Brooklyn Law Review

Volume 82 | Issue 2 Article 17

1-1-2017

Wiping the Slate … Dirty: The Inadequacies of Expungement as a Solution to the Collateral Consequences of Federal Convictions

Alexia Lindley Faraguna

Wiping the Slate . . . Dirty

THE INADEQUACIES OF EXPUNGEMENT AS A SOLUTION TO THE COLLATERAL CONSEQUENCES OF FEDERAL CONVICTIONS

INTRODUCTION

Start over with a clean slate.[1] Get a fresh start. These are phrases that might be on the minds of thousands of convicted Americans each year as they reenter the free society. In the federal prison system alone, there are currently 188,722 total federal inmates.[2] Overall, the United States prison population stands at 2,217,947—in contrast to Russia's total prison population, a mere 649,836.[3] Comparatively, the United States accounts for 4.4% of the total world population and roughly 22% of the entire prison population.[4] The essential question is, however, can ex-offenders wipe the slate clean?[5]

For people like Haywood Speight, the answer appears to be no.[6] Mr. Speight, a thirty-four-year-old Alabama resident,

---

[1] *See generally Clean Slate*, DICTIONARY.COM, http://dictionary.reference.com/browse/clean%20slate (last visited Oct. 1, 2016) (definition for "clean slate").

[2] *Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp [https://perma.cc/W7DH-J67X] (last updated Apr. 20, 2017). Moreover, roughly 8.6% "of the total adult U.S. population, have recorded *felony convictions*." JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 1 (2015).

[3] *United States of America*, WORLD PRISON BRIEF, http://www.prisonstudies.org/country/united-states-america [https://perma.cc/SCY7-JABU]; *Russian Federation*, WORLD PRISON BRIEF, http://www.prisonstudies.org/country/russian-federation [https://perma.cc/2K9M-PY4G].

[4] Michelle Ye Hee Lee, *Does the United States Really Have 5 Percent of the World's Population and One Quarter of the World's Prisoners?*, WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/?utm_term=.282ef46746d6 [https://perma.cc/T34S-T6BU].

[5] Margaret Love notes that collateral consequences of criminal convictions, "result i[n] convicted felons hav[ing] no realistic hope of satisfying their debt to society, or regaining a place in it." Margaret Colgate Love, *Starting over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1705 (2003).

[6] *See* Rachel Osler Lindley, *Life After Prison: Ex-offenders Face Many Challenges When Reentering Society*, WBHM (June 22, 2014), https://news.wbhm.org/feature/2014/life-after-prison-ex-offenders-face-many-challenges-when-reentering-society/ [https://perma.cc/EY53-DE5R].

was convicted of burglary in 2006.[7] In 2014, after two and a half years of being released, Speight still had not obtained steady employment.[8] He committed himself to living a lawful existence since release and resided with his father, whom he cared for.[9] Speight is lucky he had a "support system" to aid in his transition back to freedom, however, familial support itself still did not ensure Speight employability or the independence he strived to achieve.[10] Here, the goal of rehabilitating an ex-offender appears accomplished,[11] for Mr. Speight exhibited law-abiding behavior; however, Speight's dismal employment prospects inhibited his ability to fully return to society. Studies have shown that the earlier ex-offenders obtain employment, the less likely they are to recidivate.[12]

Scholars and commentators have recognized the societal displacement ex-offenders face due to their criminal records[13] and have argued for various legislative methods to correct this "semi-outlaw status."[14] Arguably, the most important component of curing the negative connotation of being an ex-offender is the ability to maintain employment.[15] Employment is seen as a "rehabilitative necessity" to ensure offenders do not repeat past behavior.[16] Unfortunately, for countless individuals such as Mr. Speight, employment discrimination based on prior criminal justice system exposure is pervasive.

Academics argue that the expansion of criminal record expungement would rectify the lack of employment opportunities for this group and correct the general societal imbalance ex-offenders face.[17] Wiping away an ex-offender's past transgression

---

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Bruce Bayley et al., *Why We Incarcerate: Rehabilitation*, CORRECTIONSONE.COM (July 16, 2012), https://www.correctionsone.com/jail-management/articles/5826786-Why-we-incarcerate-Rehabilitation/ [https://perma.cc/6DV4-Y3LW].

[12] Peter Cove & Lee Bowles, *Immediate Access to Employment Reduces Recidivism*, REAL CLEAR POLITICS (June 11, 2015), http://www.realclearpolitics.com/articles/2015/06/11/immediate_access_to_employment_reduces_recidivism_126939.html.

[13] *See, e.g.*, Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 755 (2011). Love describes "the phenomenon of 'internal exile'" whereby ex-offenders are pushed out of traditional society because of their criminal status. *Id.*

[14] *Id.* at 754–55.

[15] Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-violent Federal Offenders*, 79 U. CIN. L. REV. 155, 162 (2010).

[16] *Id.* at 165; JACOBS, *supra* note 2, at 221–22.

[17] *See generally* Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403 (2015); Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1 (2008); Silva, *supra* note 15.

is seen as a public act of forgiveness that removes the possibility of an ex-offender being stigmatized by his or her criminal record—either by the public or by employers.[18] The expungement of a criminal record entails erasing the conviction, essentially removing it from history.[19] This note contends that the expungement of criminal records, specifically federal criminal records, is not a viable procedure.

Currently, there is no comprehensive federal[20] legislation that broadly authorizes expungement,[21] and rightfully so. There are very few federal statutes that specifically authorize expungement of criminal records.[22] As a result, federal expungement of criminal records has been left up to federal district courts to authorize.[23] Although district courts have condoned federal expungement of criminal records in extreme cases,[24] the federal circuit courts are currently in disagreement[25] as to whether district courts have proper jurisdiction to consider

---

[18] Raj Mukherji, *In Search of Redemption: Expungement of Federal Criminal Records* 48 (May 1, 2013) (unpublished comment) (on file with the Seton Hall University eRepository), http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1163&context=student_scholarship [https://perma.cc/R29K-3HGP].

[19] *See* JACOBS, *supra* note 2, at 113 n.*. James B. Jacobs is also a preeminent American scholar on the topic of criminal law and, in particular, collateral consequences. *See generally James B. Jacobs*, NYU LAW, https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20016 [https://perma.cc/BE8T-T9PT].

[20] Many states have their own expungement schemes, which greatly vary from state to state. JACOBS, *supra* note 2, at 117. This note will not deal with matters of state law.

[21] Mukherji, *supra* note 18, at 10.

[22] Kessler, *supra* note 17, at 427. For example, the Federal First Offender Act, 18 U.S.C. § 3607 (2012), authorizes expungement for an offender under the age of twenty-one (at the time of the offense), who is guilty of knowingly or intentionally possessing a controlled substance under 21 U.S.C. § 844, does not have any previous drug convictions and completes probation with a deferred judgment. 18 U.S.C. § 3607 (a)–(c). This statute is very narrow in scope and does not apply broadly across a spectrum of crimes, rather only to knowingly or intentionally possessing a controlled substance under 21 U.S.C. § 844. *Id.*

[23] Silva, *supra* note 15, at 185.

[24] *See* Menard v. Saxbe, 498 F.2d 1017, 1020, 1025 (D.C. Cir. 1974) (holding that where an individual is detained, rather than arrested, and there are no grounds (evidence) for such a detention, "sound principles of justice and judicial administration dictate that in general actions to vindicate constitutional rights, by expungement of arrest records . . . [where there is an] absence of probable cause for arrest, be maintained against . . . law enforcement agencies involved"); *see also* United States v. McLeod, 385 F.2d 734, 749–50 (5th Cir. 1967) (holding that where police arrested individuals solely to interfere with their voting rights, with no proper basis to do so, the arrest and conviction records of those individuals should be expunged).

[25] Most federal circuit courts to decide this issue since the Supreme Court case *Kokkonen v. Guardian Life Insurance Co. of America* (which outlined the boundaries of the ancillary jurisdiction required for federal district courts to expunge criminal records based upon equitable considerations) held that district courts do not have jurisdiction to expunge criminal records based upon equitable considerations. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378 (1994). Citations to all federal circuit court cases are omitted here, but are detailed in full *infra* Section II.B. A recent case, *Doe v. United States*, 110 F. Supp. 3d 448 (E.D.N.Y. 2015), is going up to the Second Circuit for review on this matter, and will be explained further *infra* Section II.C.

expungement based on equitable considerations.[26] The Supreme Court has not yet to grant certiorari to decide this issue[27] and has denied certiorari in three cases.[28]

This note tracks the enigmatic history of federal expungement law and argues for the denial of federal judicial expungement. This note will, instead, propose a workable solution that augments the economic opportunities available to ex-offenders to alleviate the challenges these ex-offenders face.[29] Additionally, this note will clarify the reasons why expungement is an inadequate solution to the collateral consequences ex-offenders face.

Part I of this note will unpack the history of the limited expungement remedy in the United States, including some of the general philosophies behind punishment. Part II will explore the federal circuit case law surrounding expungement based on equitable considerations[30] to elucidate the disagreement among the circuits on this issue. Part II will also provide a summary of a recent expungement case in the Second Circuit, *United States v. Doe*[31] and explain the legal issues encompassing federal expungement of criminal records, as well as highlight the employment discrimination issues facing ex-offenders. Part III will explore the reasons why the outright expansion of federal criminal expungement is not a viable option in modern society and will briefly contrast the United

---

[26] Mukherji, *supra* 18, at 10. The term "equitable considerations" is not precisely defined by courts in terms of the exact considerations, however, "[i]n determining whether such circumstances exist, courts have considered the '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.'" United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977) (quoting United States v. Rosen, 343 F. Supp. 804, 806 (S.D.N.Y. 1972)). Furthermore, expungement is seen as an extreme remedy. *Id.* at 539. For example, courts granted expungement "where [an] arrest was proper but was based on a statute later declared unconstitutional." *Id.* at 540.

[27] *See Expungement*, EPIC.ORG, https://epic.org/privacy/expungement/#simplified [https://perma.cc/ZAC6-RCZ5].

[28] *Id.* Those three cases are *United States v. Coloian*, 480 F.3d 47 (1st Cir. 2007), *Rowlands v. United States*, 451 F.3d 173 (3d Cir. 2006), and *United States v. Sapp*, No. CR 95-40068 SBA, 2011 WL 2837913 (N.D. Cal. July 18, 2011).

[29] This note will focus on the federal (rather than state) expungement of criminal convictions (although the expungement of arrest records will be discussed in passing from case law). This note will not comment on the expungement of wrongful criminal convictions of innocent persons, although conversations surrounding wrongful convictions have increased lately in popular media. *See, e.g.*, *Serial*, WBEZ CHICAGO (2014) (downloaded using iTunes); MAKING A MURDERER (Netflix 2015).

[30] "A motion seeking equitable expungement requires a court to make an individualized assessment of whether, as a matter of fairness, a moving party's criminal-justice records should be publicly available." Steven F. Reich, *Expungement of Criminal Records in Federal Courts*, L.J. NEWSL. (Oct. 2009), https://www.manatt.com/uploadedFiles/Attorneys_and_Advisors/Reich,_Steven_F/Business%20Crimes%20Bulletin_Reich.pdf [https://perma.cc/SSV7-YX3X].

[31] Doe v. United States, 110 F. Supp. 3d 448 (E.D.N.Y. 2015).

States' stance on expungement against the European model. Finally, Part IV will provide a blueprint for an alternative to expungement, namely, the federal use of certificates of rehabilitation and increased economic tax incentives for employers to hire ex-offenders.

