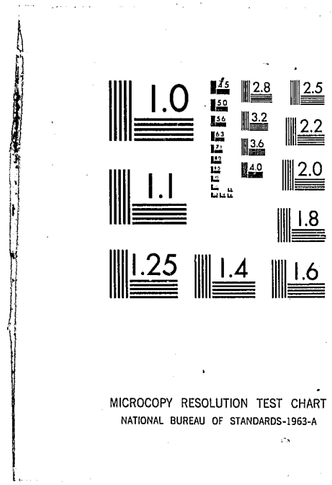

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Technical Report No. 27

SEALING AND PURGING OF CRIMINAL HISTORY RECORD INFORMATION

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SEALING AND PURGING OF CRIMINAL HISTORY RECORD INFORMATION

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PREFACE

SEARCH is a unique organization designed to bring the greatest force of expertise to bear on problems facing criminal justice agencies in all disciplines and at all governmental levels. A fundamental task of SEARCH is continuing research into justice system problems. Periodically, SEARCH looks at timely policy issues and selects a few for indepth examination. The area of sealing and purging is such a policy issue.

The following report is based on a year-long study of sealing and purging practices and procedures. The study involved eight site visits to repositories of criminal history records as well as an examination of state and Federal statutory and case laws. After a review of the laws and operating procedures currently being utilized, a paper on the subject was developed. That document was scrutinized by members of an Advisory Committee (listed in the roster of committee members immediately preceding this preface) composed of legislators, information managers, representatives from the courts, police, and prosecution representatives. The Advisory Committee was convened on two separate occasions; their expertise helped to refine the report that follows.

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PART 1

Section 1

OVERVIEW

As the 1980's begin there are few criminal justice information issues that generate as much controversy as standards for sealing and purging. The dispositive effect of a seal or purge order undoubtedly accounts for much of this controversy. Once a criminal history record is sealed or purged, it generally cannot be obtained by the public or even by criminal justice officials. Thus, sealing and purging policies affect significant personal and societal interests, among which are the privacy rights of record subjects; agencies' attempts to become more effective and more efficient; and society's interest in reducing the risks to public safety posed by the subjects of criminal records.

By any standard there is a remarkable amount of disagreement among the states regarding basic sealing and purging issues. For example, states disagree about the definition of sealing and purging; about the type of records subject to such orders; about the mechanisms for triggering such orders; about the substantive criteria for entitlement to such orders; about the role of legislative and administrative bodies in making sealing and purging policies; and about the consequences of such orders.

SEARCH and the Advisory Committee that participated in this project do not advocate that every state adopt identical sealing and purging standards, for the effective functioning of the criminal justice system and the exchange among the states of criminal history records do not require such uniformity. On the other hand, the criminal justice system and the interstate exchange of information will be benefitted by greater understanding of sealing and purging laws and their effects, and by the achievement of a basic level of agreement among the states concerning the definition, scope and impact of sealing and purging standards.

This report highlights the policy interests and conflicts raised by sealing and purging standards. It also summarizes current constitutional and statutory law which governs sealing and purging. Finally, it proposes a set of model sealing and purging standards for criminal history record information held by criminal justice agencies.

Definition of Sealing and Purging

Few terms have suffered as many differing definitions and uses as the terms "sealing" and "purging."[1]

In most jurisdictions, but by no means all, the word sealing is used to describe a procedure whereby a record is physically removed from a record system and its dissemination is substantially or altogether restricted. In most jurisdictions, but again by no means all, the word purging is used to describe a procedure whereby a record is physically destroyed.

The Advisory Committee recommended that sealing be defined as a prohibition on dissemination except to the record subject or pursuant to a court order. Purging should be defined as destruction.

> Seal means to prohibit access to criminal history record information except to: (1) employees of the repository for record management purposes only; (2) the record subject; (3) a party for an authorized research or statistical purpose; (4) a party authorized access to the record by a court order.
>
> Purge means to destroy, blot out, strike out, or efface so that no trace remains. Expunge is a synonym. Destruction of personal identifiers so that the record or entry cannot be associated with an individual is a form of purging.

Effect of Sealing and Purging

The impact of a sealing or purging order can hardly be overstated. Such an order either altogether prohibits the use of a criminal history record or drastically limits its use. A record that has been purged (and in many jurisdictions a record that has been sealed) cannot be used by law enforcement officials for investigative or identification purposes; by prosecutors for making pre-trial decisions; by courts for making post-trial decisions; by parole boards or probation officers for making determinations regarding supervision; by federal government agencies or the military for employment suitability and security clearance determinations; by state and local agencies for licensing and employment decisions; and by the private sector for employment, credit, insurance and numerous other decisions.

Thus, the effect of either a sealing or a purging order is to virtually strip the record of its utility. Further, many sealing and purging laws not only destroy or prohibit access to records, but also authorize the record subject to deny the existence of the purged or sealed record and the occurrence of the event to which it pertains. In this way sealing and purging accomplishes what some observers characterize as a "rewriting" of history.

The effect upon the record subject is just as definitive. Subjects whose records are sealed or purged are largely freed of all of the disabilities, formal and informal, that accompany the existence of a criminal record. Subjects who are authorized to deny the existence of the record and the criminal occurrence to which it pertains, can walk away from their past with the assurance that third parties will not be able to obtain any conflicting information from a criminal record repository. For example, as a practical matter, those subjects usually escape penalties imposed by law on convicted felons--such as restrictions upon voting and entitlement to certain kinds of licenses. At the same time subjects of purged or sealed records avoid a multitude of informal "penalties" that are typically imposed on criminal record subjects by employers, credit grantors, and other private sector decisionmakers.

Rationale for Sealing and Purging

Sealing or purging serves a number of important and valid interests. One of the most common (and least controversial) is to exclude from the system records that are no longer of utility. Records of individuals whose age exceeds 70 or 80, for instance, are often thought to be of little interest to criminal justice agencies. Experience has shown that individuals of this age seldom become defendants in criminal justice proceedings. For this reason the Federal Bureau of Investigation purges records of 80 year olds. Similarly, records that pertain to deceased individuals are sealed or purged by almost all agencies on the theory that these records are no longer useful.

The same argument may be made to support the sealing or purging of felony and misdemeanor conviction records pertaining to individuals who have been free of criminal involvement for a substantial number of years. SEARCH's *Technical Report No. 13, Standards for Security and Privacy of Criminal Justice Information*, for example, recommends that records of felony convicts be sealed or purged after 7 years and records of misdemeanants be sealed or purged after 5 years, if the individual has been free of criminal involvement for that period of time.

This rationale is based, at least in part, on the assumption that individuals who are free of criminal involvement for a substantial period of time are not likely again to commit crimes. Therefore, the criminal justice system does not need to continue to maintain information about them. A moderate amount of empirical research supports this position.[2] However, many criminal justice officials, including former FBI Director Clarence Kelley, have argued that conviction records should not be purged until the subject dies or reaches old age.[3] They maintain that there simply is not enough evidence to support the claim that record subjects with long, "clean record" periods seldom commit crimes.

In addition to sealing or purging criminal history records that are no longer useful, many sealing and purging schemes seek to exclude records that arguably were never useful. Included in this category are records of mistaken arrests or arrests that were not based on probable cause. These subjects should never have been arrested in the first place and, therefore, it can be argued that it makes little sense for criminal justice agencies to maintain a record of such an event.

In a similar vein, records of even a proper arrest may not be probative of criminal conduct. Therefore, the argument is made that arrest records without a disposition or with a favorable disposition should be sealed or purged.

However, many criminal justice officials reject this argument. They contend that arrest information, even without a disposition, provides agencies with useful and indeed vital information for identification and investigative purposes. Rocky Pomerance, former Chief of Police of Miami Beach, Florida, has testified, for example, that the reason for the absence of a disposition is often entirely unrelated to the merits of an arrest.[4] Evidentiary and witness problems, and prosecutorial caseload and discretion are all factors that may cause an arrest to result in "no disposition." These officials contend that if police are not permitted to retain and use records that common sense argues are relevant, police record keeping will be driven "underground." Police will develop informal, unregulated record systems, or they may resort to less reliable sources such as newspaper morgues.

Many private employers and other private individuals apparently agree that arrest information, even without a disposition, is relevant. It is generally acknowledged that an arrest record has the same adverse effects on a subject's opportunities as a conviction record. One study, for example, although it is now somewhat dated, found that 75 percent of New York employment agencies refuse to refer applicants with arrest records.[5] Insurance companies are partly to blame. Many indemnity and liability policies contain provisions that void protection if the employer hires an individual with a conviction or an arrest history.[6]

The damage that can be caused by arrest records has received judicial recognition. In Menard v. Mitchell a federal court of appeals panel catalogued the problems presented by arrest records.

> Information denominated a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved. An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned, or whether to exercise their discretion to bring formal charges against an individual already arrested. Arrest records have been used in deciding whether to allow a defendant to present his story without impeachment by prior convictions, and as a basis for denying release prior to trial or an appeal; or they may be considered by a judge in determining the sentence to be given a convicted offender.[7]

For many of these same reasons the Committee to Investigate the Effects of Police Arrest Records on Unemployment in the District of Columbia, which issued the so-called "Duncan Report" (1967) recommended that the dissemination of arrest records outside of the criminal justice community be prohibited.[8]

Sealing or purging decisions are relatively easy to make when there is wide agreement that the record is no longer of use to criminal justice agencies. However, many state sealing and purging provisions affect records that, at least arguably, continue to be of use to criminal justice agencies. In these instances sealing or purging policies are set because it is judged that the benefits to the subject (and presumably society) outweigh the benefits to law enforcement.

One such benefit is a desire to reward or to "make whole" a rehabilitated felon or misdemeanant. Proponents of this view agree that once an individual has paid his debt to society, he or she should also be freed from various collateral disabilities caused by the continued existence of the record of that criminal occurrence. Indeed the American Civil Liberties Union has argued very forcefully that without sealing or purging standards, criminal record subjects are driven to recidivism because they are unable to find jobs.[9] For the most part it does not appear that this rationale has had substantial influence on state and local policies except when the subject has been free from criminal involvement for such a period of time that the record's utility is diminished.

