



Judge Leonard Edwards (Ret.)  
Santa Clara Superior Court

## Juvenile Record Sealing Doesn't Work: Here's How to Fix<sup>1</sup>

### **W**hy Do We Have Record Sealing?

We believe that children are different from adults, that they are developing beings whose judgment has not matured.<sup>2</sup> Juvenile records can prevent a young person from having a fresh start as an adult. That was the principle reason for the creation of the juvenile court more than 100 years ago. Our legislators concluded that youthful mistakes should not burden a person for the rest of his or her life, that a person can be rehabilitated, and that a youthful offender deserves a fresh start in life as an adult. California law reflects these policy positions. The California Attorney General concluded that Welfare & Institutions Code section 781 reflects

the clear policy statement of the Legislature to grant the errant juvenile a clean slate if he grows into a law-abiding adult.<sup>3</sup>

This is an important social goal. We know that once an employer learns that an applicant has a record, regardless of the type of record (arrest, truancy, appearance before the juvenile court), the applicant's chances of getting the job are reduced.<sup>4</sup> Even if charges were never filed,

even if the youth was found not guilty, a record is a record in the eyes of an employer.<sup>5</sup>

The idea of sealing juvenile records in theory protects a person from having a juvenile record follow him or her through the remainder of his or her life. A sealed record permits the youth to deny that he or she has juvenile record or has ever been in juvenile court. This ability is critical to giving a person an

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equal opportunity to move ahead in the world whether regarding employment, schooling, or securing a position of trust.

### **How Does Record Sealing Work In California?**

According to W & I §781, a person who acquired a record while a juvenile can petition the juvenile court to have those records sealed. Juvenile records are confidential from the public as compared to adult records,<sup>6</sup>

but sealing makes them even more difficult to access.<sup>7</sup> Records include documentation of court proceedings, appearances before a probation officer, and contacts with law enforcement.<sup>8</sup> According to the statute the petitioner must wait five years from the time of the event or reach the age of 18 before filing the petition. Thereafter, the court must give notice to the district attorney or probation officer or any of their deputies of the petition and they or any other person having relevant evidence may testify at the hearing on the petition. If the court finds that the applicant has not been convicted of a felony or a misdemeanor involving moral turpitude and that rehabilitation has been attained to the satisfaction of the court, the court shall order all records, papers, and exhibits in the person's case in the custody of the juvenile court sealed, including the juvenile court dockets, and any other records relating to the case in the custody of the other agencies and officials as are named in the order. The order includes relieving the person of any registration requirement and the sealing includes the destruction of all registration information in the custody of the Department of Justice and other agencies and officials. However,

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can confer with experts before making an important decision. You, dear pal, are on your own, making important decisions by the bushel. Normal people can talk about their work with friends. You are prohibited from making any public comment about any proceeding in any court. Sure, you could talk with your next-door-neighbor judge, but you are well aware that she has her own problems. You could theoretically talk to your spouse about your day, but, let's face it, he's a little weary of hearing about it. So you live a huge part of your life in solitude. With no sympathetic ear to hear your stress, you bear the burden of your labors alone. See? This job is not as easy as it looks.

"No man is an island," wrote John Donne several hundred years ago, and he must have known even then how hard it was to work as a judge, involved in the business of mankind but removed from the main. It's lonely. It's sad. And it's everything else as well: rewarding and repetitive; delightful and demanding; gratifying and grating. You're the only one who knows exactly what your day was like. Thank you for carrying the burden of isolation.

Finally, you deserve enormous recognition for doing so much with so little. No more court reporters, bailiffs, law clerks, research support, print books, janitors! Services that generations of judges took for

granted are now mere ghosts of Christmas past. You are doing the best you can with very limited staff support. For a perfectionist, it's very challenging to do your best when, for example, the court file is missing the very document you need. Although I didn't mind emptying the wastebasket, handling calendars without files, or learning computer research after the book budget was slashed, I sorely missed my court reporter. Thank you for doing your best with the draconian budget cuts.

I need a bigger postcard to thank you for everything you do every day to make justice happen for Californians. Thank you for your hard work, for your dedication, for your brave ideals. Thank you for your patience, your courage, your diligence, and your commitment to giving your best every day. You make our system of justice the best one in the world. And if some days you feel lonely or unappreciated, pick up this postcard – or better yet, get yourself to Maui.