I. HISTORICAL UNDERPINNINGS OF EXPUNGEMENT LAW

The expungement of a criminal record is the "process by which a record of criminal conviction is destroyed or sealed by the state or federal repository."[32] The history of federal expungement law in the United States is not a clearly delineated story.[33] Therefore, to understand the concept of expungement itself, and where it originates, it is helpful to examine global philosophical ideas concerning punishment and its justifications. If the remedy of expungement is used to correct the negative influence that a criminal record can have on an ex-offender's life, then the record itself must be seen as a relic of punishment.[34]

A. Origins of Punishment and Rehabilitation

Many ancient civilizations punished offenders by demarcating their status in society, including, for instance, by the forfeiture of civil rights or property.[35] This trend continued into medieval England;[36] for example, a felony conviction in during this time resulted in the defendant forfeiting all of his civil rights.[37] Although the United States did not completely follow this historical model, there are certain citizenship rights that the United States denies its ex-offenders.[38] The rights denied to offenders include the right to vote, the right to serve on a jury, the right to keep and bear arms, and the right to run for elected office. Further, ex-offenders are disqualified from social welfare benefits, certain civil government positions, and obtaining federal student financial aid.[39] The idea of permanently punishing offenders by separating and differentiating their

---

[32] JACOBS, *supra* note 2, at 113 n.* (quoting *Expungement of Record*, BLACK'S LAW DICTIONARY 603 (7th ed. 1999)).

[33] *Id.* at 114–15.

[34] *See* Mouzon, *supra* note 17, at 35.

[35] *See, e.g.*, JACOBS, *supra* note 2, at 246.

[36] *Id.* at 246–47.

[37] *Id.*

[38] *Id.* at 247–48.

[39] *See generally* JACOBS, *supra* note 2, at ch. 13 (The rights and disqualifications presented above are nonexhaustive, and further rights are noted in the Jacobs text.).

citizenship rights from those of mainstream society persists in modern American philosophy.[40]

While it is clear that publicly punishing ex-offenders[41] has a deep history, notions of rehabilitating convicted individuals began to arise in the latter half of the seventeenth century in France.[42] Rehabilitation of a criminal is taken to mean restoring that person's law-abiding behavior.[43] In French law, rehabilitating a criminal meant "'undoing' . . . a criminal conviction."[44] Despite a lack of thorough historical perspective on rehabilitation in the seventeenth century,[45] some countries in eighteenth-century Europe embraced rehabilitation because they believed offenders were rational and possessed free will.[46]

In the late nineteenth century, the United States used prisons as a tool to rehabilitate offenders—reformers believed that offenders might reflect on their misdeeds and change themselves from within.[47] At first, authorities believed that the rehabilitation of an individual criminal was the criminal's own responsibility,[48] but as time progressed, prisons became known as "reformatories" and places where criminals could receive individualized treatment, including occupational training to rehabilitate themselves.[49] During this time,[50] a shift in criminology[51] within the rehabilitative model took hold, and the judicial system sought to order lengthier sentences that would persuade offenders to "voluntarily desist from future criminal conduct."[52] Rehabilitation received criticism across the political spectrum; some argued that it "facilitat[ed] discrimination" while others said it tended to paternalize offenders.[53] The idea

---

[40] *Id.* at 247–64.

[41] Publicly punishing refers to the publicizing of ex-offenders' status, to place shame on them to deter future criminal acts.

[42] Gwen Robinson & Iain Crow, *Introducing, Rehabilitation: The Theoretical Context*, *in* OFFENDER REHABILITATION: THEORY, RESEARCH AND PRACTICE 2 (2009).

[43] *Id.* Admittedly, this is not the only precise definition of rehabilitating an ex-offender, as Robinson and Crow point out. *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 4.

[47] Kathryn M. Campbell, *Rehabilitation Theory*, *in* ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES 831 (Mary Bosworth ed., 2005).

[48] *Id.*

[49] *Id.*

[50] I am referring to the late nineteenth and early-to-mid-twentieth centuries in the United States. Robinson & Crow, *supra* note 42, at 4–5.

[51] This shift in criminology refers to the change between a view of a criminal as a rational being with free will and the view that a criminal is prey to external and internal forces that shape his or her behavior and, therefore, should be cured of the cause of his or her "offending." *Id.* at 4. This new theory is known as "positivism," and it permeated American punishment philosophy in the mid-twentieth century. *Id.* at 5.

[52] JACOBS, *supra* at note 2, at 221; *see also* Robinson & Crow, *supra* note 42, at 5.

[53] JACOBS, *supra* note 2, at 221.

of an offender having complete control over his or her behavior fell back into favor.[54]

Although no longer completely championed, the rehabilitative model is important to the discussion of expungement of criminal records because it helps explain why some scholars argue for the expansion of expungement law.[55] Logically, scholars argue, if one of the current goals of the United States' criminal justice system is to rehabilitate an individual, then each part of the criminal justice system should strive to implement rehabilitative ideals to reach that goal.[56] If obtaining employment is a crucial step toward an ex-offender achieving rehabilitation[57] (namely, law-abiding behavior), then the criminal justice system should not impede the ability of an ex-offender to obtain employment. If the retention of criminal records impedes an ex-offender's ability to obtain employment, then as part of the rehabilitative goal, criminal records should be expunged wherever possible.[58] This logic starts to fall apart when even a few assertions are introduced: rehabilitation is not the only goal of the criminal justice system,[59] and the complete removal of criminal records may not be attainable in the modern age.[60]

B. The Brief Federal Legislative History of Expungement and the History of Creating Criminal Records

As a result of the rehabilitative model that became popular in the mid-1900s, juvenile courts in the United States began to experiment with expunging juvenile criminal records in an effort to afford juvenile offenders greater life prospects.[61] Authorities thought that since youth offenders are not fully

---

[54] Robinson & Crow, *supra* note 42, at 5.

[55] JACOBS, *supra* note 2, at 220–21; *see generally* Kessler, *supra* note 17, at 403; Mouzon, *supra* note 17, at 1; Silva, *supra* note 15, at 155.

[56] *See generally* Francis T. Cullen, *It's Time to Reaffirm Rehabilitation*, 5 CRIMINOLOGY & PUB. POL'Y 665 (2006); Francis T. Cullen, *The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference*, 43 CRIMINOLOGY 1 (2005).

[57] *See* Silva, *supra* note 15, at 162.

[58] *See generally* Mukherji, *supra* note 18.

[59] *See* JACOBS, *supra* note 2, at 220.

[60] *See* Silva, *supra* note 15, at 204 (Particularly, the private ownership of criminal record information may hinder public attempts to contain such information.). It is worth noting that in other parts of the world, namely Europe, rehabilitation is a more central goal in sentencing. JACOBS, *supra* note 2, at 221. Therefore, "[b]ecause publicly accessible criminal records stigmatize those who have been convicted, disclosing information about individual criminal history is regarded as substantially impeding that rehabilitative goal." *Id.* In fact, England appears to embrace countrywide legislation to aid ex-offenders to gain employment. Rehabilitation of Offenders Act 1974, c. 53, § 4 (Eng.).

[61] *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, RESEARCH REVIEW: IMPACT OF THE YOUTH CORRECTIONS ACT 1 (1985); JACOBS, *supra* note 2, at 114.

developed, they "would be more responsive to rehabilitative programs than older, 'hardened' prisoners."[62] In 1950, the United States Congress passed the Federal Youth Corrections Act (YCA) to help achieve rehabilitation for "eighteen- to twenty-six-year-old federal offenders."[63] If the youth offenders successfully completed their programs, and the "court released them early from probation" then their convictions would be "set aside."[64] From the legislative history of the YCA, it is unclear whether Congress meant to completely expunge a youth offender's conviction or simply make it "a token statement of rehabilitation."[65] In either case, Congress believed that "setting aside" a youth offender's conviction would help reduce the stigma attached to a criminal conviction and aid the goal of rehabilitation.[66]

Congress repealed the YCA in 1984.[67] Studies demonstrated that YCA offenders were "less willing than [their] non-YCA counterparts to be involved in treatment programs."[68] Moreover, housing solely YCA inmates together created increased violent conditions.[69] In effect, the YCA demonstrated an unstable outcome that Congress was no longer willing to support.[70] Congress has not enacted any comprehensive federal adult expungement legislation to date.[71]

Perhaps one reason why Congress did not originally consider expungement as a method to remove conviction stigma was that criminal records were not widely available until the national and statewide integration of such records.[72] The "rap sheet" did not evolve until the beginning of the twentieth century when law enforcement replaced "haphazard notes" with a centralized document for each offender.[73] To further the collection of nation-wide criminal information, among other

---

[62] U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, *supra* note 61, at 1.

[63] JACOBS, *supra* note 2, at 116; *see* Federal Youth Corrections Act of 1950, 18 U.S.C. §§ 5005–26 (1950) (repealed 1984).

[64] JACOBS, *supra* note 2, at 116.

[65] Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 484 (1981).

[66] *Id.* at 483–84.

[67] Ed Bruske, *Youth Act Repealed*, WASH. POST (Oct. 13, 1984), https://www.washingtonpost.com/archive/local/1984/10/13/youth-act-repealed/bc7189d0-1f2e-4881-a633-6b938d053fe7/?utm_term=.d7b579b6e1e6 [https://perma.cc/QWE3-ZB6M].

[68] U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, *supra* note 61, at 4–5.

[69] *Id.* at 5.

[70] *Id.*

[71] Mukherji, *supra* note 18, at 10. During the later part of the twentieth century, Congress has considered expungement legislation but has failed to pass any as of yet. *Id.*

[72] JACOBS, *supra* note 2, at 32–33; *see also* Gary Fields, *What to Know About Expungement of Criminal Records*, WALL ST. J. (Dec. 26, 2014), http://blogs.wsj.com/briefly/2014/12/26/what-to-know-about-expungement-of-criminal-records-the-short-answer/.

[73] JACOBS, *supra* note 2, at 32–33.

purposes, Congress created the Bureau of Criminal Identification in 1924.[74] As technology progressed, the FBI computerized criminal history records; this was an important step toward ensuring that individual police departments, as well as federal law enforcement agencies, had the ability to review a comprehensive record for each offender.[75] The result today is the Interstate Identification Index (III or Triple I) that allows any law enforcement agency to immediately check a person's entire criminal record.[76] Beyond law enforcement, federal and state statutes allow "[private] businesses and volunteer organizations to indirectly obtain FBI criminal background checks by submitting requests to their state repository."[77] The sale of criminal background check information soared from the 1990s to the present day, with companies providing criminal records directly to private employers at a relatively low cost.[78] Criminal records became the primary way of exposing an individual's criminal history; therefore, it seemed logical to manage the dissemination of criminal records to curtail negative effects on an ex-offenders rehabilitation.

C. The Judiciary and Expungement Law

The Supreme Court of the United States, even in the early nineteenth century, recognized "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."[79] From this premise, federal courts have authorized expungement as a remedy where they find a specific legal right has been violated, or specific legal injustice has occurred.[80]

In *Peters v. Hobby*, a federal employee believed he was erroneously debarred from federal employment due to an improper record and sought to have that record removed.[81] The Loyalty Review Board (the Board) alleged that the petitioner retained membership in the Communist Party and that this

---

[74] *Id.* at 37. This bureau is now known as the FBI. *See id.*

[75] *Id.* at 39–40.

[76] *Id.* at 41. This includes any current warrants out for an arrest. *See id.*

[77] *Id.* at 45.

[78] Kessler, *supra* note 17, at 411–13.

[79] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (internal quotation marks omitted) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23); Thomas R. Frenkel, Comment, *Criminal Record Expungement: The Fifth Circuit Addresses a Split in Authority Regarding the Modification of Executive Branch Records:* Sealed Appellant v. Sealed Appellee*, 130 F.3d 695 (5th Cir. 1997)*, 24 S. ILL. U. L.J. 627, 629–30 (2000). Frenkel's article particularly discusses the expungement of Executive Branch records. *Id.*

[80] Peters v. Hobby, 349 U.S. 331 (1955).

