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DOES THE FEDERAL YOUTH CORRECTIONS ACT REMOVE THE “LEPER’S BELL” FROM REHABILITATED OFFENDERS?

RICHARD S. HARNSBERGER*

There is nothing more tragic in life than the utter impossibility of changing what you have done.**

I. INTRODUCTION

The Federal Youth Corrections Act (FYCA),¹ passed in 1950, is a comprehensive sentencing statute designed to provide treatment and rehabilitation for persons between the ages of eighteen and twenty-two who are convicted in federal courts. Sentencing under the FYCA is automatic unless the court makes an express finding on the record that the youth would receive no benefit from its unique treatment features.² At the discretion of the judge, relief also is available to adult offenders under twenty-six years old if an affirmative finding is made that youth treatment would be beneficial.³

Under section 5021 of the FYCA, if a youth offender is unconditionally released from commitment or unconditionally discharged from probation before expiration of the maximum sentence initially imposed, his conviction is “automatically set aside” and he is given a certificate to that effect.⁴ In Dorszynski v. United States, Chief

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** JOHN GALSWORTHY, JUSTICE: A TRAGEDY IN FOUR ACTS, Act II (1910).

4. In its entirety, section 5021 reads:
Certificate setting aside conviction. — (a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.
(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction.
Justice Burger said that a "powerful tool" available under the FYCA is the "discretion to discharge committed persons unconditionally before [being] required to do so, for upon such discharge the conviction upon which the sentence rested would be automatically set aside." This constitutes one of "the new options of treatment and probation made available to the federal sentencing court under the Act."

The United States Parole Commission issues approximately 650 certificates each year setting aside convictions; the federal courts probably issue substantially more, but exact figures are unavailable. Of the large number of young persons who have received certificates since 1950, most believed they could begin life anew without the crippling taint of a criminal record. Many later learned, however, that reliance on the value of their certificates was misplaced, because the FBI does not erase a youth offender's record after receiving notice of his early discharge from the probation or parole officer; instead, following the conviction notation on the criminal "rap sheet," the Bureau simply adds the words "set aside."

Under the federal regulations, there are no limits on distribution of a young person's conviction data — they are available to prospective employers, licensing boards, educational institutions, and others by means of the FBI's vast, nationwide computer network. The resulting social and economic consequences to those whose convictions have been "set aside" are far-reaching and devastating. The impact is especially harsh in the areas of employment and professional licensing. In 1971, former Attorney General John
Mitchell told a National Conference on Corrections that there is “an appalling resistance to hiring ex-offenders, even by many government agencies at different levels . . . . When the releasee is thus denied the means of making an honest living, every sentence becomes a life sentence.”\(^{12}\) In 1975, while discussing how computer systems make a “record prison” which places a “leper’s bell” on ex-offenders, Aryeh Neier said:

> [A]rrest and conviction records often create social lepers who must exist as best they can on the fringes of society. The dissemination of records places a series of obstacles in the path of persons who wish to enter society’s mainstream and end the half-life of the world of crimes. Is it any wonder, then, that recidivism rates should be so high? How can we seriously hope to reduce crime if we disseminate records which have the unintended effect of making it impossible for people to stop being criminals?\(^{13}\)

While the FBI interpretation of section 5021 was permanently stigmatizing youth offenders, the federal judges who decided the first FYCA cases stressed the Act’s rehabilitative aspects. These judges recognized the cruelty of extrajudicial punishment after the young person had faithfully fulfilled the conditions of probation or had reacted to imprisonment in such a positive way that s/he was released before expiration of the maximum sentence imposed.

II. THE EARLIER DECISIONS: SECTION 5021 AS A REHABILITATIVE LAW

*Tatum v. United States*\(^{14}\) was the first case to consider the effect of section 5021. In a per curiam opinion (with now Chief Justice Burger participating), the D.C. Circuit considered a situation in which the sentencing judge had vacated Tatum’s original nine-year sentence under the FYCA and imposed a new sentence of thirty-four, to one hundred and two months (nearly three years to eight and a

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\(^{12}\) See A. Neier, supra note 11, at 117.

\(^{13}\) Criminal Justice Information and Protection and Privacy Act of 1975: Hearings on S. 2068 Before the Subcomm. on Constitutional Rights of the Senate Comm. on Judiciary, 94th Cong., 1st Sess. 235 (1975) (statement by A. Neier, the Executive Director of the American Civil Liberties Union).

\(^{14}\) 310 F.2d 854 (D.C. Cir. 1962).
half years) under the District of Columbia indeterminate sentence law. Tatum objected on the ground that the second sentence was more severe than the first and therefore illegal. The court agreed, because Tatum's prospect of having his conviction automatically set aside under the FYCA was such a marked and important difference from the ordinary, substituted sentence that it outweighed the possibility of longer imprisonment under the FYCA sentence. The court pointed out that a person sentenced under the FYCA "can, by virtue of his own good conduct, be spared the lifelong burden of a criminal record [so that the matter becomes] a non-criminal episode so far as the public records are concerned." The court concluded by saying that the FYCA acted "to expunge the conviction and the record . . . ."  

*Mestre Morera v. United States Immigration & Naturalization Service* and United States v. Glasgow are representative of many other decisions expressing the same viewpoint. In the former case, the Immigration and Naturalization Service claimed the authority to deport Mestre Morera for a marijuana conviction which had been set aside pursuant to section 5021. The First Circuit Court of Appeals held that the clear purpose of the FYCA was to relieve a youth "not only of the usual disabilities of a criminal conviction, but also to give him a second chance free of a record tainted by such a conviction." Both the act and the legislative history were found to express congressional concern that juvenile offenders be afforded an opportunity to atone for youthful indiscretions. The court noted that although neither an executive pardon nor a judicial recommen-

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15. Id. at 856.
16. Id. n.2.
17. 462 F.2d 1030 (1st Cir. 1972).
19. See, e.g., Doe v. Webster, No. 77-2011, 48 U.S.L.W. 2103 (D.C. Cir. July 24, 1979) (drug conviction record expunged, but placed in separate storage facility for use in criminal investigations) (decided after this article was substantially through the editorial process); United States v. Purgason, 565 F.2d 1279 (4th Cir. 1977) (conviction set aside under § 5021 is not a conviction for purposes of firearms law); United States v. Cruz, 544 F.2d 1162, 1163 (2d Cir. 1976) ("One of Judge Frankel's reasons for sentencing Cruz under the Act was that § 5021 of the Act permits expungement of his conviction."); United States v. Roberts, 515 F.2d 642, 644, 646 (2d Cir. 1975) (one of the advantages of the FYCA is the "opportunity to have the conviction erased from his record"); a "chance to have the conviction expunged from his record."); United States v. Dancy, 510 F.2d 779, 782 n.11 (D.C. Cir. 1975) ("This promise of expungement [under section 5021] is an important one."); Cox v. United States, 473 F.2d 334, 336 (4th Cir.), cert. denied, 414 U.S. 869 (1973) (section 5021 "operates automatically to vacate the conviction and clear the youth's criminal record."); United States v. Bronson, 449 F.2d 302 (10th Cir. 1971), cert. denied, 406 U.S. 994 (1972); United States v. Borawski, 297 F. Supp. 198 (E.D.N.Y. 1969); United States v. Caviness, 239 F. Supp. 545, 553 (D.D.C. 1965).
20. 462 F.2d at 1032.
dation of leniency could prevent deportation for a narcotics conviction, setting aside a conviction under the FYCA had a greater effect. "Pardon and leniency at most restore to an offender his civil rights; neither is as clearly directed as the Youth Correction Act toward giving him a second chance, free of all taint of a conviction."\(^{21}\)

