

subsurface mining¹⁰⁷ and all minerals¹⁰⁸ rather than just coal. With increased national concern over the nation's energy and land resources, the necessity of such legislation is clear.

Although the Kansas Mined-Land Conservation and Reclamation Act is a welcome first step in restoring surface mined land to productive use, the Act lacks broad application and adequate enforcement to ensure true effectiveness. Some provision should be made for the reclamation of land disrupted by non-coal mineral, surface mining. In addition, the environmental disruption caused by subsurface mining should be statutorily regulated. Though deficient in part the Act contains adequate power to reclaim coal, surface mined land. Stronger and more decisive action by the Mined-Land Conservation and Reclamation Board can effectuate the law's purpose.

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Expungement of Criminal Convictions in Kansas: A Necessary Rehabilitative Tool

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I. Introduction

Kansas' criminal adjudication process increasingly is oriented towards the rehabilitation of criminal offenders.¹ Numerous rehabilitative programs, focusing on the individual offender's needs, offer him the opportunity to gain the basic skills and education necessary to re-enter society. These programs are designed to protect society from future criminal activity by restoring the offender's self-respect and giving him incentive to accept societal norms.²

Despite this emphasis on rehabilitation, few attempts have been made to restore the offender's social status which conviction destroys.³ Society shackles the rehabilitative process by denying the offender the opportunity to utilize his skills and to participate fully in society. The offender is discriminated against in areas relating to employment, professional licensing, military enlistment and the holding of public office.⁴ These restrictions attach to all criminal offenders regardless of the offense's severity.⁵ Although these extra-judicially imposed punishments are more subtle than those imposed by law,⁶ they often prove more difficult to endure and over-

1. KAN. STAT. ANN. § 21-4601 (Supp. 1972); Note, *Sentencing Felons to Imprisonment Under the Kansas Criminal Code: The Need for a Consistent Sentencing Policy*, 10 WASHBURN L.J. 269 (1971).

2. THE UNIVERSITY OF KANSAS GOVERNMENTAL RESEARCH CENTER, SECOND ANNUAL SEMINAR ON PROBATION AND PAROLE: A REPORT (1968); THE UNIVERSITY OF KANSAS GOVERNMENTAL RESEARCH CENTER, FIRST ANNUAL SEMINAR ON PROBATION AND PAROLE: A REPORT (1967).

3. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 166 WASH. U.L.Q. 147 (1966).

4. S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 611, 617-29 (1963).

5. *Symposium--The Collateral Consequences of a Criminal Conviction*, 23 VAND. L.R. 929 (1970).

6. Historically, civil death was the severest consequence facing a person convicted and sentenced to a state penal institution in Kansas. KAN. TERR. STAT. ch. 54, § 20 (1855) (repealed 1969). A convict's right to sue was suspended during incarceration. *Board of Comm'rs of Rice County v. Lawrence*, 29 Kan. 158 (1882). His right to contract was restricted. *Dobbs v. Lilley*, 86 Kan. 513, 121 P. 505 (1912).

107. *Id.* at S842.

108. *Id.*

come.⁷

Recognizing the status degradation facing the criminal offender, some states have enacted legislation designed to restore his former social status.⁸ These statutes, generally entitled expungement statutes,⁹ attempt to insulate the criminal offender from any social penalties or adverse effects resulting from the information sought to be expunged. The scope and purpose of these acts vary from state to state.¹⁰

Kansas is among the states most recently enacting expungement legislation;¹¹ the Kansas provisions are unique and merit examination. This note examines the Kansas expungement statute from three perspectives: (1) a comparison with other states' expungement legislation, (2) the legislative intent and policy considerations behind Kansas' statute and (3) the precise language adopted by the Kansas Legislature. Finally, this note analyzes the Kansas statute's shortcomings and offers suggestions to improve expungement relief.

II. Expungement Defined

The term *expungement* denominates certain statutes that attempt, by various methods, to redefine a criminal offender's social status by erasing the legal event of conviction.¹² In an absolute sense, *expunge* means to obliterate or to make void and of no effect.¹³ Criminal record expungement theoretically destroys the record, withdraws it from public view and prevents it from hampering an individual's future endeavors. Removing the

The convict was subjected to disqualification from future jury duty. See KAN. TERR. STAT. ch. 54, § 20 (1855) (repealed 1969). Although the repeal of the Kansas Civil Death Act in 1969 removed some of these disabilities, many still exist. The conviction of a felony and imprisonment subsequent to marriage is grounds for divorce. KAN. STAT. ANN. § 1601 (Supp. 1972). A person convicted of killing another cannot inherit from his victim. Moore v. American Ins. Union, 135 Kan. 311, 10 P.2d 1084 (1932). Conviction may constitute sufficient grounds for the cancellation of automobile liability insurance policies. KAN. STAT. ANN. § 40-277 (Supp. 1972). Statutory provisions exist for the appointment of a trustee to manage a prisoner's estate. KAN. STAT. ANN. §§ 59-1901 *et seq.* (Supp. 1972). An attorney may be disbarred on the grounds of a criminal conviction. *In re Minner*, 133 Kan. 789, 3 P.2d 473 (1931). The legal penalties and disabilities attendant upon a criminal conviction in Kansas are clearly enunciated by Kansas statutes and by Kansas Supreme Court decisions.