Some sealing and purging schemes are also based, at least in part, on the notion of fairness to a record subject. Indeed, this report's analysis of the judicial case law will suggest that the courts have been especially receptive to unfairness arguments. There is a significant amount of agreement that records of mistaken arrests or arrests made without probable cause cannot be retained without causing unfair and inappropriate harm to the record subject. There is much less agreement concerning the question of whether retention of arrest record information without a disposition or with a favorable disposition causes the record subject unfair or inappropriate harm.

Another policy consideration that forms a basis for some sealing and purging standards is the notion that some classes of offenders deserve special consideration. Juvenile offenders are perhaps the prime example. Almost every jurisdiction seals or purges juvenile records. In addition, some jurisdictions seal records of adult first offenders who have committeed certain kinds of crimes. Usually, the offenses involve victimless crimes such as drug use offenses. The purpose of such standards is to give first offenders a second chance when the crime they have committed does not result in direct physical or financial harm to another person.

Finally, some jurisdictions seal or purge criminal justice records as a remedy for improper police conduct. In these instances the seal or purge decision is often made without reference to the utility of the record or to concerns for the criminal record subject. Instead, the sealing or purging is meant to be a remedy for and a deterrence against illegal or improper activity by law enforcement officials that results in an arrest. This approach is based on the same rationale as the Fourth Amendment's exclusionary rule which prohibits the introduction in court of evidence obtained as a result of an illegal search.

Section 2

THE CONSTITUTIONAL BASIS FOR SEALING AND PURGING

The constitutional arguments for sealing and purging are controversial. Until 1976, the courts seemed to be split about evenly between those that recognized sealing and purging as a court-designed remedy for constitutional violations of privacy and other rights and those that believed that sealing and purging must be authorized by statute. However, the trend in recent decisions, including a Supreme Court decision, is to reject constitutional sealing or purging arguments and instead emphasize the need for legislation.

Courts accepting the constitutional argument have ruled that the retention and/or dissemination of criminal history records of criminal justice agencies in certain circumstances violates a subject's constitutional rights. These courts conclude that even in the absence of a statute that authorizes sealing or purging, courts can order a repository to purge or seal records when retention or use would violate the subject's constitutional rights, unless the criminal justice agency can show a compelling state interest in retaining the records.

At best it is difficult to generalize about the several dozen decisions that have purged or sealed records on constitutional grounds. These courts have differed in the criteria or conditions that they use in determining that a criminal record is sufficiently flawed to permit purging or sealing. They differ in their analysis of the constitutional rights that are at stake--although the term privacy is often used. And when the term privacy is used, the courts certainly differ in their analysis of the scope and nature of a constitutional right of privacy. They differ, too, in the type of relief granted. However, the courts largely agree that when a court-authorized remedy for a constitutional violation is appropriate, that remedy should be purging rather than sealing.

Records of an Improper Arrest

The circumstances under which courts are willing to purge or seal criminal records on constitutional grounds vary depending primarily upon the type of record and the circumstances of the arrest. Generally speaking courts have only been willing to use constitutional protections to purge or seal arrest records, not conviction records or intelligence and investigative records. However, a few courts have expressed concern about the collateral consequences of the use and dissemination of conviction records. In Severson v. Duff, [10] for instance, the court was concerned about the dissemination of a plaintiff's record because the plaintiff was convicted under an unconstitutionally vague statute.

By contrast, dozens of courts have ordered arrest records to be purged or sealed. Courts that purge or seal on constitutional grounds are perhaps most likely to do so if the arrest is improper because it was made on the basis of mistaken identity or without probable cause. Menard v. Mitchell [11] provides a good example of a court's constitutional analysis of the legality of retaining a record of an arrest made without probable cause. Menard was arrested for suspicion of burglary, but two days later charges were dropped. Menard sued the FBI to purge his arrest record. The federal court of appeal's panel said that if the arrest was made without probable cause, there is a real question as to: "whether the Constitution can tolerate any adverse use of information or tangible objects obtained as a result of an unconstitutional arrest..."[12]

In United States v. Rosen a federal district court attempted to state a general rule for expungement of arrest records.[13] The court's rule relied primarily upon the occurrence of an improper or illegal arrest. Rosen was indicted for importing human

hair without a license. Some of the charges were dismissed and he was acquitted as to the others. The opinion concluded that courts should not order arrest records purged unless: (1) a statute so provides; or (2) the arrest was made without probable cause or was otherwise improper; or (3) the police had engaged in an illegal search or some other illegal activity leading to the arrest.

In Sullivan v. Murphy[14] the court had no trouble concluding that arrest records of May Day demonstrators should be purged. The court ruled that the mass arrests of several thousand District of Columbia demonstrators had been made without probable cause. The opinion said that purging is the proper remedy where this is "necessary and appropriate in order to preserve basic legal rights."[15]

Records Without a Disposition or With a Favorable Disposition

Courts are less likely to grant relief on constitutional grounds when the arrest itself is proper but the defendant is never brought to trial or is brought to trial and acquitted. In United States v. Linn[16] the court rejected the argument that an acquittal standing alone justifies a court, in the absence of a statute, to order the arrest record purged. Linn was an attorney who was indicted on stock fraud and related charges. After his acquittal Linn based his purging request on four arguments: (1) the arrest record would be likely to be misused; (2) the arrest record would cause him professional and other harm; (3) retention of his record would not benefit society; and (4) expungement of the record is necessary to insure his privacy.

The court noted that expungement on constitutional grounds is an available remedy for arrestees in some circumstances. However, the court found that the arrest itself, which was made pursuant to a grand jury indictment, was lawful and that there was no evidence that the record would be misused. The court concluded that although retention of the record might, in fact, violate Linn's constitutional right of privacy, that interest is outweighed by the government's interest in retaining the record. The opinion cites several decisions that support its conclusion that acquittal alone does not provide a basis in the Constitution for purging.[17]

A minority of courts dissent from this analysis. There is a small body of case law that holds that retention and/or use of a record of an arrest of an acquitted or otherwise exonerated subject violates the subject's fundamental constitutional rights.[18] Further, some of these courts have reasoned that the state has little or no interest in retaining a criminal record about an individual unless it has been determined by a court that the individual committed a crime. Thus, these courts conclude that the balance weighs in favor of purging.

In United States v. Kalish,[19] for instance, the court made the following argument for expunging an arrest record.

> ...when an accused is acquitted of a crime or he is discharged without a conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is invaded.[20]

In Davidson v. Dill,[21] the Colorado Supreme Court found that the Constitution mandates the purging of any arrest record that results in an acquittal unless the state can show a compelling interest in retention. Mrs. Davidson was arrested for loitering and subsequently acquitted by a jury. The court, which was perhaps influenced by the nature of the crime for which she was arrested, granted her motion for expungement. The opinion concluded:

> A court should expunge an arrest record or order its return when the harm to the individual's right of privacy or dangers of unwarranted adverse consequences outweigh the public interest in retaining the records in police files.[22]

Constitutional Provisions Supporting Sealing and Purging

Courts that accept the argument that the constitutional rights of criminal record subjects can be violated in some circumstances by retention and/or use of arrest records, have not been very specific or consistent in identifying the constitutional rights on which they rely. Generally, courts that grant expungement use a simple balancing approach that weighs the subject's interest in due process, liberty and privacy against the state's interest in retaining and/or using the record. In Kowall v. United States,[23] the court concluded that maintaining an exonerated arrestee's record was an "impermissible impingement" on the subject's "inalienable right to life, liberty and the pursuit of happiness."[24] Other courts refer to "basic legal rights;"[25] or to "constitutional rights;"[26] or to the "right to fair treatment";[27] or to a "constitutional right of privacy;"[28] or to the "right to be let alone."[29]

It is possible to identify at least four distinct personal interests served by the purging or sealing of arrest records: (1) an interest in being let alone, in being free of harassment or other types of surveillance or regulation that may flow from retaining arrest records; (2) an interest in the confidential treatment of arguably non-public information; (3) an interest in being treated in a fair manner and avoiding inappropriate harm; and (4) an interest in preserving one's reputation.

The Constitution only indirectly protects these interests. The Fifth Amendment's due process clause, for example, mandates that the government use fair and regularized procedures before taking action that directly affects a citizen. The Fourth Amendment gives citizens limited protection from government intrusion and may give citizens limited protection against government dissemination and misuse of personal information. The courts' failure to specifically and consistently identify the interests protected by purging and to link these interests to constitutional doctrines has undoubtedly sapped the vitality of the constitutional sealing and purging doctrine. Moreover, the lack of conceptual clarity makes it difficult to evaluate the merits of different sealing and purging policies applied by the courts to arrest and conviction records or to records of illegal and legal arrests; or to records of arrests with no dispositions and those with favorable dispositions.

Purging as a Constitutional Remedy

In cases where courts do grant relief on constitutional grounds, purging rather than sealing is by far the preferred remedy. This bias may simply reflect the fact that record subjects petitioning for judicial relief are far more likely to request a purging than a sealing remedy. Or, it may indicate that once a court has determined that a remedy is appropriate, the court is likely to opt for the most dispositive remedy.

Notwithstanding this bias, courts that recognize a constitutional basis for relief have affirmed their right to impose either purging or sealing remedies. In Sullivan v. Murphy,[30] for example, a federal appeals panel said that a court could order the defendant either to purge or to seal the records. In Morrow v. District of Columbia[31], the court considered the petition of an individual whose disorderly conduct charge had been dismissed. The opinion concluded that a trial court has ancillary jurisdiction to issue orders regarding the dissemination (sealing) of arrest records.

Some courts in deciding constitutional purging and sealing requests have even concluded that the courts should apply a tougher standard to obtain a purging remedy than to obtain a sealing remedy.

In Menard v. Mitchell[32] the court said that even if the petitioner could not make out a case for purging, he might be able to show sufficient, inappropriate harm in violation of the Constitution to justify a court in issuing a sealing order.

In United States v. Rosen[33] the court went further and actually suggested a formula for determining whether purging

or sealing is appropriate in constitutional cases. As previously discussed, the court felt that purging was appropriate when the arrest was improper or when it was accompanied by some kind of material governmental wrongdoing. On the other hand, a record subject was held to an easier standard in order to obtain a sealing order. An order limiting dissemination (sealing) would be issued if the plaintiff who was exonerated from the arrest charges could show that: (1) pictures would be publicly displayed in a rouges gallery; or (2) the arrest record would be disseminated to employers; or (3) retention of the record would be likely to result in harassment by governmental officials.