[81] *Id.* at 333, 335.

was evidence of disloyalty.[82] Therefore, the Board barred the petitioner from federal service for three years.[83] The Court concluded that the Civil Service Commission must expunge the "Loyalty Review Board's finding that there is a reasonable doubt as to petitioner's loyalty and to expunge . . . any ruling that petitioner is barred from federal employment."[84] The Court used the expungement remedy narrowly to appropriately alleviate the erroneous violation of the petitioner's right to his federal employment post; however, the Court did not reinstate the petitioner because his post had expired.[85] This situation is quite unlike the expungement of criminal convictions that scholars commonly advocate for[86] because the conviction was improper in the first place.

Advocates of expungement might appeal to historical arguments arguing for the remedy to demonstrate useful precedent. Although it is difficult to locate early twentieth-century federal court cases specifically identifying the expungement remedy[87] for criminal convictions, there is a modicum of mid-twentieth century cases that address expungement in the criminal context.[88] In *Rogers v. Slaughter*, the court again narrowly defined the scope of the expungement remedy.[89] The appellee in *Rogers*, a public school teacher, wrongfully discharged a firearm during school hours.[90] The district court ordered his conviction be set aside, but the Fifth Circuit held that the expungement "gave the defendant more relief than if he had been acquitted."[91] In the case of an acquittal, a court would still have records of the criminal trial that took place.[92] In the court's opinion, "[t]he judicial editing of history is likely to produce a greater harm than that sought to be corrected."[93]

---

[82] *Id.* at 335.

[83] *Id.* at 337.

[84] *Id.* at 349.

[85] *Id.*

[86] *See generally* Kessler, *supra* note 17, at 403.

[87] *Peters* seems to be one of the earliest, perhaps again this is due to the lack of widely available public records of criminal convictions. JACOBS, *supra* note 2, at 32–33.

[88] *See* Rogers v. Slaughter, 469 F.2d 1084, 1085 (5th Cir. 1972) (per curiam); United States v. Rosen, 343 F. Supp. 804, 806–07 (S.D.N.Y. 1972); Daniels v. Brown, 349 F. Supp. 1288, 1291 (E.D. Va. 1972).

[89] *Rogers*, 469 F.2d at 1084–85.

[90] *Id.*

[91] *Id.*

[92] *See generally Acquittal*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/acquittal [https://perma.cc/47TX-Q4VP] (An acquittal is where "[a]t the end of a criminal trial, . . . judge or jury [finds] that a defendant is not guilty.").

[93] *Rogers*, 469 F.2d at 1085.

That same year, in *Daniels v. Brown*, the Eastern District Court of Virginia reiterated, "the remedy of expunction is not one freely applied."[94] Instead of simply "erasing" the plaintiff's administrative records, the court put a note in the plaintiff's records to give notice to anyone viewing the records that this particular plaintiff's convictions "were voided under *Landman*."[95] This solution demonstrated an exercise of limited judicial power, while also detailing the plaintiff's actual record "to insure that the records are at least given the appropriate legal weight."[96]

These two early cases[97] demonstrate the judicial belief that expungement is a limited remedy.[98] As the Fifth Circuit concluded in *Rogers*, expunging and wiping away an ex-offender's criminal record is the equivalent of saying it never happened, which is an even greater remedy than an acquittal would be.[99] Even today, in the case of expungement, the entire criminal conviction record, including any record of a criminal trial, would essentially disappear.[100]

II. CASE HISTORY OF THE FEDERAL EXPUNGEMENT OF CRIMINAL RECORDS

The limited history of the expungement remedy in the United States places into context the current application of expungement—the use of expungement based upon equitable considerations in federal courts.[101]

---

[94] Daniels v. Brown, 349 F. Supp. 1288, 1291 (E.D. Va. 1972).

[95] *Id.* The plaintiff initially sought to have his administrative sanctions "voided for lack of due process." *Id.* at 1289. In *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), the court ordered this relief, however, the only matter this note is concerned with on appeal is the question of expungement.

[96] *Daniels*, 349 F. Supp. at 1291.

[97] Some cases (both state and federal) predating *Rogers* and *Daniels*, express a balance between the desire to maintain accurate criminal records and the resistance toward burdening an individual with the existence of a criminal record. *See generally In re* Molineaux, 69 N.E. 727, 728 (1904) (stating "An innocent man accused of crime is sometimes compelled to make sacrifice [in this case having photographs and identifying information kept as prison records] and undergo suffering for the benefit of society. . . . One, for the good of all, may be required to submit to imprisonment, incur expense, and endure mental distress, because the state cannot exist without the preservation of order, and order cannot be preserved without the punishment of the guilty."); *see also* United States v. Krapf, 285 F.2d 647, 651 (3d Cir. 1960) (quoting Judge Augustus N. Hand, "Any restraint on the person may be burdensome. But some burdens must be borne for the good of the community." United States v. Kelly, 55 F.2d 67, 68 (2d Cir. 1932)).

[98] *See Rogers*, 469 F.2d at 1085; *Daniels*, 349 F. Supp. at 1291.

[99] *Rogers*, 469 F.2d at 1084–85.

[100] BLACK'S LAW DICTIONARY 603 (7th ed. 1999).

[101] This note solely focuses on federal expungement of criminal records based upon equitable considerations. Courts have granted expungement in cases where a

A. Supreme Court Jurisprudence Regarding Ancillary Jurisdiction and Its Effect on Expungement

The Supreme Court case *Kokkonen v. Guardian Life Insurance Co. of America* is the most recent and significant case defining the scope of ancillary jurisdiction—the tool district courts use to exercise authority over expungement motions.[102] *Kokkonen* primarily involved a contract law dispute.[103] The respondent, Guardian Life, ended Kokkonen's agreement and thereafter Kokkonen sued.[104] After Guardian Life moved the case to federal court, a jury trial ensued, "but before the District Judge instructed the jury, the parties arrived at an oral agreement settling all claims."[105] The settlement did not, however, grant "the District Court [authority] to enforce the settlement agreement."[106] After the parties clashed over terms of the settlement, Guardian Life "moved in the District Court to enforce the agreement," but Kokkonen opposed stating that the district court lacked subject matter jurisdiction.[107] The district court enforced the settlement—siding with Guardian Life—and relied on an "inherent power" to enforce the order.[108] The Supreme Court granted certiorari to decide whether the district court in fact possessed such an "inherent supervisory power."[109]

Justice Scalia, writing for the majority, concluded that "[f]ederal courts are courts of limited jurisdiction . . . . which is not to be expanded by judicial decree."[110] In the instant case, the Court recognized that Federal Rule of Civil Procedure 41(a)(1)(ii) governed the settlement dismissal, but gave the district court further jurisdiction over disputes arising from the settlement agreement.[111] In addition to the "inherent power" argument, Guardian Life also asserted the alternative argument that the doctrine of ancillary jurisdiction[112] authorized the district court to enforce the settlement agreement.[113] The Supreme Court

---

conviction was unconstitutional or illegal. *See* Tokoph v. United States, 774 F.3d 1300, 1305 (10th Cir. 2014) (citing United States v. Pinto, 1 F.3d 1069, 1070 (10th Cir. 1993).

[102] Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378–80 (1994)).

[103] *Id.* at 376–77.

[104] *Id.* at 376.

[105] *Id.*

[106] *Id.* at 377.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* (internal citations omitted) (citing Am. Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951)).

[111] *Id.* at 378.

[112] *Id.* Ancillary jurisdiction was defined in this case as, "jurisdiction over some matters . . . that are incidental to other matters properly before them." *Id.*

[113] *Id.* at 378–79.

concluded that the enforcement of the settlement "is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction."[114]

The Court went on to detail the two instances when a court may assert ancillary jurisdiction, "(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."[115] The Court found neither category present in Guardian's case.[116] As for the first part of ancillary jurisdiction, the Court held "the facts underlying respondent's dismissed claim for breach of agency agreement and those underlying its claim for breach of settlement agreement have nothing to do with each other."[117] The second part of ancillary jurisdiction did not cover the instant case either; while the district court's order only dismissed the suit with prejudice, it did not incorporate an obligation for the parties to comply with the order.[118]

It is in light of *Kokkonen* that the discussion of federal district court expungement of criminal records must proceed because if a federal district court does not have ancillary jurisdiction to hear a matter (such as a petition for expungement), it must dismiss it.[119]

B. Federal Circuit Case Law

To begin to clarify why the judicial route toward expungement is not a viable option, it is crucial to consider the following: (1) the arguments surrounding the issue of whether a federal district court has ancillary jurisdiction to expunge a criminal conviction based upon equitable considerations and (2) the arguments and case precedent in favor of keeping expungement as a limited remedy.[120] Currently, circuit courts are

---

[114] *Id.*

[115] *Id.* at 379–80 (internal citations omitted).

[116] *Id.* at 380–81.

[117] *Id.* at 380.

[118] *Id.* 380–81. The Court summarized its reasoning at the end of the opinion, concluding, "[t]he facts to be determined with regard to such alleged breaches of contract are quite separate from the facts to be determined in the principal suit, and automatic jurisdiction over such contracts is in no way essential to the conduct of federal-court business." *Id.* at 381.

[119] *See generally id.* (The Court in *Kokkonen* ultimately centers the opinion around the limited scope of federal judicial jurisdiction.).

[120] Brief for the United States at 16–17, Doe v. United States, 833 F.3d 192 (2d Cir. 2016) (No. 15-1967-cr).

split as to the application of ancillary jurisdiction, as the following discussion will highlight.

In the federal system, the process of expungement based on equitable considerations begins with a petition for expungement, which is filed in the district court where the petitioner's conviction was enforced.[121] The court will then consider the merits of the application and rule on whether or not to grant expungement.[122] If expungement is granted, all official records of a conviction, arrest, and any related criminal proceedings will be ordered abolished.[123] Thereafter, a person may deny having ever been arrested or convicted of that offense; only the Department of Justice will maintain a nonpublic record of the offense.[124]

1. Circuits Authorizing Federal District Court Expungement

Although some circuit courts have held that federal district courts have jurisdiction over expungement applications,[125] they routinely deny expungement applications that are outside the scope of the limited remedy.[126] Moreover, across different circuits, courts are inconsistent in the ways they analyze ancillary jurisdiction and the scope of expungement.[127]

The earliest case on point, *United States v. Linn*, dealt with the expungement of an arrest record rather than a conviction.[128] A jury acquitted appellant of nine counts of various charges, such as mail fraud, wire fraud, and stock fraud.[129] The appellant claimed that this record could be used against him in the future to "attack his character and reputation both as an individual and in his professional capacity as an attorney."[130] The Tenth Circuit in *Linn* pointed out that "[t]raditionally,

---

[121] Doe v. United States, 110 F. Supp. 3d 448, 448, 454–55 (E.D.N.Y. 2015).

[122] *Id.*

[123] *Process for Expunging Federal Criminal Record: Non-disclosure*, FREE ADVICE LEGAL, http://criminal-law.freeadvice.com/criminal-law/arrests_and_searches/process-for-expunging-federal-criminal-record-non-disclosure.htm [https://perma.cc/K3CX-LAKH]. After the attorney general's Office grants an expungement, all official records (and arrest records) will be ordered destroyed.

[124] *Id.*

[125] *Doe*, 110 F.3d at 454 n.16. Federal courts only have jurisdiction over applications to expunge federal crimes.

[126] *See* United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977); United States v. Linn, 513 F.2d 925, 927 (10th Cir. 1975).

[127] *See generally* Sections II.B.1–2 (exploring the different approaches to expungement across circuits.).