7. R. SCHWARTZ & J. SKOLNICK, SOCIETY AND THE LEGAL ORDER 568-79 (1970); *President's Comm'n on Law Enforcement & Administration of Justice Task Force Report: Corrections* 82-92 (1967).

8. ALASKA STAT. ANN. § 47.10.060(e) (1971); CAL. PENAL CODE § 1203.4 (West Supp. 1973); DEL. CODE ANN. tit. 11, § 4332(i) (Supp. 1970); IDAHO CODE ANN. § 19-2604 (Supp. 1973); KAN. STAT. ANN. § 21-4616 (Supp. 1972); MINN. STAT. ANN. § 609.166 (Supp. 1973); NEV. REV. STAT. § 179.245 (1967); N.J. REV. STAT. § 2A:164-28 (1971); TEX. CODE CRIM. PROC. ANN. art. 42.12 § 7 (1966); UTAH CODE ANN. § 77-35-17.5 (Supp. 1973); WASH. REV. CODE ANN. § 9.95.240 (1959).

9. Although the various states have entitled their respective expungement statutes differently, all will be referred to as expungement statutes throughout this discussion.

10. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 166 WASH. U.L.Q. 147 (1966).

11. KAN. STAT. ANN. § 21-4616 (Supp. 1972). This statute became effective on July 1, 1971. Although Kansas' statute is entitled an annulment statute, for clarity it will be referred to as Kansas' expungement statute throughout this discussion.

12. *Symposium—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L.R. 929 (1970).

13. BLACK'S LAW DICTIONARY 693 (Rev. 4th ed. 1968).

burdens attendant upon a criminal conviction increases the chance for successful rehabilitation.¹⁴

Expungement statutes purportedly remove certain "disabilities" and "penalties." A *disability* generally indicates an incapacity for the full enjoyment of ordinary legal rights or social privileges.¹⁵ A *penalty* is punishment imposed as a consequence of an offense or a disadvantage or loss arising from a person's actions.¹⁶ Both terms contain legal as well as non-legal implications. The scope of the penalties and disabilities removed by a given expungement statute determines its rehabilitative effectiveness.

The state statutes attempting to remove the social disabilities burdening criminal offenders have diverse titles. They are called "expungement," "annulment of conviction," "obliteration of records," "cancellation of records" and "sealing of record" statutes.¹⁷ For clarity, all these statutes will be referred to as expungement statutes throughout the discussion.

III. State Expungement Statutes

Most expungement statutes fall into three general categories: (1) those granting relief after a specified number of years have passed since conviction (applicable to criminal offenders of any age),¹⁸ (2) those granting relief to persons having committed certain classes of crimes (applicable to criminal offenders of any age),¹⁹ or (3) those granting relief upon the discretion of the court.²⁰ Although no state's expungement statute fits perfectly into one of these general categories, California's,²¹ Washington's²² and New Jersey's²³ expungement statutes typify existing expungement laws. These states' statutes and the case law construing them serve as a model for comparing and contrasting Kansas' expungement statute.²⁴

A. California

California's statute authorizes expungement of a petitioner's conviction record if he shows he has successfully completed his probation or has been

14. S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 611, 665-72 (1963).

15. BLACK'S LAW DICTIONARY 548 (Rev. 4th ed. 1968).

16. *Id.* at 1290.

17. *Symposium—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L.R. 929 (1970).

18. NEV. REV. STAT. § 179.245 (1967); N.J. REV. STAT. § 2A:164-28 (1971).

19. CAL. PENAL CODE § 1203.4 (West Supp. 1973); IDAHO CODE ANN. § 19-2604 (Supp. 1973); MINN. STAT. ANN. § 609.166 (Supp. 1973); TEX. CODE CRIM. PROC. ANN. art. 42.12, § 7 (1966). Cf. ABA & COUNCIL OF STATE GOVERNMENTS, COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS v-21 (1972).

20. CAL. PENAL CODE § 1203.4 (West Supp. 1973); IDAHO CODE ANN. § 19-2604 (Supp. 1973); WASH. REV. CODE ANN. § 9.95.240 (1959).

21. CAL. PENAL CODE § 1203.4 (West Supp. 1973).

22. WASH. REV. CODE ANN. § 9.95.240 (1959).

23. N.J. REV. STAT. § 2A:164-28 (1971).

24. *State v. Miller, appeal docketed*, No. 47292, Kansas Supreme Court, Sept. 26, 1973. This case is currently on appeal to the Kansas Supreme Court. The District Court of Reno County, Kansas declared KAN. STAT. ANN. § 21-4616 (Supp. 1972) unconstitutional because it does not provide the courts any guidelines by which to exercise discretion to grant or deny expungement.

discharged prior to its termination.²⁵ Relief also may be granted in any case that the court determines expungement is in both the state's and defendant's best interests.²⁶ If these conditions are met, the petitioner is permitted to withdraw his plea of guilty or nolo contendere and enter a plea of not guilty; if he has been convicted after a plea of not guilty the court must set aside the guilty verdict. Probationers must be informed of this expungement right in their probation orders.²⁷ The statute emphasizes rehabilitation of certain criminal offenders and rewards an offender's good conduct by removing certain penalties and disabilities that generally attach to a criminal conviction.²⁸

