CRIMINAL LAW—JUVENILES—EXPUNGEMENT OF CONVICTION RECORDS AUTHORIZED BY THE FEDERAL YOUTH CORRECTIONS ACT—*Doe v. Webster*, 606 F.2d 1226 (D.C. Cir. 1979).

Doe v. Webster[1] presented the Circuit Court of Appeals for the District of Columbia with an opportunity to fully examine the scope of the "set aside" provision of the Federal Youth Corrections Act (YCA).[2] The plaintiff sought complete destruction of all arrest and conviction records arising out of a marijuana conviction which had been set aside pursuant to the YCA.

On January 18, 1971, John Doe pleaded guilty in the United States District Court for the District of Arizona to a federal marijuana offense.[3] As a minor, Doe was convicted and sentenced under the YCA to commitment for treatment and supervision in the custody of the Attorney General.[4] Doe's sentence was suspended several months later and, pursuant to section 5010(a) of the YCA, he was placed on probation for a five-year period.[5] On June 5, 1973, the sentencing court unconditionally discharged Doe from the three years remaining on his probationary period. This discharge operated under section 5010(b) of the Act to automatically set aside Doe's conviction, and the court issued a certificate to that effect.[6]

Four years later Doe filed suit in district court to enjoin the maintenance and dissemination of all records arising out of his arrest and conviction.[7] The suit also sought the expungement of all records

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[1] 606 F.2d 1226 (D.C. Cir. 1979).

[2] 18 U.S.C. § 5005 (1976).

[3] 606 F.2d at 1229.

Doe was convicted under 26 U.S.C. § 4744(a)(2) "for feloniously facilitating the transportation and concealment of marijuana, without having obtained a permit, and without having paid the special tax required thereon." 26 U.S.C. § 4744(a)(2) (1976). Joint Appendix to the Briefs for Appellant at 4, Doe v. Webster, 606 F.2d 1226 (D.C. Cir. 1979) [hereinafter Appendix].

[4] Doe was committed to federal prison. Appendix, *supra* note 3, at 73.

[5] 606 F.2d at 1229. The applicable section provides: "If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation." 18 U.S.C. § 5010(a) (1969).

[6] 606 F.2d at 1229. The YCA reads:

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

18 U.S.C. § 5021(b) (1976).

[7] 606 F.2d at 1229. The suit was filed in the United States District Court for the District of Columbia against the Director of the Federal Bureau of Investigation, the Attorney General of the United States, and the Secretary of the Treasury [hereinafter referred to collectively as the government]. *Id.*

in the government's possession pertaining to the arrest and conviction.[8]

At the time the suit was filed, Doe was a third year law student.[9] He averred in his complaint that the maintenance of these records was having an adverse effect on his employment and career opportunities. Specifically, he was hesitant to seek federal employment for fear that the records would be discovered and employment consequently denied.[10] Furthermore, Doe had been told by one federal court judge that his conviction, even though it had been set aside, "would be an absolute bar to the practice of law in that state."[11]

The government's motion to dismiss was granted by the district court upon a determination that the YCA does not authorize a court to expunge criminal records. It was held that the purpose of the Act was to remove only "certain legal disabilities which could otherwise attach to a youth offender."[12] In the court's opinion, it was clear that the Act was not intended to be an expungement statute, since the legislature failed to provide for the deletion of records following the setting aside of a conviction.[13]

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[8] *Id.* In the complaint, Doe petitioned the district court to "[e]njoin defendants to physically destroy any and all existing records that grow out of, refer to, or are otherwise related to the investigation, arrest, conviction or post-conviction treatment of plaintiff." Appendix, *supra* note 3, at 7.

Doe also sought a declaratory judgment that § 5021(b) prohibits the maintenance of criminal records arising out of prior arrests. Since his conviction had been set aside by operation of the Act, Doe claimed the right to state on any and all job applications that he had never been arrested for, nor convicted of, a crime. 606 F.2d at 1229.

Further, Doe sought to enjoin the government's dissemination of any information derived from the record of his arrest to any person or agency. This request included all law enforcement agencies or employers which might inquire as to Doe's criminal record. Appendix, *supra* note 3, at 7.

[9] Appendix, *supra* note 3, at 74. In 1977, Doe graduated cum laude from Harvard Law School.

[10] 606 F.2d at 1229. Doe alleged in his complaint that the government's maintenance of his criminal records has a "chilling effect" on his exercise of rights guaranteed under the first, fourth, fifth and ninth amendments to the United States Constitution. Appendix, *supra* note 3, at 5.

Doe also claimed reluctance "to move to new areas or to consider new employment opportunities for fear that his record will be exposed and his career compromised." *Id.* at 6. In addition to career opportunities affected by the maintenance of his criminal records, Doe also alleged that he "risks exposure . . . every time he applies for . . . credit, insurance, or a myriad of other benefits." *Id.*

[11] Brief for Appellant at 5, Doe v. Webster, 606 F.2d 1226 (D.C. Cir. 1979).

[12] Appendix, *supra* note 3, at 79.