[128] *Linn*, 513 F.2d at 926.

[129] *Id.*

[130] *Id.* at 926–27.

courts have been of the view that the matter of expunging an arrest record . . . was more appropriate for legislative action."[131]

Most importantly, the court discussed instances in which expungement was applied appropriately, such as where the arrestee had been acquitted.[132] Nevertheless, the court detailed a careful scheme:

> [T]he power to expunge an arrest record is a narrow one, and should not be routinely used whenever a criminal prosecution ends in an acquittal, but should be reserved for the unusual or extreme case. Certain of the cases call for a "balancing" of the equities between the Government's need to maintain extensive records in order to aid in general law enforcement and the individual's right of privacy.[133]

In conclusion, the court held Linn's fear of a possible privacy invasion did not outweigh the "[g]overnment's justification in keeping the records."[134] *Linn* did not explicitly discuss the concept of ancillary jurisdiction[135] but it did conclude that Linn's arrest record did not fall under the narrow remedy of expungement.[136]

Two years after *Linn*, the Second Circuit considered the issue of expungement of criminal records based upon equitable considerations in *United States v. Schnitzer*.[137] *Schnitzer* also dealt with a motion to expunge an arrest record, not an actual criminal conviction.[138] Yet, in this case, the circuit court held that the lower court properly exercised ancillary jurisdiction over Schnitzer's expungement motion because, "[a] court, sitting in a criminal prosecution, has ancillary jurisdiction to issue protective orders regarding dissemination of arrest records."[139]

Furthermore, the court defined the parameters of expungement authority, noting that "expungement lies within the equitable discretion of the court, and relief usually is granted only in 'extreme circumstances.'"[140] The "extreme circumstances" component can be determined if courts "consider[] the 'delicate

---

[131] *Id.* at 927.

[132] *Id.* at 927–28.

[133] *Id.* at 927.

[134] *Id.* at 928.

[135] Although the court concluded, "courts do possess the power to expunge an arrest record." *Id.* at 927.

[136] *Id.* at 928.

[137] United States v. Schnitzer, 567 F.2d 536 (2d Cir. 1977).

[138] *Id.* at 537. Specifically, Zalmon Schnitzer sought to expunge his arrest record, as well as "secure the return of fingerprints and photographs, after dismissal of [his] indictment." *Id.*

[139] *Id.* at 538 (citing Morrow v. District of Columbia, 417 F.2d 728, 740–41 (D.C. Cir. 1969)). The court further concluded, "[t]he application of ancillary jurisdiction in this case is proper and falls within the policy of encouraging judicial economy." *Id.*

[140] *Id.* at 539 (citing United States v. Rosen, 343 F. Supp. 804, 807 (S.D.N.Y. 1972)).

balancing of the equities between the right of privacy of the individual and the right of law enforcement official[s] to perform their necessary duties.'"[141] Even with this balancing, expungement "should be reserved for the unusual or extreme case."[142]

The court clarified specific instances of extreme circumstances that may warrant expungement: mass arrest situations where probable cause cannot be judicially determined; arrests where the only purpose is to "harass civil rights workers"; arrests where police misapply records that hurt the defendant; and where "the arrest was proper but was based on a statute later declared unconstitutional."[143] It is crucial to note that, ultimately, the court found Schnitzer's circumstances insufficient to warrant expungement, and neither "harsh [nor] unique."[144] Essentially, increased hardship to a person's employment prospects, even through the retention of a dismissed indictment, is not sufficient to warrant expungement.[145]

More recently, a post-*Kokkonen* case in the Seventh Circuit, *United States v. Flowers,*[146] held that "district courts do have jurisdiction to expunge records maintained by the judicial branch."[147] *Flowers* relied on its own circuit's precedent, rather than *Kokkonen*, in coming to that conclusion.[148] The Fourth Circuit applied its precedential balancing test for expungement: "if the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintenance of the records, then expunction is appropriate."[149] More importantly, the court in *Flowers* pointed out, "[a]lthough we have adopted a balancing test, it seems clear that the balance very rarely tips in favor of expungement."[150] Indeed, the court held true to this

---

[141] *Id.* (citing *Rosen*, 343 F. Supp. at 806). The court noted the possible "serious adverse consequences" that an arrest record can impose on an individual, including economic and reputational losses. *Id.* (citing Menard v. Mitchell, 430 F.2d 486, 490 (D.C. Cir. 1970)).

[142] *Id.* at 539–40 (internal quotation marks omitted) (quoting United States v. Linn, 513 F.2d 925, 927 (10th Cir. 1975)).

[143] *Id.* at 540.

[144] *Id.* Schnitzer argued his arrest record was particularly detrimental to him due to his rabbinical studies, which may require him to explain his arrest. However, the Court disagreed, stating that "[s]uch an explanation may be expected from those about to enter a profession." *Id.*

[145] *Id.*

[146] Flowers sought to expunge her criminal conviction for "interfering with housing right on account of race." United States v. Flowers, 389 F.3d 737, 738 (7th Cir. 2004). Flowers believed this conviction would hinder her employment in the healthcare field. *Id.*

[147] *Id.* at 739.

[148] *Id.*

[149] *Id.* (internal quotations omitted) (quoting United States v. Janik, 10 F.3d 470, 472 (7th Cir. 1993)). *Janik* appears to be decided a year before *Kokkonen*.

[150] *Id.*

standard in deciding that the district court improperly expunged Flowers' routine conviction with the "usual attendant consequences."[151]

Five circuit courts[152] may have held that district courts have the power to expunge criminal records based upon equitable considerations,[153] but they necessarily limited the scope of expungement because it is difficult to find the extreme circumstances expungement requires in cases where a person faces ordinary employment discrimination.[154]

2. Circuits Denying Federal District Court Expungement

Courts in the First, Third, Sixth, Eighth, and Ninth Circuits[155] properly held that district courts do not have ancillary jurisdiction over equitable expungement applications.[156] By denying the extension of ancillary jurisdiction over expungement petitions, the above circuit courts, by implication, endorse a narrow view of the expungement remedy. These circuits cite a few central arguments in supporting this conclusion, including the expungement remedy is limited by case law to unlawful rights violations, the broad use of expungement can annex the executive and legislative branch's powers, and the

---

[151] *Id.* at 740. Flowers, like others in circuit case precedent, did not allege an actual loss of employment due to her conviction. *Id.* Rather she maintained employment as a firefighter and also completed studies to become a nurse. *Id.* at 738.

[152] As noted in *Doe*, five circuits (Second, Fourth, Seventh, Tenth, and D.C.) have (at one point) held that federal district courts have subject matter jurisdiction over expungement applications. Doe v. United States, 110 F. Supp. 3d 448, 454 n.16 (E.D.N.Y. 2015). The case law of two circuits are not explained in detail in this note: United States v. Dunegan, 251 F.3d 477, 478 (3d Cir. 2001) and Livingston v. U.S. Dep't of Justice, 759 F.2d 74 (D.C. Cir. 1985).

[153] The Fifth Circuit in *Sealed Appellant v. Sealed Appellee* held that "[c]ourts have supervisory powers over their own records," but the issue of judicial expungement was not up on appeal. Sealed Appellant v. Sealed Appellee, 130 F.3d 695, 697 n.2 (5th Cir. 1997). The Fifth Circuit did, however, hold that the "district court lacked jurisdiction over the defendant's petition" to expunge executive branch records of his overturned wire fraud conviction because he had not suffered a rights violation, which is necessary for the court to consider granting expungement of executive branch records. *Id.* at 697–98.

[154] *Flowers*, 389 F.3d at 739.

[155] While other scholars have thoroughly analyzed federal expungement case law (up until 2013) and argued for the expansion of expungement, this note outlines the core arguments that the circuits have put forth, and highlights the common theme throughout each side—that expungement is an extreme remedy. *See* Mukherji, *supra* note 18, at 12–25. Circuit precedent has rightfully kept the scope of expungement limited; the concealment of criminal records undermines the criminal justice process, and larger scale expungement procedures to help certain individuals (exempting those who are wrongfully convicted or convicted unconstitutionally) do not outweigh the importance of the entire criminal record retention system.

[156] *Doe*, 110 F. Supp. 3d at 454 n.16. The most recent circuit to consider this issue is the Second Circuit; a detailed discussion of that particular case will be addressed *infra* Section II.C.

underlying facts in an expungement application are not necessarily intertwined with a prior criminal proceeding.[157]

In *United States v. Lucido*, the Sixth Circuit held the district court lacked jurisdiction over appellant's request to expunge[158] records of federal money-laundering charges for which he was acquitted.[159] The court in *Lucido* cited *Kokkonen*, concluding that "the ancillary power of the federal courts does not 'stretch' that 'far.'"[160] In recognizing district courts do not have this inherent authority, the court also concluded an important point that the key reasons Lucido gave for expunging his record—namely, his good behavior and his employment—have nothing to do with the prior criminal proceedings.[161]

The Sixth Circuit[162] brilliantly summed up the jurisdiction predicament while recognizing some of the legitimate considerations Lucido has about his criminal record:

> The equitable premise of Lucido's motion after all is not illegitimate: He claims to have gotten wrapped up unfairly in a criminal prosecution eighteen years ago . . . . Why shouldn't the federal courts be able to clean the slate on decades-old indictments when fair-minded reasons exist for doing so?
>
> That the federal courts are courts of limited jurisdiction, empowered only to wield power Congress and the Constitution has given them, is one answer.[163]

---

[157] *See generally* United States v. Lucido, 612 F.3d 871 (6th Cir. 2010) (holding similarly that the underlying facts in an expungement application are not necessarily intertwined with a prior criminal proceeding); United States v. Coloian, 480 F.3d 47 (1st Cir. 2007) (concluding that the underlying facts in an expungement application are not necessarily intertwined with a prior criminal proceeding); United States v. Meyer, 439 F.3d 855 (8th Cir. 2006) (recognizing that allowing a district court to expunge criminal records based on equitable circumstance would undermine the crucial importance of preserving criminal records); United States v. Dunegan, 251 F.3d 477 (3d Cir. 2001) (holding that courts do not have jurisdiction to grant the expungement remedy for cases that end in valid convictions); United States v. Sumner, 226 F.3d 1005 (9th Cir. 2000) (concluding that the expungement remedy is limited by case law to unlawful rights violations).

[158] *Lucido*, 612 F.3d at 875. The *Lucido* court recognizes several statutes that do permit expungement motions, *id.* at 874, but they are quite limited, as noted above in the introduction. Among them are: the Federal First Offender Act, 18 U.S.C. § 3607(c) (2012) (mentioned above), 5 U.S.C. § 552a(g) (2012) (authorizing district courts "to correct inaccurate government records"), and 42 U.S.C. § 14132(d) (2012) ("authoriz[ing] the expungement of DNA records"). *Lucido*, 612 F.3d at 874.

[159] *Id.* at 872–73.

[160] *Id.* at 874 (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379 (1994)).

[161] *Id.* at 875.

[162] The Sixth Circuit again recently affirmed its stance on jurisdiction in *Lucido*, in *United States v. Field*, 756 F.3d 911 (6th Cir. 2014). The court held in *Field*, "[a]ncillary jurisdiction over Field's motion to expunge her record of arrest does not enable the district court to vindicate its authority or effectuate its decrees because the district court did not hold Field was illegally arrested." *Id.* at 916.

[163] *Lucido*, 612 F.3d at 877.