In certain cases, relief under California's statute is mandatory.²⁹ If a defendant has met the requirements of his probation order, a court is given no discretion to deny expungement. Although the court may believe that complete and permanent rehabilitation has not been achieved, it nevertheless must erase the defendant's criminal record. The experience of arrest, processing through the courts and the restrictions imposed during probation is deemed adequate assurance of the offender's rehabilitation.³⁰ The court may not cancel the state's agreement with the defendant to expunge his conviction record if he successfully completes his probation.³¹ Mandatory relief applies only to criminal offenders who have been placed on probation. Expungement under any other circumstances is expressly subject to the court's discretion.³²

Early California courts, analogizing expungement to executive clemency and pardon, reasoned that the statute's purpose was to make the criminal offender a "new man" able to enjoy all civil and social liberties.³³ The courts soon altered their liberal interpretation of the penalties and disabilities removed by expungement and adopted a narrow interpretation that permits removal of only legal disabilities.³⁴ The courts do not proscribe social disadvantages imposed upon an offender through disclosure of his criminal record.³⁵

25. CAL. PENAL CODE § 1203.4 (West Supp. 1973).

26. *Id.*

27. *Id.*

28. Meyer v. Superior Court, 247 Cal. App. 2d 133, 55 Cal. Rptr. 350 (Ct. App. 1966); People v. Turner, 193 Cal. App. 2d 243, 14 Cal. Rptr. 130 (Dist. Ct. App. 1961); Kelly v. Municipal Court, 160 Cal. App. 2d 38, 324 P.2d 990 (Dist. Ct. App. 1958); People v. Johnson, 134 Cal. App. 2d 140, 285 P.2d 74 (Dist. Ct. App. 1955); People v. Mojado, 22 Cal. App. 2d 323, 70 P.2d 1015 (Dist. Ct. App. 1937).

29. People v. Johnson, 134 Cal. App. 2d 140, 285 P.2d 74 (Dist. Ct. App. 1955).

30. Meyer v. Board of Medical Examiners, 34 Cal. 2d 62, 206 P.2d 1085 (1949) (dissenting opinion).

31. People v. Johnson, 134 Cal. App. 2d 140, 285 P.2d 74 (Dist. Ct. App. 1955).

32. CAL. PENAL CODE § 1203.4 (West Supp. 1973).

33. People v. Mackey, 58 Cal. App. 123, 208 P. 135 (Dist. Ct. App. 1922).

34. Meyer v. Board of Medical Examiners, 34 Cal. 2d 62, 296 P.2d 1085 (1949); *In re Phillips*, 17 Cal. 2d 55, 109 P.2d 344 (1941). Both of these landmark decisions were decided by only 4-3 majorities and both contain strong dissenting opinions holding expungement should remove all disabilities. *Cf.* People v. Taylor, 178 Cal. App. 2d 736, 3 Cal. Rptr. 186 (Dist. Ct. App. 1960); Truchon v. Toomey, 116 Cal. App. 2d 736, 254 P.2d 638 (Dist. Ct. App. 1953).

35. People v. Sharman, 17 Cal. App. 3d 550, 95 Cal. Rptr. 134 (Ct. App. 1971).

The narrow interpretation of the penalties and disabilities removed by expungement diminishes the rehabilitative effectiveness of the California statute. Numerous restrictions are placed on the offender regardless of the fact that expungement has been granted. Administrative bodies exercising judicial or quasi-judicial authority have broad discretion to consider expunged convictions in licensing or disciplinary actions.³⁶ In spite of expungement, a past offender may be denied the opportunity to practice law, medicine or psychology.³⁷ He may be denied a driver's license,³⁸ a liquor sales license,³⁹ a real estate broker's license⁴⁰ or pari-mutuel wagering privileges.⁴¹ An expunged conviction may be used to dismiss a school employee convicted of a sex offense.⁴² California's courts conclude that these regulatory bodies exist to protect the public from harmful practices and that the state's concern for public safety outweighs the rehabilitative needs of criminal offenders in certain areas.⁴³

Expungement's rehabilitative effectiveness is eroded further by allowing use of an expunged conviction in subsequent criminal prosecutions. Once pleaded and proved the prior conviction has the same effect as if probation had not been granted or the accusation or information dismissed.⁴⁴ The defendant is stripped of any rights and privileges that expungement restored because his subsequent conduct evidences his refusal to profit by expungement's assistance.⁴⁵

Complete rehabilitation is limited further by other jurisdictions' disregard of California's grant of expungement relief. Numerous federal decisions allow an expunged conviction for drug law violation to support an alien's deportation.⁴⁶ The national concern over drug abuse outweighs the

36. Comment, *Criminal Records of Arrest and Conviction: Expungement From the General Public Access*, 3 CAL. W.L.R. 121 (1967).

37. Roth v. State Bar, 40 Cal. 2d 307, 253 P.2d 969 (1953) (law); Meyer v. Board of Medical Examiners, 34 Cal. 2d 62, 206 P.2d 1085 (1949) (medicine); *In re Phillips*, 17 Cal. 2d 55, 109 P.2d 344 (1941) (law); CAL. BUS. & PROF. CODE § 2963 (West Supp. 1973) (psychology); CAL. BUS. & PROF. CODE § 6102 (West Supp. 1973) (law); CAL. BUS. & PROF. CODE §§ 2383-84 (West 1970) (medicine).