[13] 606 F.2d at 1229. The district court stated that "[i]f Congress had intended that § 5021 mandate expunction, it could have expressly provided so." Appendix, *supra* note 3, at 78–79. Accordingly, the lower court held that it did not have the authority under the YCA to order expungement. *Id.*

The Court of Appeals for the District of Columbia Circuit affirmed the district court with respect to the records arising out of Doe's arrest, concluding that such records cannot be destroyed under the YCA.[14] Drawing a distinction between arrest records and conviction records, however, the court reversed the lower court's holding that records of a conviction set aside pursuant to the Act cannot be expunged.[15] The court held that such records must be removed from general access in order to fully effectuate the purpose of the Act.[16]

It was acknowledged that while a court has the inherent authority to delete or destroy a defendant's criminal record, certain conditions must first be present. A court generally will not invoke its inherent power unless there has been some governmental misconduct which deprived the defendant of a guaranteed right.[17] No such conduct was present here; to the contrary, Doe pleaded guilty to the crime charged.[18] Thus, if the court were to order Doe's records destroyed, the authority would have to come from the provisions of the Act.

The court founded its holding on the recognition that the YCA is an expungement statute. "Expungement" was defined by the court as "connot[ing] the removal of records from the general mass of law enforcement files where they are most likely to be accessible to the public."[19] Accordingly, the court detailed a system of maintaining records of set aside convictions separately from other criminal records, but leaving them available for legitimate law enforcement purposes.[20]

The YCA was passed in 1950 "to give youthful ex-offenders a fresh start, free from the stain of a criminal conviction, and an opportunity to clean their slates to afford them a second chance, in terms of both jobs and standing in the community."[21] Enactment of the YCA

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[14] 606 F.2d at 1230.

[15] *Id.* at 1232–33.

[16] *Id.* at 1244–45.

[17] *Id.* at 1232. *See* note 69 *infra* and accompanying text.

[18] 606 F.2d at 1229.

[19] *Id.* at 1241.

[20] *Id.* at 1244. The court held that once a district court orders the conviction set aside, the FBI must actually segregate the conviction records from other files.

Prior to this decision, the FBI and other agencies which had possession of criminal files freely disseminated them upon request. Convictions set aside pursuant to the YCA were marked "set aside" on the face of the records. *Id.* at 1238 n.48.

[21] *Id.* at 1234–35. As originally written, the YCA provided that, upon discharge, the conviction was to " 'be automatically set aside and held for naught.' " *Id.* at 1235. This language was

followed the finding that, between ages sixteen and twenty-two, "special factors operat[e] to produce habitual criminals."[22] Congress recognized that the methods and facilities available for treating criminally inclined youth were ineffective in preventing the youths from repeatedly running afoul of the law.[23]

Through the YCA, Congress vested trial judges with discretion as to whether a youth is to be sentenced under the Act.[24] Alternative sentences are available once the judge has determined that the youth will benefit by application of the Act. The offender may be sentenced to probation, to the custody of the Attorney General for supervision,

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later replaced by a clause providing for the issuance of a certificate "hav[ing] the same legal effect as a pardon." *Correctional System for Youth Offenders: Hearings on S. 1114 and S. 2609 Before a Subcommittee of the Senate Committee on the Judiciary*, 81st Cong., 1st Sess. 7 (1949) [hereinafter cited as *Hearings*].

This provision, allowing for the certificate to have the effect of a pardon, was stricken during the 1949 hearings before the Senate Judiciary Committee. An explanation offered by the *Webster* court for the wording change is that Congress believed that the pardon provision "would not effectively provide the youthful offender with the clean slate intended by the drafters." 606 F.2d at 1235.

"A pardon is an act of grace by the chief executive (president or governor)." Schaefer, *The Federal Youth Corrections Act: The Purposes and Uses of Vacating the Conviction*, 39 FED. PROBATION 31, 32 (Sept. 1975). Through a pardon, a person is released from further disabilities or punishment which would normally result from a conviction. The main difference between a pardon and expungement is that with a pardon, the fact of conviction is not eliminated. *Id.* at 32.

Professor Schaefer presents the following theory on why the framers omitted the pardon provision:

> Before enactment, the reference to pardons was deleted from the bill because the senators believed that it would be an interference with the president's clemency power. Since the Constitution grants the pardoning power only to the president, the committee correctly understood that Congress does not have the power itself and cannot delegate it to any other body.

Id.

[22] Dorszynski v. United States, 418 U.S. 424, 433 (1974).

[23] *See Hearings*, *supra* note 21, at 9. *See also* United States v. Fryer, 402 F. Supp. 831 (N.D. Ohio 1975). It was there recognized that the YCA departs from the traditional punitive theories of dealing with youth. Noting that the underlying purpose of the Act is rehabilitative, the court stated that "[i]t is predicated on the concept that criminal youths require special treatment because of the number and kinds of offenses they commit and because of the promise they hold out for success through correctional treatment." *Id.* at 837.

