

5-1-2013

# In Search of Redemption: Expungement of Federal Criminal Records

Raj Mukherji

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# IN SEARCH OF REDEMPTION: Expungement of Federal Criminal Records

## ABSTRACT

The presumption of innocence applicable to criminal proceedings is a hallmark of our democracy. Nevertheless, it often proves difficult to overcome the societal stigma that attaches to criminal charges – even decades after wrongfully accused defendants are exonerated. In addition, the difficulties in overcoming the sundry legal and practical disabilities created by a conviction perpetuates recidivism (thereby threatening public safety and consuming tax dollars) by frustrating ex-offenders' efforts at reentering society as productive, law-abiding contributors. Barriers to reentry for nonviolent, good hearted, low-risk, onetime offenders may include, inter alia: difficulty in securing post-conviction employment; hurdles in accessing educational and training services, such as federal student aid ineligibility for certain convictions; a federal lifetime ban from food stamps and Temporary Assistance to Needy Families, which can thwart an ex-offender's efforts to receive appropriate addiction treatment; eviction from public housing based on an arrest prior to conviction and permanent ineligibility for public housing based on conviction; ineligibility for federal and state occupational licenses; subjecting noncitizen offenders to deportation; and obstacles to a healthy family life, such as a prohibition from foster care and adoption programs.

These barriers disappear where a former defendant is able to expunge his/her criminal record and is no longer forced to disclose it on applications for employment, educational opportunities, housing, public assistance, and so forth. To cure this injustice, most states have varying mechanisms to expunge criminal records. For example, many states – including New Jersey – have enacted legislation providing for expungements as a matter of right for dismissed charges and low-level misdemeanors and after proving rehabilitation to a judge if the records pertain to certain **nonviolent** felony convictions. However, no statute creating a generally available federal expungement remedy exists, and numerous Courts of Appeals have adopted the view that there is no judicial authority to expunge federal criminal records absent specific legislation or extremely rare and extraordinary circumstances. This paper will first examine the problems for society and for former defendants created by those collateral consequences of criminal records and the consequent inescapable lifelong sentence. Then, this paper will analyze the disparity of expungement remedies available in the federal courts, which do not agree on their jurisdiction to consider the issue; expungement powers pursuant to federal statutes; and expungements made available by state statutes for state criminal records. Finally, this paper will compare two congressional proposals to enact federal expungement legislation and argue for the passage of a bill that combines the best elements of those proposals with effective state models.

RAJ MUKHERJI\*  
NOVEMBER 23, 2012

*\*Under the supervision of, and with undying gratitude to, PROFESSOR CATHERINE MC CAULIFF.*

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## I. Introduction

“To err is human, to forgive, divine.”<sup>1</sup>

The presumption of innocence applicable to criminal proceedings is a hallmark of our democracy. Nevertheless, it often proves difficult to overcome the societal stigma that attaches to criminal charges – even after wrongfully accused defendants are exonerated. In addition, the difficulties in overcoming the sundry legal and practical disabilities created by a conviction perpetuates recidivism among individuals who otherwise could have been one-time, first-time offenders turned productive, law-abiding contributors to society. To cure this injustice, most states have varying mechanisms to expunge criminal records. For example, many states – including New Jersey – have enacted legislation providing for expungements as a matter of right for dismissed charges and low-level misdemeanors and after proving rehabilitation to a judge if the records pertain to certain **nonviolent** felony convictions. However, no statute creating a generally available federal expungement remedy exists, and numerous Courts of Appeals have adopted the view that there is no judicial authority to expunge federal criminal records absent specific legislation or extremely rare and extraordinary circumstances.

With tens of millions of American criminal records readily available online<sup>2</sup> and over 80% of American employers conducting criminal background checks on new hires,<sup>3</sup> the existence of a single nonviolent item on a criminal history – however old or innocuous – is

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<sup>1</sup> ALEXANDER POPE, *An Essay on Criticism*, in COLLECTED POEMS 58, 71 (1924).

<sup>2</sup> Alfred Blumstein & Kiminori Nakamura, “Redemption” in an Era of Widespread Criminal Background Checks, 263 NIJ J. 10, 10 (2009), available at <http://www.nij.gov/journals/263/redemption.htm> (citing BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2003 (2006), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=290>)).

<sup>3</sup> Blumstein, *supra* note 2, at 10 (citing M.E. BURKE, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, 2004 REFERENCE AND BACKGROUND CHECKING SURVEY REPORT: A STUDY BY THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT (2006)).

increasingly frustrating efforts of former defendants to secure employment, occupational licenses, or customers in self-employed situations. Knowledge of the criminal history of an ex-offender or even an innocent defendant who has been exonerated can “produce assumptions of past dishonesty and future untrustworthiness in the minds of all those aware of that history.”<sup>4</sup> As a result of those assumptions as well as various statutory, regulatory, and organizational policy-based disqualifications for individuals with certain criminal histories, former defendants are forced to cope with, inter alia, injury to their reputations and difficulty in obtaining employment, even when charges were dropped;<sup>5</sup> eviction from public housing based on an arrest prior to conviction and permanent ineligibility for public housing based on conviction;<sup>6</sup> difficulty in returning to school, as a consequence of federal student aid ineligibility for certain convictions;<sup>7</sup> a federal lifetime ban from food stamps and Temporary Assistance to Needy Families;<sup>8</sup> and obstacles to a healthy family life such as a prohibition from foster care and adoption programs.<sup>9</sup>

Considering the attention of policymakers and academia to reentry and reintegration, there is a surprising paucity of scholarly literature examining expungement of federal criminal records and the congressional proposals that have not advanced. Therefore, this paper will first examine the problems for society and former defendants created by those collateral consequences of criminal records and the resultant inescapable lifelong sentence. Then, this

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<sup>4</sup> Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 2-3 (2008).

<sup>5</sup> See, e.g., Ritesh Patel, Comment, *Hall v. Alabama: Do Federal Courts Have Jurisdiction to Expunge Criminal Records?*, 34 AM. J. TRIAL ADVOC. 401, 401 (2010); Zainab Wurie, Comment, *Tainted: The Need for Equity Based Federal Expungement*, 6 S. REGION BLACK L. STUDENTS ASS’N L.J. 31, 32-33 (2012).

<sup>6</sup> *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

<sup>7</sup> 20 U.S.C. 1091(r).

<sup>8</sup> 21 U.S.C. 862a(a).

<sup>9</sup> 42 U.S.C. 671(20)(a) (requiring states to comply with the requirements of the Adoption and Safe Families Act (ASFA) of 1997 in order to receive AFSA funding).

paper will analyze the disparity of expungement remedies available in the federal courts, which do not agree on their jurisdiction to consider the issue; expungement powers pursuant to federal statutes; and expungements made available by state statutes for state criminal records. Finally, this paper will compare two congressional proposals to enact federal expungement legislation and argue for the passage of a bill that combines elements of those proposals with effective state models.

## **II. The Problem: Criminal Records Create an Inescapable Lifelong Sentence**

The pervasiveness of criminal records in the Internet age creates a serious problem not only for the offenders and subjects of the records, but also for the economy and for public safety by proliferating recidivists and frustrating the ability of ex-offenders to reenter society and avoid returning to prison. Law enforcement agencies nationwide made over 12.4 million non-traffic arrests in 2011.<sup>10</sup> Prison populations in the United States and taxpayer costs associated thereto have skyrocketed in recent years.<sup>11</sup> According to the Pew Center on the States, by 2008, one out of every 100 American adults was incarcerated, and by 2009, one out of every 31 American adults was either in jail, on probation, or on parole.<sup>12</sup> The United States has more people in prison than any other country in the world.<sup>13</sup> The Justice Department's FY 2013 budget request

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<sup>10</sup> FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2011 (2012), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-29>.

<sup>11</sup> PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 2 (2011), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/State\\_Recidivism\\_Revolving\\_Door\\_America\\_Prisons%20.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (8th ed. 2009), available at [http://www.prisonstudies.org/info/downloads/wppl-8th\\_41.pdf](http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf).

for the federal prison system is just shy of \$7 billion,<sup>14</sup> while state spending on corrections totals an additional \$52 billion annually.<sup>15</sup> Therefore, America spends more on prisons than the entire annual expenditures of many countries' governments, including Ukraine, the Philippines, Pakistan, Cuba, Chile, and Morocco.<sup>16</sup> Furthermore, "[s]tate spending on corrections quadrupled during the past two decades."<sup>17</sup>

One of the primary factors exacerbating the problems of prison overcrowding and correctional spending is recidivism. Nationally, 43.3% – nearly half – of inmates released from prisons nationally were back in jail within three years.<sup>18</sup> Even as the national crime rate has declined steadily over the past two decades, the rate of recidivism within three years for released inmates charged with a new crime (as opposed to parole violations) has continued to increase.<sup>19</sup> Studies have shown that unemployment is a leading indicator of likelihood to recidivate, while ex-offenders are less likely to commit a crime in the future when they have employment stability.<sup>20</sup>

While the correlation between employment and (lack of) recidivism is unsurprising and generally comports with the notion that idle hands are the devil's workshop, it creates a chicken-or-the-egg paradox. On one hand, we want ex-offenders to find jobs to help them stay out of trouble and avoid returning to prison (while becoming productive contributors to society and the

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<sup>14</sup> U.S. DEP'T OF JUSTICE, FEDERAL PRISON SYSTEM (BOP): FY 2013 BUDGET REQUEST AT A GLANCE (2012), <http://www.justice.gov/jmd/2013summary/pdf/fy13-bop-bud-summary.pdf>.

<sup>15</sup> Pew, *supra* note 11, at 2.

<sup>16</sup> CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, FIELD LISTING: BUDGET (2012), *available at* <https://www.cia.gov/library/publications/the-world-factbook/fields/2056.html>.

<sup>17</sup> Pew, *supra* note 3, at 2.

<sup>18</sup> *Id.* at 9.

<sup>19</sup> *Id.*

<sup>20</sup> Burt W. Griffin & Lewis R. Katz, *Overriding Purposes and Basic Principles of Felony Sentencing*, OH. FELONY SENT. L. § 5:53 (2008).

economy). On the other hand, far too often, it is the ex-offender's criminal record more than any other factor (frequently, the only factor) that impedes securing lawful employment. Despite the stated goal in President Barack Obama's crime and law enforcement agenda to "break down employment barriers for people who have a prior criminal record, but who have stayed clean of further involvement with the criminal justice system,"<sup>21</sup> the stigma associated with the record of a criminal conviction – or even a mere arrest or unproven charge – continues to pervade job searches by former offenders and even former acquitted defendants.

A study by the Society for Human Resource Management indicates that over 80% of American employers conduct criminal background checks on prospective employees.<sup>22</sup> In 2006 (six years ago, which is an eternity in the context of rapid advances in information technology and online availability of data), more than 74 million American criminal records were available online in automated databases out of 81 million criminal records on file nationwide.<sup>23</sup> Considering the widespread proliferation of public records on the Internet, arrest and conviction information – regardless of the nature of the offense or time lapsed – are readily available to interfere with the rehabilitation and reentry of ex-offenders into society. Indeed, "collateral bars to employment [can] prevent someone who was trained for a job while incarcerated—at taxpayers' expense—from taking the very job for which he or she was trained."<sup>24</sup>

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<sup>21</sup> Alfred Blumstein & Kiminori Nakamura, "*Redemption*" in an Era of Widespread Criminal Background Checks, 263 NIJ J. 10 (2009), available at <http://www.nij.gov/journals/263/redemption.htm>.