38. Ellis v. Dep't of Motor Vehicles, 51 Cal. App. 2d 753, 125 P.2d 521 (Dist. Ct. App. 1942); CAL. PENAL CODE § 1203.4 (West Supp. 1973); CAL. VEHICLE CODE § 13555 (West 1970). *Cf.* Sherry v. Ingels, 34 Cal. App. 2d 632, 94 P.2d 77 (Dist. Ct. App. 1939).

39. Copeland v. Dep't of Alcoholic Beverage Control, 241 Cal. App. 2d 186, 50 Cal. Rptr. 452 (Dist. Ct. App. 1966).

40. CAL. BUS. & PROF. CODE § 10177(b) (West Supp. 1973).

41. Epstein v. California Horse Racing Bd., 222 Cal. App. 2d 831, 35 Cal. Rptr. 642 (Dist. Ct. App. 1963).

42. CAL. EDUC. CODE § 12911 (West Supp. 1973).

43. Ready v. Grady, 243 Cal. App. 2d 113, 52 Cal. Rptr. 303 (Dist. Ct. App. 1966).

44. People v. Barwick, 7 Cal. 2d 696, 62 P.2d 590 (1936); People v. Hainline, 219 Cal. 532, 28 P.2d 16 (1934); People v. O'Brand, 92 Cal. App. 2d 752, 207 P.2d 1083 (Dist. Ct. App. 1949); People v. Mojado, 22 Cal. App. 2d 323, 70 P.2d 1015 (Dist. Ct. App. 1937); People v. Mackey, 58 Cal. App. 123, 208 P. 135 (Dist. Ct. App. 1922). *Cf.* Franklin v. State, 87 Idaho 291, 392 P.2d 552 (1964); State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958).

45. People v. O'Brand, 92 Cal. App. 752, 207 P.2d 1083 (Dist. Ct. App. 1949).

46. Brownrigg v. Immigration & Naturalization Serv., 356 F.2d 877 (9th Cir. 1966); Kelly v. Immigration & Naturalization Serv., 349 F.2d 473 (9th Cir.), *cert. denied*, 382 U.S. 932 (1965); Garcia-Gonzales v. Immigration & Naturalization Serv., 344 F.2d 804 (9th Cir.), *cert. denied*, 382 U.S. 840 (1965); Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959).

rehabilitative needs of criminal offenders.⁴⁷ Strong dissents in many of these federal decisions assert the federal government should not use a conviction that has been expunged by the sovereign against whom the offense was committed to deny United States citizenship to an otherwise worthy alien.⁴⁸

These legislative and judicial restrictions on expungement's scope conflict with its basic goal to restore the criminal offender's social status. The exceptions perpetuate social discrimination especially in the area of employment opportunities. They lessen expungement's value as an incentive for acceptance of societal norms. In effect, they render California's expungement statute a tool of limited rehabilitative effectiveness.⁴⁹

B. Washington

Washington's expungement statute,⁵⁰ similar to California's,⁵¹ allows an offender who has fulfilled his probation requirements to petition the court for expungement relief. The statute expressly leaves the grant or denial to the court's discretion.⁵² The statute, however, does not contain any criteria to guide the court in exercising its discretion.⁵³ If expungement is granted the statute releases the petitioner from all penalties and disabilities resulting from the offense or crime of which he was convicted.⁵⁴ The expunged conviction may be used in any subsequent criminal prosecution as if probation had not been granted or the conviction expunged.⁵⁵

The statute is restrictive in scope. Although courts recognize it as an expression of public policy in the field of criminal law and rehabilitation, courts construe the statute as giving them unfettered discretion to grant or deny expungement relief.⁵⁶ Criminal offenders are given no assurance that mere completion of their probation will result in expungement. The mere lapse of time is not compliance with the statute.⁵⁷ The act offers criminal offenders little incentive to conform to societal norms because it lacks uniform standards by which courts will grant or deny expungement. Without statutory guidelines expungement relief becomes subject to the social standards of individual judges, and its rehabilitative effectiveness is diminished.⁵⁸

47. *Garcia-Gonzales v. Immigration & Naturalization Serv.*, 344 F.2d 804 (9th Cir.), cert. denied, 382 U.S. 840 (1965).

48. *E.g.*, *Kelly v. Immigration & Naturalization Serv.*, 349 F.2d 473 (9th Cir.) (dissenting opinion), cert. denied, 382 U.S. 932 (1965). See also *In re Paoli*, 49 F. Supp. 128 (S.D. Cal. 1943); *In re Ringalda*, 48 F. Supp. 975 (S.D. Cal. 1943).

49. Comment, *Criminal Records of Arrest and Conviction: Expungement From the General Public Access*, 3 CAL. W.L.R. 121 (1967).

50. WASH. REV. CODE ANN. § 9.95.240 (Supp. 1961).

51. CAL. PENAL CODE § 1203.4 (West Supp. 1973).

52. *Allen v. Rhay*, 52 Wash. 2d 609, 328 P.2d 367 (1958); WASH. REV. CODE ANN. § 9.95.240 (Supp. 1961).

53. *Jaime v. Rhay*, 59 Wash. 2d 58, 365 P.2d 772 (1961).

54. *Matsen v. Kaiser*, 74 Wash. 2d 231, 443 P.2d 843 (1972).