[24] 18 U.S.C. § 5010(d) (1976). Under present case law, the YCA requires a federal district court denying sentencing under the Act to affirmatively find that the youth being sentenced would not benefit by it. *See* Brager v. United States, 527 F.2d 895 (8th Cir. 1975) (en banc), which held that if the sentencing judge can

> conscientiously . . . make current explicit findings to the effect that at the time of sentence he was familiar with the Act, that he was aware that the defendant was a person eligible for treatment under the Act, that consideration was in fact given to employing the Act with respect to the defendant, and that it was determined at the time that the defendant would not benefit from treatment under the Act, the requirement of *Dorszynski* is adequately satisfied.

or to prison.[25] If the youth then remains out of trouble, the court can order the sentence discharged, automatically setting aside the youth's conviction.[26]

The set aside provision in the Act was intended to minimize the stigma which accompanies a conviction on a youth's record, particularly as it affects employment opportunities. When framing the Act, Congress considered this a vital provision. The Senate subcommittee heard statements that the Act wipes out the conviction "if the youth is discharged, rehabilitated and behaves himself [well] after his period of supervision."[27] A legislator proposed that a youth "who makes one mistake should be permanently forgiven that mistake if his subsequent conduct indicates that he has changed his behavior."[28]

While Congress was specific as to the Act's purpose, the legislative history is silent as to the meaning of the term set aside. Therefore, the Act offers no guidance in determining whether it was intended to result in the destruction of a youth's conviction records. The legislative intent regarding these records must be discerned through an interpretation of what Congress would have provided had it addressed the issue.

Although the YCA has been in existence for thirty years, the precise effect to be given a conviction set aside has never been fully examined.[29] Several courts have, however, addressed the issue of

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Id. at 898–99. *See also* Williams v. United States, 476 F.2d 970, 972 (3d Cir. 1973) (suggesting that finding of no benefit required in section 5010 be made in open court so trial transcript will clearly show determination was made).

The Supreme Court has refused to go further by requiring a district court to explain why it chose not to sentence under the Act. Once it is clear that the lower court considered the option of sentencing under the YCA, appellate review of that issue ends. Dorszynski v. United States, 418 U.S. 424, 431 (1974).

[25] 18 U.S.C. § 5010(a), (b), (c), (d) (1976).

[26] 18 U.S.C. § 5021(b) (1976).

[27] *Hearings*, *supra* note 21, at 70 (statement of Chief Judge Orie L. Phillips). Chief Judge Orie L. Phillips of the United States Court of Appeals for the Tenth Circuit stated that the purpose of having the conviction set aside "is to help [the youth] get a job and keep him from having to be turned down by a prospective employer because of the fact that he has a conviction." *Id. See also* Utz v. Cullinane, 520 F.2d 467, 480 (D.C. Cir. 1975); Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969) ("The main evil produced by dissemination of arrest records thus seems to be the adverse effect on job opportunity.") *Id.* at 742; Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147, 153 (examination of extent of effect of arrest on employment opportunities).

[28] *Hearings*, *supra* note 21, at 117.

[29] The Act has been the subject of litigation in numerous instances. The constitutionality of the YCA was upheld in United States v. Baker, 429 F.2d 1334 (7th Cir. 1970), against a claim that the vague standards given in the Act result in "unconstitutional abdications of the congres-

whether the YCA was intended to be an expungement statute. As used in these cases, "expunge" means to obliterate or destroy.[30] In each, the youth sentenced under the Act sought to have records either made unavailable for any purpose or physically destroyed.

The leading case involving the power of a court to delete records of set aside convictions is *United States v. McMains*.[31] In *McMains*, the youth pleaded guilty to a charge that he failed to report the robbery of a federally insured bank. He was sentenced to probation under the YCA and was later unconditionally discharged from that conviction.[32]

A district court order expunging McMains's conviction record was reversed by the Eighth Circuit, which concluded that Congress had not intended to authorize the expungement of criminal records. The court reasoned that, because the Act does not specifically provide for expungement following the setting aside of a conviction, the legislature did not intend it to be an expungement statute. This reasoning was supported by the YCA provision authorizing a certificate to be issued to the youth upon discharge, indicating the conviction had been set aside.[33] The court noted that a certificate would be unnecessary if all conviction records were destroyed upon the discharge of the youth's sentence. Moreover, it stated that a court has no statutory authority to destroy criminal records, even when an arrest results in an acquittal.[34] The court concluded that it would be incongruous to infer such a statutory intent in the YCA, absent an indication that Congress intended this treatment of the record.[35]

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sional obligation to set standards and specify policies capable of administration by the federal courts." *Id.* at 1346. The court held that subjective decisions reserved to the trial judge were intended by Congress, thus authorizing the wide latitude given the Act. *Id.* at 1347.

The duty of a judge to specifically find that a youth will not benefit by sentencing under the Act before declining to so sentence has also been an issue. *See* note 24 *supra*. *See also* United States v. Dancy, 510 F.2d 779, 790 (D.C. Cir. 1975); Cox v. United States, 473 F.2d 334, 337 (4th Cir. 1973) (en banc).