Further reiterating the separation of powers argument noted in *Sumner*, the court in *Lucido* also recognized that "[t]he power to expunge an indictment is the power to undermine a web of federal (and state) laws designed to collect and preserve such information for law enforcement purposes."[164]

In *United States v. Sumner*, the appellant requested that his twenty-six-year-old unlawful possession of narcotics conviction be expunged under the Federal Youth Corrections Act,[165] or "[i]n the alternative" be expunged by the district court using "its 'inherent powers under equitable principles.'"[166] The Ninth Circuit quickly dismissed Sumner's[167] argument that his conviction should be set aside under the FYCA because the district court record reflected that Sumner failed to comply with "a condition of his sentence," and therefore did not meet the eligibility requirements under the FYCA.[168] The Ninth Circuit also held that district courts do not have the inherent authority to expunge criminal records based on equitable considerations, according to *Kokkonen*.[169] The court held, "[i]n our view, a district court's ancillary jurisdiction is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error."[170] In support of its holding, the court cautioned against a possible separation of powers violation, concluding that expunging a valid conviction "usurps the powers that the framers of the Constitution allocated to Congress, the Executive, and the states."[171]

In *United States v. Meyer*, the Eighth Circuit held the district court—and similarly, the magistrate judge—lacked jurisdiction to expunge a criminal record based on solely equitable considerations where Meyer was convicted of failure

---

[164] *Id.*

[165] 18 U.S.C. § 5010(a) (1950) (repealed 1984).

[166] United States v. Sumner, 226 F.3d 1005, 1008 (9th Cir. 1005).

[167] In fact, Sumner was gainfully employed as a substitute teacher at the time of the appeal. *Id.* He only wished to become a permanent teacher and thought that his criminal record might preclude that, but there is nothing in the opinion to state definitively that his position as a teacher would be denied due to the conviction. *Id.* at 1007–15.

[168] *Sumner*, 226 F.3d at 1009.

[169] *Id.* at 1010 (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 375–77 (1994)). The court also cited its own decision in *United States v. Smith* to demonstrate that since 1991, the Ninth Circuit has held that a district court cannot expunge a criminal conviction "without any finding or allegation that the convictions were unconstitutional or in violation or statutory authority" based upon purely equitable considerations. *Id.* at 1010 (quoting United States v. Smith, 940 F.2d 395, 395 (9th Cir. 1991) (per curiam)). In fact, in *Smith*, the court recognized that "disbarment and a possible prohibition against reenlistment" in the United States Army Reserves were "the natural and intended collateral consequences of having been convicted." *Smith*, 940 F.2d at 395.

[170] *Sumner*, 226 F.3d at 1014.

[171] *Id.*

to file income tax returns in violation of 26 U.S.C. § 7203.[172] Meyer feared that his employment in the securities industry would be compromised due to his conviction because Federal Deposit Insurance Corporation (FDIC) regulations "restricted the employment of individuals who had been convicted of certain criminal offenses."[173] Without regard to this argument, the court stated, "[w]e hold, as have the Ninth and Third Circuits, that post-*Kokkonen* a motion to expunge a criminal record that is based solely on equitable grounds does not invoke . . . ancillary jurisdiction."[174]

Soon thereafter, the Eighth Circuit addressed Meyer's apparent employment issue, stating, "[p]ermitting the expungement of a record solely on equitable grounds would interfere with state and federal laws that rely on the existence of accurate and complete criminal records."[175] The court did not believe that the narrow scope of the expungement remedy extended to cover circumstances where a petitioner argued his criminal record placed an inequitable burden on him.[176]

The First Circuit in *United States v. Coloian*,[177] summarized the spectrum of precedent set forth above when it concluded that based on *Kokkonen*, the district court did not have ancillary jurisdiction over a petitioner's motion to expunge his acquittal on bribery charges.[178] The court stated that the stigma in the legal and business community Coloian might face due to the record of his acquittal was not extreme or unusual, and did not warrant expungement.[179] Additionally, the court reiterated that the exercise of ancillary jurisdiction in Coloian's case did not satisfy either *Kokkonen* condition to find ancillary jurisdiction; Coloian's current claim that the criminal acquittal stigmatized his reputation was not interrelated to the original facts in the criminal case, and the court did not require the power to expunge to effectuate its decrees, such as Coloian's acquittal.[180] Ostensibly, according to the above circuits, most negative effects on employment prospects resulting from criminal records will fall outside the limited scope of the expungement remedy.

---

[172] United States v. Meyer, 439 F.3d 855, 856, 862 (8th Cir. 2006).
[173] *Id.* at 856.
[174] *Id.* at 860.
[175] *Id.* at 862.
[176] *Id.*
[177] United States v. Coloian, 480 F.3d 47 (1st Cir. 2007).
[178] *Id.* at 48.
[179] *Id.* at 49–52.
[180] *Id.* at 52.

C. The Current Situation—Doe *and the Second Circuit*

In August 2016, the Second Circuit decided the case of *Doe v. United States* and distinguished its *Schnitzer* precedent in holding that a district court does not have ancillary jurisdiction over an expungement application that is solely based on equitable circumstances.[181] The appeal arose from Doe's initial application to the district court, seeking to expunge her 2001 health insurance fraud conviction—which the district court granted based upon a finding of ancillary jurisdiction over the application and upon a finding that Doe's situation warranted the narrow remedy of expungement.[182]

Through an analysis of Doe's arguments, the government's contention, the district court's reasoning, and the Second Circuit's holding, it becomes clear that judicial expungement of criminal records is not a viable route to aiding ex-offenders in their transitions back into society.

1. Doe's Employment Issue and District Court Case

In 2001, Doe was convicted in the Eastern District of New York for committing health insurance fraud; Doe participated in a scheme in which she got into a staged car accident, received fake services from a complicit health care clinic that later billed for these phony services, and recovered funds from the health insurance company.[183] In October of 2014, Doe filed an application seeking to expunge her conviction because she claimed it made it difficult for her to keep, as well as maintain, jobs as a home health care aide.[184]

As Doe argued, and scholars note, one of the most damning collateral consequences of having a criminal record is the inability to maintain employment.[185] In 2008, low employment rates of ex-offenders contributed to an economic loss "between

---

[181] Doe v. United States, 833 F.3d 192, 194–98 (2d Cir. 2016). As a summer 2015 intern at the United States Attorney's Office for the Eastern District of New York (Central Islip division), I worked closely with AUSA Bradley King, one of the AUSAs assigned to the *Doe* case. During my tenure, I helped research and draft the initial letter opposing the court's May 2015 decision in favor of expungement, and I also continued to work on the case for the duration of my internship.

[182] Doe v. United States, 110 F. Supp. 3d 448, 457–58 (E.D.N.Y. 2015).

[183] *Id.* at 449–50.

[184] *Id.* at 448–49.

[185] *See, e.g.*, Genevieve J. Miller, Comment, *Collateral Consequences of Criminal Convictions: A Cost-Benefit Analysis*, 9 J.L. ECON. & POL'Y 119, 120–21 (2012); *see* Mouzon, *supra* note 17, at 1–2.

$57 and $65 billion" in the United States.[186] In Doe's case, she claims that employers hire her for various health care industry jobs, and then subsequently fire her once they find out about her criminal conviction during her background check.[187] Although the record does contain Doe's assertion that employers refuse to hire her when they discover her health care fraud conviction, the record is unclear as to how many employers fired Doe for this reason.[188] Of the five employers listed in Doe's probation file, only one of them (from the record) clearly indicated that the reason for her termination was her health care fraud conviction.[189]

In *Doe*, the district court conceded that employers are allowed to know about prospective employee's convictions and also stated that "there will nevertheless be cases in which all reasonable employers would conclude that the conviction is no longer a meaningful consideration in determining suitability for employment if only they had the time . . . to conduct a thorough investigation."[190] Studies demonstrate that employment discrimination against ex-offenders is a very real force; therefore, the ability of an employer to conduct a thorough investigation may not augment the potential for an ex-offender to gain employment.[191] And even if an employer completes a thorough analysis of a job candidate, they may elect to hire a similarly qualified candidate who does not possess a criminal conviction to lessen the risk of liability or loss.[192]

The district court granted Doe's expungement application based on a finding of ancillary jurisdiction over the application and on a finding that Doe's situation warranted the narrow remedy of expungement.[193] In supporting this conclusion, the court cited the long span of time that elapsed since Doe's conviction, her law-abiding behavior since the conviction, and the negative effect Doe's criminal conviction had on her employment in the home health aide field.[194] Relying primarily on the employment hardship Doe faced, the court concluded, "[t]he seemingly automatic refusals by judges to expunge convictions

---

[186] JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 1 (2010), http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf [https://perma.cc/B2HT-Q7AX].

[187] *Doe*, 110 F. Supp. 3d at 450–52.

[188] Brief for the United States, *supra* note 120, at 5.

[189] *Id.* at 6. The employer, Agency Five, stated there was a direct relationship between Doe's health care fraud conviction and the position she sought to obtain (home health aide) in the health care field. *Id.*

[190] *Doe*, 110 F. Supp. 3d at 449.

[191] *See id.*; JACOBS, *supra* note 2, at 279.

[192] JACOBS, *supra* note 2, at 280.

[193] *Doe*, 110 F. Supp. 3d at 455–57.

[194] *Id.* at 457.

when the inability to find employment is the 'only' ground for the application have undervalued the critical role employment plays in re-entry."[195]

On appeal, the government argued that based on circuit case law, the district court lacked ancillary jurisdiction over Doe's expungement application, and the district court abused its discretion by granting Doe's expungement application.[196] The government argued that although the Second Circuit in *Schnitzer* held that district courts do have ancillary jurisdiction over such motions, *Schnitzer* precedes *Kokkonen*; therefore, the court should examine *Kokkonen*'s holding, and the circuit case law after it to properly outline the boundaries of ancillary jurisdiction.[197] Because each circuit to consider the ancillary jurisdiction issue—and to analyze it under *Kokkonen*—has concluded that district courts do not have jurisdiction, the government argued the Second Circuit should comply.[198]

The government further supported this argument with two equally compelling justifications: expungement motions do not factually rely on the underlying prosecution and expungement motions do not allow a court to operate well.[199] These two sub-arguments stemmed from the blueprint of ancillary jurisdiction elucidated in *Kokkonen*.[200] Equitable expungement motions are not a continuation of a criminal trial; rather, they are separate applications that rest on separate facts that have occurred well after a criminal prosecution has ended.[201] In Doe's case, the court relied on the information surrounding the automobile accident fraud scheme, not her probation record, which had not even been created yet.[202] An expungement application relies on the facts about an ex-offender's life *after* the criminal conviction, not the facts of the initial case; in other words, the expungement is not an extension of the case, and therefore the jurisdiction cannot be either.[203] Moreover, the government argued that a district court's power to preside over a criminal case is not reliant upon whether or not it has power to make that case disappear—to properly function, it is not

---

195 *Id.*
196 Brief for the United States, *supra* note 120, at 16–17.
197 *Id.* at 21.
198 *Id.* at 21–26.
199 *Id.* at 27–31.
200 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378–80 (1994).
201 Brief for the United States, *supra* note 120, at 27–28.
202 *Id.* at 25–32.
203 *Id.* at 29–30.

fundamental for criminal courts to be able to destroy the records they create.[204]

Additionally, the government argued that the district court abused its discretion in granting Doe's expungement motion.[205] Notwithstanding the jurisdictional argument, the Second Circuit, in *Schnitzer*, previously confined expungement based on equitable considerations as a limited remedy when it explained that expungement was only proper in extraordinary circumstances.[206] Although the District Court for the Southern District of New York did grant expungement applications for a few select defendants who were convicted under the Federal Youth Corrections Act, no other federal district courts have granted expungement motions based solely on a criminal conviction's adverse employment impact.[207] Therefore, the government argued that this consequence does not fall under the "extreme circumstances" warranting expungement.[208]

Conversely, Doe argued that *Schnitzer* and *Kokkonen* support a finding of ancillary jurisdiction and that the district court "acted within its discretion" in granting Doe's application.[209] Doe contended that *Kokkonen*'s precedent does not disturb the holding in *Schnitzer*, and that district courts do have ancillary jurisdiction over expungement motions because "district courts retain a 'reservoir of jurisdiction . . . to entertain motions after final judgment.'"[210] The fact that all of the circuit courts to address the ancillary jurisdiction question since *Kokkonen* (and rely on *Kokkonen*'s holding) have held that district courts lack jurisdiction over expungement motions is a nonissue to Doe, who claimed that "there was no need for those cases to address it."[211] Doe further argued that the district court's exercise of ancillary jurisdiction was proper because Doe's criminal conviction and expungement motion are factually interdependent, and the jurisdiction allows the court to vindicate its sentencing decree.[212] Doe asserted that the court had to look back to her conviction while deciding her expungement motion.[213]

---

[204] *Id.* at 30 (citing United States v. Lucido, 612 F.3d 871, 875 (6th Cir. 2010)).