In *Glasgow*, the defendant mailed some hashish from India to a friend and former college classmate in the United States. After being placed on probation, he petitioned the court to be resentenced under the FYCA so he could be eligible to have his conviction set aside under section 5021. The court granted the request after carefully reviewing the history of the FYCA. Great weight was placed on the rehabilitative aspects which Congress had expressed so clearly; setting aside convictions was regarded as a form of treatment having "a curative effect which facilitates the accomplishment of the correction of the antisocial tendencies of young offenders, and thus furthers the central goal of rehabilitation."\(^{22}\)

The *Glasgow* court viewed the permanency of a criminal record as being especially harsh on young persons and said it was aware of the literally thousands of discriminatory laws at all levels of government which handicapped those persons who were attempting to secure employment and live useful and productive lives. Thus, setting aside a conviction under the FYCA enabled a young offender to "begin anew," and, the court said, there was no reason for a judge or Assistant United States Attorney to darken an individual's "otherwise [sic] bright future by denying him the opportunity to begin his mature adult life with a record clean of his felony conviction."\(^{23}\) The *Glasgow* opinion also took cognizance of a "growing recognition that expungement provisions are essential to the fair administration of justice and to the rehabilitation of offenders."\(^{24}\)

### III. A DIFFERENT PHILOSOPHY: THE McMAINS LINE OF CASES, HOLDING THAT SECTION 5021 IS NOT AN EXPUNCTION STATUTE

#### A. Fite v. Retail Credit Co.

Beginning in 1975, some federal judges began to adopt a different philosophy by rejecting the view that section 5021 authorizes expungement of a young person's records. *Fite v. Retail Credit Co.*,\(^{25}\) a federal district court case, is the first of these decisions. It is important because of its influence on the Eighth Circuit one year later,

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\(^{21}\) *Id.* (emphasis supplied by the court).

\(^{22}\) *389 F. Supp. at 224.*

\(^{23}\) *Id.* at 225.

\(^{24}\) *Id.* at 225 n.21.

\(^{25}\) *386 F. Supp. 1045 (D. Mont. 1975), aff'd, 537 F.2d 384 (9th Cir. 1976).*
when the Court of Appeals considered whether the FYCA authorizes expunction of the record of conviction as well as the conviction itself. In *Fite*, a young person pleaded guilty to theft of government property. After successfully serving his probation and receiving a certificate setting aside his conviction, he obtained summer employment between terms in college as an insurance salesman in Great Falls, Montana.\(^2^8\) A week later the insurance company's home office learned of both his conviction and its expunction through a routine credit check. Fite was fired immediately. Thereafter, he commenced proceedings seeking both a declaration that his record of arrest and conviction was "exonerated" and an injunction to prohibit the credit company from maintaining and distributing records of these facts about him. The district court granted the defendant credit company's motion for summary judgment. Its rationale was twofold. First, "[c]ourt proceedings are public events and the public has a legitimate interest in knowing the facts in them."\(^2^7\) Second, the judge said, two previous cases decided by the Court of Appeals for the Ninth Circuit, *Hernandez-Valensuela v. Rosenberg*\(^2^8\) and *Garcia-Gonzales v. Immigration and Naturalization Service*,\(^2^9\) "indicate that in the Ninth Circuit a conviction under the Youth Corrections Act does not disappear when a certificate of discharge is issued."\(^3^0\) Neither case, however, is close to being on point.  

*Hernandez-Valensuela* held that an alien sentenced under the FYCA could be deported even though there was a possibility that he might ultimately receive a certificate setting aside his conviction. The case did not deal with a conviction affected by section 5021. Neither did *Garcia-Gonzales* involve the FYCA. The only question was whether an alien's conviction upon which a deportation order rested had been "wiped out" under the provisions of a California law authorizing such a procedure after a person successfully completes the term of his probation. After considering the interplay of federal and state laws, the court held that Congress intended to deport aliens who violated the narcotics laws and that the State of California had no power to release a person from the penalties imposed by federal law even though Congress could give the state's action that effect if it so chose.

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26. Letter from Chris J. Nelson, attorney for Mr. Fite, to Richard S. Harnsberger (June 15, 1976) (containing additional facts not found in the opinion).
27. 386 F. Supp. at 1046.
28. 304 F.2d 639 (9th Cir. 1962).
29. 344 F.2d 804 (9th Cir.), cert. denied, 382 U.S. 840 (1965).
30. 386 F. Supp. at 1047.
B. United States v. McMains

From the viewpoint of young persons who have received, or who hope to receive, a certificate setting aside their convictions, the most Draconian and demoralizing decision has been United States v. McMains.\(^{31}\) The case will be analyzed in detail because its rationale is at cross purposes with the rehabilitative and humanitarian ideas Congress had in mind. Duane Thomas McMains was charged on September 27, 1971, with concealing and failing to report the robbery of a federally insured bank. On the same day he entered a guilty plea; on November 30 he was sentenced to three years probation under the FYCA. On January 14, 1974, well before the end of the probation period, he was discharged and received his certificate under section 5021 informing him that his conviction had been set aside. His records, however, stayed open, so he wrote the sentencing judge during August 1975 and requested that the conviction record be expunged. The U.S. District Court granted the request and ordered all records relating to the arrest and conviction to be expunged.\(^{32}\) The court found that the policy objectives of the FYCA "militate in favor of such relief [and that] implicit in the Court's power to expunge a youth offender's conviction is the power, in appropriate instances, to expunge the record of conviction."\(^{33}\) The Government appealed to the Eighth Circuit.

Originally the case was to be presented by briefs and arguments, but later counsel were advised it was to be submitted on briefs alone.\(^{34}\) Had there been a thirty-minute (or even an abbreviated twenty-minute) argument by each side, the court might not have disregarded so much of the legislative history which was vital for a meticulous and appropriate disposition. The opinion was written by Judge Ross and joined in by Judge Stephenson. Judge Heaney dissented.

Judges Ross and Stephenson, the majority in McMains, gave four reasons for their unwillingness to regard section 5021 as an expunction statute. First, they deemed the legislative history to be inconclusive. Second, section 5021 did not specifically provide for record expunction, but a law passed by Congress twenty years later did.\(^{35}\) Third, issuance to the youth offender of a certificate setting aside the conviction would militate against an interpretation favoring

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31. 540 F.2d 387 (8th Cir. 1976).
32. Brief of Appellee at 2, United States v. McMains, 540 F.2d 387 (8th Cir. 1976).
33. Id. at 3.
expunction, because if complete and absolute relief had been intended by Congress, a certificate would be unnecessary. Finally, it would be incongruous to infer a right to expunge the record of a conviction when there is in most cases no statutory right to expunge the record of an arrest that does not result in a conviction. The following analysis shows that none of these reasons is tenable. 36

1. The Legislative History

In 1941 a committee of the Judicial Conference of the Senior Circuit Judges began studying punishment. Chief Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit was chairman. Six other judges served; among them were Chief Judge Bolitha J. Laws of the District of Columbia and Chief Judge Orie L. Phillips of Denver who headed the subcommittee which gave special consideration to youth offenders and submitted a proposed bill which provided:

Sec. 13. Upon the unconditional discharge by the Authority [Youth Authority Division] of a youth offender before the expiration of six years from the date of his conviction, where an original sentence was not imposed on such youth offender, and upon the unconditional discharge by the Authority of a youth offender, upon

36. The McMains court also attempted to buttress its opinion by writing that commentators who have addressed the question of expunction under § 5021 are in disagreement. 540 F.2d at 388. For the proposition that the section is not an expungement law, it cited Gough, The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status, 1966 WASH. U.L.Q. 147. Gough, after stating that the FYCA was similar to statutes in nine states, wrote:

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. Though the scope of alleviation provided by them is said to be broader than that provided by pardon, they are clearly not statutes of expungement . . . . Id. at 152 (footnotes omitted). Gough cited three decisions, Garcia-Gonzales v. Immigration and Naturalization Service, 344 F.2d 804 (9th Cir.), cert. denied, 382 U.S. 840 (1965); Hernandez-Valensuelav. Rosenberg, 304 F.2d 639 (9th Cir. 1962); and Tatum v. United States, 310 F.2d 854 (D.C. Cir. 1962). Id. at nn.32, 33. The first two are not on point. See text accompanying notes 28-30 supra. After citing Tatum, there is a "But see" signal to a New Jersey Attorney General's opinion which indicates that Gough is not resting his conclusion about § 5021 on the legislative history of the FYCA. In fact, he made no references whatsoever to the history. Gough's statement, therefore, must be classified as a parenthetical one within the text of a lengthy exposition on state statutes. It only states the obvious to remark that interpretations given state laws which contain, in Gough's words, "essentially similar provisions [as the FYCA] applicable to youth offenders," id. at 152, are irrelevant when construing § 5021.

For commentaries concluding that the McMains type reasoning regarding section 5021 is incorrect, see Saperstein, Expungement for Youth Offenders, 83 (no. 1) CASE & COMMENT 3 (1978); Schaefer, The Federal Youth Corrections Act: The Purposes and Uses of Vacating the Conviction, 39 (no. 3) FED. PROBATION 31 (1975); Comment, Expungement of Criminal Records Under the Federal Youth Corrections Act, 62 IOWA L. REV. 547 (1976).
whom an original sentence was imposed, before the expiration of
the original sentence, the conviction shall be automatically set
aside and held for naught, and the Authority shall issue to the
youth offender a certificate to that effect.37

This section formed the basis of what is now section 5021 of the
FYCA.

The report of the entire committee was made to the Judicial
Conference in 194228 and at congressional hearings the next year.39
Enactment of the proposed bill was delayed, however, because of
objections to the "indeterminate" sentencing provisions. This post-
ponement gave the sponsors several opportunities to reaffirm their
recommendations dealing with youthful offenders, and they did so.40

Finally, new hearings on the proposed FYCA commenced in 1949.
For the purpose of examining the rationale of McMains and similar
decisions, the matter vital to ascertain is whether Congress intended
expunction of youth offenders’ records under section 5021. Yet, cu-
rirously, neither McMains nor its progeny analyzes the complete
legislative history pertaining to the section. To illustrate how much
persuasive testimony is left out of McMains, all the salient mater-
ials from the hearings which do appear in the opinion are capitalized
in the following discussion.

37. COMMITTEE ON PUNISHMENT FOR CRIME OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT
JUDGES, PROPOSED DRAFT OF AN ACT RECOMMENDED TO PROVIDE A CORRECTIONAL SYSTEM FOR
ADULT AND YOUTH OFFENDERS § 13, at 20 (1942).

38. COMMITTEE ON PUNISHMENT FOR CRIME OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT
JUDGES, REPORT TO THE JUDICIAL CONFERENCE ON PUNISHMENT FOR CRIME (1942).

39. Federal Corrections Act and Improvement in Parole: Hearings on H.R. 2140 Before

40. See REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 18-19 (1946). Sec-
tion 13 appeared as follows in the 1946 Report: "In the event an offender is unconditionally
discharged before six years from date of his conviction, the conviction is automatically set
aside and the offender shall be issued a certificate to this effect by the Authority, such
certificate having the same effect as a pardon." Id. at 19. There is nothing to suggest why
the "held for naught" wording was deleted or why the reference to a pardon was included. In
any event, before final passage of the FYCA the pardon reference was left out because it might
have been an unconstitutional interference with the power of the President to pardon. See
Schaefer, supra note 36, at 32. As finally passed § 5021 was intended to, and does, provide
more extensive relief than an executive pardon. Id. A pardon "never erases the basic fact of
conviction. Neither does it remove the social stigma attaching to a criminal conviction. It
involves forgiveness, not forgetfulness." Stanish, The Effect of a Presidential Pardon, 42 (no.
Under the United States Constitution, 39 Ohio St. L.J. 36 (1978); Cozart, The Benefits of
Executive Clemency, 32 (no. 2) Fed. Probation 33, 34 (1968); Schaefer, The Use of Expunged
Convictions in Federal Courts, 35 Fed. B.J. 107, 115 (1976); Note, The Impact of Expunge-
ment Relief on Deportation of Aliens for Narcotics Convictions, 65 Geo. L.J. 1325, 1338
a. The 1949 Hearings

Several weeks before the senate hearings began on September 13, 1949, Senator Kilgore, the chairman of the Judiciary’s subcommittee in charge of the bill, sent letters to the federal district judges to obtain their views on the proposed legislation.41 Fifty-one replied.42 Judge John Paul of Virginia wrote a lengthy letter stating that he saw no reason for passage of the legislation, and he commented on particular sections. He was especially critical of the theory that “no record of an offense against the law should be held against” a person between seventeen and twenty-four years of age, and he also objected to the concept of the sentence being “wiped out” and thus unavailable in case of future offenses.43 Judge Wyche of Virginia wrote Senator Kilgore a thoughtful reply which supported the proposed bill; it included the following paragraph:

Another feature of this act which appeals to me is the provision that a sentence shall be automatically set aside and held for naught upon the unconditional discharge of the youth offender, and that the authority shall issue to the youngster a certificate to that effect. I believe that a boy who makes one mistake should be permanently forgiven that mistake if his subsequent conduct indicates that he has changed his behavior. One blot on his record may cause him great harm when he applies for a position in later years.44

Clearly the two judges who addressed the matter of expunction in responding to Senator Kilgore’s letter believed the young person’s record would be wiped out completely.

A number of witnesses appeared to testify personally before the subcommittee, including Judges Laws, Parker, and Phillips; the Supreme Court has stated that because these judges were sponsors of the FYCA, their views should be considered of “particular importance.”45 Judge Laws, who had served on the Senior Circuit Judges Special Committee Studying General Punishment for Crime and was a drafter of the original proposed FYCA, was the initial

41. Although the letters were addressed to Senator Pat McCarran, chairman of the Committee on the Judiciary, Senator Kilgore’s statement that “[w]e circularized all of the district judges” shows that he and his subcommittee actually sent the letters to the district court judges. Correctional System for Youth Offenders: Hearings on S. 1114 and S. 2609 Before a Subcomm. of the Senate Comm. on the Judiciary, 81st Cong., 1st Sess. at 43 (1949) [hereinafter cited as Hearings].
42. Hearings, supra note 41, at 89-117.
43. Id. at 110.
44. Id. at 117.
witness. He testified: "COMMITTED YOUTH OFFENDERS WHO EARN THEIR FINAL DISCHARGE BEFORE THE END OF THEIR MAXIMUM TERM HAVE THEIR RECORDS CLEARED AND ALL THEIR CIVIL RIGHTS RESTORED." Later, he stated: "WHEN THE DIVISION TURNS THEM OUT AHEAD OF THEIR MAXIMUM SENTENCE, THIS BLOTS OUT THEIR SENTENCE AND LETS THEM GO WITHOUT ANY STIGMA ON THEIR LIFE."