Notification to Repositories

Courts that have found that the Constitution provides purging or sealing remedies have, on some occasions, been willing to tailor their relief to require notification of other criminal justice agencies holding the records -- even though those agencies were not parties to the action. For example, in State v. Pinkney,[34] an 18 year-old was indicted for first degree murder. Other persons subsequently confessed to the murder, and the 18 year-old sued the Cleveland Police Department and the county sheriff's office for expungement. The court directed both defendants to destroy the original and all copies of the 18 year-old's arrest record. In addition, the court directed the clerk of the court to seal the court records and directed the Cleveland Police to make a request to the Ohio State Bureau of Criminal Identification and Investigation and to the FBI to destroy or return their copies of the arrest record. Counsel for the defendants was further ordered to report to the court within ten days as to the status of these purge requests.

Most courts cite their inherent equitable powers to fashion reasonable and workable relief to violations of the Constitution or other legal standards as the basis for such remedies.[35] This equitable power includes the authority to order defendant agencies to notify prior recipients that the records have been purged or sealed.

Subjects' Right to Deny Criminal Event

Thus far most courts that have provided a purging or sealing remedy on the basis of constitutional violations have been unwilling to authorize record subjects to deny the occurrence of the event to which the record pertains. Thus, record subjects who have obtained a sealing or purging order because retention violates their constitutional rights are still required to identify their prior arrests on licensing applications or in response to other lawful requests.

In Spock v. District of Columbia[36] the court criticized the notion that record subjects should be authorized to deny the occurrence of a criminal event. The court said that judicial orders that "re-write" history undermine the integrity of the judicial system.

> ...(n)o system of law can, with integrity, lend or appear to lend its aid to an unreal denial of the events, particularly as such denials may affect the lawful judgment of other persons who may in the future deal with them. It is one thing to say that the system of law will legally ignore an acknowledged fact and perhaps, pursuant to specific legislation, indulge in a fiction that what was once a conviction or a criminal charge shall no longer be deemed as such; but it is quite another to assist in rewriting history at the expense of truth, particularly where, as outlined above, the full truth if effectively recorded can preserve the integrity of the individual as well as the rule of law.[37]

Case Law Regarding Sealing and Purging

In contrast to those cases that recognize a constitutional basis for purging or sealing, a substantial body of case law maintains that courts cannot purge or seal criminal history records absent a statute.[38] According to many of these courts nothing in the Constitution limits a criminal justice agency's ability to retain and/or use criminal history records. A few of these courts acknowledge that the Constitution may be offended by routine retention and use of criminal history records in some circumstances but conclude that the subject's constitutional interests are almost always outweighed by the state's interest in maintaining such data. These courts recognize the judiciary's power to expunge criminal records for constitutional violations but conclude that absent truly extraordinary circumstances, sealing or purging should be avoided in favor of legislative action.[39]

This sentiment was expressed by the court in Kolb v. O'Connor.[40] The opinion stated that if there was even a "minute possibility" that retention and use of a person's arrest record might help to prevent a crime or apprehend an offender, that interest outweighs any "conjectural harm" to the subject that might result from dissemination.

Constitutional Privacy Claim for Arrest Records

In 1976 the Supreme Court issued an opinion in Paul v. Davis that somewhat undermines arguments that the Constitution provides sealing and purging remedies.[41]

In anticipation of the 1972 Christmas season the police chiefs of Louisville, Kentucky and surrounding Jefferson County circulated a flyer to local merchants containing the names and photos of "active shoplifters." Davis had been arrested for shoplifting some 18 months earlier but had never been convicted (although the charges were still pending). Davis sued the police chiefs for a violation of the federal statute (42 U.S.C. Section 1983) that makes it unlawful to deprive a person of constitutional rights under color of law.

Davis claimed that circulation of the flyer violated several of his constitutional rights: his rights of due process; his right to liberty (which Davis argued had been violated by the damage caused to his reputation); and finally, his right to privacy. In addressing the privacy claim the Supreme Court said that the constitutional right of privacy protects certain kinds of very personal conduct, usually related to marriage or procreation. The Court said that Davis' claim was unrelated to these types of privacy considerations, and concluded that the Constitution does not require criminal justice agencies to keep confidential matters that are recorded in official records.

> (Davis) claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based not on any challenge to the state's ability to restrict his freedom of action in a sphere contended to be "private" but instead on a claim that the state may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.[42]

On its face, Paul v. Davis would seem to cast doubt on the validity of those pre-1976 court decisions which held that the retention of a record of a proper arrest that does not have a disposition or that results in an acquittal violates the subject's constitutional rights.

This is not to say that Paul v. Davis eliminates all constitutional arguments for purging or sealing. For one thing, Paul v. Davis only indirectly involves the Constitution. The Supreme Court has traditionally taken a narrow view of actions brought under the federal statute that provides damages for violations of constitutional rights under color of law. It is possible that the Court would have given the constitutional arguments a better hearing if Davis had not alleged a statutory violation. Secondly, the charges against Davis were still actively pending at the time when the police circulated the flyer. Had charges been dropped or Davis been acquitted, the Court might have been more receptive to Davis' constitutional arguments.

Indeed, several courts have recognized

exactly this distinction. In United States v. Dooley,[43] for example, the court said that pending arrest records were of interest to law enforcement agencies and thus should not be purged, but once the charges were no longer pending, legitimate law enforcement interest ceased.

> Unresolved arrest records generally may well have significance for law enforcement purposes ... But charges resulting in acquittal have no legitimate significance. Likewise, other charges which the government fails or refuses to press or which it withdraws are entitled to no greater legitimacy.[44]

It is still too early to determine the extent to which Paul v. Davis will be used by the courts to deny constitutional arguments for sealing and purging. To date, only two decisions have given careful attention to Paul v. Davis in analyzing an arrestee's constitutional entitlement to a sealing or purging order. However, both courts interpreted Paul v. Davis broadly to hold that arrestees do not have a constitutional interest in prohibiting the dissemination of their arrest records.

In Hammons v. Scott[45] a three-judge federal district court panel held that an arrestee was not entitled to a purging order on constitutional grounds . In this case all charges against the subject were dropped one day after his arrest for assault with a deadly weapon. The subject had no prior arrests and argued that maintenance and dissemination of this record violated his constitutional right of privacy and tangibly harmed him by impeding his opportunities for employment and licensing and causing an increased likelihood of police surveillance.

The court was emphatic in declaring that a constitutional action for purging or sealing does not exist in the wake of Paul v. Davis.

> However, by its opinion of March 23, 1976 in Paul v. Davis (citations omitted), the United States Supreme Court has snuffed out the short life of this action.[46]

The district court's opinion even extends the reach of Paul v. Davis somewhat to cover not only cases where the charges were still pending but, as well, cases such as that presented in Hammons where all charges have been dropped.

In a more recent decision, Rowlett v. Fairfax[47] a federal district court in Missouri cited Paul v. Davis as authority for holding that an arrestee whose charges were dropped shortly after his arrest had no constitutional interest that would support the purging of the FBI's rap sheet entries. The opinion criticizes the line of cases represented by Tarleton v. Saxbe which hold that constitutional privacy and due process rights give subjects certain recordkeeping rights regarding their rap sheets. The court asserts that, "Tarleton was poorly received by other Federal courts."[48] The Rowlett court states expressly that it "agrees with the comment in Hammons that Paul 'snuffed out the short life [of this action].'"[49]

The California Supreme Court has recently held that even the express right of privacy provision contained in California's state constitution is not violated by the limited retention and dissemination of an arrest record. In Loder v. Municipal Court[50] the arrestee came to the aid of a woman who was being beaten by a San Diego policeman. Loder was arrested, but two days later charges were dropped.

In denying Loder's purge request the court concluded that the state has a compelling interest in retaining the record: (1) for identification purposes; (2) for prompt and accurate public reporting; (3) for future police work; and (4) for use at pre- and post-trial proceedings.

The court also noted that California's statutory scheme provides ample confidentiality and recordkeeping safeguards. The opinion said that when this is the case, courts should be extremely reluctant to impose constitutional remedies. The Court also characterized Paul v. Davis broadly. It noted in passing that "(t)here is apparently no right of privacy in arrest records under the federal constitution."[51]

Although there appears to be a movement by the courts in the direction of finding that there is no constitutional right

to the sealing or purging of arrest records, it may still be possible, even after Paul v. Davis, to obtain such relief. The District of Columbia Court of Appeals, for example, recently ruled that an arrestee could obtain a sealing order based on constitutional grounds by showing through clear and convincing evidence that he did not commit a crime.[52] However, the Supreme Court's decision in Paul v. Davis unquestionably strengthens the role played by the state legislatures in setting statutory standards for sealing and purging.

Inherent, Equitable Powers of the Courts

Even without a sealing or purging statute, and despite the demise of a constitutional cause of action, courts can still order the sealing or purging of a criminal justice record in certain circumstances. Many judicial decisions, including several that have been decided since Paul v. Davis hold that the judiciary has inherent equitable powers to right governmental wrongs, correct governmental errors, and insure that individuals, receive just treatment. The courts have said that on occasion the exercise of those powers requires the sealing or purging of criminal justice records.

In order to convince a court that it should use its equitable powers to seal or purge a criminal justice record, the subject must ordinarily show that the records are flatly inaccurate, or that a criminal justice event (such as an arrest or conviction) was achieved by improper or illegal means, or that the record is otherwise inaccurate, improper or illegal.

On several recent occasions subjects have been successful in making exactly this kind of showing. For example, in United States v. Benlizar[53] a federal district court held that federal courts have inherent discretionary power to order expungement of criminal justice records, notwithstanding statutes requiring their maintenance, acquisition, and dissemination. The defendant had been convicted of distributing a controlled substance; however, the court found that the defendant had not received a fair trial because agents of the Drug Enforcement Administration illegally destroyed discoverable evidence. The court concluded that the case presented "extreme violations by the government of defendant's rights." Furthermore, it noted that the "defendant is facing an extraordinary degree of harm which will be inflicted upon him and his family by virtue of the record of arrest and illegal conviction.[54]

In view of all this the court ordered the record expunged and explained that courts "have a duty to redress an injury and have the inherent power to expunge criminal records.[55]

In District of Columbia v. Hudson[56] the U.S. Government and the District of Columbia appealed a judgment in favor of several record subjects by Superior Court Judge Harold Greene expunging several sets of arrest records. In one instance a person had been arrested for a murder that was later shown to be a suicide. In another instance a person had been arrested for failure to attend driving school, and it was later shown that he had attended the school. In a third instance an arrestee was arrested for carrying a pistol, but law enforcement officials later conceded that they had arrested the wrong man.