[205] *Id.* at 33.

[206] *Id.* at 36.

[207] *Id.* at 38–40.

[208] *Id.* at 42–43 (internal quotations omitted) (quoting United States v. Smith, 940 F.2d 395, 396 (9th Cir. 1991)).

[209] Brief for Petitioner-Appellee at 10–33, Doe v. United States, 833 F.3d 192 (2d Cir. 2016) (No. 15-1967-cr).

[210] *Id.* at 12 (omission in original) (quoting United States v. Smith, 467 F.3d 785, 788 (D.C. Cir. 2006)).

[211] *Id.* at 22.

[212] *Id.* at 23, 27.

[213] *Id.* at 24.

Noting that the "abuse of discretion" standard is deferential to the district court, Doe concluded that the district court did not abuse its discretion in granting the expungement motion.[214] Citing the court's particularly close review of Doe's case file and probation record, Doe argued that the court uncovered a specific harm (specific instances of failure to secure a job based upon her conviction) that properly outweighed the government's need to maintain accurate criminal records.[215]

2. The Second Circuit's Holding

The Second Circuit held that the district court lacked jurisdiction to consider Doe's expungement motion.[216] The court addressed the arguments in support of a finding of ancillary jurisdiction, beginning with the *Schnitzer* precedent.[217] In the court's view, *Schnitzer* applies only to the expungement of arrest records after a court order of dismissal, not conviction records without an order of dismissal.[218] Moreover, the court held that neither of *Kokkonen*'s defined purposes of ancillary jurisdiction (to permit disposition of factually interdependent claims, and "to enable a court to . . . vindicate its authority, and effectuate its decrees") supported a finding of ancillary jurisdiction in the present case.[219] The Second Circuit concluded that the district court's decree "long since expired by the time Doe filed her motion" and the facts supporting the grant of Doe's expungement motion were based on events "that transpired years after her sentencing."[220] The court noted that the decision to expand judicial jurisdiction lies in the hands of Congress, and until they decide to extend it, ex-offenders will not be able to pursue expungement through the courts.[221] This recent holding may prove persuasive in other circuit courts going forward, and may further prevent expungement from becoming an accessible remedy in federal court.

---

[214] *Id.* at 37–38.

[215] *Id.* at 37–40.

[216] Doe v. United States, 833 F.3d 192 (2d Cir. 2016).

[217] *Id.* at 195–96.

[218] *Id.*

[219] *Id.* at 195–97 (internal quotations omitted) (quoting Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379–80 (1994)).

[220] *Id.*

[221] *Id.* at 198.

3. Why Expungement Was Not Effective in Doe's Case

As Doe's record indicates, a person's employment history is not always straightforward.[222] Criminal convictions certainly increase the risk of employment discrimination, but expungement of those records may not be the best answer.[223] Even if a criminal conviction is expunged from an ex-offender's judicial record, the court cannot erase traces of the conviction from all social media, print, or otherwise.[224] A simple Google search would still return news stories, if any, about a criminal case. Moreover, the court cannot forbid former employers from speaking with prospective employers concerning a candidate, nor can it ask all those who know about an ex-offender's conviction to lie about it, if asked.[225] Even if the Second Circuit did affirm Doe's expungement order, a new prospective health care aide employer might not find Doe's health care fraud conviction through a paid background check, but the conviction could very well be revealed if the employer called Doe's Agency as a reference. This reality ultimately strengthens the premise that the judicial remedy of expungement is not a sufficient solution to the myriad of problems ex-offenders face upon release.

III. WHY THE TRUE PROVERBIAL CLEAN SLATE IS NOT ATTAINABLE

As James B. Jacobs recently quoted in his book, *The Eternal Criminal Record*, "[r]ecord concealment is unworkable."[226] After unfolding the history and case law regarding expungements based on equitable considerations,[227] it is apparent that the expungement remedy is unsuccessful at the federal level. The remainder of this note will dispute the usefulness of federal judicial and legislative expungement[228] through practical and philosophical lenses.

---

[222] *See* Brief for the United States, *supra* note 120, at 5.

[223] *See* JACOBS, *supra* note 2, at 120–28.

[224] *Id.* at 121.

[225] *Id.*

[226] *Id.* at 113 (quoting Bernard Kogon & Donald L. Loughery Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 378, 383 (1970)).

[227] *See supra* Parts I, II.

[228] Although some of the case law discussed in this note involved the expungement of arrest records and criminal acquittals, the arguments set forth in Part III are applicable to the expungement of criminal convictions based upon equitable considerations. This note does not comment on the expungement of those acquitted or wrongfully convicted.

A. Federal District Courts Currently Lack the Authority to Grant Expungement Motions and Expungement Is Not Uniform Throughout the Circuits

Without a conclusive consensus in circuit case law on whether or not district courts can grant expungement motions based on equitable considerations, the expungement remedy is not a widely viable option for most ex-offenders.[229] Although the Second Circuit's *Doe* precedent is not binding in other circuits, it may be persuasive.

Moreover, even if federal judicial expungement based on equitable considerations becomes an option for ex-offenders in some circuits, this traditionally narrow remedy will be unavailable to many ex-offenders.[230] Those ex-offenders with convictions for violent felonies,[231] or convictions that are not as remote in time as Doe's conviction, will still be precluded from seeking the expungement remedy.[232] If an individual ex-offender's conviction is expunged, and she is not the only defendant in the prior criminal case, the proper convictions of other individuals that are not entitled to expungement may nevertheless become sealed.[233] In that scenario, the court will keep records of the underlying criminal proceeding confidential and they will not be open to the public.[234] This can lead to an overinclusive effect of expungement whereby ex-offenders who did not petition for expungement may nevertheless receive some privacy benefit from the codefendant's petition.[235] Therefore, federal judicial expungement is not an accurate tool for the reduction of employment discrimination against all ex-offenders because it may include some ex-offenders (codefendants) who do not meet the stringent standards, yet also may exclude some seemingly deserving ex-offenders who do not have extreme enough circumstances.[236]

---

[229] For a more recent case that limits the expungement remedy, yet discusses the desirability of granting such motions, see generally Stephenson v. United States, 139 F. Supp. 3d 566 (E.D.N.Y. 2015).

[230] Doe v. United States, 110 F. Supp. 3d 448, 455–57 (E.D.N.Y. 2015).

[231] *See infra* Section III.C for an explanation of violent versus nonviolent offender expungement arguments.

[232] Jacobs addresses the need to allow the expungement remedy closer in time to the conviction, however, he also notes that some current expungement schemes demand a waiting period before the remedy is available. JACOBS, *supra* note 2, at 131.

[233] *See* Brief for the United States, *supra* note 120, at 13–14.

[234] ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 1–2 (2010).

[235] *See generally* Brief for the United States, *supra* note 120, at 13–14. If the district court's order stood, the thirty-seven other codefendants might have had their criminal records sealed, thereby benefitting from Doe's expungement. *See id.*

[236] *See* Kessler, *supra* note 17, at 410–15.

B. The Practical Obstacles to Erasing a Criminal Record

There are significant practical obstacles to using expungement as a means to rehabilitate ex-offenders and aid their the transition back into society.[237] Just eight years ago, 73% of employers that responded to a survey required a criminal background check for all hires.[238] In fact, commercial information vendors such as HireRight and ChoicePoint advertise their services by "warning employers about the risks of failing to screen job applicants and incumbent employees properly."[239]

The prominence of the public dissemination of criminal records impacts the efficacy of expungement as a tool to combat negative collateral consequences of a criminal conviction.[240] A federal court, if properly exercising jurisdiction, can order a criminal conviction to be expunged, but there are limitations to its power.[241] The court cannot completely discard the online presence a criminal conviction may have, including Google search terms, mug shot websites, background check company data storage, and background check dating websites.[242] Furthermore, keeping criminal records of convictions from the public eye cannot stop the public from viewing criminal trials nor stop the press from reporting about them.[243] Additionally, constitutional protections such as freedom of speech and freedom of the press make it impossible for the judicial or legislative branches to stop media outlets from commenting on criminal convictions or to erase previous stories on a conviction.[244] Suggestions such as creating a separate criminal record database within public records to avoid the issue of open-records laws[245] still do not resolve the issue of third party dissemination of information concerning a criminal conviction.[246] For example, Colorado has a separate statute that applies to the public access of criminal records—CCJRA.[247]

---

[237] *See* Love, *supra* note 13, at 755, 759.

[238] JACOBS, *supra* note 2, at 6.

[239] *Id.* at 71–72.

[240] *See* Love, *supra* note 13, at 755, 759.

[241] JACOBS *supra* note 2, at 121.

[242] *See generally* Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV 321 (2015) (providing a comprehensive argument as to why expungement is a difficult remedy in the modern technology age).

[243] JACOBS, *supra* note 2, at 121.

[244] *Id.*

[245] *Open Records Laws and Resources*, JUDICIAL WATCH, http://www.judicialwatch.org/open-records-laws-and-resources/ [https://perma.cc/9UPE-AXFH]. Open records laws allow for public access to government records to combat against corrupt behavior. *Id.*

[246] *See* Kessler, *supra* note 17, at 441.

[247] COLO. REV. STAT. § 24-72-304(1) (2016); COLORADO CROSS-DISABILITY COAL. LEGAL PROGRAM, COLORADO OPEN RECORDS ACT AND COLORADO CRIMINAL JUSTICE

Criminal justice records may be requested "at the discretion of the official custodian [a state bureaucrat]."[248] Again, this "custodian" barrier will not prevent third party dissemination of information concerning a criminal conviction, it is not implemented at the federal level (for federal convictions), and some criticize the statute as a restrictive open-records law.[249]

Countries outside the United States[250] that value an individual's privacy over the public's access to criminal records tend to have broader expungement processes and greater protections for the dissemination of criminal records.[251] For example, in Australia, it is "a crime to disclose an expunged conviction."[252] In Spain, criminal trial verdicts are typically not read "in open court," and published opinions are anonymous, giving the defendant increased privacy.[253] Employers in Germany are not allowed to obtain an applicant's criminal record, but "if a specific type of criminal propensity would be incompatible with carrying out a particular job's duties successfully" the employer may inquire about it.[254] The aforementioned policies are inconsistent with the present federal approach in the United States; the public can retrieve federal court records through the internet and PACER.[255] Likewise, America's culture dogma—uncovering the intimate details of a person's life (just look at any headline of a magazine)—conflicts with the important notions of privacy protected by other countries.[256] In the modern United States, policy and procedure make it incredibly difficult for the expungement of criminal records to be effective.

RECORDS ACT (2013), http://www.ccdconline.org/sites/default/files/colorado_open_records_act_info.pdf [https://perma.cc/5CEU-26ZR].