<sup>22</sup> *Id.* (citing M.E. BURKE, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, 2004 REFERENCE AND BACKGROUND CHECKING SURVEY REPORT: A STUDY BY THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT (2006)).

<sup>23</sup> Blumstein, *supra* note 2, at 10 (citing BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2003 (2006), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=290>)).

<sup>24</sup> Christopher Gowen & Erin Magary, *Collateral Consequences: How Reliable Data and Resources Can Change the Way Law Is Practiced*, 39 FORDHAM URB. L.J. 65, 69 (2011).



Difficulty in finding post-conviction employment is only one of numerous reentry barriers faced by ex-offenders. The mere existence of a criminal record also perpetuates recidivism (thereby threatening public safety and consuming tax dollars) by frustrating former defendants' ability to access educational and training services, healthcare, affordable housing, or occupational licensure; subjecting noncitizen offenders to deportation; and interfering with their family lives (such as thwarting their ability to care for foster children or adopt). With all of these hurdles to reentering society, one can hardly be surprised that so many low-risk first-time offenders are drawn back into criminal activity, propagating the cycle of recidivism.

Specifically, these collateral consequences of a criminal record – creating a life sentence for the defendant, even if the sentence for a relatively minor offense was not custodial in nature – include:

- A five-year prohibition from foster care and adoption programs for drug-related convictions and other felony offenses.<sup>25</sup>
- A federal lifetime ban from food stamps and Temporary Assistance to Needy Families, which can thwart an ex-offender's efforts to receive appropriate addiction treatment.<sup>26</sup>
- Ineligibility for federal student aid (such as grants, loans, and work assistance programs) based on drug offenses.<sup>27</sup>
- Ineligibility for (and/or eviction from) public housing. Housing authorities may evict an entire low-income household based upon a mere arrest, rather than waiting for a conviction, pursuant to HUD regulations and the Anti-Drug Abuse Act of 1988.<sup>28</sup>

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<sup>25</sup> 42 U.S.C. 671(20)(a) (requiring states to comply with the requirements of the Adoption and Safe Families Act (ASFA) of 1997 in order to receive AFSA funding).

<sup>26</sup> 21 U.S.C. 862a(a).

<sup>27</sup> 20 U.S.C. 1091(r).

<sup>28</sup> Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

These barriers disappear where a former defendant is able to seal or destroy his/her criminal record through a procedure known as expungement and is no longer forced to disclose it on applications for employment, educational opportunities, housing, public assistance, and so forth.

Some form of expungement of criminal records or similar relief is available in 46 states of our union, as discussed below at § VI of this paper. One observer has uncovered a direct correlation between unemployment rates and state expungement laws.<sup>29</sup> Although extremely rare, expungements are theoretically possible in certain federal circuits that have held that such motions may be entertained under their inherent equitable powers, as discussed below at § III, but not in other circuits. As such, whether a onetime minor offender or a defendant proven innocent is permanently branded with the “scarlet letter” of a criminal record may depend upon where s/he was charged with the offense and whether s/he was charged in state or federal court. This is especially troubling since many state-level misdemeanors or equivalent (i.e., disorderly persons) offenses overlap with federal misdemeanors, and numerous felonies at the state level have nearly identical federal counterparts with which defendants can be charged. The decision of which forum to charge a defendant is left entirely to the discretion of prosecutors, who may be driven by external pressures or sometimes make such decisions based on untoward motivations. For example, congressional and Justice Department investigations uncovered that federal prosecutors politically targeted Democrats and soft-pedaled investigations involving Republicans in certain federal districts during the presidency of George W. Bush.<sup>30</sup>

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<sup>29</sup> Marlin Bressi, *The Link Between Unemployment and Expungement Laws* (Nov. 15, 2011), <http://voices.yahoo.com/the-link-between-unemployment-expungement-laws-10446717.html?cat=17>.

<sup>30</sup> In 2008, the Inspector General of the United States Department of Justice and DOJ’s Office of Professional Responsibility released a report detailing a joint investigation into highly publicized

Considering that widespread disparities in federal criminal sentencing among geographic areas and attributes of the defendant gave rise to the federal sentencing guidelines as such disparities were viewed as anathema,<sup>31</sup> it is equally unfair that defendants convicted of the same exact misdemeanor or cleared of the same charges and otherwise equally situated face totally different opportunities for clearing their names and redemption depending upon geography.

The cases in § III of this paper make evident that even in those circuits that have found the elasticity of ancillary jurisdiction reaches expungement authority, defendants who have been acquitted of all charges were usually denied expungement. Accordingly, unless charged with and cleared of offenses in a jurisdiction where the remedy is available, even innocent persons who were wrongfully accused are haunted by the allegations and associated stigma long after their exoneration in federal court. The enactment of federal legislation uniformly providing an

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allegations of politicization of federal prosecutors' offices. The investigation examined whether certain U.S. Attorneys were "removed for partisan political purposes, or to influence an investigation or prosecution, or to retaliate for their actions in any specific investigation or prosecution." OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 1 (2008), *available at* <http://www.justice.gov/oig/special/s0809a/final.pdf>. The investigation uncovered "significant evidence that political partisan considerations were an important factor in the removal of several of the U.S. Attorneys." *Id.* at 325-26. For example, the Inspector General "concluded that complaints from New Mexico Republican politicians and party activists about [U.S. Attorney for New Mexico David] Iglesias's handling of voter fraud and public corruption cases caused his removal." *Id.* Furthermore, "[t]he bigger scandal, however, almost surely involve[d] prosecutors still in office. The Gonzales Eight were fired because they wouldn't go along with the Bush administration's politicization of justice. But statistical evidence suggests that many other prosecutors decided to protect their jobs or further their careers by doing what the administration wanted them to do: harass Democrats while turning a blind eye to Republican malfeasance [...resulting in] abuses of power that would have made Richard Nixon green with envy." Paul Krugman, *Department of Injustice*, N.Y. TIMES, March 9, 2007, *available at* <http://www.nytimes.com/2007/03/09/opinion/09krugman.html>.

<sup>31</sup> *See, e.g.,* *Mistretta v. United States*, 488 U.S. 361, 365 (1989) (discussing the need to shift away from indeterminate sentencing and discretion to reduce disparities in upholding constitutionality of the Sentencing Commission under separation of powers principles).

expungement remedy for nonviolent, first-time offenders and defining its reach would go a long way toward resolving these inequities.

### **III. Circuit split: federal courts' inherent powers and ancillary jurisdiction to expunge criminal records**

Given the absence of federal legislation expressly authorizing courts to expunge criminal records except as discussed below at § III, federal courts have held that expungements nevertheless may be granted pursuant to a court's inherent powers or subject to the exercise of ancillary jurisdiction. However, as a result of a 1994 Supreme Court decision limiting ancillary jurisdiction in the lower courts, a circuit split exists as to whether expungements may be considered solely on equitable grounds. The Supreme Court twice passed on opportunities to resolve the discrepancy.<sup>32</sup>

Federal courts have limited jurisdiction. Their powers are limited to those “authorized by Constitution and statute.”<sup>33</sup> Congress has provided, “The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”<sup>34</sup> However, the courts' reach includes inherent powers 1) derived from Article III and grounded in the separation of powers concept, vesting in courts certain judicial powers “once Congress has created lower federal courts and demarcated their jurisdiction;”<sup>35</sup> 2) arising from the nature of the court or necessary for the courts to exercise other powers, such as

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<sup>32</sup> Rowlands v. United States, 127 S.Ct. 598 (2006) (cert. denied); United States v. Coloian, 128 S. Ct. 377 (2007) (cert. denied).

<sup>33</sup> Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citing Willy v. Coastal Corp., 503 U.S. 131, 136-137 (1992); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986)).

<sup>34</sup> 18 U.S.C. § 3231.

<sup>35</sup> Eash v. Riggins Trucking Inc., 757 F.2d 557, 563 (3rd Cir. 1985).

the contempt sanction to maintain order while administering justice;<sup>36</sup> and 3) “rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.”<sup>37</sup> This inherent equitable power has been applied in several circuits to find judicial expungement authority.<sup>38</sup>

Despite the limited jurisdiction of federal courts, the doctrine of ancillary jurisdiction allows those courts to exercise jurisdiction over certain matters that would otherwise exceed their competence, if those matters are incidental to other matters properly being considered by those courts.<sup>39</sup> The seminal Supreme Court decision demarcating ancillary jurisdiction was *Kokkonen v. Guardian Life Ins. Co. of Am.*, which explained that courts have generally asserted ancillary jurisdiction for two purposes:

- (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, [...] and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.<sup>40</sup>

In *Kokkonen*, the Supreme Court in a 9-0 holding reversed the assertion of ancillary jurisdiction by both a district court and the Ninth Circuit Court of Appeals to enforce a settlement agreement disposing of an earlier lawsuit related to the termination of a general

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<sup>36</sup> *Id.* (citing *Michaelson v. U. S. ex rel. Chicago*, 266 U.S. 42, 65-66 (1924)).

<sup>37</sup> *Eash*, 757 F.2d at 564 (quoting *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978); *cf. Hall v. Cole*, 412 U.S. 1, 5 (1973) (courts enjoy inherent equitable powers)).

<sup>38</sup> *See, e.g., Livingston v. U.S. Dept. of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985); *United States v. Flowers*, 389 F.3d 737, 739-40 (7th Cir. 2004).

<sup>39</sup> *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994).

<sup>40</sup> *Kokkonen*, 511 U.S. at 379-80 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (asserting ancillary jurisdiction to order payment of adversary’s attorney fees as a misconduct sanction); *United States v. Hudson*, 11 U.S. 32, 34 (1812) (asserting ancillary jurisdiction to hold parties in contempt as means of maintaining order during courtroom proceedings)).

agency agreement.<sup>41</sup> In delivering the opinion of the Court, Justice Scalia rejected as overbroad dictum from a 1904 Supreme Court decision: “A bill filed to continue a former litigation in the same court...to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties...or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court...is an ancillary suit.”<sup>42</sup> However, Justice Scalia acknowledged that the doctrine of ancillary jurisdiction was neither rigid nor precise.<sup>43</sup>

Based on the foregoing powers of the court, most circuits found jurisdiction to expunge criminal records on equitable grounds prior to *Kokkonen*, although several of those circuits never actually allowed an expungement to be granted. However, several circuits have subsequently reversed course in light of *Kokkonen*, finding that ancillary jurisdiction no longer exists for expungement based solely on equitable grounds. Specifically, Courts of Appeals in the First, Third, Sixth, Eighth, and Ninth Circuits have cited *Kokkonen* in declining to recognize ancillary jurisdiction over expungement motions on equitable grounds, as have district courts in the Eleventh Circuit. Conversely, appellate authority in the Second, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits continues to recognize jurisdiction for expungement motions pursuant to the courts’ inherent powers.

**a. Circuits declining to consider motions to expunge based on equitable grounds under ancillary jurisdiction**

The Court of Appeals to adopt this viewpoint most recently was the Sixth Circuit in 2010, which despite a dissent from the Chief Judge of the Circuit held that the District Court for the

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<sup>41</sup> *Kokkonen*, 511 U.S. at 375.

<sup>42</sup> *Id.* at 378-79 (quoting *Julian v. Central Trust Co.*, 193 U.S. 93, 113-14 (1904)).

<sup>43</sup> *Kokkonen*, 511 U.S. at 379.