On the second day, Chief Judge Parker, the Chairman of the Judicial Conference special committee which drafted the bill, appeared. After the judge and Senator Kilgore discussed particular aspects of the proposed legislation, the senator described an experiment in the armed services which included review of court martials by appointed civilian judges who could erase the record of the court martial and substitute an honorable discharge for a dishonorable discharge after a specified period of satisfactory service. The senator said, "My understanding is that that has been remarkably successful in returning boys to life with no stain on their records and thereby giving them a chance to straighten out." Judge Parker responded:

I AM GLAD YOU MENTIONED THAT BECAUSE THERE IS ONE FEATURE IN THIS BILL WHICH IS VERY SALUTARY AND THAT IS THAT IF THE YOUTH OFFENDER IS RECLAIMED IN THE OPINION OF THE BOARD AND THEY DECIDE TO RELEASE HIM, THEY CAN STRIKE OUT THE SENTENCE IMPOSED UPON HIM AND COMPLETELY SET ASIDE HIS CONVICTION SO THAT HE WILL NOT HAVE A CRIMINAL RECORD STARING HIM IN THE FACE.

On the final day of the hearings, Judge Phillips appeared. He had been the chairman of the committee of the Judicial Conference of the Senior Circuit Judges, which had given particular attention to the study of treatment of youth offenders convicted in the federal courts. What he said is pivotal, because the McMains court wrote that he expressed a view "contrary" to that of the other judges, and it was on that basis that Judges Ross and Stephenson concluded the legislative history underlying the FYCA was "inconclusive." Since Judge Phillips' statement is the only testimony ever referred to in

47. *Id.* at 19.
48. *Id.* at 45.
49. *Id.*
50. 540 F.2d at 389.
support of a finding that section 5021 is not an expungement law, the entire line of testimony must be reproduced in order to put the record in proper context and not mislead regarding what was understood so clearly about the section.

Judge Phillips. WELL, OF COURSE THE ACT DOES PROVIDE FOR THE WIPING OUT OF THE CONVICTION IF THE YOUTH IS DISCHARGED, REHABILITATED AND BEHAVES HIMSELF AFTER HIS PERIOD OF SUPERVISION. THE PURPOSE OF THAT IS TO HELP HIM GET A JOB AND KEEP HIM FROM HAVING TO BE TURNED DOWN BY A PROSPECTIVE EMPLOYER BECAUSE OF THE FACT THAT HE HAS HAD A CONVICTION. IT DOES NOT ENTIRELY REMOVE THE DIFFICULTY BUT HE CAN SAY TO THE PROSPECTIVE EMPLOYER, "I HAVE GONE THROUGH THIS THING. THEY THINK I AM REHABILITATED AND THEY HAVE GIVEN ME THIS CLEARANCE AND I THINK I AM REHABILITATED AND CAN MAKE GOOD."

It will be a great aid in restoring him to a normal situation in society so that he can go out and get work. There is nothing more important when a man gets out than that he get a good useful job.

Senator Kilgore. That is one thing that we do not look at. In the Army, for instance, in West Virginia we had a young man who had a magnificent [sic] record as a pilot of multiple-engine planes. At least three air lines would like to have him as a pilot but for a purely technical violation of regulations he got a dishonorable discharge. Until that can be wiped out they cannot hire him. He would have to have an honorable discharge, not even a blue discharge would suffice. That situation is simply eliminating that young man from a job for which he is especially well fitted. He flew the Hump more than any pilot they had.

Mr. Bennett. As was pointed out the other day, it is the same provision as that which the Army has for restoration of a man to duty.51

It should be noted that after the judge's statement, the senator's immediate response is to discuss the necessity of having a clear record, and then Mr. Bennett, the Director of Prisons, United States Department of Justice, referred back to the senator's description during the previous day of procedures in the armed services pursuant to which service personnel could return to life "with no stain on their records." Considering this testimony, there can be little doubt that Judge Phillips, Senator Kilgore, and Mr. Bennett regarded the proposed FYCA as a bill which mandated expunction of

51. *Hearings, supra* note 41, at 70.
a youth offender's criminal records.

Therefore, the testimony of Judges Laws, Parker, and Phillips is not contradictory, and it is simply baffling to read in the *McMains* opinion that Judge Phillips expressed a view "contrary" to the other two judges. Judge Laws said the records were to be cleared so there would be no stigma; Judge Parker told the committee there would be no remaining criminal record; Judge Phillips said the conviction was wiped out. The common sense interpretation of "wipe out" is corroborated by the technical definitions: to wipe out means to "erase, obliterate," 52 or "to destroy completely." 53

Judge Phillips, however, also observed that a young person seeking a job might still have a problem. Did the *McMains* court believe that this reference to a continuing problem signified that the judge thought the record would not be wiped out, despite the language two sentences before? Apparently so, although that would be a strained interpretation. The *McMains* court never explained why it decided that Judge Phillips' testimony was contrary to that of Judges Laws and Parker. Nonetheless, Judge Phillips' reference to the difficulty a young person has after expunction of his criminal records surely was concerned with the fact that people, especially those in small or close-knit communities, remember convictions for years. In such situations, the certificate setting aside the conviction can be shown, but it is unrealistic to think that showing a certificate will completely overcome the effect of a criminal record on employment opportunities; 54 however, in some cases it may be helpful as tangible evidence of the government's faith in this youth's rehabilitation.

Reading the *McMains* opinion by itself, one would remain unapprised of further testimony at the hearings which showed that those in attendance were convinced that a youth offender's criminal records were to be expunged. During the afternoon session on the last day, James E. Palmer, president of the Federal Bar Association, appeared to support the bill on behalf of that organization. He stated:

I commend the part of the bill that wipes off the offense, so to speak. To me that is very highly important in instilling in the hearts and minds of these youths that we turn back some inspira-

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52. Webster's New World Dictionary of the American Language 1631 (2d ed. 1976).
53. Random House Dictionary of the English Language — Unabridged Edition 2623 (1966) ("Wipe . . . 2b: to completely expunge: obliterate, abolish, cancel . . . to cause to cease to exist; annihilate — used with out.")
tion to go ahead. Their crime has been wiped out and their Nation still has confidence in them, and they will probably make good citizens, all of them.\textsuperscript{55}

John Holzworth, a former district attorney in Westchester County, New York, also appeared on the last afternoon and described a system used by New York district attorneys to prevent recidivism. He said the "biggest handicap a man can have against him, no matter how small an offense is, is a conviction of and a record of felony . . . ."\textsuperscript{56} Thus, in New York offenders went through the process "without even having the stigma of an indictment or a conviction."\textsuperscript{57} Then Mr. Holzworth said the New York system he described was an excellent example of how the bill before the committee would operate.\textsuperscript{58} Referring to the offenders, he testified: "If he [the apprehended person] did not come back and it worked out, that was the end of it; there was nothing on record against him."\textsuperscript{59}