The poet Theodore Roethke said, "What we need are more people who specialize in the impossible." That would be you. And so, my friend, I wish you well. May the coming year bring you health, happiness, and wisdom. Aloha! 🌺

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the record will not be sealed if the person has been found by the juvenile court to have committed an offense listed in subdivision (b) of Section 707 when he or she had attained 14 years of age. The sealing provisions do not apply to any records held by the Department of Motor Vehicles (DMV). There are other minor exceptions to the sealing law.<sup>9</sup>

The juvenile court judge has additional powers. At any time before the minor reaches the age of 21, the juvenile court judge can dismiss the petition or may set aside the finding and dismiss the petition if the court finds that the interests of justice and the welfare of the minor require such dismissal or if the court finds that the minor is not in need of treatment or rehabilitation.<sup>10</sup> In the author's experience, this provision is rarely used in practice.

### Why the System Doesn't Work

For a number of reasons the petitioning system does not work. First, very few persons take advantage of the system. They either do not know they have a record, are not advised they have a record, if advised, forget about having a record, are too pre-occupied to complete the process, or believe whatever record they have will not have an impact on their life.<sup>11</sup>

Second, even if a person decides to petition the court, the process is complex, some counties charge for filing a petition to seal records, and some young people believe it is necessary to hire an attorney. The estimates are that youths petition to seal their records in less than 10% of cases.<sup>12</sup>

Third, it is widely known that almost anyone who makes the effort can get another person's

juvenile record. Employers, credit reporting agencies, educational institutions, insurance companies, newspaper reporters, and social service agencies are known to use investigators and other contacts to discover juvenile records. The use of "insiders" such as present or former employees at law enforcement agencies or probation departments has long been an effective means of gaining access to otherwise confidential records.

Fourth, it is not known whether all agencies seal their records after they receive an order from the Superior Court. Federal and state record holders may maintain the records even after receiving a Superior Court order. For example, the Federal Bureau of Investigation will not acknowledge that they seal records even when presented with a court order to do so.<sup>13</sup>

Fifth, even after a record has been ordered sealed, the person is not protected. The potential employer may ask the person: "Have you ever had your record sealed?" While the law permits the applicant to answer "no,"<sup>14</sup> the potential employer may inform the applicant that "if I find out that you have lied, I will fire you." The job applicant will likely reveal information about even a sealed record.

### What Should Be Done to Improve the Record Sealing System?

There will never be a perfect way to protect against juvenile records having an impact on some person's lives. However, six changes in the law would greatly improve the process and save resources. First, some records should be automatically sealed.<sup>15</sup>

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Second, some records should be automatically destroyed. Third, any juvenile arrested or brought before a probation officer or who appears in juvenile court should be informed, in writing, of the nature of the juvenile record created, whether it will be automatically sealed or destroyed, and what he or she can respond if someone asks about his or her juvenile record. The writing should contain how the juvenile can access online information about record sealing. Fourth, the juvenile court judge should have the discretion to order a record sealed or destroyed at any time based upon the court's finding that the minor has been rehabilitated. Fifth, it should be illegal for employers, news media, educational institutions, insurance companies, and agencies to ask a person if he or she has a juvenile record, has ever been arrested as a juvenile, or has had a juvenile record sealed. Sixth, there should be widespread publicity that a juvenile record is not a proper concern in making decisions about a person's opportunities in life.

#### **Automatic Sealing**

All records of arrests, probation contacts, and court involvement regarding infractions, misdemeanors and less serious felonies should be automatically sealed when the minor reaches 18 years of age.<sup>16</sup> If the arrest does not lead to a prosecution or referral to probation, the record should be sealed immediately. If the probation officer works out a contract of supervision for the minor, once that has been successfully completed, the record should be sealed.

#### **Automatic Destroyed**

All sealed records should be destroyed one year after the

record was sealed.<sup>17</sup> The court should have the authority to order any record destroyed after hearing evidence in court. This power should be exercised when the court dismisses a case for lack of evidence or when the court concludes that the destruction is proper under the circumstances of the case. All records of infractions, misdemeanors, W & I §§300 and 601, and less serious felonies should be destroyed when the minor reaches the age of 21, if these records have not been destroyed earlier.

#### **Notice to Minors**

Whenever a minor is arrested, the officer should provide the minor with a written description of the record created by that arrest and what the minor can do to have the record sealed or destroyed. Whenever a minor appears before a probation officer regarding a law violation or a violation described by W & I §601, the probation officer should provide the minor with a written description of the record created by that contact and what the minor can do to have the record sealed or destroyed. Whenever a juvenile court finds a petition to be true and makes dispositional orders regarding that petition, the court should also provide the minor a written description of the record created by the court process and what the minor can do to have the record sealed or destroyed. In all three of these written descriptions, the information shall include the website where the juvenile can access further information about record sealing. In this age of sophisticated technology, the court should also send the person an e-mail with this information.