Eastern District of Michigan correctly declined to exercise ancillary jurisdiction over the expungement motion of an acquitted defendant's arrest record.<sup>44</sup> In *Lucido*, a money manager had been charged with sundry money laundering and conspiracy crimes in two indictments that were 17 and 18 years old, respectively.<sup>45</sup> *Lucido* was granted a judgment of acquittal by the district judge in the first indictment, and he was acquitted of all charges against him by a jury in the second indictment.<sup>46</sup> Despite being totally cleared in both cases, records of his indictment continued to haunt *Lucido* in a Financial Industry Regulatory Authority (FINRA) database, which damaged his investment management business and impaired his post-acquittal success in society.<sup>47</sup>

The Sixth Circuit analysis immediately dispensed of the first purpose of ancillary jurisdiction prescribed by *Kokkonen* and focused on the second purpose: "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."<sup>48</sup> To that end, a majority of the panel wrote, "These criminal cases have long since been resolved, and there is nothing left to manage, vindicate or effectuate,"<sup>49</sup> and therefore, the court's consideration of the expunction of records was not ancillary to the already-concluded cases giving rise to the request.

The Sixth Circuit's holding in *Lucido* modified its own pre-*Kokkonen* precedent in *United States v. Doe*, where it had noted, "[i]t is within the inherent equitable powers of a federal

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<sup>44</sup> *United States v. Lucido*, 612 F.3d 871, 872-73 (6th Cir. 2010).

<sup>45</sup> *Id.* at 873.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 874 (citing *Kokkonen*, 511 U.S. at 379-80).

<sup>49</sup> *Lucido*, 612 F.3d at 875.

court to order the expungement of a record in an appropriate case,”<sup>50</sup> as well as one post-*Kokkonen* decision in *United States v. Carey*, 602 F.3d 738, 740 (6th Cir. 2010), reh’g denied (May 17, 2010), *cert. denied*, 131 S. Ct. 322 (U.S. 2010).

A similar analysis appeared in the relevant First Circuit precedent in *United States v. Coloian*, where an attorney and former Chief of Staff to the Mayor of Providence, Rhode Island, sought to expunge records of a corruption indictment in which Mr. Coloian was totally exonerated by a jury.<sup>51</sup> Coloian asserted that the existence of the arrest and indictment records, notwithstanding his acquittal, harmed his ability to practice law and otherwise conduct business.<sup>52</sup> The First Circuit considered the circuit split and joined the Third, Eighth, and Ninth Circuits, holding, “*Kokkonen* forecloses any ancillary jurisdiction to order expungement based on Coloian’s proffered equitable reasons.”<sup>53</sup> As a result, no expungement of criminal records is available on equitable grounds within the First Circuit.

In *Dunegan*, the Third Circuit considered a retired police officer’s petition to expunge nearly 30-year-old charges for violating a suspect’s civil rights in an accidental shooting.<sup>54</sup> As in *Coloian* and *Lucido*, the retired officer had been acquitted of the charges, and no record of conviction existed. However, since Dunegan had not alleged unlawful arrest or conviction or “Constitutional or statutory infirmity in the underlying criminal proceedings,” the district court

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<sup>50</sup> *United States v. Doe*, 556 F.2d 391, 393 (6th Cir. 1977).

<sup>51</sup> *United States v. Coloian*, 480 F.3d 47, 48 (1st Cir. 2007).

<sup>52</sup> *Id.* at 49.

<sup>53</sup> *Id.* at 52.

<sup>54</sup> *United States v. Dunegan*, 251 F.3d 477, 478 (3d Cir. 2001).



did not have jurisdiction to expunge a criminal record, whether of an acquittal or conviction.<sup>55</sup>

This view was upheld in *United States v. Rowlands*, 451 F.3d 173, 178 (3d Cir. 2006).<sup>56</sup>

The Eighth Circuit also backpedaled on the issue of subject matter and ancillary jurisdiction in the wake of *Kokkonen*. Previously, the Eighth Circuit had held, “[c]onsistent with other circuits, that a federal court may exercise its inherent equitable powers by ordering the Attorney General to expunge criminal records in a particular case, provided that the case presents extraordinary circumstances warranting such an exercise of the court’s equitable power.”<sup>57</sup> But the Court of Appeals applied *Kokkonen* to narrow its definition of ancillary jurisdiction in *Meyer*. In that case, the panel found that Meyer, a *pro se* petitioner employed in the securities industry who 18 years earlier had pled guilty to a single count of failing to file income tax returns and served probation, “sought expungement based solely on the equitable considerations that his employer was insured by the FDIC and that FDIC regulations restricted the employment of individuals previously convicted of certain criminal offenses. Meyer did not allege that his misdemeanor conviction was in any way invalid or illegal nor did he rely on any Constitutional provision or statute authorizing either a district court or magistrate judge to expunge his criminal

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<sup>55</sup> *Id.* at 480.

<sup>56</sup> David Rowlands, unlike the petitioners in *Coloian*, *Dunegan*, and *Lucido*, sought to expunge a record of conviction. Twenty-four years prior to bringing the expungement petition, Rowlands—a former Councilman and Mayor of Kearny, New Jersey—had been convicted of conspiring to obstruct and delay interstate commerce in violation of 18 U.S.C. § 1951, knowingly attempting to obstruct and delay interstate commerce by extortion, in violation of 18 U.S.C. § 1951-52, and knowingly attempting to influence and obstruct a federal grand jury investigation, in violation of 18 U.S.C. § 1503. Despite being sentenced to eight years in prison, Rowlands was released after serving 10 months after two federal prosecutors urged the court to reduce his sentence because of significant post-sentencing cooperation. Two decades later, despite having letters of support from both Assistant U.S. Attorneys who had prosecuted him and boasting a lengthy post-conviction history of productivity, community service, and making amends, Rowlands remained unable to have his teaching certificate reinstated by the State Board of Examiners as a result of his decades-old conviction. *Rowlands*, 451 F.3d at 175.

<sup>57</sup> *Geary v. United States*, 901 F.2d 679, 680 (8th Cir. 1990) (citing *United States v. Doe*, 859 F.2d 1334 (8th Cir. 1988); *United States v. McMains*, 540 F.2d 387 (8th Cir. 1976)).

conviction.”<sup>58</sup> Finding that the proposed exercise of ancillary jurisdiction did not comport with the second of the two purposes in *Kokkonen*, the Eighth Circuit Court of Appeals reversed and vacated the District Court’s order of expungement of Mr. Meyer’s arrest and conviction.<sup>59</sup>

For the same reasons, the Ninth Circuit declared that district courts lack ancillary jurisdiction to expunge criminal records based on equitable considerations, holding that the “expungement of an accurate record of a valid arrest and conviction necessarily disrupts [the Tenth Amendment’s] balance of power and, in doing so, violates the principles of federalism upon which our system is founded.”<sup>60</sup> Basing its opinion on *Kokkonen* insofar as it concerned the ancillary jurisdiction purpose of managing proceedings, vindicating authority, and effectuating decrees, the Court of Appeals noted, “Expungement of a criminal record solely on equitable grounds, such as to reward a defendant’s rehabilitation and commendable post-conviction conduct, does not serve any of those goals.”<sup>61</sup>

The present state of the law is unclear in the Eleventh Circuit, where the Court of Appeals has not considered the issue since Justice Scalia authored the Supreme Court opinion in *Kokkonen* but several district courts within the circuit have adopted the view that ancillary jurisdiction does not exist to consider expungement motions solely on equitable grounds.<sup>62</sup>

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<sup>58</sup> *United States v. Meyer*, 439 F.3d 855, 861 (8th Cir. 2006).

<sup>59</sup> *Id.* at 863.

<sup>60</sup> *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000) (affirming dismissal of expungement motion for want of jurisdiction where Thomas Sumner, a substitute teacher seeking permanent certification as a teacher, petitioned to expunge a nearly 30-year-old conviction for unlawful possession of narcotics in Yosemite National Park while in his youth and was sentenced to 90 days of probation and a \$100 fine).

<sup>61</sup> *Id.*

<sup>62</sup> “Despite the circuit split, this court is comfortable that the Eleventh Circuit would follow the post-*Kokkonen* theory discussed above and not the theory applied by other circuits not discussed.” *United States v. Paxton*, 2007 WL 2081483, at \*2 (M.D. Ala. July 20, 2007). *See also* *Hall v. Alabama*, 2010 WL 582076, at \*8 (M.D. Ala. Feb. 18, 2010).

However, since all Fifth Circuit decisions that predate October 1, 1981, have precedential authority on courts of the Eleventh Circuit,<sup>63</sup> other district courts within the circuit are free to adopt the view of the circuits finding that the elasticity of ancillary jurisdiction reaches equitable expungements, in accord with pre-1981 Fifth Circuit holdings that have not been abrogated.<sup>64</sup>

Unlike the Sixth Circuit decision, which seems to have foreclosed judicial federal expungements entirely, the First, Third, Eighth, and Ninth Circuits have left open the possibility that courts may nevertheless have ancillary jurisdiction to expunge certain records on *other* than equitable grounds, “in extraordinary cases to preserve its ability to function successfully by enabling it to correct an injustice caused by an illegal or invalid criminal proceeding.”<sup>65</sup> “When we refer to ‘equitable grounds,’ we mean grounds that rely only on notions of fairness and are entirely divorced from legal considerations [...] [E]xpungement of a criminal record ‘solely on equitable grounds, such as to reward a defendant’s rehabilitation and commendable post-conviction conduct’ did not serve the purposes of ancillary jurisdiction as articulated in *Kokkonen*, and... ‘a district court’s ancillary jurisdiction is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error.’”<sup>66</sup> At present, the distinction seems purely academic. This writer was unable to locate a single district court within these circuits that has actually granted an expungement since *Kokkonen*.

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<sup>63</sup> *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

<sup>64</sup> *See United States v. McLeod*, 385 F.2d 734, 747-50 (5th Cir. 1967) (granting expungement of state criminal records of African-Americans who were arrested by state law enforcement officers attempting to intimidate them against voting); *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972) (acknowledging the power of the courts to expunge records but finding that the power “is one of exceedingly narrow scope” and vacating a lower court’s expungement order).

<sup>65</sup> *Meyer*, 439 F.3d at 860-62.

<sup>66</sup> *Coloian*, 480 F.3d at 51 (quoting *Sumner*, 226 F.3d at 1014-15. *See also Dunegan*, 251 F.3d at 480 (holding that district courts do not have jurisdiction over expungement motions based on equitable grounds, but declining to decide “whether a record may be expunged on the basis of Constitutional or statutory infirmity in the underlying criminal proceedings or on the basis of an unlawful arrest or conviction”).

**b. Circuits recognizing jurisdiction for expungement motions brought solely on equitable grounds**

Unlike the circuits in the foregoing section, in six other circuits, Court of Appeals precedents continue to allow district courts to exercise jurisdiction to consider motions to expunge criminal records solely on equitable grounds. In the Second, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits, the courts' inherent equitable powers vindicate such authority.

Since *Kokkonen*'s narrowing of ancillary jurisdiction, the Seventh Circuit reaffirmed its pre-*Kokkonen* holding that “[D]istrict courts do have jurisdiction to expunge records maintained by the judicial branch” (but not for Executive Branch records) and ancillary jurisdiction over judicial expungements arises out of the federal courts' inherent equitable powers.<sup>67</sup> Courts in the Seventh Circuit must apply a balancing test: “if the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintenance of the records, then expunction is appropriate.”<sup>68</sup> The Court of Appeals elaborated on the balancing test in *Flowers*:

[E]xpungement is, in fact, an extraordinary remedy...“unwarranted adverse consequences” must be uniquely significant in order to outweigh the strong public interest in maintaining accurate and undoctored records. We will turn first to the second part of the test: the public interest in maintaining accurate records. That interest is strong as evidenced by the statutory admonition found in 28 U.S.C. § 534 which requires the Department of Justice to collect criminal records and make them available to state and local law enforcement agencies. Records relating to a person's criminal conduct are vital tools to law enforcement and are...essential to the computation of sentences under the United States Sentencing Guidelines. Other evidence of the weight of the public interest can be seen in the long tradition of open proceedings and public records, which is the essence of a democratic society.