\textbf{b. Other Jurisdictions}

In addition, sponsors of the FYCA had precipitated the adoption of similar legislation in five states,\textsuperscript{60} including Massachusetts and Texas. The Massachusetts law established a Youth Service Board\textsuperscript{61} and provided, \textit{inter alia}, that the effect of a discharge when ordered by the board restored the young person to all civil rights and had the effect of setting aside the conviction.\textsuperscript{62} The Texas Legislature established a State Youth Development Council\textsuperscript{63} in 1950, and the provisions of its law regarding restoration of civil rights and withholding records from public inspection are almost identical to those of Massachusetts.\textsuperscript{64} Even though the provisions are not worded as expungement laws, the effect is the same because civil disabilities are removed and records are withheld from scrutiny. Because the FYCA is modeled to some extent on these statutes, they furnish an additional basis for ascertaining a legislative intent that section 5021 was designed as an expungement law.

\begin{itemize}
\item \textsuperscript{55} \textit{Hearings, supra} note 41, at 82.
\item \textsuperscript{56} \textit{Id.} at 84.
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.} at 85.
\item \textsuperscript{60} \textit{Id.} at 12 (testimony of Judge Laws).
\item \textsuperscript{61} Ch. 310, § 22, 1948 Mass. Acts (current version at Mass. Gen. Laws Ann. ch. 120, § 1 (West 1969 & Supp. 1979)).
\item \textsuperscript{62} \textit{Id.} § 21.
\item \textsuperscript{63} Ch. 538, § 4, 1949 Tex. Gen. Laws 988 (repealed 1977).
\item \textsuperscript{64} \textit{Id.} §§ 34-35.
\end{itemize}
c. The 1961 Amendment

The most glaring omission in *McMains* is the absence of any reference to remarks made in 1961 when section 5021 was amended to add subsection (b) to include those committed to the youth division as well as those placed on probation. The amendment’s sponsor, Senator Dodd, said:

I think section 5021 represents an important factor in the treatment of youthful offenders. It provides an additional incentive for maintaining good behavior by holding out to the youth an opportunity to clear his record . . . . For those youths who demonstrate a willingness to help themselves, every reasonable opportunity is afforded to assist them in making a new start.65

It is noteworthy that Senator Dodd’s comments were never mentioned in *McMains*, despite the fact that the youth offender there had received his certificate setting aside the conviction under subsection (b).

The legislative history outlined above clearly demonstrates that Congress intended section 5021 to be an expungement statute. The sponsors said the records of young persons released early are wiped out and youth offenders understand at the time of sentencing that they are eligible for and should work towards obtaining the benefits held out by the government in section 5021. Jettisoning this promise of a chance to rid oneself of a lifetime, extra-judicial second sentence is unwarranted.

2. The *McMains* Analysis

After determining that the legislative history was inconclusive, the *McMains* court interpreted section 5021 by what it referred to as its “own reading.” The court addressed the following questions:

a. Did Congress manifest its intent clearly enough in section 5021 to authorize expunction?

*McMains*’ first contention was that the language of section 5021 does not specifically provide for record expunction. The court was “confident that had Congress intended to authorize expunction, it would have manifested that intent with greater clarity. It has done so on other occasions. See 21 U.S.C. § 844(b)(2).” 66 There are a

65. 107 CONG. REC. 8709 (1961). The *McMains* court also failed to mention that the Eighth Circuit, sitting en banc, had stated previously in Brager v. United States, 527 F.2d 895, 897 n.1 (8th Cir. 1975), that “a youth offender may be able to have his conviction expunged from his record.”

66. 540 F.2d at 389.
number of responses to the court's position. The question is what would the average person mean by the words "set aside the conviction." The ordinary meaning of "set aside" is to dismiss from the mind, to discard, vacate, annul, quash, make void. When one adds to this definition the overwhelming evidence at the hearings that the youth's records were intended to be "wiped out," the purpose of section 5021 is clear.

Congress intended expunction. With respect, the McMains conclusion is, to say the least, not a little remarkable. The salient thought expressed at the hearings and by Senator Dodd at the time of amending section 5021 is clear and unequivocal; it was an overwhelming penchant for expunction. Yet, an interpretation for expunction is rejected because Congress was more explicit in drafting a drug law twenty years after passage of the FYCA. In 1949, the federal judges who drafted the FYCA had no model acts to follow, and they were unaware of the intricate procedures used by agencies to wipe out records from the vast data collection systems kept by state and federal police. This became apparent only after the Vietnam demonstrations and the large number of drug convictions in the late 1960's.

Additionally, the fact that Congress used a different approach in 1970 means little regarding its intentions in 1950. Even more important, under 21 U.S.C. § 844, which the McMains court cited as showing a clearer intent to expunge, an offender of any age convicted of a first offense for possession of a controlled substance can be placed on probation without being sentenced. After the probation period all proceedings are dismissed without a court adjudication of guilt and the individual is not considered to have been convicted for any purpose. By providing that no public record would be kept of a first offense, Congress intended to erase completely the stigma of a conviction and its collateral burden. The incongruous result is that an adult sentenced under the drug law can be the recipient of more favorable treatment than a young person sentenced and receiving treatment under the FYCA for the same crime. This violates one of the earliest rules regarding interpretation of statutes, that the judge should always make such construction as shall advance the

68. See Kutcher, Looking at the Law, 42 (no. 3) Fed. Probation 60, 61 (1978).
70. If the first offender is under 21, 21 U.S.C. § 844(b)(2) provides that all records be expunged except a nonpublic one to be maintained by the Department of Justice for use in determining future eligibility under § 844(b)(2).
true intent of the legislators.\textsuperscript{71} Congress never intended such an inconsistency. It denies fundamental fairness to require a youth offender to undergo a comprehensive scheme of treatment and then be in a worse position than an adult drug offender whose records were cleared. Thus, the first reason offered by Judges Ross and Stephenson does not support their decision.

\textbf{b. If the records were wiped out, what purpose would be served by a certificate showing that fact?}

The \textit{McMains} court next states that section 5021's provision for the issuance of a certificate to the offender upon the setting aside of the conviction militated against a construction favoring expunction. The court reasoned that a certificate would be unnecessary if there were complete expunction of the records. This completely disregards the practicalities. Expunction would neither reach newspaper reports nor alleviate the situation in small communities where a conviction often is common knowledge.\textsuperscript{72} This is precisely what Judge Phillips discussed at the hearings. He said positively that the conviction was wiped out, but that the young person might yet have a problem if the employer knew of the conviction. It is in this type of situation that the certificate is useful to prove there has been a clearance. Judge Phillips' testimony before Congress directly refutes the statement in \textit{McMains} that a certificate would be unnecessary if there were expunction of the records.

In addition, the certificate is tangible evidence to the young person not only that the conviction has been set aside, but also that the government has confidence in his/her future. This point was made to Congress by the president of the Federal Bar Association.\textsuperscript{73} Finally, delivery of the certificate can serve as a triggering device to an official agency informing it to wipe out the records.