55. WASH. REV. CODE ANN. § 9.95.240 (Supp. 1961).

56. *Mempa v. Rhay*, 68 Wash. 2d 882, 416 P.2d 104 (1966); *Jaime v. Rhay*, 59 Wash. 2d 58, 365 P.2d 772 (1961).

57. *Jaime v. Rhay*, 59 Wash. 2d 58, 365 P.2d 772 (1961).

58. *Mempa v. Rhay*, 68 Wash. 2d 882, 416 P.2d 104 (1966) (by implication).

C. New Jersey

New Jersey's expungement statute permits a criminal offender who receives either a suspended sentence or a fine of not more than one thousand dollars to petition the court for expungement relief. This petition may not be filed until ten years after the date of conviction.⁵⁹ The petition is denied summarily if the defendant has been convicted of any offenses within the ten year period.⁶⁰ Numerous crimes are specifically excepted from the statutory relief. These exceptions are as follows: treason; misprision of treason; anarchy; all capital cases; kidnapping; perjury; carrying concealed weapons or weapons of any deadly nature or type; rape; seduction; aiding, assisting or concealing persons accused of high misdemeanors; aiding the escape of prison inmates; embracery; arson; robbery; and burglary.⁶¹

New Jersey's statute forces the criminal offender to lead an "exemplary" life during the ten years following conviction. Unless the petitioner experiences a complete "moral change," the court will exercise its discretion and deny relief.⁶² The state is allowed to introduce any information it deems pertinent regarding the defendant's application for expungement.⁶³ The terms *exemplary* and *moral change* defy objective definition. Such indefinite criteria permit subjective decision-making by courts and hamper the growth of uniform standards by which to judge expungement petitions. Like Washington's statute,⁶⁴ New Jersey's act offers little incentive for a criminal offender to accept societal norms.⁶⁵

D. Summary

The common thread uniting the various expungement statutes is the limited relief available under their provisions. These limitations reflect the states' temerity to accept fully expungement's premise: the complete restoration of a criminal offender's social status offers him incentive to accept societal norms which in turn protects society from future criminal activity. Regardless of the states' purported acceptance of criminal corrections' rehabilitative objectives, these restrictions indicate an unwillingness to abandon the themes of deterrence and retribution which traditionally have influenced correctional law. It is inconsistent to ask a criminal offender to accept so-

59. N.J. REV. STAT. § 2A:164-28 (1971).

60. *State v. Blinsinger*, 114 N.J. Super. 318, 276 A.2d 182 (Super. Ct. App. Div. 1971).

61. N.J. REV. STAT. § 2A:164-28 (1971).

62. *State v. Chelson*, 104 N.J. Super. 508, 250 A.2d 445 (Bergen County Ct. L. Div. 1969); *State v. Garland*, 99 N.J. Super. 383, 240 A.2d 41 (Bergen County Ct. L. Div. 1968).

63. *Waterfront Comm'n v. Pasquale*, 65 N.J. Super. 498, 168 A.2d 246 (Super. Ct. App. Div. 1961).

64. WASH. REV. CODE ANN. § 9.95.240 (Supp. 1961).

65. Application of Raynor, 123 N.J. Super. 526, 303 A.2d 896 (Super. Ct. App. Div. 1973) (by implication). Although this case concerns the expungement of an arrest record, the court indicates that criminal offenders' rehabilitative needs will be subordinated to the investigative practices and crime prevention theories of law enforcement agencies. See also Application of Fortenbach, 119 N.J. Super. 124, 290 A.2d 315 (Essex County Ct. L. Div. 1972). Cf. Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CIN. L. REV. 850 (1971).

ciety's norms while he is openly prevented from freely and fully participating in society. Expungement cannot adequately assist other rehabilitative efforts if society is unwilling to forgive completely the offender for his past actions.⁶⁶

IV. Kansas' Expungement Statute

A. Statutory Provisions

Responding to the social degradation convicted criminal offenders experience, the Kansas Legislature enacted a unique expungement statute in 1971.⁶⁷ Early in the 1971 legislative session companion bills were introduced to lower the juvenile age from eighteen to sixteen⁶⁸ and to expunge certain conviction records.⁶⁹ The expungement bill was intended to ameliorate the effect of lowering the juvenile age.⁷⁰ Although the bill reducing the juvenile age was defeated,⁷¹ the expungement bill was passed by both houses and signed into law.⁷²

Kansas' expungement statute allows a convicted criminal offender to petition the court for expungement if (1) he was under twenty-one years old at the crime's commission and (2) he has served his sentence or has completed his probation or suspended sentence. If the petitioner meets these criteria, he is entitled to withdraw his plea of guilty and enter a plea of not guilty; if the petitioner had plead not guilty, the court is authorized to set aside the verdict of guilty. The complaint, indictment or information is dismissed in either event and the petitioner is released from all penalties and disabilities resulting from the crime for which he was convicted. Expungement mandates that the petitioner be treated in all respects as if he had not been convicted. The expunged record, however, may be considered for sentencing purposes upon a subsequent conviction. A criminal

66. S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 611-72 (1963). See *State v. Schreiber*, 121 Utah 653, 245 P.2d 222 (1952). The latter case indicates an expungement order may be revoked if the defendant fails to fulfill the conditions of that order.

