on page 2 of the testimony.

Mr. SHATTUCK. There is another reference on page 6 to something in Nation's Business entitled "Employees Who Got a Second Chance."

Mr. MEEKER. Excuse me. Is not the import of the Cornell Law Review article that of 475 employers interviewed 312 said they would not even hire an exconvict and 311 of them said they would fire an employee who is subsequently discovered to have a criminal record?

Mr. SHATTUCK. Yes, but those who did not take that position did not find that there was any problem if they did, in fact, hire.

Senator BURDICK. Well, the Law Review article indicates there is a problem.

Mr. NEIER. There is a very large problem, indeed, and I think that if you can take some steps in this direction, you have done a very great service, indeed.

Senator BURDICK. Thank you very much.

Mr. NEIER. Thank you.

Senator BURDICK. Our next witness is Professor Paul E. Wilson of the University of Kansas Law School, Lawrence, Kans.

We are pleased to welcome you to the committee, Professor.

Mr. WILSON. Thank you, Senator Burdick.

(The biographical sketch submitted for Prof. Paul E. Wilson follows:)

BIOGRAPHICAL SKETCH—PROFESSOR PAUL E. WILSON

Professor Paul E. Wilson, a former prosecuting attorney and assistant state attorney general, is Kane Professor of Law at the University of Kansas. His professional work has included projects dealing with criminal procedure, standards of criminal justice and corrections.

STATEMENT OF PAUL E. WILSON, KANE PROFESSOR OF LAW, UNIVERSITY OF KANSAS, LAWRENCE, KANS.

Mr. WILSON. Now, I am indeed pleased to be invited to speak before the subcommittee. As I have listened to the other witnesses testify, it occurs to me that I probably have nothing of substance to offer that the subcommittee has not already heard.

Perhaps, I can add some perspective.

I am a former prosecutor and, as my title indicates, I am presently a teacher of criminal law and procedure, and I organized and for several years I was director of an inmate counseling program at the Federal penitentiary at Leavenworth which provided a limited amount of legal services to the inmates of that institution. In this work I have had close contact with literally hundreds of convicts, most of whom were recidivists, and I have had some opportunity to consider their problems and gain some insight.

Also, I drafted, or participated in the drafting of, legislation that was passed by the Kansas Legislature a year ago—and I might say "passed" in a form that was substantially amended from the draft that I submitted. This legislation accomplishes some of the objectives of Senate bill 2732.

It is my view that legislation of the kind that the subcommittee is considering has great merit, and I think it is most appropriate that the Congress should take a leading role in implementing the policy declared by S. 2732. I am pleased that the subcommittee has taken the initiative in proposing that such legislation be enacted on a national scale. The questions that I shall mention go only to the scope and methods of the bill and not to its objectives.

The problem that S. 2732 seeks to attack is complex. I suppose it eventually is one of correcting a public attitude which I understand is not the business of legislation. I have never fully understood the view reflected in employment policies and in legislative a administrative policies in government that attaches an overriding significance to the fact of a conviction quite apart from the merit or lack of merit of the individual who is the subject of the conviction. I suppose that part of the reasons is historical. Perhaps this is the 20th century view of the common-law approach that conviction of a felony placed upon one the badge of infamy which continued with him throughout his life.

I suppose, to some extent, the attitude is based on emotional considerations—fact, ignorance perhaps.

In any case, the attitude of the public that attaches severe prejudice to the fact of conviction is a fact of life with which, I suppose, legislation cannot deal. About all legislation can do is to mitigate its

impact upon the individual, and this I understand to be the objective of this legislation.

The fact that a criminal record, either arrest or conviction, constitutes a substantial barrier to employment or other legitimate occupational activity has been amply documented by witnesses who have appeared before the subcommittee. The fact that many former offenders return to crime because of an inability to find gainful vocational opportunities is perhaps less fully documented, but is certainly supported by an impressive body of opinion and comment. Any step, legislative or otherwise, which would expedite the reemployment of the exoffender and tend to restore him to membership in the economic community ought to be given earnest consideration.