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<sup>67</sup> *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004). *See also* *United States v. Kotsiris*, 543 F. Supp. 2d 966, 969-70 (N.D. Ill. 2008).

<sup>68</sup> *United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993) (prescribing a balancing test for expungement of judicial records but foreclosing judicial expungement of records in possession of the Executive Branch).

To outweigh that interest, “unwarranted adverse consequences” must truly be extraordinary. The phrase does not refer to adverse consequences which attend every arrest and conviction. Those are unfortunate but generally not considered *unwarranted* adverse consequences. It is possible, even likely, that any person with an arrest or conviction record may well be impeded in finding employment. As the Court of Appeals for the Ninth Circuit has stated, if employment problems resulting from a criminal record were “sufficient to outweigh the government's interest in maintaining criminal records, expunction would no longer be the narrow, extraordinary exception, but a generally available remedy.”<sup>69</sup>

It should be noted that although the Court of Appeals in *Flowers* recognized jurisdiction to expunge on equitable grounds, a lower court’s grant of expungement was reversed and vacated because Flowers had not demonstrated that the balancing test weighed in favor of expungement.<sup>70</sup> Consequently, Katherine Ann Flowers, a recently graduated practical nurse and Lieutenant in her local fire department, was unable to expunge an 8-year-old one-count conviction for violating 42 U.S.C. § 3631(b)(1) (“interfering with housing rights on account of race”).<sup>71</sup>

Pre-*Kokkonen* precedent also remains undisturbed within the D.C. Circuit. “The judicial remedy of expungement is inherent and is not dependent on express statutory provision.”<sup>72</sup> Further, “courts have the inherent, equitable power to expunge arrest records...expungement can and should be ordered ‘when that remedy is necessary and appropriate in order to preserve basic legal rights.’”<sup>73</sup> In *Livingston*, the D.C. Circuit Court of Appeals called for a balancing of the

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<sup>69</sup> *Flowers*, 389 F.3d at 739-40 (quoting *United States v. Smith*, 940 F.2d 395, 396 (9th Cir. 1991)).

<sup>70</sup> *Flowers*, 389 F.3d at 738.

<sup>71</sup> *Id.*

<sup>72</sup> *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974).

<sup>73</sup> *Livingston v. U.S. Dept. of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985) (quoting *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973)).

equities and “a logical relationship between the injury and the requested remedy.”<sup>74</sup> The court noted the need to consider expungements based on the necessities of each case, emphasizing “flexibility rather than rigidity...[retaining] the qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation.”<sup>75</sup>

The Second Circuit likewise rejected arguments by the government that district courts lack ancillary jurisdiction to hear expungement motions.<sup>76</sup> Uniquely, the Second Circuit found that applying ancillary jurisdiction to expungement cases – even where based solely on equitable considerations – fell “within the policy of encouraging judicial economy.”<sup>77</sup> Nevertheless, the Second Circuit limited the relief to extreme circumstances, the finding of which should involve a “delicate balancing of the equities between the right of privacy of the individual and the right of law enforcement officials to perform their necessary duties.”<sup>78</sup> Although the Court of Appeals expressed its view over three decades ago, it has declined to reconsider in the aftermath of the *Kokkonen* decision, and district courts within the circuit have agreed that federal courts remain vested with inherent equitable powers to expunge criminal records.<sup>79</sup>

The Fourth Circuit followed the view of *Schnitzer* in *Allen v. Webster*, which has not been abrogated by the Court of Appeals since *Kokkonen* and remains good law within the

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<sup>74</sup> *Livingston*, 759 F.2d at 78.

<sup>75</sup> *Id.*

<sup>76</sup> *United States v. Schnitzer*, 567 F.2d 536, 538 (2d Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

<sup>77</sup> *Id.*

<sup>78</sup> *Schnitzer*, 567 F.2d at 539 (quoting *United States v. Rosen*, 343 F.Supp. 804, 806-7 (S.D.N.Y. 1972)).

<sup>79</sup> *See, e.g.*, *Melendez v. United States*, 2012 WL 3614605 (E.D.N.Y. Aug. 21, 2012); *United States v. Rabadi*, 889 F. Supp. 757, 759 (S.D.N.Y. 1995); *United States v. Daisley*, 2006 WL 3497855 (E.D.N.Y. Dec. 5, 2006).

circuit.<sup>80</sup> However, several district courts within the Fourth Circuit have declined to follow *Allen* in favor of the no-ancillary-jurisdiction view of the First, Third, Sixth, Eighth, and Ninth Circuits, noting that the Court of Appeals has not spoken to the issue since the Supreme Court narrowed ancillary jurisdiction in *Kokkonen*.<sup>81</sup>

The Tenth Circuit has stated, following *Kokkonen*, “[i]t is well settled in this circuit that courts have inherent equitable authority to order the expungement of an arrest record or a conviction in rare or extreme instances.”<sup>82</sup> The Tenth Circuit Court of Appeals has exercised ancillary jurisdiction to find this authority.<sup>83</sup> However, the Tenth Circuit has applied a heightened standard to attempts to expunge convictions of persons “adjudged as guilty in a court of law” vis-à-vis expungements of arrest records of a “presumably innocent person.”<sup>84</sup>

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<sup>80</sup> *Allen v. Webster*, 742 F.2d 153, 154-55 (4th Cir. 1984).

<sup>81</sup> *See, e.g.*, *United States v. Harris*, 847 F. Supp. 2d 828 (D. Md. 2012) (denying expungement of a 8-year-old misdemeanor conviction for possessing a small amount of cocaine on equitable grounds due to lack of federal ancillary jurisdiction, noting the Fourth Circuit’s holding in *Allen* predated *Kokkonen*); *United States v. Mitchell*, 683 F. Supp. 2d 427, 432 (E.D. Va. 2010) (finding no ancillary jurisdiction under 18 U.S.C. § 3231 “because the act of entering judgment of conviction in defendant’s criminal case divests a district court of original jurisdiction over defendant’s case” and distinguishing from *Allen*); *United States v. Gary*, 206 F. Supp. 2d 741 (D. Md. 2002) (making no mention of *Allen* but citing the Ninth Circuit decision in *Sumner* in finding no ancillary jurisdiction to expunge solely for equitable considerations and claiming there is no direct authority in the Fourth Circuit on the issue).

<sup>82</sup> *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1234 (10th Cir. 2001) (citing pre-*Kokkonen* holdings in *United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993) and *United States v. Linn*, 513 F.2d 925, 927 (10th Cir.), *cert. denied*, 423 U.S. 836 (1975)). *See also* *United States v. Friesen*, 853 F.2d 816 (10th Cir. 1988) (trial court could not exercise its discretion to order expungement of arrest without a factual showing of harm or extreme circumstances).

<sup>83</sup> *Id.*

<sup>84</sup> *Pinto*, 1 F.3d at 1070 (holding federal trial courts are without power to expunge a conviction that was in no way alleged to be invalid and defendant was only being harmed by the natural and intended collateral consequences of conviction).

Nevertheless, the fact that a defendant was acquitted was not “in itself sufficient to require the trial court to expunge his record of arrest.”<sup>85</sup>

The Fifth Circuit has famously proclaimed, “Public policy requires ... that the retention of records of the arrest and of the subsequent proceedings be left to the discretion of the appropriate authorities. The judicial editing of history is likely to produce a greater harm than that sought to be corrected.”<sup>86</sup> Nevertheless, post-*Kokkonen*, that Court of Appeals has asserted inherent equitable powers under its ancillary jurisdiction to uphold an expungement of **judicial** records upon a mere showing that the existence of the records burdened the petitioner, where a conviction had been overturned.<sup>87</sup> In the seminal Fifth Circuit case, a former federal law enforcement officer whose 1986 wire fraud and conspiracy convictions had been set aside sought expungement of the records of the arrest and overturned convictions.<sup>88</sup> The Fifth Circuit noted that federal courts have supervisory powers over judicial records, and the government had not challenged the expungement order as it pertained to such records.<sup>89</sup> However, the panel reversed the district court’s expungement of **Executive Branch** records. In doing so, the Fifth Circuit opined that the *Janik* court in the Seventh Circuit had gone too far in foreclosing the expungement remedy against the Executive Branch, noting:

First, courts—not legislatures—have historically crafted remedies when a claimant has demonstrated that his rights have been violated. [...] In the main, courts have not restrained their remedial powers on account of the wrongdoers’ affiliation with the executive branch. [...] More importantly for our purposes, our circuit has employed the expungement remedy before—in the

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<sup>85</sup> *Linn*, 513 F.2d at 928.

<sup>86</sup> *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972).

<sup>87</sup> *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 697 (5th Cir. 1997), *cert. denied*, 523 U.S. 1077 (1998).

<sup>88</sup> *Id.* at 696.

<sup>89</sup> *Id.* at 697.



absence of specific congressional permission—when no other remedy existed to vindicate important legal rights.<sup>90</sup>

Nevertheless, the court adopted a narrower jurisdictional test than its sister circuits that had found inherent equitable powers to expunge; to wit, the standard adopted in *Sealed Appellant* was that the party “seeking expungement against executive agencies must assert an affirmative rights violation by the executive actors holding the records of the overturned conviction.”<sup>91</sup> Since the petitioner had not made a specific showing that any government agency was using adverse information to harm the petitioner, the standard for invoking the expungement remedy against the Executive Branch had not been satisfied and the order of expungement was reversed as against the FBI.<sup>92</sup>

Although federal courts in the Second, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits have asserted ancillary jurisdiction to consider expungement motions on equitable grounds, giving the appearance that the balancing test could afford ex-offenders or exonerated defendants in these circuits a fighting chance to clear their records, the above cases make clear that the test rarely tips in favor of expungement. Occasionally, a bold district court has granted an expungement of criminal records in one of the circuits permitting ancillary jurisdiction to be exercised.

Within the Second Circuit, Senior District Judge Pettine ordered the FBI to expunge 15-year-old investigative and arrest records of a petitioner who had been arrested at the age of 21 on an extortion charge based on nothing but an angry letter written out of youthful impetuosity to a liquor store owner who refused to sell him beer just after his twenty-first birthday.<sup>93</sup> The grand

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<sup>90</sup> *Id.* at 698-99 (citations omitted).

<sup>91</sup> *Id.* at 699.

<sup>92</sup> *Id.* at 702.

<sup>93</sup> *Natwig v. Webster*, 562 F. Supp. 225 (D.R.I. 1983).

jury refused to indict the then-21-year-old, and he went on to become an accomplished economist. Nevertheless, the record of the arrest – despite the lack of conviction – had stymied his advancement in a government contractor role that required a security clearance and threatened his ability to emigrate to Australia.<sup>94</sup> As Judge Pettine eloquently wrote:

The plaintiff is an accomplished economist. He has not been involved with the criminal justice system in any way since the folly of his youth. For this Court to insist under these circumstances that the government’s general need in preserving arrest records outweighs the harm caused by maintaining the plaintiff’s record would result in a grave injustice—the evils of bureaucracy and inflexibility would triumph over the virtues of individuality and personal growth. In a fundamental way expungement in this case protects what Justice Brandeis termed the “right to be let alone—the most comprehensive of rights and right most valued by civilized men.”<sup>95</sup>

The Chief Judge of the Eastern District of Wisconsin, within the Seventh Circuit, granted an unopposed motion to expunge the 12-year-old criminal records of an attorney who had been arrested on a federal mail fraud charge that was subsequently dismissed.<sup>96</sup> Within the Fourth Circuit, an Eastern District of Virginia judge found after asserting the court’s inherent equitable powers that the balancing test required expungement where a young, aspiring Washington businessman was totally innocent and had been mistakenly charged in a cocaine distribution conspiracy but faced obstacles to secure bank loans and government contracts, notwithstanding the dismissal of the charges against him.<sup>97</sup>

More recently, the District of Utah relied on the Tenth Circuit’s balancing test referenced in *Linn* and expunged the **conviction** records of a railroad worker and married father of three

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<sup>94</sup> *Id.* at 226.