\textbf{c. Was it incongruous for Congress to provide for expunging conviction, but not arrest, records?}

For its final reason that section 5021 is not an expungement law, the \textit{McMains} court stated it would be incongruous to infer a statutory right to expunge a conviction when there is no similar right in most cases for expunging an arrest record that does not result in prosecution. This ignores the fact that the subject of the FYCA was rehabilitation of those convicted of federal crimes, not rehabilitation of persons arrested for federal crimes. Concluding that expunci-
tion was essential for those who have successfully completed a treatment program under the FYCA while finding identical relief unnecessary for those merely arrested is well within the familiar rule that Congress does not have to deal with all situations at once; it may apply a remedy to one problem while postponing or even neglecting others. In this regard, the Supreme Court has stated that congressional judgment is final so long as the problem is immediate and the solution rational. 74

d. When enacting the FYCA in 1950, did Congress balance the usefulness of permanent FBI records against the rehabilitative importance of a second chance for youth offenders?

After discussing the three questions above, the McMains court summarily attributed the final form of the FYCA to an attempt by Congress to balance the goal of rehabilitating youth offenders against the societal interests served by criminal recordkeeping. 75 Nothing from the FYCA hearings supports this and no corroboration is offered in the court's opinion.

In Dorszynski v. United States, Chief Justice Burger said the FYCA was "designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket, [16 to 22] to rehabilitate them and restore normal behavior patterns." 76 The Dorszynski opinion does not say precisely how this is to be accomplished, but congressional intent is clear about the goal of relieving youths of tainted records. That purpose was not weighed by Congress against the worth of criminal records; to the contrary, it was implicit that the records were to be set aside and wiped out, not stored and distributed. 77

e. Apart from the FYCA, do United States District Courts have inherent power to order expunction?

The McMains court, having determined that section 5021 does

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74. See Williamson v. Lee Optical, 348 U.S. 483, 489, rehearing denied, 349 U.S. 925 (1955). In Katzenbach v. Morgan, 384 U.S. 641, 657 (1966), the Court stated "that a 'statute is not invalid . . . because it might have gone further than it did,' . . . that a legislature need not 'strike at all evils at the same time,' . . . and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . .'" Id. at 657 (citations omitted).
75. 540 F.2d at 389.
77. Enormous sums are spent collecting, storing, retrieving, and disseminating information from dossiers throughout the United States; the claim that such dossiers serve a critical role in the control of crime has gone virtually unchallenged. A congressional study of the costs and benefits probably would be worthwhile to evaluate the damage to human lives against the danger to the public of having fewer criminal files. See generally A. NEIER, supra note 11; A. Nussbaum, supra note 11; The Collateral Consequences of a Criminal Conviction, supra note 54. Statements supporting maintenance of criminal records for law enforcement purposes usually are unsupported by data. E.g., Comment, Maintenance and Dissemination of Criminal Records: A Legislative Proposal, 19 U.C.L.A. L. Rev. 654, 668 n.87 (1972).
not permit expunction, considered next whether the sentencing judge had the inherent power to wipe out the records. In cursory fashion, the court said no such authority existed because the power of expungement is a narrow one not routinely used, and because Duane Thomas McMains had shown no extraordinary circumstances warranting clearance of his records. There was no discussion concerning whether expunction of a youth offender's records furthers the goals Congress wanted to achieve by enactment of the FYCA. The district court judge, on the other hand, had perceived, quite correctly, that this was the proper question, as did Circuit Judge Heaney in the 

McMains dissent. In a brief opinion, Judge Heaney wrote:

I respectfully dissent. The admitted doubt as to congressional intent should be resolved in favor of giving district court judges the discretion to expunge the record of youthful offenders. These judges are in the best position to determine whether the broad purposes of the Act will be best served by expunging the record or leaving it as is. I find no abuse of discretion here and would affirm the district court.

Heaney's view regarding the inherent power of a federal district judge is sound. The authority of federal courts to advance congressional policies was recognized in United States v. Glasgow when the court said "[i]n order to effectuate the purposes of the Youth Corrections Act, the court, under its inherent powers as an Article III court having equitable jurisdiction may, in the appropriate situation, order the expungement and sealing of the offender's records." This is in conformity with a cardinal FYCA principle of making "available for the discretionary use of federal district judges a system for the sentencing and treatment of youth offenders."

The history of the FYCA shows clearly that its overall concept (like the English Borstal System upon which it was patterned) is to get young persons through the turbulent years, from fourteen to

78. 540 F.2d at 390.
79. Id.
80. 389 F. Supp. at 224 n.17. In United States v. Hall, 452 F. Supp. 1008 (S.D.N.Y. 1977), Judge Motley refused to order expunction on the basis of the presentence report, probation reports, and facts of the case, but she recognized that "a district court has the inherent power to expunge a criminal record if, in the particular case, expunction would further the purposes of the Youth Corrections Act." Id. at 1013.

The Administrative Office of the United States Courts believes "there is great merit to the position articulated by Judge Constance Baker Motley in United States v. Hall, that a district judge has inherent power to order expunction or sealing in an appropriate case, to further the purposes of the FYCA." Kutcher, supra note 68, at 62. (Mr. Kutcher is Assistant General Counsel to the Administrative Office).
twenty-one, and to ensure that they become good citizens. Read as a whole and in relation to the ends in view, the FYCA demonstrates that this was to be accomplished by treatment, rather than by retribution. As envisioned by the act’s sponsors, part of this treatment was to be an opportunity for a youngster to earn a clean record.

At the time the act was passed, Congress had decided that the earlier methods for treating criminally inclined youths were inadequate to avoid recidivism. Moreover, it was aware of the direct correlation between employment and the tendency to relapse into crime and antisocial behavior patterns. As the 1975 Vera Institute of Justice report states, “employment is not only necessary for rehabilitation, but the process of employment itself with its discipline and associated learning process is an important part of the rehabilitative process.” Unquestionably, record clearing was made an integral component of the FYCA in order to assist youth offenders in the marketplace and to give them a strong incentive to seek early release by responding to treatment or by complying with the conditions of their probation.

By denying federal judges the authority of expunction, McMains, rather than advancing the beneficial goals of the FYCA, is indicative of a current philosophy which advocates punishing every offender in a legislatively prescribed way. The object of this philosophy is to take away from criminal justice personnel the freedom to exercise their considered judgment in the imposition of alternative punishments. The wisdom, compassion, expertise, and judiciousness of judges is to be eliminated for bureaucratic uniformity. The trouble with this view is that while experts have differing theories about society at large, judges do not sentence society at large; they

82. The term “treatment” appears throughout the congressional hearings and the FYCA. See, e.g., Hearings, supra note 41, at 19, 43, 61, 63; 18 U.S.C. §§ 5010(b)-(e), 5011, 5012, 5014, 5015(a), 5020, 5025(a)-(c). See also text accompanying note 65, supra.
86. D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 311-61 (1964); AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE — STANDARDS RELATING TO PROBATION § 4.3 (1970); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT § 4-1005(d) (1978).
When enacting section 5021, Congress intended to treat and sentence youth offenders individually and to give them a chance to atone for their mistakes. Surely an FBI notation reading “conviction set aside” at the end of a rap sheet is not what the sponsors of the FYCA had in mind as a procedure which “blots out their sentence and lets them go without any stigma on their life.” Such a notation certainly could not be regarded as a treatment or as an aid in rehabilitation. The only fair conclusion is that Congress did not intend the use of a system which brands youth offenders forever untrustworthy and compromises their job prospects.