[30] *See* United States v. Doe, 556 F.2d 391, 393 (6th Cir. 1977); United States v. McMains, 540 F.2d 387, 389 (8th Cir. 1976); Fite v. Retail Credit Co., 386 F. Supp. 1045, 1047 (D. Mont. 1975).

[31] 540 F.2d 387 (8th Cir. 1976). *See also* Comment, *Expungement of Criminal Records Under the Federal Youth Corrections Act*, 62 IOWA L. REV. 547 (1976), where the author examines the *McMains* decision in light of legislative history and past case law involving the Act.

[32] 540 F.2d at 387-88. McMains was sentenced to three years' probation under the YCA. He served his sentence, and thereupon his conviction was automatically discharged. *Id.*

[33] *Id.* at 389.

[34] *Id. See* Coleman v. United States Dep't of Justice, 429 F. Supp. 411, 413 (N.D. Ind. 1977) ("the mere fact that a person is not convicted on the charges for which he was arrested does not automatically entitle . . . [him] to an expungement of that record."). *Id.*

[35] 540 F.2d at 389.

In the view of the *McMains* court, by framing the YCA as it did, "Congress has chosen to strike a balance between rehabilitation of youthful offenders and the important societal interests served by criminal record-keeping."[36] Although the Act was found to be effective in striking such a balance, the court conceded that deleting conviction records would further advance the purposes of the Act.[37]

In *United States v. Doe*,[38] the Sixth Circuit assumed a position similar to that of the *McMains* court. The youth in *United States v. Doe* was sentenced to probation under the YCA for embezzling from a federally insured bank.[39] It was decided that a youth is not entitled to have his conviction records removed once his sentence is discharged and he has received the mandated certificate. The court held that the youth was entitled only to have all conviction records clearly reflect the set aside status of his conviction.[40]

As in *McMains*, the court in *United States v. Doe* relied upon a finding that the YCA does not specifically permit expungement. Recognizing that the purpose of the Act is "to enhance the probability of rehabilitation of youthful offenders,"[41] the court believed Congress would have nonetheless expressly provided for the removal if it had intended to accomplish its aim through the destruction of conviction records.[42] Although the court acknowledged that the YCA has been

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[36] *Id.* The court considered itself bound by what it perceived to be the legislative intent in enacting the YCA. Thus, the court declined to grant expungement, even upon a recognition of its inherent power to do so. It held that while the power to expunge is within its ambit, it is a narrow power and not routinely used. *Id.* at 389–90.

[37] *Id. See* notes 21–27 *supra* and accompanying text for the stated purposes for the enactment of the YCA.

[38] 556 F.2d 391 (6th Cir. 1977).

[39] *Id.* at 392. Defendant was placed on probation for two years. Approximately 17 months after sentencing, he petitioned the sentencing court for an unconditional discharge from probation pursuant to section 5021(b) of the Act. The district court granted that portion of defendant's petition, but refused to order the records of the conviction destroyed. *Id.*

[40] *Id.* at 393. The court noted that 28 U.S.C. § 534 "require[s] the FBI to take reasonable measures to safeguard the accuracy of information in its criminal files which is subject to dissemination." *Id. See* 28 U.S.C. § 534 (1970). *See* Tarlton v. Saxbe, 507 F.2d 1116, 1122-23 (D.C. Cir. 1974) where the court stated:

> To permit the FBI to disseminate inaccurate criminal information without the FBI making reasonable efforts to prevent inaccuracy would be tantamount to permission to accuse individuals of criminal conduct without ever providing such individuals an opportunity to disprove that accusation.

Id. at 1123. *See also* Menard v. Saxbe, 498 F.2d 1017, 1027–28 (D.C. Cir. 1974); Shadd v. United States, 389 F. Supp. 721, 724 (W.D. Pa. 1975).

[41] 556 F.2d at 392.

[42] *Id.* at 393. The court in *United States v. Doe* found the rationale of *McMains* "convincing." *Id.* It noted that had Congress intended the YCA to be an expungement statute, it "could easily have provided for expungement." *Id.*

called an expungement statute by other courts, it held the Act to be so only to the extent that it sets aside or annuls a conviction. The court further stated that the destruction of conviction records is unnecessary to effectuate the purposes of the Act because the automatic discharge and issuance of the certificate combine to offer "a unique shield from the prejudicial effects of a criminal conviction."[43]

A different approach was taken by the Court of Appeals for the District of Columbia in an earlier examination of the YCA expungement issue. In *Stevenson v. United States*,[44] the court employed a literal reading of the statute to deny destruction of the records. Since section 5006(h) of the Act defines "conviction" as "the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere,"[45] the court stated that, according to the plain language of the Act, no more than the judgment need be set aside.[46]

The youth in *Stevenson* claimed that fingerprints which had been used to show complicity in a crime were erroneously admitted as evidence. The prints had been identified by comparison with prints taken in a prior arrest. That arrest had resulted in a conviction which had been subsequently set aside.[47] The youth claimed that fingerprints taken as a result of the arrest could not be used in a later proceeding.[48]

The *Stevenson* court found that the Act was not meant to prohibit the later use of physical evidence arising out of a conviction. The court ruled that application of the YCA neither changes the fact that the youth had been arrested, fingerprinted, and photographed, nor does it erase such facts.[49]

Fite v. Retail Credit Co.[50] concerned the issue of whether a conviction which has been set aside may be revealed to later inquirers.