Obviously, the employer must have the prerogative of selecting his employees on the basis of qualification. But where a high degree of public interest is to be served by the employment of a particular class of persons, the opportunity to work ought not to be withheld from those persons on the basis of an irrelevant criterion. The facts of race, age, and sex are usually recognized as irrelevant criteria for job selection. For most kinds of employment, other than in limited areas of public and professional service, the fact of an arrest or conviction for an isolated crime is irrelevant. A State with which I am familiar—in fact, my own State—for a number of years maintained a training program for barbers at the institution to which youthful felons are committed. For many years, interestingly, after the establishment of the program, a regulation of the board of barber examiners of that State denied a barber's license to any person who had been convicted of a felony. The relevance of a prior conviction of a young man for auto theft or worthless checks to his vocational competence as a barber is not clear to me. And the philosophy that permits a State agency to frustrate the State's own plan for the vocational rehabilitation of offenders is even less clear.

If a record of arrest or conviction were a meaningful criterion by which persons who in fact commit crimes can be separated from those who are innocent of blameworthy conduct, perhaps more could be said for its use as a standard for nonacceptance in the community. However, it is often pointed out that only the unsuccessful criminal is caught and punished and, thus, acquires a record. If reports of law-enforcement agencies are correct, the perpetrators of relatively few crimes are ever identified by arrest, particularly in cases of crimes against property. After an alleged offender is arrested and charged, his conviction or acquittal may depend more upon his ability to muster resources for his defense than upon the degree of his actual guilt. The suggestion that I make, and which I do not care to belabor, is that a record is hardly a satisfactory standard of moral character which may be used to separate the guilty from the innocent. Many morally guilty people are never arrested or convicted. A few of those convicted are in fact innocent.

There is, I suppose, a range of legislative alternatives for mitigating the postdischarge impact of a criminal record. Juvenile court records are frequency made confidential by law. Because of the widespread dissemination of information among law-enforcing agencies and because of the public interest in effective law enforcement

and the like, such a policy might be difficult to implement with respect to dealing with adult records. However, I know of no reason —and this has been touched on by the other witnesses—why records of proceedings not resulting in conviction should be public information.

Another approach might be through legislation prohibiting prospective employers from inquiring concerning criminal records. This seems particularly appropriate with respect to records of arrest not resulting in conviction. The presumption of innocence loses much of its virility if a record of arrest or accusation, not followed by a determination of guilt, is allowed to prejudice the citizen's opportunity to engage in useful and gainful work. Several commentators have suggested the interesting possibility of congressional legislation prohibiting discrimination in employment on the basis of a prior criminal record, similar to existing fair employment opportunity legislation. The argument is made that the national interest in the prevention of crime and the welfare of former offenders may be sufficient to justify Federal legislation. These proposals may merit consideration by the Congress at another time.

Although many of the ideas in S. 2732 are drawn from other legislation, both Federal and State, its cope and possible impact appears to go much further than any existing law. But, I suggest, it might go still further with wholesome results. At the outset, it seems to me that if the findings recited in section 2 reflect the philosophy of the bill, the waiting periods prescribed by section 3 are unduly long. If the intent is to mitigate the impact of the criminal record, the remedy ought to be made available when the record may be most burdensome and the need for relief is greatest. And here I reach back to statements made by earlier witnesses, but I suppose the justification for a waiting period, in part, depends upon one's attitude towards the relief that is being granted by this legislation.

There are two possible objectives. One, to expedite the readjustment of the former offender to the community, to expedite his gaining employment and getting squared away with the society; second, the obliteration of his criminal record might be regarded as a reward, something that he has earned by his striving against very severe difficulty and overcoming that difficulty to become adjusted in the community.

It would seem to me that the objective of the legislation ought to be the former, to assist the offender, the ex-offender, when he needs help most. And it seems to me that the period that is critical, the time when he does need help most, is that time when he is cut loose from the institution or from the correctional supervision and is first on his own in the community.