<sup>95</sup> *Natwig*, 562 F. Supp. at 231 (citing *Olmstead v. United States*, 277 U.S. 438 (1928)).

<sup>96</sup> *United States v. Bohr*, 406 F. Supp. 1218 (E.D. Wis. 1976) (finding authority under the All Writs Act; see § IV(b) below).

<sup>97</sup> *United States v. Van Wagner*, 746 F. Supp. 619, 621 (E.D. Va. 1990).

who had been charged with distribution of cocaine 20 years prior while a student at Weber State University.<sup>98</sup> A federal prosecutor supported the expungement petition, noting the government had no continuing need to retain the records, and the petitioner testified that background checks prevented him from coaching his children's sports teams and stymied potential workplace promotions.<sup>99</sup>

Since these three cases were the only ones this writer could locate since *Kokkonen* in which expungement was granted, these cases sadly represent exceptions rather than the norm. Even in these circuits where ancillary jurisdiction exists, orders granting expungement are usually as scarce as in the First, Third, Sixth, Eighth, and Ninth Circuits. The circuits in this section either have not revisited the issue since *Kokkonen*, or they have not viewed *Kokkonen* as precluding expungement authority in the court's inherent equitable powers. In sum, unlike the circuits discussed in § III(a), these other circuits do continue to find ancillary jurisdiction for expungement solely on equitable grounds.

Twenty-four years after pleading guilty to conspiring to obstruct and delay interstate commerce, a former New Jersey mayor who went on to serve the public in noteworthy ways and never committed another crime was unable to have his teaching certificate reinstated, despite the pleas of both federal prosecutors and the federal judge in his case who insisted he had made amends.<sup>100</sup> A money manager cleared of all charges in money laundering and conspiracy indictments continued to suffer harm to his reputation and investment management business two decades after the acquittals, but he was nevertheless denied expungement.<sup>101</sup> An exonerated

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<sup>98</sup> *United States v. Williams*, 582 F. Supp. 2d 1345, 1346 (D. Utah 2008).

<sup>99</sup> *Id.*

<sup>100</sup> *Rowlands*, 451 F.3d at 175.

<sup>101</sup> *Lucido*, 612 F.3d at 872-73.

attorney and mayoral Chief of Staff was likewise ineligible for the relief.<sup>102</sup> A retired police officer cleared of civil rights violations in an accidental shooting could not expunge the records 30 years later,<sup>103</sup> and neither could a law-abiding securities industry employee who had committed a single misdemeanor 18 years earlier.<sup>104</sup> Therefore, whether or not filing in a circuit that recognizes ancillary jurisdiction over expungement of criminal records, a petitioner seeking such relief is not likely to find it in the federal courts.

#### **IV. Expungements pursuant to federal statutes**

##### **a. Expungement powers expressly granted by statutes**

Although Congress has not enacted federal expungement legislation mirroring remedies available in most states, offenders may be eligible for limited expungements under narrow circumstances based on certain statutes. One circumstance where Congress has explicitly granted expungement authority to the Judicial Branch is where an offender was under 21 years old at the time of a single offense involving possession of a small, “personal use” amount of certain controlled substances in violation of the Controlled Substances Act,<sup>105</sup> and the defendant was granted pre-judgment probation (wherein the District Court dismissed the proceedings without entering a judgment of conviction prior to the expiration of a term of probation). In such cases:

The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such

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<sup>102</sup> *Coloian*, 480 F.3d at 48-49.

<sup>103</sup> *Dunegan*, 251 F.3d at 478.

<sup>104</sup> *Meyer*, 439 F.3d at 861.

<sup>105</sup> 21 U.S.C. § 844.

arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.<sup>106</sup>

When an expungement is granted pursuant to 18 U.S.C. § 3607(c), the Department of Justice retains a sealed, nonpublic record of the conviction, “solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition” provided in the statute.<sup>107</sup>

Congress has also directed the Executive Branch to expunge its own records in limited instances. For example, the statute authorizing the FBI to create an index of DNA identification records of federal criminal defendants and convicts contains a provision requiring the Director of the FBI to expunge the DNA analyses of persons whose charges are dismissed or whose convictions are overturned.<sup>108</sup> The statute authorizing the Department of Defense to collect and index DNA samples of service members convicted of qualifying military offenses contains an analogous provision requiring the expungement of the DNA analyses of military personnel whose convictions are overturned.<sup>109</sup>

Congress has also authorized the Secretary of Veterans Affairs to expunge records related to disciplinary matters involving the professional conduct or competence of Veterans Health Administration employees, where a Disciplinary Appeals Board has recommended such a remedy in resolving a disciplinary question.<sup>110</sup> Separately, Executive Branch agencies have

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<sup>106</sup> 18 U.S.C.A. § 3607(c) (West). *See also* 21 U.S.C.A. § 844a(j) (West).

<sup>107</sup> 18 U.S.C.A. § 3607(b) (West).

<sup>108</sup> 42 U.S.C.A. § 14132(d) (West).

<sup>109</sup> 10 U.S.C.A. § 1565(e) (West).

<sup>110</sup> 38 U.S.C.A. § 7462(d)(1) (West).

administrative procedures in place pursuant to 5 U.S.C. § 552a that permit individuals who are subjects of inaccurate government records to request correction of those records.

**b. Expungement powers implicit in statutes**

Ex-offenders have creatively resorted to other statutes that do not mention expungement to seek relief, mostly without success. In *Carey*, a defendant who had years earlier pled guilty to a one-count Information for conducting an illegal gambling business, served one year or probation without incident, and led a commendable, law-abiding post-conviction life, brought a motion to expunge his criminal records under the Federal Gun Control Act and asserted before the Sixth Circuit that the motion's denial violated his Second Amendment right to bear arms, in turn violating his Fifth Amendment rights under the Equal Protection and Due Process clauses.<sup>111</sup> Carey argued that the expungement would have restored his right to possess or carry a firearm and its denial therefore infringed upon a fundamental right.<sup>112</sup> Carey further asserted that congressional passage of the Federal Gun Control Act's reference to expunged records implied an expungement remedy for federal convictions.<sup>113</sup>

However, the Supreme Court had previously upheld “longstanding prohibitions on the possession of firearms by felons and the mentally ill [...and] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings [...and] or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>114</sup> Accordingly, the Sixth Circuit

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<sup>111</sup> *Carey*, 602 F.3d at 740-41.

<sup>112</sup> *Id.*

<sup>113</sup> 18 U.S.C.A. § 921(a)(20) (West) (“Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.”).

<sup>114</sup> *Dist. of Columbia v. Heller*, 554 U.S. 570, 571 (2008).

held, it follows that Carey’s inability to obtain an expungement did not violate a constitutional right, and the Federal Gun Control Act – while not precluding expungements of valid convictions and while disallowing expunged convictions to interfere with the right to bear arms – conferred no authority on the courts to grant such expungements.<sup>115</sup>

As an alternative to the inherent equitable powers discussed above at § III, petitioners have also asserted that courts enjoy a statutory conferral of expungement authority under the All Writs Act.<sup>116</sup> One petitioner in the Third Circuit articulately averred:

The United States Supreme Court ... has clearly held that lower federal courts may perform acts without an express statutory bases pursuant to their general authority to issue common law writs under the All Writs Act, 28 U.S.C. § 1651 [...which] grants federal courts the power to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” [...] See also *United States v. Ayala*, 894 F.2d 425, 428 (D.C. Cir. 1990) (explaining that the All Writs Act was designed to “fill the interstices of the federal post-conviction remedial framework”). In other words, a federal court can take whatever action is necessary to achieve justice unless that particular action is prohibited by Congressional mandate.<sup>117</sup>

One federal court agreed that the statute does empower federal courts to expunge criminal records.<sup>118</sup> In granted an unopposed motion to expunge the 12-year-old criminal records of an attorney who had been arrested and cleared on a federal mail fraud charge, the Chief Judge of the Eastern District of Wisconsin cited the All Writs Act and held, “In the absence of a specific denial of power, this court may fully effectuate its jurisdiction and do complete justice in the cases before it. [...] This plenary power undoubtedly includes the authority to order expunction of criminal records where circumstances demand such action. [...]

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<sup>115</sup> *Carey*, 602 F.3d at 741-42.

<sup>116</sup> 28 U.S.C. § 1651.

<sup>117</sup> (Rowlands Br. at \*13-14, *United States v. Rowlands*, 2005 WL 6074972 (3d Cir. 2005).)

<sup>118</sup> *Bohr*, 406 F. Supp. at 1218.

The exercise of the power, however, is discretionary with the court, with the decision to expunge resting on the facts and circumstances of each case.”<sup>119</sup>

However, the Third and Tenth Circuits have rejected the reasoning in *Bohr* and proffered by Mr. Rowlands. The Tenth Circuit disagreed with *Bohr* with a brief observation, “While we agree that the All Writs Act plays a part in enabling the court to issue the writs of error coram nobis and the writs of mandamus necessary to accomplish an actual expungement, we believe that the authority to consider the [expungement] issue in the first place is not contained in that Act.”<sup>120</sup> The Third Circuit held that since it had previously concluded no subject matter existed to consider an expungement motion on equitable grounds, the All Writs Act could not empower the court to issue a writ to vindicate its jurisdiction.<sup>121</sup>

Although the Third Circuit claimed in *Rowlands* that *Bohr* had been superseded by *Flowers* as the Eastern District of Wisconsin falls within the Seventh Circuit, a close reading of *Flowers* finds no analysis whatsoever as to the applicability of the All Writs Act, nor is the statute even mentioned in the decision.<sup>122</sup> Indeed, while the Seventh Circuit found inherent equitable powers to expunge **judicial** records through the court’s ancillary jurisdiction and set forth a balancing test, the balancing test could be reconciled with *Bohr* as the rubric for a lower court’s determination of whether an expungement motion should be granted. Nevertheless, a court may still derive the authority to expunge from the All Writs Act within the Seventh Circuit, until the Court of Appeals says otherwise.

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<sup>119</sup> *Id.* at 1219 (citations omitted).

<sup>120</sup> *Pinto*, 1 F.3d at 1070.

<sup>121</sup> *Rowlands*, 451 F.3d at 178-79. *See also* § III(b) and Note 48 above.

<sup>122</sup> *Flowers*, 389 F.3d at 737.