Each of these written descriptions should contain information about what the

minor can answer to potential employers or others regarding any enquiries about his or her contact with law enforcement, probation authorities, and/or the juvenile court.

#### **Authority of the Juvenile Court to Order Records Sealed or Destroyed**

The juvenile court judge should have the authority to order a juvenile record sealed and/or destroyed whenever the judge finds that this would be in the interests of justice. For example, after a trial, if the judge finds that the petition was not sustained and the case was dismissed, the judge should have the power to order all records relating to the arrest and court proceedings sealed or destroyed.

#### **Questioning Persons About Their Records**

It should be illegal for employers and others dealing with applicants to ask about his or her juvenile court record, about arrests while as a juvenile, or about efforts to have a juvenile record sealed. It is well known that an employer or other person interviewing a potential employee or student may ask the applicant whether he or she has a juvenile record, whether the applicant has ever had a juvenile record sealed, or about contact with the juvenile justice system. These questions may be accompanied with the threat of losing the position if the employer finds out that such a record exists. Even well-prepared applicants may succumb to this pressure and reveal some contact with the juvenile justice system, thus defeating the purpose of the law.

By making it illegal for such questions to be asked, the potential employer or other

interviewer will be less likely to engage in this type of questioning. A number of states have enacted statutes restricting the questioning of employers to potential employees.<sup>18</sup> The State of North Carolina has a statutory scheme which apparently has worked well.<sup>19</sup> The statutes prohibit the employer from enquiring about juvenile records and include the requirement that a potential employer who requests disclosure of information concerning any arrest, criminal charge, or criminal conviction of the applicant shall first advise the applicant that State law allows the applicant to not refer to any arrest, charge, or conviction that has been expunged. Any refusal shall not be the sole reason for denying any application.<sup>20</sup>

#### **Widespread Publicity Concerning Juvenile Records**

In order to implement these changes effectively, it will be helpful to have significant public education in the schools and in the media about the changes in the law. As a part of the proposed changes, the Judicial Council should prepare documents for distribution and available online explaining the rights outlined in these proposals once they are approved of by the legislature and signed by the governor.

#### **Resistance to These Proposals**

There may be resistance to these proposals from law enforcement, prosecutors, employers, and others. Many see value in keeping records so that they can access information about people who come to their attention in the future. This is a legitimate concern, but their need to know should be restricted to serious crimes committed when the

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person was a juvenile. There is no compelling reason why they should maintain arrest or court records for infractions, §§ 601 and 300 proceedings, and less serious crimes. The legislature has carefully distinguished between serious and less serious crimes in a number of statutes.<sup>21</sup> That distinction should be acknowledged in the record sealing and destruction process.

### Summary

The time has come to put in place an effective system to protect a person from having a juvenile arrest or court record impact his or her future. The suggestions contained in this article would be important steps to accomplish this goal. 📌

### Endnotes

- 1 The contents of this article were presented at a seminar in Beijing, China, in October, 2014. The author was invited by the Supreme Court of the Peoples Republic of China to discuss record sealing with Chinese judges from across that country. The Dui Hua Foundation and its Executive Director, John Kamm, facilitated the program. The author thanks Judge Pat Tondreau for his help in preparing this article.
- 2 In several recent cases the United States Supreme Court has affirmed this finding that children are different from adults. *Roper v Simmons*, 543 U.S. 551 (2005); *Graham v Florida*, 130 S.Ct. 2011 (2010). *Roper* and *Graham* emphasize that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.
- 3 40 Op. Cal. Att’y Gen. 50, 53 (1962).
- 4 Refer to the numerous studies cited in Edwards, L., & Sagatun, I., “A Study of Juvenile Record Sealing Practices in California,” 4 *Pepperdine Law Review* 543, at footnote 3, (1976-1977). Available online at [judgeleonardedwards.com](http://judgeleonardedwards.com).

*com*. As stated in a decision by the California appellate court: “While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. Courts cannot and will not shut their eyes to everyday contemporary happenings. It is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minors. Let him attempt to enter the armed services of his country or obtain a position of honor and trust and he is immediately confronted with his juvenile record.” *In re Contreras*, 109 Cal.App.2d 787, 789 (1955).