On the other hand, it seems to me that if we are to hold the possibility of obliteration of his record out to him as a reward to be earned, we give undue emphasis to the fact of the record. We are saying to him, you have a record and that is bad, but if you are good for a long time then we will wipe out that record. What I am trying to say is, however ineffectively, it seems to me that our approach ought to be to mitigate the significance of the criminal record and in the circumstance that I have described it seems to me

we may tend to exaggerate the importance more than we should or more than is desirable.

In any case, where a person is discharged following a period of supervised probation, parole or mandatory release, I suggest that he should be able to seek nullification upon discharge, and that the appropriateness of the nullification order should have been tested during the period of supervised release. Further delay does not seem necessary.

In cases where only a fine has been imposed, or sentence has been suspended without probation, a waiting period of not more than 1 year may be justified. A different standard may be appropriate here, I would suggest, since there has been no trial period of supervised release. Also, the person who has not been dislodged from his community and does not face readjustment may find the record less prejudicial, and it may not be as burdensome.

In requiring an application and hearing before a nullification order can be entered, section 3 may place an unnecessary burden on a person eligible for relief. No provision is make for counsel or other assistance to the applicant in preparing and processing his application. The objectives of the bill might be accomplished more expeditiously and uniformly, and the work of the courts might be minimized, if the statute were to provide for the automatic nullification of the conviction when the conditions of eligibility occur. If nullification is deemed improper, the Government should have the opportunity to object. Provision should also be made for the subsequent review, upon motion or otherwise, of those eligible cases where nullification orders have been denied.

Section 4 provides relief for persons whose convictions are later determined to be invalid by reason of innocence as well as persons who have been pardoned on the ground of innocence. I am puzzled by the limitation by reason of innocence. If a conviction is found to be invalid for any reason, the defendant simply hasn't been convicted. He is only an accused person and as an accused person he is presumed to be innocent. Whatever the cause of invalidity, an invalid conviction is a nullity. Similarly, a full pardon effectively wipes out the conviction and its consequences. The defendant's legal position is identical to that of the accused but unconvicted person contemplated by section 5. I would suggest that in either case the nullification ought to be automatic. If the presumption of innocence has any substantive content, I can see no justification for maintaining as a public criminal record the fact that one has been arrested but not convicted—or even acquitted—of a crime. Hence, I would suggest that in every case not resulting in a valid conviction, the disposition should include an order nullifying and expunging all official records of the proceeding.

I suppose there may be practical reasons for limiting the operation of the act to first offenders, but conceptually I am not sure that it is justifiable. If the purpose of the legislation is to expedite the restoration of the offender to a place in the community, the fact he may be a two- or three-time loser should not be determinative. I have known men who got the right breaks after several prison terms and led lives socially as acceptable as others who had only one con-

viction, or no convictions. I am reluctant to foreclose the benefits of this legislation to an otherwise deserving subject on the ground of a prior conviction, without knowing more of the facts and the personality of the applicant. I do not recommend that the nullification be automatic in the case of the multiple offender. I do suggest that a person with a prior conviction should be permitted to apply for an order of nullification and that a court should have power to grant such an order when a proper showing is made.

State experience has indicated a disposition on the part of courts to limit the operation and effect of nullification laws. Hence, it is desirable to spell out the effect of nullification orders in some detail. In this respect, I think that section 7 (a) and (b) are excellent. In 7(c), the phrase "necessary in order to protect the public," seems quite broad. I wonder if it would be feasible to state more particularly the circumstances under which courts may qualify nullification orders. I trust that section 7(d) does not intend to limit distribution of the nullification order to persons and agencies indicated by the applicant. His perspective of the keeping and exchange of criminal records is unlikely to be complete. The Attorney General or other Government representative might be directed to develop procedures for the dissemination of such information to appropriate agencies.