V. **Separation of powers: may the Judicial Branch order the expungement of Executive Branch records, and vice-versa?**

Separation of powers principles derived from Articles I (establishing the Legislative Branch and vesting lawmaking power in Congress), II (establishing the Executive Branch and vesting “executive power” in the President), and III (establishing the Judicial Branch and vesting judicial power in the federal courts) of the United States Constitution reveal another circuit split pertaining to expungements that the Supreme Court has not resolved,<sup>123</sup> creating another argument favoring the need for federal legislation to bring clarity and equity to the issue.<sup>124</sup>

While several circuits and district courts have ordered, albeit rarely, the expungement of criminal records retained by the Executive Branch pursuant to their inherent equitable powers,<sup>125</sup> at least two circuits have held that to do so would violate separation of powers between the three branches of government. Ironically, the Seventh Circuit – one of the most liberal circuits as concerning its interpretation of a district court’s equitable powers to expunge **judicial** criminal records – has held it is powerless to expunge Executive Branch records without a statute expressly conferring such authority on the Judiciary even before *Kokkonen*.<sup>126</sup> “To obtain expungement of records maintained by the FBI or any other Executive Branch agency, [a petitioner] must go directly to the Executive Branch. If the Executive Branch refuses, Congress can act to confer jurisdiction on the federal courts.”<sup>127</sup> That Court of Appeals reiterated, “[F]ederal courts are without jurisdiction to order an Executive Branch agency to expunge what are admittedly accurate records of a person’s indictment and conviction. We are without

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<sup>123</sup> See Note 24.

<sup>124</sup> U.S. Const. art. I-III.

<sup>125</sup> See discussion at § III.

<sup>126</sup> *Janik*, 10 F.3d at 473.

<sup>127</sup> *Id.*

statutory or constitutional authority to hold otherwise. In fact, in Section 534, Congress suggested the opposite—that is, in favor of **requiring** the Executive Branch to maintain accurate records of such convictions.”<sup>128</sup>

Similarly, the Sixth Circuit Court of Appeals in *Lucido* found that to order the removal of FBI records of indictments resulting in acquittal “would amount to an extraordinary inter-branch incursion, one that should not lightly be effectuated through the federal courts' unexceptional right to oversee their own criminal cases.”<sup>129</sup>

One scholar argued earlier this year that since (in her view) “[t]he federal courts’ ancillary jurisdiction does not stretch so far as to allow the judiciary to be able to encroach on the executive branch’s power by having the authority to expunge federal agency documents [...], there should be an equitable expungement petition process through the FBI that will afford individuals the opportunity to have federally maintained records of arrest and indictments expunged.”<sup>130</sup> Ms. Wurie’s law journal comment goes on to propose a process by which individuals could petition the FBI’s Criminal Justice Information Services Division to have their criminal records contained within the Executive Branch expunged by the Justice Department itself.<sup>131</sup>

This approach, while laudable for its ingenuity and intention of providing a mechanism for Executive Branch expungements under existing law, leaves much to be desired. Putting in charge of expungement requests the very agency at the crux of most federal investigations and prosecutions – many of which were botched in those cases where defendants were acquitted but

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<sup>128</sup> *Flowers*, 389 F.3d at 738-39.

<sup>129</sup> *Lucido*, 612 F.3d at 875.

<sup>130</sup> Wurie, *supra* note 5, at 51-52.

<sup>131</sup> *Id.*

nevertheless denied expungement<sup>132</sup> – creates a situation of the fox guarding the henhouse. Moreover, absolving the court system of involvement in overseeing expungement requests would deny petitioners any meaningful method of appealing arbitrary or capricious denials by the FBI’s appointed hearing officer.

Even if the Sixth and Seventh Circuits are correct in their constrictive view that courts may not rely on their inherent equitable powers to order the expunction of Executive Branch criminal records in extreme cases, there is no disagreement about whether Congress may grant that authority to the courts. “Consistent with separation of powers, Congress may delegate to judicial branch” additional authority that comports with the functions of the judiciary.<sup>133</sup> Indeed, the Seventh Circuit has explicitly stated, “Congress can act” to confer such jurisdiction on the courts.<sup>134</sup> Therefore, the legislation proposed by this paper would resolve the circuit split over ancillary jurisdiction as well as the circuit split over separation of powers. Federal legislation would maintain oversight by neutral arbiters – federal courts – rather than requiring the approval of an Executive Branch investigative or prosecutorial agency.

While the Supreme Court has never considered the issue, most circuits have followed the Third Circuit’s holding that the inverse situation – an Executive Branch order expunging judicial records – *is* precluded insofar as a presidential pardon does not expunge the subject conviction and the President may not order the Judicial Branch to expunge its records.<sup>135</sup> The Supreme Court held in *Ex Parte Garland*:

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<sup>132</sup> See § III.

<sup>133</sup> *Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>134</sup> *Janik*, 10 F.3d at 473.

<sup>135</sup> *United States v. Noonan*, 906 F.2d 952 (3d Cir. 1990) (a draft violator who was a member of a group of such offenders pardoned *en masse* by President Carter asserted that his pardon operated as an expungement of his convictions. *See also* *United States v. Bays*, 589 F.3d 1035 (9th Cir. 2009) (Tallman, J., holding a pardon does not expunge the subject offense).

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.<sup>136</sup>

However, a half-century after *Garland*, the Court held that acceptance of a pardon necessarily implies guilt.<sup>137</sup> Reading the two decisions together and attempting to reconcile them, the Third Circuit found that a pardon amounted to “an executive prerogative of mercy, not of judicial record-keeping”<sup>138</sup> and the President could not directly or indirectly expunge a Judicial Branch record using the pardon power, despite its constitutional basis.<sup>139</sup>

The President could likely seal or destroy FBI, Department of Justice, or other Executive Branch records pertaining to a criminal arrest or conviction. The Department of Justice opined to the United States Pardon Attorney under President Bush, “Pardons that address the innocence of the pardonee have not to date also commanded expungement of Executive Branch records of the offense. If a President chose simultaneously to issue a pardon and order the Executive Branch to expunge any such records, we believe that order would have the effect intended, subject to any

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<sup>136</sup> *Ex Parte Garland*, 71 U.S. (4. Wall.) 333, 381-82 (1866) (invalidating a statute requiring allegiance from Confederate attorneys seeking to appear before federal courts where a former Confederate lawyer and Senator had been pardoned by the President).

<sup>137</sup> Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 179-84 (2010) (citing *Burdick v. United States*, 236 U.S. 79 (1915)).

<sup>138</sup> *Noonan*, 906 F.2d at 955.

<sup>139</sup> *Id.*

statutory constraints on executive record keeping.”<sup>140</sup> However, a concurrent pardon and expungement order would necessarily operate as a secret pardon, lest the expungement lose its value to the ex-offender in search of redemption, and judicial records would be unaffected.

The foregoing section illustrates that even if an ex-offender or exonerated defendant succeeds in obtaining a rare expungement order in the Sixth or Seventh Circuits, or if an ex-offender obtains both a pardon and an expungement order from the President of the United States, such expungements would not serve to remove the deleterious disabilities associated with the petitioner’s criminal record since records of the charge(s) would subsist in the other branch. This only compounds the need for comprehensive federal expungement legislation.

## **VI. State Expungement Laws**

The failure of Congress to act has not precluded state legislatures from taking advantage of the moral, social, and economic benefits of enacting expungement legislation; indeed, 46 state legislatures have addressed expungement in some manner, as well as the legislatures of the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.<sup>141</sup> Of those states, 40 states (nearly three-quarters of all states in our union) have statutes in effect permitting the expungement of arrest records, while 24 states permit expungements even after a conviction in certain circumstances.<sup>142</sup>

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<sup>140</sup> Michelle Boardman, *Whether A Presidential Pardon Expunges Judicial & Executive Branch Records of A Crime*, 30 OP. OFFICE OF LEGAL COUNSEL, 2006 WL 6167045, at \*5 (U.S.A.G. Aug. 11, 2006).

<sup>141</sup> LESLIE MCADOO, ET AL., *CREATING AN EXPUNGEMENT STATUTE FOR THE DISTRICT OF COLUMBIA: A REPORT AND PROPOSED LEGISLATION 65-79 (2006)*, available at [http://www.courtexcellence.org/uploads/publications/CCEReportonExpungement\\_041406new.pdf](http://www.courtexcellence.org/uploads/publications/CCEReportonExpungement_041406new.pdf).

<sup>142</sup> *Id.*

Twenty-eight states permit the individual whose records were expunged to deny their existence if asked, creating a legal fiction necessary to effectuate the purpose of the expungement and clear the person of the stigma and lifelong collateral consequences of the criminal record.<sup>143</sup> In the states where statutes permit the eventual expungement of **felony convictions**, most have imposed a requirement of greater temporal distance between the successful completion of the sentence and the petition for expungement, ostensibly to allow petitioners sufficient time to demonstrate they have led law-abiding lives and the antisocial conduct was a one-off occurrence meriting the “judicial editing of history.”<sup>144</sup> For example, in the case of a dismissal, acquittal, or vacated conviction, expungement relief may be available immediately (such as in Mississippi and New Jersey) or in as little as 30 days following dismissal (such as in Indiana).<sup>145</sup> For misdemeanors or disorderly persons offenses, state statutes

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<sup>143</sup> ALASKA STAT. ANN. § 12.62.180 (West 2012); ARK. CODE ANN. § 16-90-902, 903 (West 2012); CAL. CODE REGS. TIT. 2, § 7287.4; CAL. LAB. CODE § 432.7 (West 2012); CAL. PENAL CODE § 667 (West 2012); CAL. PENAL CODE § 851.8 (West 2012); COLO. REV. STAT. ANN. § 24-72-308 (West 2012); DEL. CODE ANN. TIT. 11, § 4374(E) (West 2012); FLA. STAT. ANN. § 943.0585(4), 943.059(4) (West 2012); HAW. REV. STAT. § 831-3.2 (West 2012); IL ST CH 775 § 5/2-103 (West 2010); KAN. STAT. ANN. § 22-2410(F) (West 2012); KY. REV. STAT. ANN. § 431.076, 510.300 (West 2012); LA. STAT. ANN. § 44:9 (West 2012); MASS. GEN. LAWS ANN. CH. 276, § 100C (West 2012); MD. CODE ANN., CRIM. PROC. § 10-109; MISS. CODE ANN. § 99-15-57 (West 2012); MO. REV. STAT. ANN. § 610.110 (West 2012); N.C. GEN. STAT. ANN. § 15A-146 (West 2012); N.H. REV. STAT. ANN. § 651:5 (West 2012) (referring to the expungement procedures as “annulment of criminal records” but having the same effect); N.J. STAT. ANN. § 2C:52-27; NEV. REV. STAT. ANN. § 179.285 (West 2011); N.Y. CRIM. PROC. LAW § 160.60 (MCKINNEY); OHIO REV. CODE ANN. § 2953.55 (West 2010); OKLA. STAT. ANN. TIT. 22, § 19 (West 2012); OR. REV. STAT. ANN. § 137.225 (West 2012); 35 PA. CONS. STAT. ANN. § 780-119(B); R.I. GEN. LAWS ANN. § 12-1.3-4 (West 2012); UTAH CODE ANN. § 77-40-108 (West 2012); VA. CODE ANN. § 19.2-392.4 (West 2012); W. VA. CODE ANN. § 61-11-25 (West 2012).

<sup>144</sup> *Rogers*, 469 F.2d at 1085.