Assuming, for the sake of argument, that section 5021 is not an expungement law, then to carry out congressional goals under the FYCA, federal district judges must be able to exercise their discretion to order the expunction or sealing of criminal records on a case by case basis. If (as the McMains court believes) they cannot be entrusted to do this, we have reached a truly regrettable split among the federal judges.

C. The Aftermath of McMains, a Continuing Dilemma for Youth Offenders Resulting from Confusion Among Federal Judges

Three courts have followed the views of the McMains court to justify denial of record expunction for youth offenders. For example, in United States v. Doe, the most important of the decisions, the Sixth Circuit backed away from earlier statements it made in United States v. Fryer that section 5021 “is by legislative design an

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90. See text accompanying note 47 supra.

After this article was completed and substantially through the editorial process prior to publication, Doe v. Webster, No. 77-2011, 48 U.S.L.W. 2103 (D.C. Cir. July 24, 1979), was decided. Stating that its holding and that of McMains possibly rested on differing interpretations of the word “expungement,” the court ordered the FBI to expunge from its records an Arizona drug conviction which had been set aside under the FYCA. According to Doe v. Webster, the FBI must and the youth offender may respond in the negative “to any and all questions concerning his former conviction.” The opinion states, however, that the conviction record may be placed in a separate storage facility so as to be available for use in criminal investigations. The court refused to expunge the petitioner’s arrest record, and this arrest record plus the record of the Arizona court proceedings were left open. Although the holding is contrary to McMains, the decision falls far short of the congressional intent that a youth offender is entitled to a clean record in order to ensure a second chance without any stigma on his or her life.
92. 556 F.2d 391 (6th Cir. 1977).
expungement statute . . . .”

93. 545 F.2d 11, 13 (6th Cir. 1976).
94. 556 F.2d at 393.
96. See Schaefer, supra note 36, at 33-35. See also Kutcher, supra note 68, at 60-61; Saperstein, supra note 36, at 6.

In the area of professional licensing, In re Estes, 580 P.2d 977 (Okla. 1978) is an encouraging decision which appears critical of the McMains philosophy. In reversing a denial of an application for admission to the bar by examination, the Supreme Court of Oklahoma said:

"Courts differ as to the effect of setting aside of the conviction under § 5021. We leave this decision to the federal courts. However, there seems to be no doubt the intent and purpose of the Act is to encourage rehabilitation which will prevent such a conviction from haunting the offender for life.

Id. at 979 (footnotes omitted)."
defendant’s record, there is case law which states the contrary view that section 5021 is not an expunction statute. Probationers, therefore, should be advised of both views so they can act accordingly, particularly in situations in which they must answer questions concerning their prior records, until a more clear and uniform policy is established by the courts.

Probation officers may wish to suggest that their probationers seek a presidential pardon to supplement their section 5021 setting aside certificate. This course of action is advantageous because the effects of such a pardon are more clearly established under the case law than a section 5021 certificate. Moreover, a survey conducted by the Administrative Office several years ago indicated that few states treated the section 5021 certificate as a restoration of the offender’s civil rights. Until the meaning of a section 5021 certificate is clearly established by the federal courts, therefore, probationers may be advised to seek a presidential pardon in addition to their section 5021 setting aside certificate.97

The suggestion may have merit, but it is not the solution. First, youth offenders who have received certificates automatically setting aside their convictions should not have to expend time, energy, and money trying to obtain a pardon. Second, expunction is much more helpful than a pardon from the standpoint of obtaining employment and assuring rehabilitation. Third, it is clear that the FYCA was intended to give the young people more relief than a pardon because Congress expressly rejected the language in proposed section 5021 which read “and the certificate shall have the same legal effect as a pardon.”98 Lastly, the burden should be on either the Supreme Court or Congress to bring about national uniformity of interpretation and practice. To do that, one of the following recommendations should be carried out.

IV. Recommendations

Recommendation One. In accordance with its usual practice when federal circuit courts of appeals are in direct conflict on an important matter of federal law, the Supreme Court should grant certiorari at the earliest opportunity99 in order to hold that a discharge under section 5021 expunges all records and lets youth offenders “go without any stigma on their life.” It would be helpful if the opinion expressly advised former youth offenders that they can

98. Hearings, supra note 41, at 7. It was Judge Phillips who suggested deleting the language. Id. at 71. See also Schaefer, supra note 36, at 32; Stanish, supra note 40, at 4, 6.
answer "no" when asked if they have been convicted of a felony.

**Recommendation Two.** Recent proposed amendments to the federal criminal code would repeal the FYCA even though no showing has been made to support the wisdom of doing this.\(^{100}\) In the absence of such a showing, the FYCA, which was reflected upon for so long by so many prestigious individuals and groups in the 1940's, should not be lightly discarded.\(^{101}\) Nevertheless, because the state has a legitimate right of access to records in case of a subsequent offense, many believe that a more desirable balance between society's interests in wiping out the records for rehabilitative purposes and its interest in disclosure would be better served if youth offender files were automatically sealed upon discharge rather than expunged. A sealing proposal entitled "Proposed Amendment to 18 U.S.C. § 5021" appears in the appendix to this article. The times when the records could be unsealed are listed in paragraph (b); the principle utilization would occur in the event of a later offense.\(^{102}\)

**Recommendation Three.** An individual's legitimate right to treatment, rehabilitation and privacy, and the public interest in disclosure could be balanced by providing that after a person has been free from the jurisdiction or supervision of any criminal justice agency for two years in the case of a misdemeanor or five years in case of a felony, his/her records would be removed to a separate file and not released to anyone unless relevant for law enforcement purposes, for a determination of an issue involving rights and liabilities of someone other than the arrestee or offender, or for determining sentence on a subsequent violation. The records could also be opened if the data were useful to counsel for the offender, to a court, to a government prosecutor, to qualified persons for research related to the administration of criminal justice, or to the head of a treatment facility or agency to which an arrestee or offender has been committed.\(^{103}\)

**Recommendation Four.** If expunction or sealing of records is politically infeasible because of opposition, especially from the press\(^{104}\)

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102. The fact that there would be no record of the offense under the FYCA for use "in case of future offenses" was pointed out to Congress when it was considering the proposed bill in 1949. See text accompanying note 43 supra.
103. See generally Comment, Maintenance and Dissemination of Criminal Records: A Legislative Proposal, supra note 77, at 677 ("Model Criminal Records Disclosure Act").
104. See Weinstein, Confidentiality of Criminal Records — Privacy v. the Public Interest, 22 VILL. L. REV. 1205, 1212-13 (1977); Comment, The Press and Criminal Law Privacy, 20
and law enforcement organizations, the approach of the Uniform Law Commissioners' Model Sentencing and Corrections Act is a commendable alternative. Under this act, criminal records stay open but it is an unlawful employment practice to discriminate against a person because of his conviction unless the underlying offense directly relates to the duties and responsibilities of the particular occupation, profession, or educational endeavor involved.\footnote{105}

In making the determination of causal relationship, consideration may be given to whether the work provides an opportunity for commission of similar offenses, the elapsed time since release, subsequent offenses, and whether there would be association with the victim involved.

V. CONCLUSION

After reflecting upon the matter for a number of years, it is my opinion that "tracking" rehabilitated first offenders by means of nationwide computer systems is unmerciful. At some point a person who has fallen from grace on a single occasion should be given a second chance, free from the gnawing nightmare of unrelenting, inescapable pursuit. Expunction is the best way to achieve the goal; sealing the records or making the use of such records an unfair employment practice are fair alternatives.