There are a couple of parts of section 7 which seem to be of particular interest to lawyers, and I would like to comment on them rather specifically. I say these are of interest to lawyers because in my discussions with lawyers about this legislation these are the sections about which questions seem to be raised most often. First, subsection (A)(3) prohibits the use of an annulled conviction record for purposes of impeachment. As a teacher of evidence, I am pleased by this provision. I have never fully understood the rule of most jurisdictions which permits a witness to be impeached by showing a conviction of felony, irrespective or remoteness or relevance to the witness' credibility. There are few more effective ways of diverting the juror's attention from the merits of the witness' testimony. It may be argued that crimes involving dishonesty or false statement are relevant to credibility. But the conditions that justify nullification inject an element of remoteness which should minimize its value of conviction as evidence of credibility. In any case, nullification should be no less effective in the courtroom than elsewhere in the community. The section prohibits use of any such record for purposes of impeaching. Does this deny use of the formal record only, or does it preclude cross-examination about nullified convictions? Also, does the phrase "any civil or other action" include trials of criminal cases and administrative proceedings?

Section 7(b) permits a person whose criminal record has been nullified to deny that "any such arrest, indictment, hearing, trial, conviction, or correctional supervision (as the case may be) ever occurred." He is not subject to prosecution for perjury under any State or Federal law by reason of such denial. The proposal thus follows the pattern of several States, including my own State, where the statute provides:

> In any application for employment, license or other civil right or privilege, or any appearance as a witness, a person whose conviction of crime has been annulled under this statute may state that he has never been convicted of such crime. (Kansas Sess. Laws, 1971, ch. 119).

To grant the former offender this privilege of perjury is intellectually and morally troubling to many legislators and lawyers.

Senator BURDICK. Professor Wilson, on that point we have had a bulk of testimony disapproving of that language and that it should just be a prohibition to the asking of the question instead, and the committee is leaning to that position today.

Mr. WILSON. I see. But I have prepared a few comments in defense of the section.

Senator BURDICK. Well——

Mr. WILSON. And I take it then that my remarks will be concerned with a moot matter?

Senator BURDICK. Well, please, proceed. I thought I would tell you that there had been a wealth of material on this section and that we are in a state of, perhaps, amending it. But maybe after we hear you we will not.

Mr. WILSON. I see. My argument may be considered by some to be a bit legalistic; however, I can make an argument, I think.

It is argued that a conviction cannot be decreed out of existence; that the statute effectively licenses fraud against prospective employers; and that it is morally wrong to assist the offender to conceal his record. I am sensitive to the feeling that these arguments reflect. But after thinking the matter through, I have concluded that the position taken in 7(b) which permits outright denial, is legally, intellectually and morally sound.

The proposal does not seek to help the offender to avoid facts. It attempts to assist him to avoid an unnecessary consequence of an operation of law. Arrest, indictment, hearing, trial, conviction and correctional supervision are legal concepts. The facts of each occurring apart from a legal context would have no legal significance or consequence. Records of such occurrences are kept when and in the manner the law requires. Thus, the criminal record, the occurrences that it records and the consequences that it requires are purely the creatures of law. I see no reason in law or logic why the law cannot withdraw the status it has conferred. As I understand the purpose of S. 2732 and similar legislation it is legally to erase and obliterate a legal consequence. It seems entirely appropriate that an order of nullification should be deemed to reach back to the event that it nullifies with the result that the event is deemed never to have happened.

If a conviction is set aside upon appeal or post conviction proceeding, as a result of a legal infirmity, it is thereafter a legal nullity. I see no reason why a conviction nullified in the interests of justice should be differently regarded. And if the supposed conviction is, as a matter of law, no conviction, I know of no reason why the affected person should not say so.

All lawyers are aware that the law has often advanced by the employment of legal fictions. A fiction in law is the assumption or invention that something is true which is, or may be, false but which is made to accomplish justice. The existence of a corporate entity separate and distinct from the stockholders who own it is a fiction created and recognized by law, yet I hear no complaint as to the morality of the corporation concept. I do not suggest that the legal fiction argument is necessary to justify section 7(b). I am simply

pointing out that the law has never been necessarily bound by historical facts when a contrary assumption would produce a more just result.