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[43] *Id.*

[44] 380 F.2d 590 (D.C. Cir. 1967).

[45] 18 U.S.C. § 5006(h) (now codified at 18 U.S.C. § 5006(g) (1976)).

[46] 380 F.2d at 593. The court recognized that the Act was meant to be applied to a youth deemed by the sentencing court to be a proper subject of rehabilitation. By remaining out of trouble, the youth "may be spared the lifelong burden of a criminal record." *Id.* The setting aside of the conviction of a youth can operate to his great advantage and, thus, it alone can go far toward meeting the Act's objectives. *Id.*

[47] *Id.* at 593 n.8. The initial identification of the youth had been accomplished by comparing fingerprints taken from the scene of a robbery with those already in police files. *Id.* at 593.

[48] *Id.* at 593.

[49] *Id.* at 593–94. It was pointed out that the set aside provision is far from inconsequential. *Id.* at 593 & n.11. For example, the court noted that where penalties for the violation of a statute increase according to the number of times a person is convicted of violating that statute, having the first conviction set aside will result in a lesser penalty for subsequent convictions than would have been imposed had it not been set aside. *Id.* at 593 n.11.

[50] 386 F. Supp. 1045 (D. Mont. 1975).

In *Fite*, the appellant had lost his job as a result of the respondent's credit report which was commissioned by the appellant's employer. The report showed a theft conviction which had been set aside pursuant to the YCA.[51]

In holding that a set aside conviction may be revealed in reports of this nature, the District Court for the District of Montana contrasted the YCA with the Juvenile Justice and Delinquency Prevention Act of 1974.[52] The key difference between the two statutes is that the YCA does not expressly prohibit the disclosure of records, while the Juvenile Justice Act does.[53] This distinction led the court to reason that Congress had not intended the YCA to prevent, for all purposes, the disclosure of records which involved a set aside conviction.[54] The court determined that when a defendant pleads guilty, he admits to having committed the crime; the mere fact that the youth was sentenced under the YCA "does not change the quality of the admission because a defendant pleads guilty to the crime charged, not to a violation of the [YCA]."[55]

While not specifically addressing the expungement issue, other courts have taken a broader view of the Act. These courts have held that the YCA is an expungement statute designed to relieve the offender of all disabilities attending a criminal conviction.

The First Circuit, in *Mestre Morera v. United States Immigration & Naturalization Service*,[56] was confronted with a deportation

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[51] *Id.* at 1046. Plaintiff commenced an action in which he sought a declaration prohibiting defendant from either maintaining any records, or reporting facts concerning the arrest and conviction to any of its customers. *Id.* Plaintiff had been convicted of violating 18 U.S.C. § 641 (theft of government property), after entering a plea of guilty. He was sentenced under the YCA to probation for one year and later was unconditionally discharged from probation prior to its expiration. 386 F. Supp. at 1046.

[52] 386 F. Supp. 1046–47, citing 42 U.S.C. §§ 5601–5751 (1978).

[53] The Juvenile Justice Act provides that "[r]ecords containing the identity of individual youths pursuant to this chapter may under no circumstances be disclosed or transferred to any individual or to any public or private agency." 42 U.S.C. § 5731 (1978).

[54] 386 F. Supp. at 1046–47. The court noted that the public has an interest in knowing the facts of court proceedings, and that traditionally the records arising out of such proceedings are open for public inspection. This was found to be so even in criminal actions where the case is later dismissed or a judgment of acquittal entered. *Id.* at 1046.

The *Fite* court examined the Fair Credit Reporting Act, 15 U.S.C. § 1681, upon which defendant based his claim. It found that the Reporting Act intended that "consumer reporting agencies will report matters of public record which may have an adverse effect upon a consumer's ability to obtain employment and refers specifically to records relating to 'arrest, indictment, or conviction.' " 386 F. Supp. at 1047.

[55] 386 F. Supp. at 1047.

[56] 462 F.2d 1030 (1st Cir. 1972). Plaintiff was convicted of conspiring to possess marijuana known to be unlawfully imported and was sentenced to the custody of the Attorney General under section 5010(b) of the YCA. *Id.* at 1031.

proceeding based on a set aside conviction. The court held that conviction records which had been set aside could not be used to support deportation proceedings. It further found that the purpose behind the automatic setting aside of a youth's conviction is not only to remove "the usual disabilities of a criminal conviction, but also to give him a second chance free of a record tainted by such a conviction."[57]

The holding in *Mestre Morera* demonstrates a strong reliance on the court's interpretation of the legislative intent behind the Act. The court felt this intent would not be realized if the application of the Act simply resulted in a "technical erasure" of the youth's conviction. Instead, the court understood the YCA to wipe the youth's slate clean.[58] The court noted that without the hinderance of a conviction record, the youth is granted "an opportunity to atone for . . . [his] youthful indiscretions."[59]