Regardless of what else is accomplished, either Congress or the Supreme Court should make clear that federal district judges have inherent power to order the expunction or sealing of a youth of-

\footnote{St. Louis U.L.J. 509 (1976). Proposed regulations of the Law Enforcement Assistance Administration would have denied funds for crime prevention in states which compiled criminal history records alphabetically rather than chronologically. 40 Fed. Reg. 22,115 (1975). After the press complained this would make the data irretrievable, the rules were changed. See Goodale, Massachusetts Court Grapples With Criminal Suspects' Right of Privacy, Nat'l L.J., June 18, 1979, at 31, col. 2. Arthur Miller, author of The Assault on Privacy: Computers, Data Banks and Dossiers (1971), has stated:

Vigorous and diligent reporters can effectively monitor the criminal justice system without examining the records of those who have paid their debt to society, who have met the stringent conditions of the statutes, and who deserve a second chance. If we believe in rehabilitation . . . then we must tolerate some risks. We should permit some people to reenter the mainstream of society by eliminating the social and vocational ostracism associated with an ancient record that does not reflect their present worth. How can you quarrel with the principle of sealing the record of a youthful peccadillo which has never been repeated?

Saturday Review, July 21, 1979, at 23, col. 2.}

fender's records on a case by case basis. This would not only over-
turn McMains but would be in accord with the American Bar Assos-
ciation Standards Relating to Probation, which recommend that
every jurisdiction have a method by which the collateral effects of
a criminal record can be avoided or mitigated following successful
completion of a term on probation.\textsuperscript{106}

Section 5021. Nullification of conviction and sealing of records.

(a) The division may unconditionally discharge a committed youth offender before the expiration of the maximum sentence imposed upon him.

(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court.

(c) An unconditional discharge of the youth offender pursuant to subparagraph (a) or (b) or this section shall cancel and nullify the conviction. A certificate to that effect shall be issued to the youth offender by the division or by the court giving his/her discharge and a copy of such certificate shall be transmitted to the Federal Bureau of Investigation and to any other agency which the division or the court has reason to believe may have records pertaining to the youth offender's offense. No youth offender whose conviction is nullified under the provisions hereof shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement, in response to any inquiry made of him/her for any purpose, by reason of his/her failure to recite or acknowledge such arrest or indictment or information, trial, finding of guilty, conviction, sentence, commitment, probation, discharge, or any other matter occurring at any stage of enforcement of the criminal laws against him/her from arrest or indictment through release from supervision.

(d) Subsequent to the issuance of a certificate pursuant to subparagraph (c) of this section, all records relating to the youth offender's offense shall be sealed by the agency or agencies having custody or control thereof. The term "records" means any item, collection, or grouping of information about such offense that is maintained by an agency, including, but not limited to, any data identifiable to the youth offender compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision. Such data includes any identifying number, symbol, or other identifying particular assigned to the youth offender, and any information in connection with the arrest, detention, confinement, indictment, trial, finding of guilty, probation reports, presentence reports, sentence sheets, conviction, sentence, commitment, correctional supervision, probation, discharge, recordings, reports, information obtained by informants or investigators, memoranda, cards, books of entry, police blotters, fingerprint data, palm prints, hand printing, footprints, measurements, handwriting exemplars, lineups, voice samples, comparative personal appearance, photographs, writings, and information of every kind, and all copies of the foregoing without exception that would in any way reflect any fact relating to or growing out of the youth offender's offense.

(e) Within 60 days after receipt of a copy of the certificate referred to in subparagraph (c), the agency to which such copy was transmitted shall mail to the sentencing court a written verification, signed by an authorized officer or employee, certifying that all records relating to the youth offender's offense have been sealed or that it has no such records. In the case of the Federal Bureau of Investigation, it shall in addition verify that it promptly notified all private and public agencies and persons to whom it transmitted records regarding the youth offender's offense to deliver all such records to the Bureau and that it requested no copies or records whatsoever be retained.

(f) Nullification of a conviction and the sealing of records pursuant to subparagraph (d) shall not:

1. Require reinstatement to any office, employment, or position which was previously held and lost or forfeited as a result of the conviction.
2. Preclude proof of a plea of guilty whenever such plea is relevant to the determination of an issue involving the rights and liabilities of someone other than the offender.
3. Preclude proof of the conviction as evidence of the commission of a crime, whenever the fact of its commission is admissible under applicable rules of evidence for the purpose of impeaching the offender as a witness.
4. Preclude use of the conviction for the purpose of determining sentence on any subsequent conviction of a crime of violence. The term "crime of violence" includes, but is not limited to, murder, manslaughter, rape, kidnapping, maiming, robbery,
and assaults with deadly weapons, or an attempt to commit any of the aforemen-
tioned.
5. Preclude proof of the conviction as evidence of the commission of a crime in
the event an offender is charged with a subsequent offense and the penalty provided
by law is increased if the prior conviction is proved.
6. Preclude proof of the conviction to determine whether an offender is eligible to
have a subsequent conviction nullified and sealed in accordance with this act.
7. Preclude an employee of an agency from disclosing records to the sentencing
court.
8. Preclude the sentencing court, in its discretion, from disclosing records to coun-
sel for the youth offender, to the attorney for the government, or to qualified persons
for research related to the administration of criminal justice.
9. Preclude the court from releasing information to comply with a written inquiry
from another federal court, from a state court of general jurisdiction, or from the
director of a treatment agency or facility to which the offender has been committed
by the court. The court shall not release information in the sealed records to comply
with any other request, and responses to such inquiries shall be the same as respon-
ses made about persons who have never been the subject of a conviction.

(g) Any person who willfully disseminates, maintains, or uses information sealed pur-
suant to this section or who willfully maintains records in violation of this section, knowing
such dissemination, maintenance, or use to be in violation of this section, shall be guilty of a
misdemeanor and fined not more than $5,000; and may be removed from office or employ-
ment.
(h) Any officer or employee who signs a verification pursuant to the provisions of subpara-
graph (e) which contains a statement of fact which s/he knows, or in the exercise of reasonable
diligence should have known, is false shall be guilty of a misdemeanor and imprisoned for
not more than one year or fined not more than $5,000.
(i) Any person who knowingly and willfully fails to seal any records which s/he knows
should be sealed under the provisions of this section shall be guilty of a misdemeanor and
fined not more than $5,000.
(j) The term "agency" specifically includes, but is not limited to, all courts, all establish-
ments in the executive branch of the government, bureaus, boards, commissions, sections,
offices, divisions, departments, agencies, authorities, facilities, independent establishments
or corporations in which the United States has a proprietary interest, non-federal facilities
which contract for the custody, care, subsistence, education or training of youth offenders,
police, prosecutors, corrections personnel, other individuals and organizations concerned with
law enforcement, states, territories, and all subdivisions of such states and territories.
(k) The status of each youth offender or young adult offender unconditionally discharged
by the division or by a court between September 30, 1950, and the effective date of this act
shall be identical to that before the event occurred upon which s/he was convicted, the
proceedings in his/her case shall be deemed never to have occurred, and all records relating
to said event shall be completely expunged.
(l) All provisions of this section shall apply to young adult offenders whose sentences are
or have been imposed under the Federal Youth Corrections Act as provided in 18 U.S.C. §
4209.