Of course, there are alternatives. I have no strong feeling against the employment of the alternative either of framing a more limited question, such as "have you ever been convicted of a crime which has not been nullified," or a prohibition against asking the question. Either one would be satisfactory.

However, it seems to me that the approach should be to say loudly and clearly that after a person has demonstrated that he is entitled to be reinstated in the community his prior conviction should be of no concern to any of us and should have no effect. And it seems to me that when the law permits, in response to the question: Have you ever been convicted of a crime?, an unequivocal denial, the law is saying to the whole world that we do not think this is important and we do not think you ought to either.

Obviously, the law cannot prevent informal disclosure of one's past acts and omissions. The prospective employer is going to find out about the facts and circumstances that led to a crime, but here we are talking about the record of conviction as a road block to even becoming a serious applicant for a job, and I think in this case the law properly may say that it is no longer regards such conduct as significant if the case is one coming within the statute. As I see it, there is no question of, authorizing an applicant to lie to a prospective employer or licensing agency. It is simply a matter of giving full effect to the policy of the statute.

My only other comment concerns section 11, which I must admit I did not fully understand as to what is the role of Federal courts' judgments in extending a State nullification order to other States.

My thought was that if it is a matter of full faith and credit requiring that the State honor nullification orders of other States, then the proceeding in the Federal court is unnecessary. Committee counsel has spoken to me about this section, and I must admit that my comment here is based on an incomplete understanding of the objective, so perhaps I ought not to stress it.

I have no other comments, and, again, I am pleased that I was invited to speak with the subcommittee, and I hope that the bill comes out of the committee and gets a favorable look by the Congress.

Senator BURDICK. Well, I think you have given us some very valuable testimony. I have listened to every word, and I am very impressed with what you have had to say. I think if we can build into this legislation some automatic provisions that I think are necessary as now—which you have stated yourself—we are dealing with some public attitudes, and the reason I think the committee has asked for a waiting period was to more or less accommodate itself to that public attitude. If an employer knows that a man has been discharged from prison and for a period of time there has been no difficulty, certainly you will have to concede that he is more apt to be hired than one that has not had this period of exposure to new life.

On the other hand, on the other horn of the dilemma you might call it, is the fact that this is the very period when the man needs employment most.

So, we have to take into consideration, I presume, public attitudes if we are going to have a practical bill.

Mr. WILSON. Well, I am aware of the limitations that the public attitude imposes upon legislation. I spent several years of my life in public office in the State of Kansas. Public attitudes there are strong and are frequently expressed. And while I think the legislation ideally ought to go further than it does, it represents, though, a giant stride, and in moving into a new area I think it is necessary that we move one step at a time.

My thinking was that most men who leave institutions, leave on parole or mandatory release. They are in the community, and if they are on parole or probation systems and are function-properly, they do have some resources to lean upon, some sources of help during the period immediately following the institutional release. My thought was that this might be regarded as the trial period, and when they come to the point where they are discharged from correctional supervision and cut loose entirely on their own, then they ought to be cut loose from the burdens of the conviction and the burdens the conviction has imposed on them.

Senator BURDICK. Well, I think you are correct. I think you have put your finger on the distinction between the offender who has had a period of parole and a period of observation as against one who has just served his time and is let free. There is a distinction.

Your testimony certainly has been very interesting and what I consider very valuable.

Thank you.

Mr. WILSON. Thank you.

Senator BURDICK. That concludes the hearing for today, and we will resume again at a date to be announced.

(Whereupon, at 11:55 a.m., the subcommittee adjourned, subject to the call of the Chair.)

(Letter from Fred Raach to Senator Burdick follows:)

WALLACE-MURRAY CORPORATION,
New York N.Y., April 28, 1972.

Senator QUENTIN N. BURDICK,
U.S. Senate, Committee on the Judiciary, Subcommittee on National Penitentiaries, Washington, D.C.