The court rested its analysis on an assumption that criminal justice records are ordinarily useful to criminal justice officials and ought to be preserved. However, where the arrest record is admittedly wrong, it has no utility to law enforcement officials. Consequently, the court will use its equitable powers to give these record subjects relief and order the data to be sealed. (The Court of Appeals disagreed with the lower court in holding that the District of Columbia's state law prohibited a court from ordering a law enforcement agency to expunge the data. Instead the court ordered the government to turn the records over to the court for sealing.)

Despite the demise of a constitutional remedy it seems clear that in many jurisdictions a record subject can still obtain relief even if no sealing or purging statute exists. However, the subject must meet a tough test. The subject must be able to show that the record is wrong or that the record describes an arrest or conviction that was illegal or improper.

Section 3

STATE AND FEDERAL STATUTORY LAW

By the end of the 1970's most states had enacted statutes that permit the sealing and purging of criminal history records. Research for this project indicates that just over 40 states have adopted statutes that specifically regulate the sealing or purging of criminal history records. At the federal level, a few statutes provide a basis for sealing or purging claims.

With one exception, constitutional standards do not limit the scope or nature of statutory sealing and purging remedies. The one exception, accepted by some but not all courts, holds that legislatures are restrained by the Constitution from requiring courts to purge or seal their own records. According to these courts, such requirements would violate the rights that each of the three branches of government enjoy under the Constitution's Separation of Powers clause. For example, in People v. Chapman[57] a California court of appeals panel suggested that a statute that required the purging of court records would be unconstitutional.

> "(t)he integrity of the court system requires that the courts have sole custody and control of their own records."[58]

State Statutory Law

As previously noted, sealing and purging statutes differ substantially from state to state.

> ...there are further distinctions to be drawn in the various states' approaches to record expungement or sealing. Whereas, the relief is automatically provided in some states, in other states the exonerated arrestee must petition for relief. Some states provide for a hearing and judicial determination on whether to grant relief. Relief may be restricted to persons with no prior record.[59]

Variations in state statute law are sufficiently great that only a few generalizations can be made. First, sealing is a more common remedy than purging. However, a substantial minority of states permit the purging of records either as the sole remedy or, more commonly, as a substitute remedy for sealing.

Second, a great majority of the states require record subjects to petition a court in order to obtain a sealing or purging order. Only a few state statutes direct criminal justice agencies (or the courts upon dismissal of charges or an acquittal) to "automatically" purge or seal records. South Carolina's statute is an example of an especially strong automatic purging procedure. The South Carolina code requires agencies to automatically purge arrest records upon notification that charges were dropped or that the subject was acquitted.[60]

However, in requiring record subjects to petition a court the statutes differ greatly in the amount of discretion that courts enjoy. Some statutes give the courts enormous discretion to take into account such subjective factors as the extent of the subject's rehabilitation or "good moral character."[61] For example, Nevada permits courts to seal conviction records if certain conditions are met and the court is satisfied that the subject is "rehabilitated."[62]

Virginia's statute directs courts to grant a subject's request for a purge order if certain conditions are met and the court determines that the continued existence and possible dissemination of the record will cause the subject a "manifest in-

justice."[63] A few state statutes also add another subjective consideration for the courts to consider--whether the purging or sealing is in the public interest.[64]

By contrast many other states sharply limit the extent of the court's discretion. Relief must be granted (upon the subject's request) at the completion of parole or probation; or the completion of a period of years without criminal involvement; or the occurrence of a particular event such as dismissal of charges.[65]

Texas, for example, requires courts to grant requests for purging orders if the subject can show that charges were never filed; or if charges were dropped because of a mistaken arrest; or if there is no disposition and no charges pending and the subject was not convicted of a felony for at least five years prior to the arrest in question.[66] Colorado goes further. It almost completely eliminates the court's discretion by requiring courts to grant a request for a sealing order unless the attorney general files an objection.[67]

Third, a substantial number of statutes authorize a record subject who has obtained a seal or purge order to deny the occurrence of the criminal event to which the record relates. This immunity almost always covers employment applications and may cover licensing applications as well as other governmental requests for information.[68] However, virtually every state, no matter how generous its grant of immunity, permits the sealed or purged record to be pleaded and proved in a subsequent criminal prosecution.[69]

Criteria Used to Seal or Purge

State statutes permit sealing or purging of criminal history records on a number of grounds and in a number of circumstances. For example, purging rights are an implicit part of subject access and review rights. Almost every state now permits subjects of criminal history records to see and review their files. As a part of this review process, most state statutes permit subjects to request criminal justice agencies to correct, amend, or delete inaccurate or incomplete information. If the criminal justice agency agrees with the subject's requested changes, it must delete the objectionable entries or make other changes. Massachusetts' *Criminal Offender Record Information Act*, for instance, permits subjects to see their criminal history data and petition the agency to "purge, modify or supplement" inaccurate or incomplete information.[70] Statutes in some jurisdictions authorize record subjects to bring a court action if the criminal justice agency refuses to make the requested changes. This procedure is also required by the Justice System Improvement Act (JSIA) regulations for all state and local criminal history systems that receive monies under the provisions of that act.[71]

Thus, a great many criminal justice agencies have adopted at least limited purging policies for criminal history information that is judged to be inaccurate or incomplete. In addition, most states purge or seal the entire record of a particular criminal event if certain conditions are met. The most common substantive criteria for entitlement to a seal or purge order are dismissal of charges, failure to prosecute or an acquittal. In total, almost 30 states will seal or purge an arrest record upon the dismissal of charges, failure to prosecute, or an acquittal.[72] In most of these states the subject can only obtain the seal or purge order through a court action.

The number of state statutes that authorize sealing or purging on these grounds is somewhat surprising. Criminal justice officials have sharply criticized statutes that authorize the sealing or purging of such non-conviction records. Furthermore, as previously noted, the courts have not been very receptive to constitutional arguments for the sealing or purging of such records.

However, the effect of statutes that authorize the sealing or purging of non-conviction type data is often limited in several respects: (1) coverage is limited to statewide central repositories; (2) courts are given discretion to reject record subject's purging requests on the basis of subjective factors such as the public interest; or (3) the sealing or purging is limited to those instances where the subject makes a showing that the arrest itself was illegal or improper; or (4) a sealing or purging order is available only to subjects who have no prior conviction or arrest history or at least no such recent history.

A significant minority of states also permit the sealing or purging of conviction records if: (1) the conviction is overturned upon appeal;[73] or (2) the subject has completed the jail term or period of supervision and a period of years has elapsed since the termination of the jail term or supervision during which time the subject has been free of criminal involvement.[74] The length of time during which the subject must be free of criminal involvement varies depending upon the jurisdiction and the seriousness of the subject's crime. However, a ten-year waiting period seems to be a common time period.

A substantial number of state statutes also authorize sealing or purging of records pertaining to a first offender's conviction of particular crimes, especially drug offenses.[75] In many states conviction of an offense results in automatic, adverse, collateral consequences. For instance, State v. Compobasso[76] involved a student who was expelled from trade school because he was convicted of being under the influence of a substance regulated by a dangerous substances act. First offender sealing safeguards seek to avoid such consequences.

Other state statutes authorize the sealing or purging of investigative and intelligence information upon termination of an investigation or upon its termination and the expiration of a waiting period.[77] A few states permit courts to seal or purge criminal history records whenever a court determines that on balance, the harm to the individual's privacy interest exceeds the public's interest in retention.[78]

A couple of states also seal or purge conviction records when the subject has been pardoned.[79] A full pardon is a grant of absolution to an individual which provides relief from most of the legal consequences of the crime.[80] Most states vest the pardon power in their governors and permit the granting of pardons at the governor's discretion, both to the guilty and to those thought to be innocent. However, with the exception of a couple of states, most jurisdictions do not automatically seal or purge the record of an event for which the subject receives a pardon. However, pardons are generally treated as a favorable disposition. Thus, when a state permits subjects to seek a purging or sealing order for favorable disposition, the pardon provides the basis on which subjects may eventually obtain a sealing or purging order.

The legislative approach to sealing and purging seems to be based upon two policy considerations. First, many legislatures have been receptive to the notion that there is little utility in the retention of a record that does not indicate guilt or culpability. Hence, a significant number of states permit the sealing or purging of records of arrest when charges are dismissed or the matter ends in acquittal or non-conviction.

Second, many legislatures have been receptive to the argument that the retention and use of non-conviction information unfairly and inappropriately harms record subjects. The small amount of empirical research that has been done suggests that employers and other decisionmakers discriminate against individuals with arrest records to virtually the same extent that they discriminate against individuals with conviction records. Consequently, many legislatures have concluded that individuals with non-conviction records should not have to run the risk of "record punishment."[81]

Federal Statutory Law

No federal statutes provide a definitive or comprehensive right to seal or purge federal criminal history records. The writ of *coram nobis* brought under the *All Writs Statute*[82] permits federal courts to correct, amend, or delete erroneous facts in criminal justice records. In addition, a few plaintiffs have been successful in using the federal *Civil Rights Act* to obtain the

purging or sealing of records of illegal or improper arrests.[83]

The federal criminal justice regulations (like their counterpart JSIA regulations) also permit subjects of federal criminal history records to seek the correction, amendment, or in the right case the deletion of inaccurate or incomplete information.[84]

Finally, the federal *Privacy Act of 1974*[85] may, in some circumstances, give subjects of federal criminal history records a right to review, amend or delete inaccurate or incomplete information.

On balance, subjects of federal criminal history records enjoy a statutory remedy that is neither as specific nor as extensive as that enjoyed by most subjects of state criminal history records.