A similar conclusion was reached in *United States v. Fryer*.[60] The *Fryer* court refused to uphold a conviction which, as an essential element thereof, required the government to prove that the defendant had a prior felony conviction.[61] It reasoned that since the prior conviction relied upon by the government had been set aside, the conviction was vacated. The court stated that once a conviction is set

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The time sequence in *Mestre Morera* gave rise to a second issue. Plaintiff had not been discharged from his sentence at the time he began his suit against deportation. He tendered the argument that his conviction was not final because of the possibility that it would be expunged at a later date. *Id.* The court was spared ruling on this issue, however, since plaintiff did, in fact, receive a discharge prior to his case reaching court. For a discussion of this issue, see Hernandez-Vansuela v. Rosenberg, 304 F.2d 639, 640 (9th Cir. 1962) (holding YCA conviction to be final for deportation purposes).

[57] 462 F.2d at 1032.

[58] *Id.* The court ruled that while the statute under which plaintiff was being deported, 8 U.S.C. § 1251(a)(11) (1970), provides that deportation based upon a narcotics conviction cannot be prevented either by an executive pardon or a judicial recommendation of leniency, that alone does not demonstrate a legislative intent that a § 5021 certificate be equally ineffective. *Id.* at 1032.

[59] 462 F.2d at 1032.

[60] 402 F. Supp. 831 (N.D. Ohio 1975).

[61] *Id.* at 832. Defendant had pleaded guilty to a violation of 18 U.S.C. § 545 (smuggling goods into United States) and was sentenced to three years probation. Although he was entitled to be tried as a youth, defendant was prosecuted and convicted as an adult. Defendant was then convicted of making a false statement to a firearms dealer. As an essential element of this offense, the government was required to show that defendant had been previously convicted of a felony. *Id.*

Defendant's conviction of smuggling was discharged by the trial court upon a recognition that the youth should have been sentenced under the YCA, and an application of the Act thereon. Defendant therefore sought to withdraw his guilty plea to making false statements to a firearms dealer on the ground that he had never been convicted of a felony. *Id.* at 831–32.

aside under the Act, it is deleted from the offender's records "for all purposes."[62]

The rationale of *Fryer* was that one whose conviction has been set aside possesses the same rights as one who has never been convicted.[63] The court noted the expungement nature of the YCA and declared that, "[t]o give such a statute full force and effect, the event expunged must be treated as if it never occurred."[64] Acknowledging that the YCA departs from traditional punitive theories of dealing with criminally inclined youth, the court found the Act to be "predicated on the concept that criminal youths require special treatment because of the number and kinds of offenses they commit."[65] In addition, youths sentenced under the Act and exposed to rehabilitation offer a likelihood of becoming responsible adults.[66]

In *Doe v. Webster*, the court examined whether Congress intended the records of set aside convictions to be destroyed or to remain generally accessible. In considering congressional intent, the court weighed the competing interests of the rehabilitated youth against those of law enforcement agencies seeking access to the conviction records.[67]

The *Webster* court recognized its inherent authority to obliterate arrest records in special circumstances. It stated that the decision to delete arrest records must be determined by the facts of each case, and a significant relationship must exist between the alleged injury to the plaintiff and the maintenance of the records before expungement

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[62] *Id.* at 837.

[63] *Id.* The court held that a youth whose conviction has been set aside is entitled to the same right to possess firearms as any other citizen. A contrary conclusion would "state that the youth has not been rehabilitated, that he cannot be trusted and that he does not deserve a second chance." *Id.* The court believed such a result was inconsistent with the congressional intent underlying the YCA.

[64] *Id.* at 834.

[65] *Id. See* also notes 21–27 *supra* and accompanying text.

[66] 402 F. Supp. at 837.

[67] 606 F.2d at 1241–45. The court balanced "the needs of law enforcement agencies and the interests of rehabilitated youthful offenders under the Act." *Id.* at 1245. *See* Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975). The *Paton* court stated that the factors to be balanced

> are the accuracy and adverse nature of the information, the availability and scope of dissemination of the records, the legality and the methods by which the information was compiled, the existence of statutes authorizing the compilation and maintenance, and prohibiting the destruction, of recoreds [sic], and the value of the records to the Government.

Id. at 869.

It should be noted that the FBI's duty to preserve criminal records is statutory in nature. 28 C.F.R. § 0.85 (1979). Similarly, the Attorney General is statutorily obligated to collect criminal records and exchange them with appropriate agencies. 28 U.S.C. § 534 (1970).

will be granted.[68] The court noted that generally arrest, as well as conviction, records may be deleted "when serious governmental misbehavior leading to the arrest, or unusually substantial harm to the defendant not in any way attributable to him, outweighs the government's need for a record of the arrest."[69] Applying that test, the court denied Doe's request for destruction of his arrest records. Expungement was held to be inappropriate in light of the fact that not only was Doe's arrest constitutional in all respects, but the conviction was also valid.[70]

In contrast, however, the court did find merit in Doe's claim that he was entitled to have his conviction record expunged. In its examination of case law involving the YCA, the court identified several concepts repeatedly relied upon to deny destruction of conviction records. Each of those rationales was examined, and rejected, as a sound basis for denying relief.