248 COLO. REV. STAT. § 24-72-304(1) (2016).

249 *See, e.g.*, Christopher N. Osher, *Colorado Gets Grade of F for Its Open-Records Laws*, DENVER POST (Nov. 11, 2015), http://www.denverpost.com/2015/11/11/colorado-gets-grade-of-f-for-its-open-records-laws/ [https://perma.cc/E4ZF-KMEE].

250 Such as Spain, France, and Germany. JACOBS, *supra* note 2, at 119 & n.*–20, 192.

251 *Id.* at 192.

252 *Id.* at 121 n.*.

253 *Id.* at 164.

254 *Id.* at 276 n.*.

255 *Id.* at 57. PACER is the federal courts' record system. *Id.* On PACER, anyone can access indictments, pre-trial motions, briefs, and opinions for criminal cases after 1999. *Id.*

256 Roberts, *supra* note 242, at 321–22; Constance Gustke, *Which Countries Are Better at Protecting Privacy*, CAPITAL (June 26, 2013), http://www.bbc.com/capital/story/20130625-your-private-data-is-showing [https://perma.cc/Z746-7P2Z].

C. Congress Has Failed to Pass Comprehensive Federal Expungement Legislation

As of April 2017, Congress has not passed any extensive federal expungement legislation.[257] The House of Representatives previously proposed variations of the REDEEM Act—the current federal expungement legislation being considered by the Committee on the Judiciary—known as the "Second Chance for Ex-Offenders Act" in 2000, 2005, 2007, 2009, and 2011.[258] The REDEEM Act attempts to seal the criminal records of some nonviolent offenders.[259] Without considerable support from both parties, the currently proposed expungement legislation is not an adequate solution to the employment barriers ex-offenders face because it only grants expungement to a limited number of ex-offenders, and it still cannot overcome the practical obstacles facing expungement discussed *supra* Section III.B.[260]

As one critic pointed out, the current REDEEM Act proposal severely limits the number of ex-offenders who can even benefit from the plan.[261] Without diving into exact statistics, the Collateral Consequences Resource Center (CCRC)[262] notes that "many deserving individuals" with so-called "violent" federal rap sheets will fail to take advantage of this law if it ever even comes to fruition.[263] The CCRC takes particular issue with the distinction the REDEEM Act draws between violent and nonviolent offenses.[264] Beyond the fact that the law limits expungement to certain classes of ex-offenders, the CCRC argues that the process of delineating which offenses are violent and nonviolent is ambiguous.[265] Although subsection (a) of 18 U.S.C. § 16—the statute that determines which crimes are crimes of

---

[257] Mukherji, *supra* note 18, at 26; *see* REDEEM Act, H.R. 1672, 114th Cong. (2015).

[258] *See* Second Chance for Ex-Offenders Act of 2011, H.R. 2065, 112th Cong. (2011); Second Chance for Ex-Offenders Act of 2009, H.R. 1529, 111th Cong. (2009); Second Chance for Ex-Offenders Act of 2007, H.R. 623, 110th Cong. (2007); Second Chance for Ex-Offenders Act of 2005, H.R. 662, 109th Cong. (2005); Second Chance for Ex-Offenders Act of 2000, H.R. 5433, 106th Cong. (2000).

[259] REDEEM Act, H.R. 1672, 114th Cong. (2015).

[260] *Why Should Expungement Be Limited to "Nonviolent" Crimes?*, COLLATERAL CONSEQUENCES RES. CTR. (July 29, 2015), http://ccresourcecenter.org/2015/07/29/should-violent-convictions-be-expunged-why-the-redeem-act-eligibility-provisions-should-be-amended/ [https://perma.cc/S4YN-74D2].

[261] *Id.*

[262] The Collateral Consequences Resource Center is a nonprofit organization that "promote[s] public discussion of the collateral consequences of conviction." *About Us*, COLLATERAL CONSEQUENCES RES. CTR., http://ccresourcecenter.org/about-the-collateral-consequences-resource-center/ [https://perma.cc/F4M8-D6YU].

[263] *Why Should Expungement Be Limited to "Nonviolent" Crimes?*, *supra* note 260.

[264] *Id.*

[265] *Id.*

violence—is rather straightforward,[266] the application of subsection (b) (that enumerates further "violent" crimes) is not completely clear for two reasons: (1) the Supreme Court has yet to decide "whether a crime falls within the definition of § 16 (b) [i.e., whether or not it is a felony]" and; (2) the task itself of determining whether an offense "involves a substantial risk that physical force . . . may be used in the course of committing the offense" is not entirely objective.[267] For example, what is the threshold for "substantial risk" of physical force in an extortion case? Moreover, this violent versus nonviolent paradigm begs the question: Do we believe that only nonviolent ex-offender traits are capable of being rehabilitated?[268]

Countries with more aggressive expungement policies, and actual expungement legislation, still encounter the decision of which crimes to exclude from the expungement remedy.[269] England appears to embrace countrywide legislation to aid ex-offenders in finding employment.[270] According to England's Ministry of Justice, the Rehabilitation of Offenders Act of 1974 "exists to support the rehabilitation into employment of reformed offenders who have stayed on the right side of the law."[271] One major exception to the Act, which precludes many ex-offenders from its benefit, is the clause that, "[a]ll cautions and convictions eventually become spent [once an offender has met certain criteria], with the exception of prison sentences of over 30 months (2 ½ years)."[272] Additionally, although the Act essentially erases, or turns convictions into spent convictions, it does caution that there are exceptions where an ex-offender may still have to disclose his prior conviction.[273] These exceptions include applying for employment working with "children and vulnerable

---

[266] According to the REDEEM Act, to determine whether a crime is violent or nonviolent, one must look to 18 U.S.C. § 16, which provides:

> The term "crime of violence" means—(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (2012).

[267] *See id.*

[268] *Why Should Expungement Be Limited to "Nonviolent" Crimes?*, *supra* note 260 (stating that the REDEEM Act's limitation to nonviolent crimes "invit[es] endless wrangling over which particular individuals are deserving").

[269] *See, e.g.*, Rehabilitation of Offenders Act 1974, c. 53 (Eng.).

[270] *Id.*

[271] MINISTRY OF JUSTICE 1, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216089/rehabilitation-offenders.pdf [https://perma.cc/QVR3-EDGZ].

[272] *Id.*

[273] *Id.* at 1–2.

adults," law enforcement, the legal system, "and high level financial positions."[274] Exceptions may also apply to obtaining certain licenses.[275] In light of all of these exceptions to this admirable act, it appears that the same issues come to the forefront in England with regard to expungement of criminal records. Although the Act attempts to erase prior convictions, it does so in limited circumstances,[276] which will not aid all ex-offenders.[277] Even the ex-offenders the Act does purport to help must succumb to the Act's exceptions, which are not limited in scope, and may threaten to exclude many ex-offenders who otherwise qualify.[278] Ultimately, legislation must pick and choose whom to forgive, and past proposals, such as the REDEEM Act, still succumb to this realization.

D. Synergizing the Philosophies of Punishment and the Criminal Justice System with Expungement

When considering whether to implement expungement, both judicially or legislatively, one should consider the philosophy behind criminal punishment and how those policies interact with the expungement solution proposed by other scholars.[279] The consideration of two prominent philosophical schools of thought, retributivism and utilitarianism, facilitates a discussion of the purpose of punishment, the purpose of recording criminal punishment, and whether erasing such records conflicts with the goals of punishment.[280]

Proponents of the retributive theory of punishment argue that the government should punish all people who do wrong because justice demands payback.[281] A retributivist believes that offenders possess free will, and since they commit crimes purposefully, an offender must, in turn, receive a purposeful negative punishment to correct the imbalance of wrongdoing.[282] Vindicating the harm an offender inflicts on society may feel like a natural response—an ingrained social tit-for-tat—for doing

---

[274] *Id.* at 2.

[275] *Id.*

[276] Remember, the limitation on convictions over two-and-a-half years.

[277] *See* MINISTRY OF JUSTICE, *supra* note 271, at 2.

[278] *See id.*

[279] *See* JACOBS, *supra* note 2, at 210 (Retribution remains a central goal of punishment within the criminal justice system.).

[280] *See id.* at 210–11; Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1896 n.71 (1991).

[281] MARK TUNICK, PUNISHMENT THEORY AND PRACTICE 67–69 (1992), http://publishing.cdlib.org/ucpressebooks/view?docId=ft4q2nb3dn&chunk.id=d0e2384&brand=ucpress [https://perma.cc/JWE2-A6R7].

[282] Massaro, *supra* note 280, at 1891–92.

something wrong in the first place.[283] This may explain why this theory of punishment finds marked support in the American criminal justice system.[284]

If the creation of a criminal record itself is a permanent part of an offender's punishment,[285] then it becomes harder to justify expunging it.[286] Of course, there may always be individuals who do not care whether they have a criminal record, and in that case, it will not matter whether their records are expunged.[287] Even if a criminal record is not part of an offender's punishment (for example, if a retributivist deemed imprisonment the only punishment), there is still a legitimate purpose in retaining criminal records to "promot[e] effective law enforcement."[288]

At variance with retributivism is utilitarianism, which argues that the government should only punish to augment social utility overall.[289] This theory suggests that an offender should be punished to the extent that the punishment will actually deter negative behavior and therefore eliminate negative consequences to society.[290] The question becomes, does the creation of a criminal record deter an offender from committing future crimes?[291] If a person fears the repercussions of the public knowing she committed a crime, then using a criminal record as a method of punishment may work.[292] The counter argument to this proposition is that the collateral consequences of a criminal record far exceed the intended deterrence effect and punishment.[293] Expungement is not the only solution to correcting the deleterious effects of collateral consequences,[294] and other justifiable uses of

---

[283] *See id.*

[284] JACOBS, *supra* note 2, at 210 (stating that since the mid-1970s, retribution has been the "dominant justification for punishment in the United States").

[285] *Id.* at 211.

[286] *Id.* at 212–13.

[287] *See generally* GOODFELLAS (Warner Bros. 1990). Of course, this is a fictional account, but consider the following quote:

> For us to live any other way [without a life of criminal activity] was nuts. Uh, to us, those goody-good people who worked shitty jobs for bum paychecks and took the subway to work every day, and worried about their bills, were dead. I mean, they were suckers. . . . If we wanted something, we just took it.

Id.

[288] United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977).

[289] *See* Jocelyn M. Pollock, *The Rationale for Imprisonment*, *in* PRISONS TODAY AND TOMORROW 5–6 (Jocelyn M. Pollock ed., 2d ed. 2006).

[290] *See id.* at 5.

[291] *See* JACOBS, *supra* note 2, at 216–17.

[292] *Id.* at 217–18.

[293] Silva, *supra* note 15, at 164–45.

[294] *See* Love, *supra* note 13, at 753–55 (advocating for a holistic alteration of the current criminal justice system, including sentencing and relief mechanisms for ex-offender reentry into employment).

criminal records caution against expungement, such as the use of criminal records "as an investigative tool."[295]

Margaret Colgate Love, a preeminent scholar of collateral consequences, argued for the forgiveness for ex-offenders.[296] Although some may argue that expungement is compatible with the philosophy of forgiveness and rehabilitation,[297] expungement also implicates the notion of forgetting. For an ex-offender to truly be rehabilitated, society must not only forgive but also "forget" that the offense occurred, otherwise the fact that an offense occurred will continue to permeate that person's identity and societal prospects. There are also legitimate reasons why employers may need access to criminal records, such as eliminating risks ex-offender employees may pose to customers or reducing liability in potential negligent hiring suits.[298] As previously stated,[299] completely forgetting the existence of a federal criminal record is not a feasible reality and conflicts with important components of our current criminal justice system.[300]

IV. THE SOLUTION—FORGOING THE OUTRIGHT EXPANSION OF FEDERAL EXPUNGEMENT AND DEALING WITH THE MODERN DAY REALITIES IN A PRACTICAL MANNER

Arguably, even a limited form of expungement—as advocated in some of the aforementioned circuit cases—would succumb to the practical difficulties of erasing all public and private records of criminal activity. Therefore, this section advocates for a combined approach: the use of certificates of rehabilitation and increased tax incentives to aid ex-offenders with the collateral consequences they face. In *Doe v. United States*, Judge Gleeson recognized the emergent public cognizance of the negative collateral consequences associated with criminal convictions: "There is an increasing awareness that continuing to marginalize people like Doe does much more harm than good."[301] Nonetheless, relatively recent studies demonstrate that employers continue to discriminate against job applicants with criminal records.[302] This impacts all ex-offenders, whether or not they may pose a real liability to prospective employers. Until a majority of

---

[295] U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT 14 (1993).