Dear SENATOR BURDICK: I am very sorry I was unable to appear before your Subcommittee in person. I have outlined several comments, however, which I would welcome having entered in the written record. Because of my experiences as President of the Wallace-Murray Corporation, I would like to address my remarks to the employment obstacles confronting the offender upon completion of his "debt to society."

Our correctional system is supposedly geared toward rehabilitation. We stress concepts of job training, remedial education, and prison industry; however, we spend pitifully little of our correctional funds for these programs. The few offenders who complete a period of rehabilitation and training run into a business and industry wall. Whenever an "ex-con" applies for a job, he is asked if he has ever been convicted of a felony. In most cases, a truthful answers bars any chance for employment.

I feel a sense of great concern for the ex-offender as he attempts to become a constructive member of his society. It is not enough that we have punished, rehabilitated, and deterred him. We continue to place him in the role of a second class citizen as we further deny him employment opportunities and civil rights. We should not simply train a man to be a working and contributing member of society and then discourage him upon release. The fact that a man has been convicted of a felony should, in no way affect his qualifications to

perform a societal function such as working or voting. The use of such labels as "ex-con", "repeater" and "criminal mind" is archaic and has no place in our move toward a humanitarian and rehabilitative correctional system. I am not so unrealistic as to think that these labels are not basic criteria by which many people in positions of power will judge others. I do not feel, however, that this practice should be furthered by building it formally and legally into the system so as to restrict all of a man's future endeavor.

I am very pleased that your Subcommittee has seen fit to grapple with this problem through the pending legislation, the Offender Rehabilitation Act (S.2732). I sincerely hope that, as this piece of legislation moves from inception to committee to Senate floor, it will structually retain all provisions which insure that its enforcement will fully realize its spirit of rehabilitation.

At the present time, there are already some restrictions in this bill which detract from that spirit. I am indeed hopeful that these particular oversights can be corrected before S.2732 emerges from this Subcommittee. In its present form, this bill requires a thirty-six month delay beyond final release from probation and a sixty month delay after mandatory release from prison or completion of parole before the offender can apply for nullification. In addition to this delay or waiting period, the ex-offender is further handicapped by the requirement that he *prove his rehabilitation*. The obvious oversight here is the requirement for results without providing a fair opportunity to produce those results. In other words, the bill seems to perpetuate the label "ex-con" at a time when he should be most supported and have maximum freedom for establishing himself in society. His criminal record prevents him from gaining employment which in turn prevents him from achieving total rehabilitation. Yet, this bill requires proof of rehabilitation before his records may be nullified. Such circular reasoning poisons our entire present correctional system. The primary victim, of course, is the "ex-con". However, our entire society is also victimized when the "ex-con" finds a hostile and unaccepting community and reverts to a criminal life-style.

A problem that I find very unsettling about S.2732 is its requirement that the ex-offender, himself, initiate application for the annulment of his criminal records. If there is any rational justification for this procedure, I fail to see it. We all know that a disproportional number of convicted felons is either poorly educated or illiterate. To place the burden of initiating and monitoring a bureaucratic procedure is, at best, unfair when we consider the complexities and skills necessary. It almost seems as if we are setting the ex-offender up for inevitable failure. Why can not annulment of criminal records be automatic? Are we so immeshed in our punitive system that we must keep on punishing a man until we beat him into the ground?

In my view, the limitation of this Act to first offenders is also completely justified. Our present criminal justice system has had its part in creating "repeaters". Yet, S.2732 takes no note of this and again hits the labelled "repeater" as beyond help. We cannot keep this up without the inevitable consequences of recidivism and high crime rates. I am not an expert in psychology, but it seems to me that you cannot keep telling a man that he is worthless and bad without his beginning to believe it and beginning to act that way.

I again wish to commend your Subcommittee on its concern for these forgotten men. I trust that your enlightenment reflects the attitude of many other Senators. I implore you to restudy your bill and examine those areas which detract from its overall intent. We cannot afford to pass a weak bill now and wait twenty or thirty years for its improvement.

Very truly yours,

FRED R. RAACH,
President.

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