- 5 Schwartz, R.D. & Skolnick, J.H., “Two Studies in Legal Stigma,” 10 *Dep’t of Canadian Comm. On Corrections*, 407-412 (1969); reprinted in *The Presidential Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society*, 74-77.
- 6 Welfare and Institutions Code section 827 limits access to court records to a select group of persons and agencies. However, once a record is sealed, only the minor can inspect and copy the sealed record and only the minor can petition to allow third parties to inspect. See *In re James H.*, (2007) 154 Cal. App.4th 1078.
- 7 It should be noted, however, that the United States Supreme Court concluded that juvenile records are not protected from the public. “[I]t is frequently said that juveniles are protected by the process from disclosure of their deviational behavior.... This claim of secrecy, however, is more rhetoric than reality.” *In re Gault* 387 U.S. 1, 24 (1967).
- 8 Some definitions are helpful. A **record** is an account of some fact or event preserved in writing or other permanent form; a document on which such an account is inscribed. “To **‘expunge’** means to obliterate

with no trace of their former existence. To **‘seal’** is to close the records from view without physical destruction, and requires physical removal of the records from general files and storage elsewhere.” 40 Ops. Attn.Gen. 50 at 51.

- 9 Section (b) permits opening a sealed record in a defamation case, and section (e) permits the court to examine a sealed record of a person who is petitioning the court to resume jurisdiction pursuant to section 388(c).
- 10 W & I § 782.
- 11 As one probation officer informed the author: “Most persons who have probation contact either are not advised, forget, or don’t care about their 781 rights, hence only a small fraction of records are sealed.”
- 12 This estimate is based on the author’s discussions with juvenile court clerks and probation staff in several counties, on the study the author undertook years ago, and information from other jurisdictions. See Edwards, L., & Sagatun, I., “A Study of Juvenile Record Sealing Practices in California,” *op.cit.* footnote 4 at 564, and Rubin, H.T., “Avoid Juvenile Court,” *Juvenile Justice Update*, Vol. 20, No. 3, June/July 2014 at p. 1-2 where the author wrote that in Cook County out of over 25,000 arrests, less than 100 expungements were granted.
- 13 Edwards & Sagatun, *Id.* pp. 560-562.
- 14 Welfare and Institutions Code §781(a); *T.N.G. v Superior Court*, 4 Cal.3d 767, 94 Cal. Rptr. 813, 494 P.2d 981 (1971); Opinions, Attorney General, *op.cit.*, footnote 3.
- 15 California law was amended by Senate Bill 1038 in 2014 so that some juvenile court records can be automatically sealed. This legislation is not comprehensive and may not include sealing of law enforcement, school, correctional institution, or probation records. Nor is there a mechanism to inform the youth of his or her rights under the law. More needs to be done.
- 16 It is important to permit probation officers and prosecutors to have access to juvenile records up to age 18

for purposes of determining eligibility for deferred entry of judgment.

- 17 The current law maintains records regarding §300 until age 28, §601 until 21 and §602 until 38. W & I §826(a).
- 18 Colo. Rev. Stat. Ann. §24-27-702(1)(f)(I); 775 Ill. Comp. Stat. Ann. 5/2-103(A); 20 Ill. Comp. Stat. Ann. 2630/12(a); Neb. Rev. Stat. Ann. §43-2, 108.05; Or. Rev. Stat. Ann. §670.290; Conn. Sen. Stat. Ann. § 31-51i.
- 19 N.C. Gen. Stat. Ann. § 15A-153 (c): “Employer or Educational Institution Inquiry Regarding Disclosure of Expunged Arrest, Criminal Charge, or Conviction. An employer or educational institution shall not, in any application, interview, or otherwise, require an applicant for employment or admission to disclose information concerning any arrest, criminal charge, or criminal conviction of the applicant that has been expunged and shall not knowingly and willingly inquire about any arrest, charge, or conviction that they know to have been expunged. An applicant need not, in answer to any question concerning any arrest or criminal charge that has not resulted in a conviction, include a reference to or information concerning arrests, charges, or convictions that have been expunged. This subsection does not apply to State or local law enforcement agencies authorized pursuant to G.S. 15A-151 to obtain confidential information for employment purposes.”  
N.C. Gen. Stat. Ann. § 7B-2412 (West) Legal Effect of adjudication of delinquency. “An adjudication that a juvenile is delinquent or commitment of a juvenile to the Division for placement in a youth development center shall neither be considered conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights.”
- 20 N.C. Gen Stat. Ann. § 15A-153(d). There are exceptions to these rules – see section (e) of this statute.
- 21 Refer to Welfare and Institutions Code §707(b) and Penal Code § 1192.8.