67. KAN. STAT. ANN. § 21-4616 (Supp. 1972). This statute reads as follows: "Every defendant who had not attained the age of twenty-one (21) years at the time of the commission of the crime for which he was convicted and who has served the sentence imposed or who has fulfilled the conditions of his probation or suspension of sentence for the entire period thereof, or who shall have been discharged for probation prior to the termination of the period thereof, may at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court may set aside the verdict of guilty; and in either case, the court shall thereupon dismiss the complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the crime of which he has been convicted, and he shall in all respects be treated as not having been convicted, except that upon conviction of any subsequent crime such conviction may be considered as a prior conviction in determining the sentence to be imposed. The defendant shall be informed of this privilege when he is placed on probation or suspended sentence.

"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."

68. Kan. S.B. 122 (1971).

69. Kan. S.B. 265 (1971).

70. Bennett, *1971 Legislative Synopsis*, 40 J. KAN. B. ASS'N 307, 355 (1971).

71. *Senate Journal*, State of Kansas, 683 (1971).

72. *Senate Journal*, State of Kansas, 559 (1971).

offender whose record has been expunged may state "[i]n any application for employment, license or other civil right or privilege, or any appearance as a witness . . ." that he has never been convicted of the crime for which relief has been granted.⁷³

B. Mandatory or Discretionary Relief

The Kansas expungement statute's language raises the question whether expungement is mandatory upon proof of compliance with the statutory criteria or whether the relief is discretionary with the court. Examining the limited availability of expungement relief and the precise statutory language in light of expungement's purpose to restore a criminal offender's social status indicates that the relief is mandatory and that the legislature did not intend to give courts any discretion to grant or deny relief.⁷⁴

1. Limited Availability

Kansas' expungement statute offers relief only to persons who are under twenty-one at the commission of the crime. The act is directed at an age group too old chronologically to be treated under the Kansas Juvenile Code⁷⁵ and generally too young emotionally to be treated as adults.⁷⁶ The majority of crimes committed by this age group involve quick, impulsive and forceful acts which are natural tendencies during maturation.⁷⁷ Youth is predominately a formative age during which flexibility and suggestibility have not been replaced by the more crystallized patterns of adult behavior. Wisely-directed rehabilitation programs have a good chance of being successful with youthful offenders.⁷⁸ Another indication of the legislature's emphasis upon the expungement of only youthful criminal offenders' records is its rejection of the Kansas Judicial Council's proposed expungement statute. The Judicial Council proposal offered expungement to criminal offenders of any age group who had been placed on probation or parole; it did not offer relief to offenders who had been incarcerated.⁷⁹ Kansas' existing expungement law offers expungement to all youthful offenders who were under the age of twenty-one at the commission of the crime for which they were convicted. The legislature clearly recognized a need to give youthful criminal offenders every opportunity to succeed in society despite their past criminal acts.⁸⁰

73. KAN. STAT. ANN. § 21-4616 (Supp. 1972).

74. *State v. Miller*, appeal docketed, No. 47292, Kansas Supreme Court, Sept. 26, 1973. In this case the District Court held that expungement was discretionary with the court. The District Court also declared the Kansas expungement statute unconstitutional because it does not give the courts any guidelines by which to exercise that discretion.

75. KAN. STAT. ANN. § 38-801 *et seq.* (Supp. 1972).

76. S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 427-34.

77. *Id.* at 428-57.

78. *Id.*

79. KAN. JUD. COUN. BULL. 134-35 (April 1969); see also R. SPRING & D. RYAN, *11 VERNON'S KANSAS STATUTES ANNOTATED* 387-88 (1971).

80. Bennett, *1971 Legislative Synopsis*, 40 J. KAN. B. ASS'N 307, 355 (1971).

2. Precise Language

Kansas' expungement law states that a convicted criminal offender who was under twenty-one at the commission of the crime and who has served his sentence or completed his probation or suspended sentence "[m]ay at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court may set aside the verdict of guilty . . ."⁸¹ Standing alone the term *may* arguably gives the court discretion to grant or deny expungement. When, however, *may* is read in light of expungement's underlying purpose, to restore a criminal offender's former social status, and of the limited age group to whom expungement is available, it is apparent that the legislature did not intend to give courts discretion to grant or deny expungement. The probable intent behind the legislature's choice of the word *may* is to indicate that a power and a right which did not exist prior to the statutory enactment are being granted to the courts and certain criminal offenders. By definition the term *may* is an auxiliary verb qualifying the meaning of another verb by expressing ability or competency. Courts often construe the term as meaning *shall* or *must* when necessary to prevent justice from being the slave of grammar.⁸² Interpreting the Kansas expungement statute as offering mandatory relief completely prohibits socially-imposed punishments from interfering with a youthful offender's rehabilitative efforts. The legislature has an exclusive duty to delimit criminal punishment. The courts must adhere to those legislative mandates.⁸³

Kansas' criminal justice system recognizes that rehabilitation of the criminal offender offers society the best protection against future criminal activity. Kansas' sentencing policy expressly advocates this goal.⁸⁴ The sentencing court is given every tool necessary to design a rehabilitation program best suited to the criminal offender before it. The sentence determined by the court, according to not only the offense but also to the characteristics of the offender involved, is the key to criminal justice.⁸⁵ If the sentencing court carefully fulfills its sentencing duty, the sentence imposed is an equitable assessment of the criminal offender's liability to society and of his rehabilitative needs. Once the offender pays his legal debt by serving his prison term or completing his probation or suspended sentence, he should not be subjected to additional penalties and disabilities imposed by society. Youthful offenders, whose criminal activities often are prompted by their immaturity, need protection from punishment imposed by society if the state's rehabilitative efforts are to be successful.⁸⁶ Expungement reflects a