<sup>145</sup> *See, e.g.*, N.J. STAT. ANN. § 2C:52-6 (West 2012) (providing immediate expungement following dismissal and expungement after 6 months following dismissal pursuant to a diversionary program); MISS. CODE ANN. § 99-19-71 (West 2012); IND. CODE ANN. § 35-38-5-5.5 (West) (if a defendant is not prosecuted or is the subject of dismissed charges, an acquittal, or a vacated conviction, that person may petition to limit disclosure of related records to criminal

may allow immediately expungement relief (as in Mississippi for first-time offenders)<sup>146</sup> or require a waiting period following completion of the sentence ranging from 3 years (as in New Hampshire)<sup>147</sup> to 5 years (as in Kentucky and New Jersey)<sup>148</sup> to 10 years (as in Oklahoma).<sup>149</sup> But in states permitting expungement of a felony conviction, the mandatory waiting period extends to a minimum of 5 years in Mississippi and New Hampshire<sup>150</sup> and could require 10 years to have lapsed since completion of the sentence (as in New Jersey);<sup>151</sup> 15 years (as in Indiana and Massachusetts);<sup>152</sup> or even 20 years (as in Oregon).<sup>153</sup>

Further, most of the legislative bodies in states allowing expungement of felony convictions have (wisely) determined as a matter of policy that certain crimes – such as sex crimes, crimes involving child victims, and violent felonies – should never be sealed. These crimes are more heinous, offenders are at a much higher risk of recidivism than other lower-risk offenders, and there may be a more compelling need for public availability of such records (particularly as regards sex offenses, where many states have passed measures requiring sex offender registration and protocols notifying residents when such an offender moves into the neighborhood). In addition, motor vehicle offenses are usually ineligible for expungement to ensure accurate motor vehicle records and driver histories.

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justice agencies. Such relief may be granted 30 days following acquittal or dismissal or one year following vacation of the conviction.).

<sup>146</sup> MISS. CODE ANN. § 99-19-71 (West 2012).

<sup>147</sup> N.H. REV. STAT. ANN. § 651:5 (West 2012).

<sup>148</sup> KY. REV. STAT. ANN. § 431.078 (West 2012); N.J. STAT. ANN. § 2C:52-3 (West 2012).

<sup>149</sup> OKLA. STAT. ANN. tit. 22, § 18(10) (West 2012).

<sup>150</sup> MISS. CODE ANN. § 99-19-71 (West 2012); N.H. REV. STAT. ANN. § 651:5 (West 2012).

<sup>151</sup> N.J. STAT. ANN. § 2C:52-3 (West 2012).

<sup>152</sup> IND. CODE ANN. § 35-38-5-5 (West 2012); MASS. GEN. LAWS ANN. ch. 276, § 100A (West 2012).

<sup>153</sup> OR. REV. STAT. ANN. § 137.225(9)(a) (West 2012).

For example, the Arizona statute precludes the expungement of records of dangerous offenses (without further definition), sex crimes requiring registration or crimes for which there has been a finding of sexual motivation, all crimes involving a victim under 15 years of age, and certain motor vehicle offenses.<sup>154</sup> Kentucky permits the expungement of only those misdemeanor convictions that did not involve sex offenses or a child victim;<sup>155</sup> Mississippi limits expungement of felony convictions to six enumerated crimes;<sup>156</sup> New Hampshire does not allow the expungement of convictions of violent crimes, crimes involving obstruction of justice, or offenses subject to an extended term of imprisonment;<sup>157</sup> and the Ohio statute precludes the sealing of convictions of violent crimes, offenses involving child victims, and first or second degree felonies.<sup>158</sup>

A minority of states allow for expungement of a sex offender's conviction. In New Hampshire, expungement of a felony conviction for sexual assault, felony indecent exposure, or lewdness is possible once 10 years has passed since the date of completion of the sentence, although violent crimes and offenses subject to an extended term of imprisonment are excluded.<sup>159</sup> Massachusetts allows the sealing of sex offense convictions after 15 years following completion of the sentence, although level 2 or level 3 sex offenders are ineligible for the

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<sup>154</sup> ARIZ. REV. STAT. ANN. § 13-907 (West 2012).

<sup>155</sup> KY. REV. STAT. ANN. § 431.078 (West 2012).

<sup>156</sup> MISS. CODE. ANN. § 99-19-71 (West 2012) (limiting expungement eligibility to a felony conviction for passing a bad check, possession of certain controlled substances or paraphernalia, false pretense, larceny, malicious mischief, or shoplifting).

<sup>157</sup> N.H. REV. STAT. ANN. § 651:5 (West 2012) (allowing, however, the expungement of a one-time conviction for sexual assault, indecent exposure, or lewdness after 10 years has lapsed since completion of the sentence).

<sup>158</sup> OHIO REV. CODE ANN. § 2953.36 (West 2012).

<sup>159</sup> N.H. REV. STAT. ANN. § 651:5 (West 2012).



relief.<sup>160</sup> And although Indiana does not provide for outright expungement, its statute permits ex-offenders to petition the state police department to restrict access to the person's limited criminal history so that only criminal justice agencies can access the information, once 15 years have passed since the person completed the sentence for the most recent conviction.<sup>161</sup> The provision contains no statutory bar to expunging sex offenses.<sup>162</sup>

One of the most comprehensive statutes, prescribing in detail the information to be submitted with the petition, the boundaries of the expungement order, and exactly which crimes are ineligible is New Jersey's expungement law.<sup>163</sup> In New Jersey, dismissed charges are eligible for expungement immediately after disposition. A conviction of a non-criminal disorderly persons or petty disorderly persons offense (the state's equivalent of a misdemeanor) may be expunged after 5 years from completion of the sentence,<sup>164</sup> while a conviction of an eligible crime (an indictable offense, the state's equivalent of a felony) may be expunged after 10 years from completion of the sentence.<sup>165</sup>

New Jersey delineates specific crimes that are never eligible for expungement: criminal homicide, except death by auto; kidnapping; luring or enticing; human trafficking; aggravated sexual assault; aggravated criminal sexual contact; criminal sexual contact, if the victim is a minor; criminal restraint and false imprisonment, if the victim is a minor; robbery; arson and related offenses; endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child; endangering the welfare of a child; causing or

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<sup>160</sup> MASS. GEN. LAWS ANN. ch. 276, § 100A (West 2012).

<sup>161</sup> IND. CODE ANN. § 35-38-5-5 (West 2012).

<sup>162</sup> *Id.*

<sup>163</sup> N.J. STAT. ANN. § 2C:52-1, *et seq.*

<sup>164</sup> N.J. STAT. ANN. § 2C:52-3 (West 2012).

<sup>165</sup> N.J. STAT. ANN. § 2C:52-2 (West 2012).

permitting a child to engage in a prohibited sexual act; selling or manufacturing child pornography; perjury; false swearing; knowingly promoting the prostitution of the actor's child; terrorism; producing or possessing chemical weapons, biological agents or nuclear or radiological devices; and conspiracies or attempts to commit such crimes.<sup>166</sup> New Jersey also has a permanent bar for expungement of any convictions for crimes by public official who breached the public trust or drug dealers who transacted in large quantities of unlawful controlled substances.<sup>167</sup>

Of course, an expungement only serves the petitioner's goal and societal aims if the order is complied with and the stigmatic information is not disseminated. The electronic age and the widespread availability of criminal records on the Internet have complicated that purpose. States with expungement statutes have set different penalties to prevent inadvertent disclosure or, worse yet, official misconduct. The "teeth" behind an expungement statute may be criminal in nature (in instances of willful disclosure of an expunged record by a law enforcement or court official), civil (allowing an action for damages by an aggrieved party or the Attorney General), or unspecified. In Massachusetts, public and private employers are not permitted to ask about or require the disclosure of expunged charges, and violators can be sued civilly by the Attorney General, but the statute does not fashion a private right of action.<sup>168</sup> In Arizona and Rhode Island, an aggrieved party can recover civil damages from the discloser of expunged records.<sup>169</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> MASS. GEN. LAWS ANN. ch. 276, § 100A (West 2012).

<sup>169</sup> ARIZ. REV. STAT. ANN. § 13-4051; R.I. Gen. Laws Ann. § 12-1.3-4 (West 2012).

Failure to comply with the expungement statute in New Jersey, Ohio, and Virginia can subject the violator to criminal penalties.<sup>170</sup>

States differ in the procedures for expungement, types of eligible offenses, when expungements can be granted, and other conditions. For the most part, however, it is clear that state legislatures have seen the unmistakable need to avoid hamstringing courts that desperately want to provide relief to ex-offenders in certain circumstances if they are empowered to do so. Alas, the U.S. Congress has yet to follow suit.

## **VII. Proposed Legislation Authorizing Expungement of Federal Criminal Records**

Two bills creating federal expungement authority were introduced in the current congressional session, but neither was able to proceed to consideration by the House Judiciary Committee, let alone advance to a floor vote. On June 1, 2011, Rep. Charles B. Rangel, a prominent Democrat from New York, introduced the “Second Chance for Ex-Offenders Act of 2011” together with Rep. Steve Cohen of Tennessee, Rep. Pete Stark of California, Rep. Alcee L. Hastings of Florida, Rep. Karen Bass of California, Rep. Corinne Brown of Florida, outgoing Rep. Edolphus Towns of New York, Rep. John Lewis of Georgia, and Rep. Jan Schakowsky of Illinois.<sup>171</sup> Rep. Hank Johnson of Georgia and Rep. Hansen Clarke of Michigan both signed on as sponsors in May 2012.<sup>172</sup> All eleven sponsors are Democrats.

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<sup>170</sup> OHIO REV. CODE ANN. § 2953.35 (West 2012) (divulging sealed records constitutes a fourth degree misdemeanor); VA. CODE ANN. § 19.2-392.3 (West 2012) (disclosure of expunged records constitutes a Class 1 misdemeanor); N.J. STAT. ANN. § 2C:52-30 (West 2012) (“any person who reveals to another the existence of an arrest, conviction or related legal proceeding with knowledge that the records and information pertaining thereto have been expunged or sealed” is guilty of a disorderly persons offense).

<sup>171</sup> Second Chance for Ex-Offenders Act of 2011, H.R. 2065, 112th Cong. (2011).

<sup>172</sup> Additional Sponsors, 2012 WL 1719867, 158 CONG. REC. H2813-01, 112th Cong. (2012).

The other bill that would create a federal expungement mechanism – the “Fresh Start Act of 2011” – was introduced on July 7, 2011, by Rep. Steve Cohen of Tennessee, together with Rep. Raul Grijalva of Arizona, Rep. Donald Payne of New Jersey,<sup>173</sup> Rep. Jesse Jackson, Jr. of Illinois,<sup>174</sup> Rep. Bob Filner of California, and Resident Commissioner Pedro Pierluisi of Puerto Rico.<sup>175</sup> Like Rangel’s bill, all of the bill’s sponsors are Democrats. Rep. Eleanor Holmes Norton of the District of Columbia signed onto the bill on November 14, 2012.<sup>176</sup>

Previous incarnations of both bills have been proposed by Congressman Cohen and Congressman Rangel, respectively, in previous congressional sessions without avail.<sup>177</sup> The lack of bipartisan support in the sponsorship of either bill does not spell improved prospects for passage in a Republican-controlled House of Representatives. Nevertheless, this section will compare both bills and combine certain provisions of the Second Chance for Ex-Offenders Act (hereafter the “Rangel bill”) and the Fresh Start Act (hereafter the “Cohen bill”) with worthy provisions of state expungement statutes to propose a new, model federal expungement law.

Both the Cohen and Rangel bills are incredibly broad in the offenses they would reach. Under both proposals, all nonviolent offenses – whether misdemeanors or serious felonies – would be eligible for expungement. The Rangel proposal defines a “nonviolent offense” as any federal misdemeanor or felony “that does not have as an element of the offense the use of a

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<sup>173</sup> Mr. Payne is deceased but his son, Donald Payne, Jr., was sworn in to succeed him on November 15, 2012. U.S. CONGRESS, CONGRESSMAN DONALD PAYNE, JR. (2012), <http://payne.house.gov>.