First, the court rejected the government's contention that "the existence of a provision in section 5021(b) for the issuance of a certificate attesting to the set-aside of the conviction militates against a construction favoring expungement."[71] The certificates were not aimed at the legal disabilities which accompany a conviction, but only to the practical difficulties created by references to the conviction in newspaper files or credit reports. Nonetheless, the certificates were considered to be of great benefit to the youth. The court stressed that they provide documentation which can lessen the effect of the offender's arrest and conviction.[72] As a practical matter, however, it was opined that most employers would not "consider the niceties of a set-aside certification."[73] Rather, the employers would continue to

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[68] 606 F.2d at 1229–31.

[69] *Id.* Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974) ("The judicial remedy of expungement is inherent and is not dependent on express statutory provision, and it exists to vindicate substantial rights provided by statute as well as by organic law."); Sullivan v. Murphy, 478 F.2d 938, 968 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973) (expungement available where constitutional rights violated); United States v. McCleod, 385 F.2d 734, 749–50 (5th Cir. 1967) (expungement proper where sole purpose of arrest was to harass defendant); Kowall v. United States, 53 F.R.D. 211, 213 (W.D. Mich. 1971) ("the logic of the natural law of remedies does not set arbitrary limits on a federal court's jurisdiction to right wrongs cognizable by the common law within the jurisdiction of the court").

[70] 606 F.2d at 1231.

[71] *Id.* at 1232.

[72] *Id.* at 1232–33. The court noted that the certificate is valuable to an offender whether or not his record has been expunged. In either situation, the certificate would be evidence to anyone who might have heard of the arrest and conviction from the media or from any other source. *Id. See* Comment, *supra* note 31, at 564–65.

[73] 606 F.2d at 1240.

act as they always have; that is, the youthful offender with the criminal record will be denied a second chance in terms of job opportunities.[74]

The court was similarly unimpressed with the government's position that Congress would have specifically included the term expungement in the Act had it intended to authorize that power. It noted that at the time the YCA was enacted, the word expungement was not widely used.[75] Therefore, the absence of the term, and the presence of set aside, were not necessarily indicative of the legislature's intent to enact a non-expungement statute. No evidence was discovered by the court indicating an intention to distinguish between setting aside and expunging a conviction. In fact, "[t]he contrary conclusion is far more plausible: that prior to the time the term 'expungement' became fashionable, Congress meant precisely that when it directed conviction records be set aside upon the rehabilitation of the youthful offender."[76]

Referring to the legislative history, the court also refuted the government's argument that, under the YCA, a youthful offender is entitled to no more than the removal of statutory disabilities which attach to a criminal conviction. These include the loss of the right to vote or to hold public office.[77] In its inquiry, the court found that Congress directed little attention to these legal disabilities. Its primary concern was to ensure that youth be spared the social and economic stigmas which in our society accompany the label of "ex-con."[78]

The *Webster* court accepted that the YCA was intended to be an expungement statute. It recognized that although traditionally expungement has been viewed as requiring the physical destruction of records, under modern usage it encompasses more.[79] As construed in *Webster*, the term "may be used to connote the removal of records from the general mass of law enforcement files where they are most

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[74] *Id. See also* Gough, *supra* note 27, at 153.

[75] 606 F.2d at 1233 & n.21. The court noted that the term "expungement" did not apear in the United States Code until 1966 and that expungement statutes did not become a common form of statutory language until after the YCA hearings. *See* Comment, *supra* note 31, at 565.

[76] 606 F.2d at 1233.

[77] *Id.* at 1233–34. *See also Mestre Morera*, 462 F.2d at 1032. *But cf.* Garcia-Gonzalez v. Immigration & Naturalization Serv., 344 F.2d 804, 808 (9th Cir. 1965) ("[w]hat the statute does is reward the convict for good behavior during probation by releasing *certain* penalties and disabilities.") (emphasis added).

[78] 606 F.2d at 1234. *See also* note 27 *supra* and accompanying text.

[79] 606 F.2d at 1241, 1243–44.

likely to be accessible to the public."[80] Thus, instead of ordering the destruction of Doe's conviction records, as expungement normally would require, the court skirted that result by redefining the term.