81. KAN. STAT. ANN. § 21-4616 (Supp. 1972).

82. BLACK'S LAW DICTIONARY 1131 (Rev. 4th ed. 1968).

83. The fundamental rule of statutory construction to which all others are subordinate is that courts must ascertain the legislative intent, if at all possible, in an honest endeavor to harmonize conflicting provisions within the act and to effectuate that legislative intent. *Great Lakes Pipe Line Co. v. Wetschensky*, 193 Kan. 706, 396 P.2d 295 (1964); *Parker v. Continental Cas. Co.*, 191 Kan. 674, 383 P.2d 937 (1963).

84. KAN. STAT. ANN. § 21-4601 *et seq.* (Supp. 1972).

85. R. SPRING & D. RYAN, 11 VERNON'S KANSAS STATUTES ANNOTATED 389 (1971).

86. See Schiavo, *Condemned by the Record*, 55 A.B.A.J. 455 (1969).

legislative decision that society's interests are best served by erasing the youthful offender's criminal conviction record and offering him a second chance to participate fully and succeed in society.⁸⁷

Although the mere completion of probation, suspended sentence or a prison term does not insure complete rehabilitation purely objective standards do not exist by which to measure degrees of rehabilitation. Rehabilitation is an individual and subjective experience. The rationale of expungement mandates that the courts grant relief if the petitioner has complied with the statutory criteria. The Kansas expungement statute should not be interpreted to give individual judges discretion to apply their personal, social and moral value judgments regarding the rehabilitative progress of certain youthful criminal offenders. The legislature gives youthful offenders the benefit of the doubt regarding their rehabilitative efforts and erases their conviction records.⁸⁸ If a youth's future activity results in criminal conviction the expunged record may be taken into consideration for sentencing purposes at that time to determine his rehabilitative needs.⁸⁹ The use of expunged records in future criminal prosecutions is adequate protection for society from youths who cannot conform to societal standards; courts need not have discretion in granting or denying expungement to those meeting the express statutory criteria.

V. Improvement and Expansion of Expungement

Despite the progressive posture of Kansas' expungement statute, it does not address itself to three areas which currently are undergoing judicial and legislative expansion. Kansas' statute does not (1) extend expungement to records of arrest which do not result in conviction, (2) offer expungement to convicted adult offenders who demonstrate their ability to conform to societal norms or (3) provide any method to assure nondisclosure of expunged records.

The punishment imposed by society upon persons with a criminal past often does not distinguish between persons who were convicted and those who were released or acquitted. The arrest record leaves an indelible stain upon the person arrested. Notwithstanding the absence of a conviction, arrest records serve as a basis for discrimination in the areas of employment, professional licensing and subsequent relations with the court.⁹⁰

87. KAN. STAT. ANN. § 21-4616 (Supp. 1972). Historically, a person convicted of a felony and sentenced to a state penal institution in Kansas forfeited certain civil rights. KAN. TERR. STAT. ch. 54, § 20 (1855) (repealed 1969). The lost civil rights could only be restored by executive pardon unless the offender was "[W]ithin the age of sixteen years, and such conviction shall be for a first offense." In the latter situation, all civil disabilities incurred shall be removed and his competency restored at the expiration of the term of imprisonment to which he was sentenced. KAN. TERR. STAT. ch. 54, § 25 (1855) (repealed 1969). The statute did not offer relief against the socially imposed disabilities attendant upon a criminal conviction which KAN. STAT. ANN. § 21-4616 (Supp. 1972) attempts to remove.

88. See generally Bennett, 1971 *Legislative Synopsis*, 40 J. KAN. B. ASS'N 307, 355 (1971); Schiavo, *Condemned by the Record*, 55 A.B.A.J. 455 (1969).

89. KAN. STAT. ANN. § 21-4616 (Supp. 1972).

90. *Morrow v. District of Columbia*, 417 F.2d 728 (D.C. Cir. 1969); Fishman, *Expungement of Arrest Records: Legislation and Litigation to Prevent Their Abuse*, 6

Despite these serious consequences, state legislatures and courts are reluctant to expunge arrest records. Judicial and legislative bodies theorize that in the interest of effective law enforcement arrest records should be retained.⁹¹ Statutes providing for the expungement of arrest records are narrowly construed by the courts.⁹²

Although the majority of jurisdictions refuse to expunge arrest records, a developing case law trend permits that relief. One California court holds that California's expungement statute violates the constitutional guarantee of equal protection because it arbitrarily refuses to expunge arrest records of the same class of persons whose conviction records are expunged.⁹³ Recent Colorado⁹⁴ and Washington⁹⁵ decisions hold a plaintiff may have his arrest records expunged if harm to the individual's right of privacy or dangers of unwarranted adverse consequences outweigh the public's interest in retaining arrest records.⁹⁶ These courts emphasize that unless the government demonstrates a compelling need to retain arrest records, the return of fingerprints and photographs upon acquittal is a fundamental right implicit in the concept of ordered liberty which cannot be denied.⁹⁷ These decisions hold that the return of arrest records is within the penumbras of the bill of rights' guarantees recognized in *Griswold v. Connecticut*.⁹⁸ The validity of retaining arrest records depends upon the correctness of two assumptions, (1) that the person arrested did in fact commit the crime with which he is charged and (2) that his commission thereof indicates a propensity for similar activity in the future. An acquittal negates both premises essential to the rationale for retaining arrest records.⁹⁹