PART 2

Section 1

INTRODUCTION

Sealing and purging standards are an important part of criminal history information law and policy, for they represent a valid strategy for the effective management of criminal justice record systems and for the protection of privacy and other interests of criminal records subjects. Such standards are thought to make criminal record systems more cost effective by eliminating aged and otherwise irrelevant records. Furthermore, these standards are thought to benefit record subjects by freeing them from the adverse consequences of a criminal record. And such standards are thought to benefit the public by helping criminal record subjects to participate fully and gainfully in society.

But, should all criminal justice agencies in a state be covered by the same standards, or should the central repository have distinct standards? Should the sealing or purging occur automatically when identified characteristics are present or only upon petition to a court by a record subject? Should all non-conviction data be purged or only records of improper or illegal arrests? Should conviction data ever be sealed or purged? Should authorized record subjects be allowed to deny the occurrence of the criminal event? And, when should records be sealed as opposed to purged?

The standards that follow address all of the key questions raised by sealing and purging: (1) definition of terms; (2) authority to set standards; (3) scope of the standards' coverage; (4) substantive criteria for entitlement to a sealing order and implementation mechanisms; (5) substantive criteria for a purging order and implementation mechanisms; (6) effect of a sealing or purging order on other criminal justice agencies; (7) rights of criminal record subjects to obtain a sealing or purging order and to deny the events covered by such orders; and (8) the right of criminal justice agencies to unseal records. This section also contains commentary relating to the standards that includes considerations to assist in the implementation of these standards.

The model standards were developed with an eye to three principal benefits. First, they will help criminal justice agencies to use similar definitions and terms and a similar approach in setting sealing and purging policies. Second, the model standards will promote discussion and analysis of these admittedly difficult policy issues in a focused and systematic way. Third, criminal justice policymakers hopefully will find that the model standards provide useful recommendations for desirable procedural and substantive approaches to sealing and purging policy.

Section 2

SEALING AND PURGING STANDARDS

Standard 1: Definitions

1.1 "Seal means to prohibit access to criminal history record information except to: employees of the repository for record management purposes only; the record subject; a party for an authorized research or statistical purpose; a party authorized access to the record by a court order."*

Standard 1.1 defines the term "seal" to denote two characteristics: (1) the sealed record or entry continues to exist; and (2) virtually all dissemination of the sealed record or entry is prohibited. This approach distinguishes a sealed record from a purged (destroyed) record and from a record that is merely subject to certain confidentiality safeguards and dissemination limitations.

This definition is consistent with the practice in many state criminal justice record repositories. The heart of a sealing action, in most states, is to remove the record or a specific entry on the record from routine access within the repository and routine dissemination outside the repository. The information once sealed is available only in exceptional circumstances (e.g., upon a court order to "unseal" or disclose record contents). Levels of security may be applied when the sealed data is under the custody of specific repository personnel or, in an automated environment, when the data is accessible only by selected terminals. In any event, the effect of the seal from the point of view of the records keeper is to insure reasonable safeguards against improper disclosure or dissemination consistent with the law.

Standard 1.1 permits disclosure in only four circumstances. Repository employees (as well as contractors or agents who are performing microfilming or other record management functions) are permitted access provided they have a demonstrated need to see the data in order to accomplish a proper record management function (updating or correcting an entry or record, or some other recordkeeping operation). This provision represents a common sense, practicable accommodation to the reality that some employees or agents of an entity maintaining a record must, of necessity, see the record. However, those persons are only permitted access in connection with record keeping operations. Other criminal justice purposes, no matter how urgent or important, are not grounds for access to sealed data.

Standard 1.1 also permits the record subject to have access to the sealed data. (The standard does not indicate whether such access should involve only a right to see the record or to, in addition, obtain a copy. This implementation issue is expected to be dealt with by regulation.) In *Technical Report No. 13* SEARCH recommended that criminal history record subjects be able to obtain a copy of the record. (Recommendation No. 14). However, the JSIA Regulations merely require that criminal justice agencies permit subjects to review the record (except when a copy of the record is necessary to permit a subject to challenge the accuracy or completeness of the record). (28 C.F.R. Section 20.21(g))

Standard 1.1 is premised on the notion that the purposes served by sealing a criminal history record are not served by cutting off a record subject's normal access rights. This approach is consistent with existing state statutory sealing stan-

*Additional definitions pertinent to the discussions that follow are included in Section 3, Glossary of Terms.

dards. In most states a subject, upon proper identification, is entitled to review the contents of sealed information--presumably for purposes of ascertaining the entry's completeness and accuracy. Statutory language is usually categorical in granting this right; that is, justification or show of good cause is not required. Sealing notwithstanding, several state laws mandate that identification data be either returned to the individual or destroyed. In these instances, repositories may retain a sealed copy of official information surrounding the action of the criminal justice system. The respository, however, is required to eliminate identification data such as the fingerprint record, photographs, etc., from its files. However, in view of the administrative burden caused by providing access to sealed records, many members of the committee felt that were it not for existing access formulas, it would be preferable to require subjects to obtain a court order for access.

Persons who will use the sealed data for authorized research and statistical purposes are also permitted access. The term "authorized research and statistical purposes" requires the applicant to comply with the standards for researcher access and use of identifiable criminal justice data adopted by the JSIA Regulation at 28 C.F.R. Part 22. (See Standard 1.4).

Fourth, any party with a court order is permitted access. This provision provides a "safety valve" for access when there is a legitimate need. This definition should be read in conjunction with Standard 8 which sets general criteria for the courts to use in unsealing records. Standard 8 permits a court to unseal a record if it determines that the benefits of granting access for the criminal justice system "clearly outweigh" the subject's confidentiality interest.

Methods to accomplish sealing vary, but usually recordkeepers use two distinct approaches, both of which are consistent with this definition of sealing. Strict physical segregation of a record is the first approach. Agencies remove all information pertaining to the sealed record from repository records and secure the sealed data in a separate file. The file usually contains other sealed records and is maintained under lock and key. Often agencies assign responsibility for record maintenance and security to certain designated personnel.

Agencies also use a second, less restrictive approach. Agencies maintain the sealed data along side non-sealed records. However, agencies use physical shielding techniques to prevent the record from being seen during routine passes through the file. In automated systems, the task of shielding the data is made easier. The sealed data remains in the system but can be retrieved only by personnel who are authorized to use particular terminals and/or retrieval directions.

1.2 "Purge" means to destroy, blot out, strike out, or efface so that no trace remains. Expunge is a synonym. Destruction of personal identifiers so that the record or entry cannot be associated with an individual is a form of purging.

Standard 1.2 defines the term "purge" in a literal and common sense manner--to destroy or expunge. To accomplish a purge, repositories may often destroy an entire record, including fingerprints, photos, arrest, and disposition data. Or agencies may retain a record, but entries within records are purged. This is a common occurrence when multiple charges are part of the same case, not all of which resulted in a disposition favorable to the subject. A criminal case that resulted in two charges being filed, one of which ended in conviction and one of which ended in a non-conviction, for example, might be handled in the following manner: identification data including the fingerprint card is retained; however, the non-conviction data and any other data which refer to the non-conviction are erased or otherwise destroyed.

1.3 "Repository" means a federal, state or local criminal justice agency that is maintaining criminal history records in its filing system(s).

Standard 1.3 defines "repository" broadly. The term encompasses every criminal justice agency that maintains criminal history record information. As a practical matter, this definition reaches every criminal justice agency except courts. Technically, the definition also covers courts; however, Standard 3 exempts most court-maintained criminal history information.

1.4 "Authorized research or statistical purpose" means a research or statistical project that meets the standards in 28 C.F.R. Part 22.

The Bureau of Justice Statistics has adopted detailed and comprehensive standards to protect the confidentiality of identifiable criminal justice records used for research and statistical purposes. These regulations prohibit researchers from releasing criminal justice data in individually identifiable form or from using the data to make decisions about the individual. Furthermore, the regulations protect the data from access by subpoena or other form of compulsory process.

1.5 "Dissemination" means to disclose information by any means to a party other than employees or agents of the repository or the record subject.

Standard 1.5 defines dissemination broadly to mean any type of disclosure, by any means, to any party other than employees and agents or contractors of the repository and the record subject. This definition of dissemination comports with the customary manner in which the term is used within the criminal justice community.

Standard 2: Authority to Set Standards

Sealing and purging standards should be set by state legislation provided, however, that standards governing federal agencies should be set by the Congress, including federal standards to implement applicable state standards.

Standard 2 proposes that sealing and purging standards be set exclusively by state and federal legislation. This Standard addresses three questions: First, what political jurisdiction should have policy-making discretion--the federal government, state governments, local governments, or some combination? Second, should policy-making discretion lie exclusively with legislative bodies or should it be shared with appropriate criminal justice agencies? Third, should federal agencies be required by law to comply with state sealing and purging standards for state and locally generated criminal history data held by federal agencies?

As to the first issue, Standard 2 opts for giving discretion to a combination of entities: state legislatures for state and local standards and the Congress for federal standards. At the state level the Committee believes that an effective and workable sealing and purging standard could not be devised or implemented unless discretion to set such standards is vested exclusively in the state legislature. If local legislative bodies have discretion to set their own sealing and purging policies, centralized state repositories simply could not function efficiently. Moreover, criminal justice agencies and other users of criminal history records would be faced with a baffling "hodge podge" of inconsistent and perhaps conflicting, sealing and purging requirements. However, once criminal history data is in federal hands the standard recognizes that standards for federal handling of the data must be left to the Congress.

As to the second issue, the Committee

feels that all significant policy issues should be disposed of by the legislative branch. These bodies are, after all, charged with setting policy and have ample ability to obtain advice from criminal justice officials and other experts. On the other hand, the formulation of implementation strategies and issues are properly left to the officials responsible for accomplishing the implementation.

For example, the definition of "sealing" is a policy matter that should be dealt with by the legislative branch. However, the methods of accomplishing a seal--whether by physical removal or by physical shielding--should be left to criminal justice officials.

Third, the Committee believes that when federal agencies obtain state and locally generated criminal history data they should return or purge the data upon direction from the jurisdiction in which the data originated. However, a state (or local) standard that called for this result would almost certainly be ineffectual. Consequently, the Committee urges the Congress to adopt standards that require federal agencies to handle criminal justice data according to the rules of the originating jurisdiction. As a practical matter, this means that when a federal agency receives a notice of a seal or a purge from the originating jurisdiction, it will destroy or return the data. (The federal agency would, under no circumstances, seal such data since a sealed record should be maintained only by the repository in the jurisdiction responsible for issuing the seal order.)