The government maintained that by ordering expungement, the court was rewriting history, and that by removing the conviction records, the court was interfering with governmental interests in keeping accurate historical records.[81] The assertion that expungement rewrites history by officially declaring that an event never took place was deemed by the court to be "inaccurate." It was recognized that courts have often, in a variety of criminal and quasi-criminal situations, directed that events which occurred in fact be denied their legal effects.[82] The court added that the obliteration of criminal records had also been ordered in instances where public policy or equity required; yet in this case no justification was found for such a holding.[83]

Ultimately, the court based its decision not to order the destruction of Doe's conviction records on the "legitimate need for maintaining criminal records in order to efficiently conduct future criminal investigations."[84] It believed that law enforcement officials have an interest in, and will benefit by, knowing if a suspect in a crime has been previously arrested and convicted. This was held by the court to be particularly true where the crime under investigation involves a similar offense or modus operandi.[85]

In allowing the government access to records that have been set aside, the *Webster* court gave greater deference to the government's desire to maintain these records than to the individual's need to have them destroyed.[86] Arrest records, not expunged under the Act, would already be within the government's control.[87] These would satisfy the court's stated purpose for maintaining the conviction rec-

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[80] *Id.* at 1241. *See* notes 90 & 91 *infra* and accompanying text.

[81] 606 F.2d at 1241. The court recognized the government's interests, but was "satisfied that the expungement remedy as herein defined may properly be applied without jeopardizing legitimate law enforcement concerns." *Id.*

[82] *Id.* The court stated that "the fact of the conviction would be given no *legal* effect but at the same time it would not be obliterated as an historical event." (emphasis in original). *Id. See* note 69 *supra* and accompanying text.

[83] 606 F.2d at 1241–43 and cases cited therein. *See also* note 69 *supra* and accompanying text.

[84] 606 F.2d at 1243.

[85] *Id. See* Hammons v. Scott, 423 F. Supp. 625, 627–78 (N.D. Cal. 1976); United States v. Dooley, 364 F. Supp. 75, 77–79 (E.D. Pa. 1973); United States v. Rosen, 343 F. Supp. 804, 809 (S.D.N.Y. 1972).

[86] 606 F.2d at 1245. *See* note 62 *supra* and accompanying text.

[87] 606 F.2d at 1230–31. *See* note 69 *supra* and accompanying text.

ords: to give the government assistance in its criminal investigations, especially where similar offenses are involved.[88] Additionally, under *Stevenson v. United States*, fingerprints, photographs and other physical evidence of the arrest would remain in the government's possession.[89] Thus, an adequate pool of material would remain available for use in governmental investigations, without the inclusion of conviction records set aside pursuant to the YCA.

The *Webster* court's opinion, requiring set aside conviction records to be physically removed from general arrest files, is more protective of youthful offenders than are prior court opinions. Past courts have held that the Act is satisfied by simply placing a notation on the conviction record indicating the conviction has been set aside.[90] Except for the notation, such records were treated like any others, and were available for the same uses as other criminal records. The *Webster* court, however, directed that files containing records of set aside convictions are "not to be opened other than in the course of a bona fide criminal investigation by law enforcement authorities and where necessary for such an investigation."[91] This two-fold test would not permit, for example, the decision reached in *Fite v. Retail Credit Co.*, authorizing records of a set aside conviction to be used in routine credit checks.[92] Although the court's holding advances the purposes of the Act, it fails to justify a need for retaining the records for any use.

In *Doe v. Webster*, the court recognized that the YCA was established to free reformed youthful offenders of "the economic, social, and legal consequences which impair their reintegration into society."[93] Doe was clearly a member of the class of persons meant to be protected by the Act, having shown by his behavior subsequent to his arrest and conviction that he had earned a second chance, "free of *all* taint of a [criminal] conviction."[94] Yet the *Webster* court failed to

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[88] *See* note 85 *supra* and accompanying text.

[89] *See* notes 44–49 *supra* and accompanying text.

[90] 606 F.2d at 1238 n.48. Addressing this practice, the court stated:

> The plain fact is that—irrespective of notations and certifications—unless the slate is wiped clean in such a way that the FBI will not disclose, and the youthful ex-offender whose conviction was set aside may legally deny, the existence of that previous conviction, he will almost inevitably and forever bear its stigma in terms of both social relationships and economic opportunities.

Id. at 1239.

[91] *Id.* at 1244.

[92] *See* notes 50–55 *supra* and accompanying text.

[93] 606 F.2d at 1245.

[94] *Mestre Morera*, 462 F.2d at 1032. *See also* Schaefer, *supra* note 21, at 31–32.

give full credence to the individual's need to invoke the uncompromised force of a statute enacted for his protection.

The YCA dictated a result beyond that reached by the *Webster* court. In balancing the competing interests involved in having the conviction records destroyed, it is clear that the individual stands to lose more by having these records remain available than the government does by having access denied.[95] If the government has a special interest in having access to the conviction records, greater and more specific than evident here, it should seek legislative reform of the YCA. As the YCA presently stands, records of convictions set aside pursuant to the Act should be physically destroyed, making them unavailable to any agency for any purpose.

Michael A. Bars

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[95] The *Webster* court found that the effect of retaining conviction records, and the duty to answer questions affirmatively as to prior arrests, will be "relatively slight" to the youth. 606 F.2d at 1245 n.67. It based this opinion on the rationale that questions regarding prior arrests are less frequently asked than those on convictions. *Id.* at 1244 n.61. In addition, arrest data was noted to be distributed less freely than conviction information.