<sup>174</sup> Mr. Jackson has since resigned from office. Monica Davey, *Jesse Jackson Jr. Resigns, Facing Illness and Inquiry*, N.Y. TIMES, Nov. 21, 2012, available at [http://www.nytimes.com/2012/11/22/us/jackson-jr-to-resign-house-seat.html?\\_r=0](http://www.nytimes.com/2012/11/22/us/jackson-jr-to-resign-house-seat.html?_r=0).

<sup>175</sup> Fresh Start Act of 2011, H.R. 2449, 112th Cong. (2011).

<sup>176</sup> Additional Sponsors, 2012 WL 5512088, 158 CONG. REC. H6369-03, 112th Cong. (2012).

<sup>177</sup> See, e.g., Second Chance for Ex-Offenders Act of 2009, H.R. 1529, 111th Cong. (2009); Fresh Start Act of 2010, H.R. 5492, 111th Cong. (2010).

weapon or violence and which did not actually involve violence in its commission.”<sup>178</sup> The Cohen proposal ties the term to a crime of violence as it is defined in the United States Code.<sup>179</sup>

Both bills require the petitioner to be a first-time offender and preclude from eligibility individuals with prior criminal histories. Both bills would require all requirements of the sentence to be fulfilled prior to consideration of an expungement petition, including the payment of fines and restitutions; completion of any term of imprisonment, probation, or supervised release; and freedom from dependency or abuse of alcohol or controlled substances for at least one year, if required by the terms of the sentence. The Rangel bill additionally imposes educational and community service requirements; a petitioner must have obtained a high school diploma or completed a high school equivalency program and completed at least one year of community service.<sup>180</sup>

Neither bill contains a provision concerning the expungement of records relating to charges that did not result in any conviction. Neither bill speaks to the specific effect of expungements on immigration status or past disciplinary or adverse employment actions taken against offenders. A federal expungement statute should consider all avenues in which criminal records may harm an exonerated defendant or one-time nonviolent offender long after the charges are brought and expressly ensure that the person is restored to their pre-arrest state.

Both bills prescribe a procedure for the court to consider a petition for expungement, consider the recommendations of the United States Attorney in the local federal district to be submitted within 60 days, and “weigh the interests of the petitioner against the best interests of

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<sup>178</sup> Second Chance for Ex-Offenders Act of 2011, H.R. 2065, 112th Cong. § 3631(b) (2011).

<sup>179</sup> Fresh Start Act of 2011, H.R. 2449, 112th Cong. § 3631(b) (2011).

<sup>180</sup> Second Chance for Ex-Offenders Act of 2011, H.R. 2065, 112th Cong. § 3632 (2011).

justice and public safety.”<sup>181</sup> Neither bill is instructive as to what factors a court should employ in the balancing test. The Cohen bill would **require** an expungement petition to be granted if it is filed at least 7 years following completion of the sentence, unless the underlying offense of conviction required the petitioner to register as a sex offender or caused a victim to sustain a loss of \$25,000 or more.<sup>182</sup> Accordingly, a sex offender or the mastermind behind a massive Ponzi scheme would not be entitled to a mandatory expungement (at least 7 years following release from prison), but such an offender could see his/her entire record wiped clean through a discretionary expungement under either the Cohen or Rangel legislation.

The high risk of recidivism of certain classes of offenders and the greater need for public access to criminal records of sex offenders or fraudsters counsel in favor of a federal expungement bill that more closely mirrors most state expungement statutes and is less generous in its reach than the Cohen or Rangel proposals. This would also increase the likelihood that the bill would garner additional support in both houses of Congress and eventually become law.

As such, certain enumerated felonies should be ineligible for expungement. The New Jersey statute is instructive in this regard; homicide, kidnapping, sex crimes, human trafficking crimes, child pornography, offenses involving underage victims, terrorism-related crimes, public corruption, and perjury could be delineated as ineligible for such relief.<sup>183</sup>

Furthermore, a federal expungement statute should limit expungement **as a matter of right** to a one-time nonviolent misdemeanor conviction or charges that did not result in conviction. The bill could authorize courts to employ the balancing test to determine whether a felon is deserving of the second chance provided by expungement relief on a case-by-case basis,

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<sup>181</sup> Fresh Start Act of 2011, H.R. 2449, 112th Cong. § 3633(c) (2011); Second Chance for Ex-Offenders Act of 2011, H.R. 2065, 112th Cong. § 3633(b) (2011).

<sup>182</sup> Fresh Start Act of 2011, H.R. 2449, 112th Cong. § 3633(e) (2011).

<sup>183</sup> N.J. STAT. ANN. § 2C:52-2 (West 2012).

but the bill should set forth the factors for a court to consider (such as time elapsed since the offense, the offender's age at the time of the misconduct, the nature and seriousness of the offense, post-offense conduct and other evidence of rehabilitation, such as family life, vocation, education, and community service). For felony convictions, the bill should impose a minimum waiting period following completion of sentence, such as 5 to 10 years.<sup>184</sup> The bill should also permit expungements of investigative and arrest records following pretrial diversion or receipt of a presidential pardon.

Finally, the bill should address consequences of disclosure by combining civil liability with criminal exposure. Both the Cohen and Rangel bills would create a federal misdemeanor of knowingly disclosing information related to an expunged conviction, similar to expungement statutes in New Jersey, Ohio, and Virginia.<sup>185</sup> However, a private right of action should also be included to afford aggrieved parties a civil remedy against violators.<sup>186</sup>

### **VIII. Conclusion**

The barriers to employment, education, housing, and government assistance abound for nonviolent ex-offenders despite their best efforts to reintegrate and reenter society. A lawful permanent resident (green card holder) can even be deported for a first-time, nonviolent lapse in judgment. The cases discussed in this paper reveal these collateral consequences can haunt people from all walks of life – from firefighters to politicians to lawyers to stockbrokers to physicians – and at all stages of their lives, from 20-somethings to septuagenarians. However,

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<sup>184</sup> See, e.g., MISS. CODE ANN. § 99-19-71 (West 2012); N.H. REV. STAT. ANN. § 651:5 (West 2012); N.J. STAT. ANN. § 2C:52-3 (West 2012).

<sup>185</sup> See, e.g., OHIO REV. CODE ANN. § 2953.35 (West 2012); VA. CODE ANN. § 19.2-392.3 (West 2012); N.J. STAT. ANN. § 2C:52-30 (West 2012).

<sup>186</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-4051; R.I. GEN. LAWS ANN. § 12-1.3-4 (West 2012).

all of their alleged offenses were nonviolent, and most of the petitioners were onetime offenders who had made a grave mistake that was out of character. Many of these individuals were cleared of the allegations brought against them but continued to face suspicions of their guilt decades after proving their innocence.

The inability of nonviolent ex-offenders to secure employment and become productive citizens also exacerbates our recidivism problem, which in turn contributes to the skyrocketing costs to taxpayers of supporting the world's most overcrowded and expensive prison system.<sup>187</sup> But the barriers to reentry disappear – and the individual enjoys restoration of dignity and reputation – where a former defendant is able to seal or destroy his/her criminal record and is no longer forced to disclose its existence.

The foregoing reasons explain why 46 states of our union, along with the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have enacted some form of expungement. Considering the presumption of innocence that attaches to criminal proceedings as a hallmark of our democracy, it only seems fair that defendants who are cleared in court should be able to clear their names and reputations and the stigma of charges that are dismissed. It seems equally appropriate to allow – as half of all state legislatures have done – nonviolent one-time misdemeanants or low-level felons to ease their reentry or reap the rewards of years of law-abiding, productive life by forgiving them for an isolated (often youthful) transgression from the distant past.

However, Congress has yet to act on repeated proposals by veteran members of the House of Representatives to create a uniform expungement remedy for individuals haunted by federal criminal records. Consequently, good hearted, hard-working Americans with low-risk

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<sup>187</sup> See § II.



criminal records (who are otherwise equally situated) may or may not face difficulties in finding employment, prohibitions from state or federal vocational licenses or contractor opportunities, ineligibility from participating in foster care and adoption programs, a lifetime ban from food stamps and other federal assistance, ineligibility for federal student aid, and eviction from public housing, depending upon where the individual lives or committed the offense many years ago.

As one scholar puts it, “A bedrock legal principle requires that similarly situated persons be treated similarly. If a law fails, without reasonable justification, to treat those in similar situations with the same degree of reward or consequence, it is stricken. As it relates to federal expungement, rather than the existence of unbalanced legislation, the madness in the method results from an absence of legislation, which causes an ex-offender’s opportunity to seek an expungement to depend largely on the jurisdiction where the crime was committed.”<sup>188</sup>

Despite the lack of a federal expungement statute, Courts of Appeals in the Second, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits have exercised ancillary jurisdiction to consider expungement motions on equitable grounds. Nevertheless, district courts in those circuits have only granted expungements in a handful of cases, while Courts of Appeals in the First, Third, Sixth, Eighth, and Ninth Circuits have refused to recognize jurisdiction to consider such motions at all. A separate circuit split exists as to whether the courts may order the Executive Branch, which hosts the law enforcement agencies possessing the most problematic criminal records, to expunge its records even in the most extraordinary circumstances. Where the Supreme Court has declined to resolve either circuit split, Congress must step in and extinguish the fog. After all, federal courts have cried out for legislative action.<sup>189</sup>

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<sup>188</sup> Mouzon, *supra* note 4, at 45-46.

<sup>189</sup> *See, e.g., Kotsiris*, 543 F. Supp. 2d at 969-70 (“Congress, in its collective wisdom, could certainly make expungement of federal criminal records a ‘generally available remedy,’ but it

The federal expungement legislation proposed in this paper does not provide hardened criminals an escape route from their past wrongdoing, nor does it pave a new road for such offenders to commit more crimes without the backdrop of their past misdeeds. Expunged federal criminal records would be restored automatically if an offender returns to the error of his/her old ways, just like in the many states where expungements are available through comprehensive statutory frameworks.

However, making expungements of federal criminal records available by statute **would** serve laudable goals of criminal justice public policy. “Scripture informs [a] focus on rehabilitation and reintegration, offering many examples of restorative justice in which the Lord demands punishment and reparations for wrongs and then grants forgiveness.”<sup>190</sup> A federal expungement statute would allow ex-offenders to be rewarded for successful efforts at rehabilitation. It would encourage decent human beings who have rejected their youthful transgressions or a one-off incident in their past in favor of abiding the law to raise a family, seek an education, secure gainful employment, and contribute to society. It would allow talented individuals stigmatized by an isolated lapse in judgment to reacquire a security clearance and serve their country as government architects, engineers, scientists, lawyers, and service members. It would also keep individuals at a crossroads from returning to the environs that foster antisocial

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has not yet chosen to do so.”); *United States v. Tyler*, 670 F. Supp. 2d 1346, 1349 (M.D. Fla. 2009) (“Because judicial expungement of criminal records implicates the separation of powers doctrine, Congress should consider enacting legislation allowing relief in limited circumstances...Notwithstanding the legitimacy of the Executive Branch's interest in maintaining accurate arrest records, there is a question as to the value in creating a permanent stigma for a wrongfully accused defendant, the likely results of which will be permanent removal from a level playing field of future employment opportunities. And, certainly any interest the Executive Branch could have in maintaining the records of illegally procured arrests would be minimal at best and outweighed by adverse consequences to the innocent defendant.”).

<sup>190</sup> CATHOLIC CHARITIES USA, SPECIAL POPULATIONS: PRISONER RE-ENTRY, <http://www.catholiccharitiesusa.org/page.aspx?pid=654>.

behavior and instead, find jobs and steer clear of a path that lands them back in custody while draining valuable taxpayer resources.

It would allow nonviolent ex-offenders in search of redemption to finally find it, putting an end to the lifelong sentence arising from the collateral consequences of having a criminal record.