Standard 3: Agencies Covered

3.1 All federal, state and local criminal justice agencies should be covered by the model sealing and purging standards.

Standard 3 sets out the scope or coverage of the model sealing and purging standards. Standard 3.1 proposes that all federal, state, and local criminal justice agencies should be covered. Standard 3.2 states that the standards should not apply to court record systems unless information is accessed from these systems by subject name or other personal identifier.

The issue presented in Standard 3.1 is closely related to the authority question addressed by Standard 2. Clearly, it follows that if the federal and state legislative branches are to be the exclusive source of sealing and purging standards, then local agencies must be covered by the state-authored standards. The only real coverage issue left unaddressed is whether the state-authored sealing and purging standards should be identical for both local and state agencies. The Committee believes that this question should be answered affirmatively. The growing and critical role of centralized state repositories makes it imperative that all criminal justice recordkeeping agencies that are serviced by the central repository live by the same set of record-keeping rules.

3.2 Courts should be excluded from the coverage of model sealing and purging standards, except that court-operated name or personal identifier indexes are covered.

Standard 3.2 addresses the question of whether all criminal history information maintained by courts should be covered by the model standards. It would be impractical, inadvisable, and perhaps unlawful for a legislature to impose sealing and purging standards on all court-maintained criminal history information.

Much of that information is maintained in chronologically arranged original records of entry. As such, this information is difficult to retrieve and poses little threat to subject interests. In addition, by both tradition and law, the information is considered to be in the public domain. Furthermore, there is at least some constitutional question as to whether a legislature can: (1) prohibit access to a public record; or (2) regulate the internal recordkeeping

operations of a separate and equal branch of the government.

A "functional" approach is proposed. If a court "functions" as a criminal justice repository by maintaining a name indexed system, then it is recommended that for this limited purpose courts should be regulated in the same manner as any other repository. Thus, the model standards apply to name-indexed court systems but not to any other type of judicially-operated record systems.

Standard 4: Criteria for Sealing Criminal History Records

4.1 Repositories must take action to seal arrest record information pertaining to individuals who are acquitted.

4.2 Upon application by the record subject a court of appropriate jurisdiction will order an arrest record to be sealed where the arrest is followed by a nolle prosse, a dismissal, a failure to bring charges, or any other disposition favorable to the subject (other than an acquittal).

Standard 4 calls for the sealing of arrest records when the arrest leads to a disposition favorable to the subject either because of an adjudicated acquittal or dropped or not pursued charges.

Standard 4.1 requires repositories to "automatically" seal arrest records that result in an acquittal. Thus, repositories must insure that sufficient disposition reporting mechanisms are in place. The term "acquittal" is used to mean any adjudicative finding of innocent. Traditional American norms of fair play and justice demand that an individual who has been found innocent not be a victim of the stigma or other collateral harms that accompany a criminal record. Occasionally (but not often), acquittal records are of some utility within the criminal justice system; however, the Committee believes that the harm to record subjects' interests from routine maintenance outweigh whatever benefits might exist for criminal justice agencies.

Standard 4.2 authorizes a court upon petition by the record subject to order a repository to seal an arrest record if the arrest led to a disposition favorable to the subject (short of an outright acquittal). The individual and not the system bears the responsibility for initiating the seal. Thus, a record subject may obtain a court-ordered sealing remedy for dismissals of charges, failure to bring charges, and various other forms of "no dispositions," provided that action is not still actively pending.

The formula in Standard 4.2 represents a difficult policy judgment. It is generally accepted that many of the records sealed pursuant to this standard pertain to valid arrests made with probable cause. These are the types of arrest that many reasonable persons believe to be probative of criminal conduct. In many of these cases the individual is not charged or the charges are not pursued for reasons largely unrelated to the alleged criminal conduct or the validity of the arrest.

Despite these considerations, the standard permits the sealing of such records. Entitlement to a sealing remedy is based upon two rationales: (1) some of the record subjects did not, in fact, commit a crime; and (2) all of the record subjects must be presumed to be innocent. Indeed, in these instances the record subject may never even have had an opportunity to prove innocence. Consequently, the Committee feels that fairness to the record subject demands that these individuals be given an opportunity to go to court to obtain a sealing order.

Although Standard 4.2 requires the record subject to go to court to obtain a sealing order, the court does not have discretion to deny the order if the individual can show that the charges were dismissed or nolle prossed and charges are not still actively pending. This approach represents a compromise between automatic repository-initiated sealing and a re-

quirement that the subject convince a court of having met a subjective standard such as "rehabilitation."

The Committee seriously considered recommending sealing standards for conviction record information when the record subject has served imposed time or otherwise been free of supervision; and provided that a significant period of time has been established during which there has been no arrest or other adverse involvement in the criminal justice process. In the end the Committee rejected this approach because it believes that criminal history data should only be withheld from criminal justice officials in two circumstances: (1) the data unfairly stigmatizes the subjects (such as arrest data with favorable dispositions); or the data is of little or no utility to criminal justice agencies (such as the data covered by Standard 5. Purging).

Standard 5: Criteria for Purging Criminal History Records

5.1 Repositories must take action to purge misdemeanor arrest records when the arrest did not result in a conviction or for which no disposition was received at the expiration of five years from the date of the arrest if during that time the record subject has been free of criminal involvement and provided that the repository notifies criminal justice agencies that either contributed the information or received such information and no such agency objects in writing to the purge within six (6) months after notification. If a criminal justice agency does object, the record of entry will not be eligible for purging for an additional five (5) years during which time the record subject must be free of criminal involvement.

5.2 Repositories must take action to purge misdemeanor conviction records of individuals who have been free of criminal involvement for a period of seven years following final release from confinement or supervision, provided that the repository notifies criminal justice agencies that either contributed the information or received such information and no such agency objects in writing to the purge within six (6) months after notification. If a criminal justice agency does object, the record of entry will not be eligible for purging for an additional seven (7) years, during which time the record subject must be free of criminal involvement.

5.3 Repositories must take action to purge felony arrest records when the arrest did not result in a conviction or for which no disposition was received at the expiration of seven years from the date of the arrest if during that time the record subject has been free of criminal involvement and provided that the repository notifies criminal justice agencies that either contributed the information or received such information and no such agency objects in writing to the purge within six (6) months after notification. If a criminal justice agency does object, the record of entry will not be eligible for purging for an additional seven (7) years during which time the record subject must be free of criminal involvement.

Criminal history record information should be destroyed (purged) only when the criminal justice system no longer has sufficient interest in or need for such records. Purging, unlike sealing, is a dispositive remedy. In extreme circumstances sealed information can be obtained. However, once information is purged it is gone forever. Naturally, any formula used to determine the point at which the criminal justice system ceases to have a significant interest is somewhat arbitrary and is likely to cause controversy. Although the Committee was aware of this problem, the general consensus of the Committee was that the data covered by Standards 5.1-5.3 is not likely to be of interest to criminal justice officials.

The Committee based this on three

criteria (and safeguards) which underlie the purging standard. First, the data to be purged only covers arrest information with dispositions favorable to the subject, and misdemeanor conviction records. Therefore, the data indicates one of three things: (1) a court found the subject to be innocent; (2) the criminal justice system failed to find the subject guilty and thus he must be presumed to be innocent; or (3) the subject was found guilty of a relatively minor crime.

In any one of these circumstances, the Committee believes that it is in the repository's interest to destroy the data if the second and third criteria and safeguards are also met. The second criteria requires the record subject to be free of criminal involvement for a period of five years (for misdemeanor arrests) or seven years (for felony arrests and misdemeanor convictions).

The Committee recognizes that the five and seven year time periods are arbitrary. However, the Committee is not aware of convincing recidivism statistics that point to five or seven years as "magic numbers" (although the Committee is also not aware of recidivism statistics that cast doubt on the wisdom of using these time periods). The Committee chose these time periods primarily because the State of California has had success in using exactly this formula and these time periods in purging criminal history records.

The third criterion in Standards 5.1-5.3 is also based upon the California approach. It establishes a safety valve for criminal justice agencies by requiring the repository to notify any agency that has contributed or received the record of the intended purge. These agencies have six months to object in writing. If any criminal justice agency does object, the data is not destroyed and another five or seven year cycle is begun.

The Committee recognizes that this procedure has some potential for abuse. A criminal justice agency could, for example, frivolously or routinely object to all purging notices. However, as a practical matter, the Committee doubts that this will occur. Instead, agencies can be expected to object only when the record subject is the target of agency investigation or is otherwise an object of agency interest. In any event, the Committee believes that this procedure is necessary to implement its philosophy that criminal history records should be purged only if criminal justice agencies do not have a significant interest in the record. Therefore, agencies must be permitted to block record destructions.

The Committee considered but rejected a proposal to recommend a purge formula for felony conviction records. A majority of the Committee believes that a felony conviction represents a serious violation of law that is more or less of permanent interest to criminal justice officials. (We note that a large minority of the Committee feels that this is equally true of misdemeanor conviction records; consequently, Standard 5.2 was adopted with significant opposition.)

The standards do not require record subjects to go to court to obtain a purging order. Because purging is done for the repositories' convenience, it would clearly be inappropriate to make the purging remedy dependent on the record subject's initiation of a court action.

5.4 Repositories must take action to purge criminal history record information pertaining to an individual who is deceased within 3 years after notice of the individual's death.

Standard 5.4 would require repositories to purge criminal history record information pertaining to deceased individuals within three (3) years of the repository's notice of the death. This or a similar procedure is common throughout the criminal justice system. A record subject's death ends any interest in that individual by the criminal justice system.

5.5 Categories of criminal history record information that a repository deems no longer useful and not covered by the above should be purged at the discretion of the repository responsible for maintaining the records and pursuant to applicable record maintenance and archival laws upon notice to the criminal justice system of the categories of records that are to be covered by the standards.

Standard 5.5 is a catch-all provision that would permit repositories to purge categories of criminal history records not covered by the other sealing or purging standards and which the repository no longer deems useful. The standard recognizes that in many states the repository would have to take into account general record maintenance and archival laws before destroying officials records.