Kansas' expungement statute does not offer expungement to adult offenders who have responded to rehabilitative programs and have demonstrated affirmatively their ability to accept societal norms. If an adult offender proves his ability to become a stable community member, courts

CLEARINGHOUSE REV. 725 (1973); Karabian, *Record of Arrest: The Indelible Stain*, 3 PAC. L.J. (1972); Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850 (1971).

91. *United States v. Rosen*, 343 F. Supp. 804 (S.D.N.Y. 1972); Application of Raynor, 123 N.J. Super. 526, 303 A.2d 896 (Super. Ct. App. Div. 1973); Walker v. Lamb, 254 A.2d 265 (Del. 1969).

92. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970); *Village of Homewood v. Dauber*, 85 Ill. App. 2d 127, 229 N.E.2d 304 (1967); *City of Chicago v. Mayers*, 68 Ill. App. 2d 442, 216 N.E.2d 298 (1966); *People v. Lewerenz*, 42 Ill. App. 410, 192 N.E.2d 401 (1963). Traditionally courts hold that the expungement of arrest records is an exclusive legislative function. See, e.g., *Spock v. District of Columbia*, 283 A.2d 14 (D.D.C. 1971).

93. *McMahon v. Municipal Court*, 6 Cal. App. 3d 194, 85 Cal. Rptr. 782 (1970). Cf. *Menard v. Mitchell*, 430 F.2d 486 (D.C. Cir. 1970).

94. *Davidson v. Dill*, 503 P.2d 157 (Colo. 1972).

95. *Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 211 (1973).

96. *Id.*

97. *Id.*

98. 381 U.S. 479 (1965), reviewed in Comment, 12 WASHBURN L.J. 97, 98-99 (1972).

99. *Eddy v. Moore*, 5 Wash. App. 2d 334, 487 P.2d 211 (1973). Another developing area of litigation to prevent the abuse of arrest records which have not resulted in conviction is under the 1964 Civil Rights Act. 42 U.S.C. §§ 2000 et seq. (1964). See *Wilson v. Webster*, 467 F.2d 1282 (9th Cir. 1972); see generally Fishman, *Expungement of Arrest Records: Legislation and Litigation to Prevent Their Abuse*, 6 CLEARINGHOUSE REV. 725 (1973).

should have the discretion to expunge his conviction records and thereby restore his lost social status and its attendant privileges. Because of more crystallized behavior patterns of adults which hinder the state's rehabilitative efforts, the courts must be given discretion to either grant or deny relief upon the facts of the individual case. The legislature, however, should establish guidelines by which the judges will exercise that discretion to prevent its abuse.¹⁰⁰

Kansas' expungement statute does not provide any assurances or safeguards to prevent the disclosure of expunged criminal records.¹⁰¹ Available research indicates that employers and news reporters often gain access to expunged records to investigate potential employees or to substantiate news reports.¹⁰² Provisions should be enacted which hold persons disseminating or using expunged records in contempt of court. Although such procedures would not insure nondisclosure, they would help alleviate the abuses and offer stronger protection to innocent persons.¹⁰³

VI. Conclusion

Kansas' expungement statute completes the rehabilitative process. The criminal process sentences, incarcerates, grants probation and parole, counsels, rehabilitates and through expungement forgives. Expungement offers a positive stimulus and incentive to youthful criminal offenders to accept and conform to societal standards. Ultimately it offers protection against future criminal activity. "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."¹⁰⁴ Regardless of its shortcomings, Kansas' expungement statute is an important step forward towards total acceptance of correctional law's rehabilitative objectives. Correction premised upon vengeance, deterrence and retribution have proven ineffective methods to prevent crime.¹⁰⁵ Society and the courts must weigh carefully the benefits which expungement offers youthful offenders against the deleterious effects a criminal record has upon a youthful offender's rehabilitative endeavors. Mandatory expungement offers a youthful offender the maximum benefits of this rehabilitative policy by erasing his criminal record from the public's view. When Kansas courts are faced with the construction and application of this statute, they should take careful note of its underlying policies to insure a construction which will promote the statute's objectives.

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100. See ABA & COUNCIL OF STATE GOVERNMENTS, COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS v-21 (1972).

101. KAN. STAT. ANN. § 21-4616 (Supp. 1972).

102. *Id.*

103. The Kansas Legislature has enacted safeguards in other vital areas to prevent the disclosure and use of private records. See KAN. STAT. ANN. § 59-2931 (Supp. 1972) (Mental Illness Code); KAN. STAT. ANN. § 38-815 (Supp. 1972) (Juvenile Code).

104. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 166 WASH. U.L.Q. 147, 186 (1966).

105. R. SPRING & D. RYAN, 11 VERNON'S KANSAS STATUTES ANNOTATED 387-402 (1971).