The standard permits agencies to purge records only by category. Agencies could not destroy records on an individual basis, thus avoiding or minimizing the risk of favoritism or other abuse in setting destruction policies. Standard 5.5 would also require the repository to give other criminal justice agencies notice of the types or categories of records to be purged. This procedure will permit interested criminal justice agencies to question or object to the purging. Although the repository is not required to accept such objections, the Committee believes that the notice procedure should be sufficient to minimize chances for abuse.

Standard 6: Information and Recordkeeping Practices

Upon sealing or purging criminal history record information, repositories will promptly notify criminal justice agencies within the same state that have previously received the sealed or purged information or contributed such information. Upon receipt of such a notification, these criminal justice agencies will promptly destroy or return to the repositories the purged or sealed record information. Upon sealing or purging a record, repositories will also promptly notify all criminal justice agencies outside of their state that have previously received the sealed or purged information and request that they return or destroy the purged or sealed record information.

Standard 6 proposes that repositories that seal or purge a record, whether pursuant to a court order or to statutory requirements, notify all other criminal justice agencies in the state that have received or contributed the record. Compliance with a seal or purge order or request cannot be sought unless the respective holders of the record are notified that the record has become subject to special treatment These agencies would be required to return or destroy the record. Out-of-state agencies, that receive the record information including federal agencies, must also be notified; however, in recognition of the limits of state law, these agencies would merely be requested to return or destroy the records. Out-of-state agencies that contributed criminal history record information are not mentioned on the theory that jurisdictions will ordinarily not initiate a seal or puge of information that was generated by another jurisdiction. Even if a repository does seal or purge such data from its own records, it is hardly appropriate for that repository to call upon the agency that generated the data and from which they received the data, to follow suit.

Standard 6 would require agencies that receive either a sealing or a purging notification to return or destroy their copies of the records. These agencies are not permitted to seal their copies even if the initiating agency is merely sealing rather than purging its copy. The definition of sealing used in these standards permits only employees of the agency maintaining the record to have access to the record for record management purposes only. Consequently, return or removal of a sealed record is necessary in order to insure that a seal order, in fact, cuts off disclosure. A sealed record should be maintained only in one repository, and only employees of that repository charged with maintaining the record should have access.

Thus, local agencies within the state will return or destroy their records upon notification regardless of whether the local agency originally generated the record or was a subsequent recipient. Local agencies are already somewhat familiar with requirements to perform recordkeeping functions in response to orders from central repositories. Many states have codified the provisions in the JSIA Regulations which require local agencies to query the repository prior to dissemination of criminal history data. This "query before dissemination" rule is intended to insure that local agencies are in possession of a complete and current criminal history on any individual.

Standard 7: Rights of Criminal Records Subjects

7.1 Any individual who is the subject of a criminal history record can petition an appropriate court to obtain an order to seal or purge information pertaining to him without regard to the sealing and purging criteria established by Standards 4 and 5. The court may issue such an order when it determines that due to exceptional circumstances maintenance of the record information will cause substantial harm to the subject and such harm clearly outweighs the criminal justice system's interest in the record information.

Standard 7 contains provisions that would give criminal history record subjects extremely significant rights. Standard 7.1 would permit any criminal history record subject at any time to petition a court of appropriate jurisdiction for sealing or purging relief. The court would make its decision independent of the substantive criteria identified in Standards 4 and 5. Instead, the court would balance the harm that routine retention would cause the record subject against the benefits of access and use to criminal justice agencies.

However, the language in the standard is intended to cause courts to lean heavily toward retention. Relief would be granted only in "exceptional circumstances" involving "substantial harm" to the subject. In some states subjects already enjoy a right similar to this based on their state courts' interpretation of the Constitution or their inherent powers. This standard proposes to extend that right to all states and to put it on a more secure and defined footing.

7.2 An individual whose criminal history record has been sealed or purged can deny the existence of such record and the arrest or conviction to which it pertains.

Standard 7.2 would permit a subject of a sealed or purged record to deny the existence of that record and the arrest or crime to which it pertains.

Many states' sealing and purging statutes give subjects a right to deny their record and the crime to which it pertains, at least in most circumstances.

The Committee believes that the utility and import of a seal or purge order is emasculated if the record subject is still required to disclose the existence of the record or the occurrence of the underlying event. Thus, the more sensible and desirable approach is to permit record subjects to deny the existence of all sealed or purged records.

Consequently, this Standard is not subject to any of the exceptions (such as applications for security clearances or for licensing for a firearm) found in many state laws.

Standard 8: Criteria to Obtain a Court Order for Access to Sealed Criminal History Record Information

A court of appropriate jurisdiction may issue an order to unseal criminal history record information when the court determines that the benefits of granting access for the administration of the judicial or the criminal justice system clearly outweighs the record subject's interest in preserving the confidentiality of the data.

Standard 8 would permit a court of appropriate jurisdiction to "unseal" a record when the benefits for the administration of justice or the criminal justice system, "clearly outweigh" the record subject's interest in preserving confidentiality. The Committee feels that in some instances criminal justice agencies may need the option of going to court to obtain a sealed record. However, the Standard requires the court to tilt in favor of the subject's interest in maintaining the record's sealed status. Thus, the procedure recommended in Standard 8 would result in the unsealing of a record only in circumstances in which the need could be demonstrated clearly. Examples of such circumstances include:

- for sentencing purposes pursuant to a subsequent conviction;
- to determine eligibility for first offender status;
- upon a request by the prosecutor or state's attorney as part of an ongoing investigation or criminal proceeding.

Many state sealing statutes permit unsealing for one or more of the above-enumerated purposes. In addition, it appears that statutory sentencing standards or guidelines increasingly require the courts to take into account a subject's previous criminal history.

Section 3

GLOSSARY OF TERMS

The following definitions are pertinent to discussions of the seal/purge standards in Section 2. They are taken verbatim from the *JSIA Regulations (28 C.F.R., Part 20(a))* or from SEARCH's *Technical Report No. 13*, or are based closely on those sources. The definitions are well known and accepted within the criminal justice community.

Criminal history record information - information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrest, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system.

Criminal justice agency:

(a) Any court with criminal jurisdiction or any other governmental agency (or subunit thereof) which performs as its principal function any activity directly relating to the detection or investigation of crime; the apprehension, detention, pre-trial release, posttrial release, prosecution, defense, correctional supervision or rehabilitation of accused persons or criminal offenders; or criminal identification activities or the collection, storage, or dissemination of criminal justice information; and

(b) Any other agency or organization not covered by paragraph (a), which, by contract with a covered agency, performs an activity covered by paragraph (a) but only to the extent of such activity.

Arrest record information - information collected about an individual including identification information concerning the arrest, detention, indictment or other formal filing of criminal charges against an individual, which does not include a disposition.

Nonconviction information - arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information discloses that the police have elected not to refer a matter to a prosecutor or that a prosecutor has elected not to commence criminal proceedings; or proceedings have been indefinitely postponed or resulted in acquittal or dismissal.

Conviction record information - information collected about an individual including identification information concerning the arrest, detention, indictment or other formal filing of criminal charges against an individual, which includes a final adjudication of guilt.

Disposition - information disclosing that criminal proceedings have been concluded, including information disclosing that the police have elected not to refer a matter to a prosecutor or that a prosecutor has elected not to commence criminal proceedings and also disclosing the nature of the termination in the proceedings; or information disclosing that proceedings have been indefinitely postponed and also disclosing the reason for such postponement. Dispositions shall include, but not be limited to, acquittal, acquittal by reason of insanity, acquittal by reason of mental incompetence, case continued without finding, charge dismissed, charge dismissed due to insanity, charge dismissed due to mental incompetency, charge still pending

due to insanity, charge still pending due to mental incompetence, guilty plea, nolle prosequi, no paper, nolo contendere plea, convicted, youthful offender determination, deceased, deferred disposition, dismissed - civil action, found insane, found mentally incompetent, pardoned, probation before conviction, sentence commuted, adjudication withheld, mistrial - defendant discharged, executive clemency, placed on probation, paroled or released from correctional supervision.

FOOTNOTES

[1] "Expungement, record sealing, record destruction, obliteration, setting aside of conviction, annulment of conviction, nullification of the conviction, purging and pardon are all terms used to denote what has been described as 'deleting the adjudication of guilt upon proof of reformation.'"

"Criminal Procedure: Expunction--Fact or Fiction?" Ikla. L. Rev. 31:978, 981 (1978).

[2] See "Right to Privacy: Should Criminal Records be Sealed?" Cong. Q.W. Rpt. 32:946-7 Ap. 13, 1974.

[3] *Ibid.* Kelly argued that if even 10 murderers exceed the 7 year period, continued access to the records by criminal justice officials is justified.

[4] See Testimony of Rocky Pomerance Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, S. 2008, at pp. 150-152.

[5] The President's Commission on Law Enforcement and Administration of Justice Report: The Challenge of Crime in a Free Society at p. 75 (1967).

[6] "Special Project--The Collateral Consequences of a Criminal Conviction", Vand L. Rev. 23:929 (1970).

[7] 430 F.2d 486, 490-91 (D.C. Cir. 1970).

[8] See also, Gough "The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status" Wash. U.L.Q. 1966: 147 (1966), and see "The Expungement of Restriction of Arrest Records" Cleveland State L. Rev. 23:123 (1974).

[9] "Right to Privacy: Should Criminal Records be Sealed", Cong. Q.W. Rept. 32:946-7, Ap. 13, '74.

[10] 322 F. Supp. 4 (M.D. Fla. 1970).

[11] 430 F. 2d 486 (D.C. Cir. 1970).

[12] *Ibid.*, p. 491.

[13] 343 F. Supp. 804 (S.D.N.Y. 1972).

[14] 478 F.2d 938 (D.C. Cir. 1973), cert. denied 414 U.S. 880 (1973).

[15] *Ibid.*, p. 968.

[16] 513 F. 2d 925 (10th Cir. 1975).

[17] United States v. Seasholtz, 376 F. Supp. 1288 (N.D. Okla. 1974); United States v. Dooley, 364 F. Supp. 75 (E.D. Pa. 1973); and United States v. Rosen, 343 F. Supp. 804 (S.D.N.Y. 1972).

[18] Wilson v. Webster, 467 F. 2d 1282 (9th Cir. 1972).

[19] 271 F. Supp. 968 (D.P.R. 1967).

[20] *Ibid.*, p. 970.

[21] 503 P. 2d 157 (Colo. 1972).

[22] *Ibid.*, p. 161.

[23] 53 F.R.D. 211 (W.D. Mich. 1971).

[24] *Ibid.*, p. 214.

[25] Sullivan v. Murphy, 478 F. 2d 938 (D.C. Cir. 1973).

[26] Menard v. Mitchell, 430 F. 2d 486 (D.C. Cir. 1970).

[27] Carr v. Watkins, 177 A. 2d 841 (Md. Ct. App. 1962).

[28]United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967).

[29]Davidson v. Dill, 503 P. 2d 157 (Colo. 1972).

[30]478 F. 2d 938 (D.C. Cir. 1973).

[31]417 F. 2d 728 (D.C. Cir. 1969).

[32]430 F. 2d 486 (D.C. Cir. 1970).

[33]343 F. Supp. 804 (S.D.N.Y. 1972).

[34]290 N.E. 2d 923 (Ohio 1973).

[35]Doe v. Commander Wheaton Police Department, 329 A. 2d 35 (Md. 1974); Bradford v. Mahon, 548 P. 2d 1223 (Kans. 1976).

[36]283 A. 2d 14 (D.C. Ct. of App. 1971).

[37]*Ibid.*, p. 21. See also Cissell v. Brostran, 395 S.W. 2d 322 (Mo. 1965).

[38]See "Constitution Does not Protect an Individual From Being Labeled a Criminal", S.W.L.J. 30:781 Fall '76; and see "Expungement and Sealing of Arrest and Conviction Records: The New Jersey Response" Seton Hall L. Rev. 5:864 (1974) and their list of citations with capsule descriptions at p. 870, ftnote 28.

Herschel v. Dyra, 365 F.2d 17, 20 (7th Cir.), cert. denied, 385 U.S. 973 (1966) (no right to expungement of arrest records even though valid cause of action under Section 1983 existed); United States v. Dooley, 364 F. Supp. 75, 76, 79 (E.D. Pa. 1973) (motion for expungement denied following acquittal of a criminal charge and dismissal of an additional indictment); Sterling v. City of Oakland, 24 Cal. Rptr. 696, 697, 699 (Dist. Ct. App. 1962) (police department not required to return fingerprints, photographs, and arrest records upon dismissal of misdemeanor charges); District of Columbia v. Sophia, 306 A. 2d 652, 653-54 (D.C. Ct. App. 1973) (exculpatrory explanation, rather than expungement and sealing of arrest records, is proper remedy upon dismissal of charges where arrest was mistaken); Purdy v. Mulkey, 228 So. 2d 132, 136 (Fla. Dist. Ct. App. 1969) (no right to expungement and sealing); Village of Homewood v. Dauber, 229 N.E. 2d 304, 305 (Ill. 1967) (no right to return of fingerprints and photographs following conviction of traffic violation); People v. Lewerenz; 192 N.E. 2d 401, 402 (Ill. 1963) (lower court had no jurisdiction to order return of photographs, fingerprints and other records of identification following acquittal on narcotics charges); Kolb v. O'Connor, 142 N.E. 2d 818, 824 (Ill. 1957) (no right to return of fingerprints, photographs, and other identification records upon acquittal); State ex rel. Mavity v. Tyndall, 66 N.E. 2d 755, 757 (Ind. 1946); aff'd, 74 N.E. 2d 914 (1947), appeal dismissed, 33 U.S. 834 (1948) (no right to return of fingerprints, photographs and other identifying records upon acquittal); Roesch v. Ferber, 137 A.2d 61, 72 (N.J. App. Div. 1957) (no right to return of fingerprints and photographs following conviction of traffic violation); Fernicola v. Keenan, 39 A.2d 851, 852 (N.J. 1911) (police have discretion to retain fingerprints, photographs and other identifying records upon failure of grand jury to indict); In re Molineux, 69 N.E. 727, 728 (N.Y. 1904) (no right to return of prison identification records following acquittal upon second trial for murder); Peabody v. Francke, 168 N.Y.S. 2d 201, 202 (1957), cert. denied, 357 U.S. 941 (1958) (upon reversal of conviction and subsequent dismissal of proceedings no right to expungement).

[39]See Alexander and Walz, "Arrest Record Expungement in California: the Polishing of Sterling" Univ. of S. Fran. L. Rev., 9:299 (1974).

[40]142 N.E. 2d 818, 822 (Ill. 1957); and see also United States v. Dooley, 364 F. Supp. 75 (E.D. Pa. 1973); Sterling v. Oakland, 24 Cal. Rptr. 969 (1962).

[41]424 U.S. 693 (1976), and see M. Elizabeth Smith "The Public Dissemination of Arrest Records and the Right to Reputation: The Effect of Paul v. Davis on Individual Rights", Am. J. Crim. Law 5:72 (1977).

[42]*Ibid.*, p. 713.

[43]364 F. Supp. 75 (E.D. Pa. 1973).

[44]*Ibid.*, p. 77.

[45]423 F. Supp. 618 (N.D. Calif. 1976).

[46]*Ibid.*, p. 619.

[47]446 F. Supp. 186 (N.D. Mo. 1978).

[48]*Ibid.*, p. 188.

[49]*Ibid.*, p. 188-189.

[50]553 P. 2d 624 (Calif. Sup. Ct. 1976).

[51]*Ibid.*, p. 637 n. 24.

[52]District of Columbia v. Hudson, et al., 93-12 (D.C. July 19, 1979).

[53]459 F. Supp. 614 (D.D.C. 1978).

[54]*Ibid.*, p. 615.

[55]*Ibid.*, p. 622.

[56]404 A.2d 175 (D.C. Ct. of Apps. 1979).

[57]132 Cal. Rptr. 831 (1976) and for the same holding see, Johnson v. State, 19 Cr. L. Rptr. 2406 (Aug. 18, 1976).

[58]132 Cal. Rptr. at 833 (1976).

[59]"The Rights of the Innocent Arrestee: Sealing of Records Under California Penal Code Section 851.8" Hastings L.J., 28:1463, 1483 (July 1977).

[60]S. Carolina Code Sect. 17-1-40.

[61]See, Idaho Statute 19-2604(1); Kansas Statute 21-4617; Michigan Statute 780.621; Minnesota Statute 638.01 subd. 2; Utah Statute 77-35-17.

[62]Nev. Rev. Stat. Sect. 453.336(d)(5).

[63]Va. Statute Sect. 192-3922.

[64]Ohio Statute 2953.32(c).

[65]See, for example, Delaware Statute 11 Sect. 4332(i); Maine Statute Tit. 15 Sect. 2162-A; Oklahoma Statute Tit. 22 Sect. 991C.

[66]S.B. No. 374 entitled "Expunction of Criminal Records - Procedures and Fees".

[67]Colorado Rev. Statute Sect. 24-72-308.

[68]See "Expungement in Ohio: Assimilation Into Society for the Former Criminal" Akron L. Rev. 8:480 (Sp. '75); and see, for example, Kansas Statute 21-4616(b) and 26-2617(d); Ohio Statute 2953-33(B); Oklahoma Statute 2-410.

[69]See, for example, Arizona Statute 13-807; Minnesota Statute 638.02; North Dakota Statute 12-53-18-19; Ohio Statute 2953.32(e); Oklahoma Statute 2-410.

[70]Mass Criminal Offender Record Information Act Sect. 175.

[71]28 C.F.R. part 20(B).

[72]Alaska Statute 6AAc 60.100; Arkansas

Statute 5-1109; California Statute 851.8; Connecticut Statute 54-90(a); Delaware Statute 11-3904 (if first offender); Florida Statute 901.33 (sealed); Hawaii Statute 831-32; Idaho Statute 19-4813; Illinois Statute 38-206-5; Indiana Statute 35-4-8.1 (only if charges dropped or dismissed and only if no record of prior arrests); Iowa Statute 749B.1d (arrests over a year old with no disposition); Louisiana Statute 44.9; Maine Statute 16.600; Maryland Statute 27.736 & 737; Massachusetts Statute 1000; Mississippi Statute 610.100; Montana Statute 44-2-204; Nevada Statute 179.255; New York Statute 160.50; Rhode Island Statute 12-1-12; South Carolina Statute 17-1-40; Tennessee Statute 40-202109; Utah Statute 77-35-175(2)(a); Virginia Statute 19.2-392.2; Washington Statute 2608 Sec. 6 (2 years elapse).

[73]Many states permit record subjects to petition the court for purging or sealing if the proceeding terminates in favor of the subject. Thus, subjects whose convictions are overturned are free to petition the court. See, for example, Alaska Statute 6AAc 60.100.

[74]Alaska Statute 6AAc 60.100 (10 years felony); Kansas Statute 21-4617 (5 years, except 2 years for municipal ordinances); Massachusetts Statute 100A (10 years); Minnesota Statute 299c.11 (10 years); Nevada Statute 179.245 (15 years felony; 10 and 5 years misdemeanor); New Jersey Statute 2A:164-28 (10 years); Oregon Statute 137.225 (3 years for certain types of offenses).

[75]Florida Statute 893.14 (drug offense); Hawaii Statute 7121256 (drug offense); Massachusetts Statute 34; Michigan Statute 335.347 (drug offense); Oklahoma Statute 63-2-410 (drug offense); Arkansas Statute 43-1231 and 43-1232, 33; Ohio Statute 2953.32.

[76]553 P. 2d 624 (Cal. Sup. Ct. 1976).

[77]See, for example, Alaska Statute 6AAc 60.110.

[78]See, for example, Colorado Statute 24-72-308; Utah Statute 77-35-17.5(1)(a).

[79]Connecticut Statute 54-90(d) and Maine Statute 2161-A.

[80]Humbert, The Pardoning Power of the President, American Council on Public Affairs, pp. 22-27 (1941).

[81]Note that for the same rationale the Committee to Investigate the Effects of Police Arrest Records on Unemployment in the District of Columbia which issued the so-called Duncan Report (1967) recommended that the dissemination of arrest records without a conviction should be prohibited outside the law enforcement community.

[82]28 U.S.C. Sect. 1651.

[83]See, for example, Menard v. Mitchell, supra.

[84]28 C.F.R. Sect. 16.32 (1974).

[85]5 U.S.C. Sect. 552a.

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