[296] Love, *supra* note 13, at 753–54.

[297] *Id.* at 759.

[298] JACOBS, *supra* note 2, at 277–78.

[299] *See supra* Section III.B.

[300] *See supra* Sections III.A–B, III.D.

[301] Doe v. United States, 110 F. Supp. 3d 448, 457–58 (E.D.N.Y. 2015).

[302] SCHMITT & WARNER, *supra* note 186, at 9–11.

society transforms the way they view ex-offenders, negative collateral consequences of criminal convictions will remain a part of the criminal justice system.[303] Changing a person's perspective on any topic can be challenging. The pervasive application of criminal law in the United States also makes it difficult to remedy the unintended result of criminal convictions—collateral consequences.[304] To alter the output of the criminal justice system (collateral consequences), one might suggest reforming the input of the criminal justice (reduce prosecutions for certain crimes and reclassify certain crimes).[305] There is no single solution to the problem of collateral consequences, just as there is no singular issue arising from collateral consequences.[306] To address the issue of employment discrimination against ex-offenders, the federal government should (1) implement the use of federal certificates of rehabilitation and (2) increase employer tax incentives to hire ex-offenders.

A. Certificates of Rehabilitation

Rather than pursuing federal judicial expungement of criminal convictions, the federal government can issue certificates of rehabilitation (COR).[307] A certificate of rehabilitation "places [a] prior conviction in a more favorable light" and reveals that an ex-offender has not committed any further offenses.[308] States have carried out different forms of certificates of rehabilitation, with varied success.[309] After considering New York's scheme for certificates of rehabilitation as an example, this section will present a basic proposal for a federal program, taking into account some of the critiques and issues surrounding certificate programs.[310] It is unlikely that the federal government can force all states to

---

[303] Love, *supra* note 13, at 755–56.

[304] *See* JACOBS, *supra* note 2, at 94 (arguing that overcriminalization in the United States has resulted in "an immense population of persons with criminal records"); *see also* Roberts, *supra* note 242, 325–37.

[305] *See* JACOBS, *supra* note 2, at 95–97. This would entail recategorizing some felonies as misdemeanors and some misdemeanors as criminal violations.

[306] *See generally* Kessler, *supra* note 17 (strategically highlighting such consequences as difficulty maintaining employment and securing housing).

[307] *See generally* RECOMMENDATION 103E (AM. BAR ASS'N 2007) (recommending certificates of rehabilitation in the 2007 Recommendation).

[308] JACOBS, *supra* note 2, at 127.

[309] Eleven states experimented with issuing variations of certificates. *Id.*; MARGARET LOVE & APRIL FRAZIER, AM. BAR ASS'N, CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS 2 (2006).

[310] *See* JACOBS, *supra* note 2, at 127–28.

implement a certificate of rehabilitation program,[311] however, states may consider adopting similar regimes once the federal government imposes a legitimate COR program of its own. Admittedly, federalism and state sovereignty create vast difficulties in imposing a COR regime on states, but the creation of a federal COR system that can potentially relieve collateral consequences of those convicted of federal crimes is better than declining to experiment with any program. With a dearth of curative policies for ex-offenders, it is advantageous to implement a procedure to augment the fight against collateral consequences and to prevent against recidivism. Perhaps the federal government can additionally provide funding incentives to states who decide to adopt a COR program comparable to the federal COR program proposed below.

Moreover, some states already implemented COR programs of their own and can also serve as additional models to fellow states. In New York, an ex-offender can be eligible for one of two certificates: a certificate of relief from disabilities or a certificate of good conduct.[312] A certificate of relief from disabilities is open to "misdemeanants and first-time felony offenders," while a certificate of good conduct is open to offenders with more than one felony conviction.[313] In similar fashion, the certificate of relief from disabilities is available immediately after sentencing from either the court or the parole board, whereas a certificate of good conduct involves a waiting period of one to five years before availability and is granted only by the parole board.[314] Both forms of the certificate "relieve an eligible person of 'any forfeiture or disability,' and 'remove any barrier to . . . employment that is automatically imposed by law by reason of conviction.'"[315] These certificates are actual documents that may alleviate some of the negative consequences of a conviction by providing evidence to an employer or licensing agency that an ex-offender has been rehabilitated.[316] COR programs in places like New York have recently seen increased

---

[311] *See generally* Printz v. United States, 521 U.S. 898 (1997) (holding that the federal government cannot commandeer states to implement federal programs, specifically portions of the Brady Handgun Violence Prevention Act).

[312] LOVE & FRAZIER, *supra* note 309, at 3.

[313] *Id.*

[314] *Id.*; JACOBS, *supra* note 2, at 128–29.

[315] LOVE & FRAZIER, *supra* note 309, at 3 (omission in original).

[316] *See* LEGAL ACTION CTR., LOWERING CRIMINAL RECORD BARRIERS: CERTIFICATES OF RELIEF/GOOD CONDUCT AND RECORD SEALING 19 (2014).

success, with support from public aid attorneys to execute the process, and accompanying anti-discrimination legislation.[317]

In March 2016, before he left the bench, Judge Gleeson issued a certificate of rehabilitation to a woman he previously sentenced based on the belief that the woman's lawful record since her conviction deemed her rehabilitated.[318] In the "influential" ruling, Judge Gleeson discussed the difference between the "forgetting" model of expungement and the "forgiveness" model that his certificate of rehabilitation exhibits, and he concluded that a COR "can significantly alleviate the collateral effects of a criminal record by emitting a powerful signal that the same system that found a person deserving of punishment has now found that individual fit to fully rejoin the community."[319] Judge Gleeson cited state examples of COR programs.[320]

Employers might find a federal certificate of rehabilitation[321] program more credible than individual states' certificate plans (and therefore the program may gain more recognition) due to the unified national reach a federal program could have. Since a federal COR program would have to be created by the legislature even if it is carried out by the federal courts,[322] and since federal expungement legislation has continually failed to gain widespread support,[323] an initial proposal for a COR program should be straightforward, yet robust.[324] A federal COR program may have an easier time getting through Congress than expungement legislation because COR legislation would not be "rewriting history."[325]

Unlike the New York COR program, a federal COR system should begin with offering one form of certificate relief that does not directly discriminate based upon the type of conviction[326] but rather grants federal judges (rather than a parole

---

[317] *Certificates of Rehabilitation Can Help Promote Successful Re-Entry Outcomes*, AM. PRISON DATA SYS. (May 31, 2016), http://apdscorporate.com/certificates-of-rehabilitation-can-help-promote-successful-re-entry-outcomes/ [https://perma.cc/2NGV-D8R8]; Eli Hager, *Forgiving vs. Forgetting*, THE MARSHALL PROJECT (Mar. 17, 2015), https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting#.3CqVrcvi5 [https://perma.cc/Y8K2-KPK3].

[318] Margaret Love, *Judge Gleeson Issues a "Federal Certificate of Rehabilitation"*, COLLATERAL CONSEQUENCES RES. CTR. (Mar. 7, 2016), http://ccresourcecenter.org/2016/03/07/judge-gleeson-issues-a-federal-certificate-of-rehabilitation/ [https://perma.cc/J6TE-JJZ7].

[319] Doe v. United States, 110 F. Supp. 3d 448, 455–57 (E.D.N.Y. 2015).

[320] *Id.*

[321] This section is referring to the use of a federal COR program for federal crimes.

[322] *See* Margaret Colgate Love, *The Debt That Can Never Be Paid a Report Card on the Collateral Consequences of Conviction*, 21 CRIM. JUST. 16, 22 (2006).

[323] *See supra* Section III.C.

[324] *See, e.g.*, Love, *supra* note 322, at 22.

[325] *See* JACOBS, *supra* note 2, at 130.

[326] Although, similar to presently proposed expungement legislation, an initial COR proposal will most likely have to include some type of a violent versus nonviolent

board) discretion in awarding a certificate.[327] To keep the program transparent to ex-offenders and the public in general, the system should contain the following guidelines: ex-offenders must apply themselves for the COR, but either the court or probation office must notify the offender of the existence of the program;[328] certificates should be granted upon a holistic review of an offender's probation file, but certificates are only available to those ex-offenders who have not been re-arrested since his or her last sentence; ex-offenders can apply for a COR upon completion of their sentence; COR can be revoked if an offense is committed after receipt; and employers must review a COR in addition to a criminal record if they are completing a background check.[329]

Under the proposed federal COR legislation, Congress could give federal district courts and federal magistrate judges authority to issue CORs.[330] Judicial oversight of CORs would bolster the credibility of the program because judges could begin to discern those applicants who truly earned a COR; it has been noted that if everyone receives a COR, employers may deem them worthless.[331] The costs associated with COR applications may be less than the costs associated with expungement applications based on equitable considerations because United States attorney offices might oppose COR applications less than expungement motions.[332] United States Attorneys could be open to CORs, rather than expungement petitions, because CORs would not unravel the purpose of criminal prosecution, nor hide a criminal conviction; therefore, less money would be spent on the appeals process of an expungement application.[333]

To strengthen the efficacy of a federal COR program, legislation should provide for an avenue for ex-offenders to seek

---

distinction when it comes to eligibility. *Why Should Expungement Be Limited to "Nonviolent" Crimes?*, *supra* note 260. Unlike the currently proposed expungement legislation, a COR proposal could clearly identify the specific crimes ineligible for rehabilitation, such as murder or violent rape. *Id.*

[327] *See* JACOBS, *supra* note 2, at 127–29 (discussing state law procedures for expungement).

[328] RECOMMENDATION, *supra* note 307, at 5.

[329] *See* LEGAL ACTION CTR. NAT'L H.I.R.E. NETWORK, RECOMMENDED KEY PROVISIONS FOR CERTIFICATE OF REHABILITATION LEGISLATION, https://lac.org/toolkits/certificates/Key%20Provisions%20-%20Certificates.pdf [https://perma.cc/9T9A-DGNG].

[330] Since magistrate judges handle "most petitions by prisoners for review of their convictions" is it plausible that they may also preside over COR applications. *See Questions and Answers About Magistrate Judges*, U.S. DIST. COURT FOR THE DIST. OF UTAH, http://www.utd.uscourts.gov/judges/qa_magjudge.html [https://perma.cc/RFN3-S5K9].

[331] Hager, *supra* note 317.

[332] *See* Stephenson v. United States, 139 F. Supp. 3d 566, 571–72 (E.D.N.Y. 2015).

[333] *See generally id.*; JACOBS, *supra* note 2, at 130 (Jacobs and Judge Dearie recognize the resistance to expungement due to the concealment of potentially important public information.).

redress if employers discriminate against those with a COR. New York's Article 23A prohibits unfair discrimination against persons previously convicted of one or more criminal offenses (with certain exceptions and limitations).[334] It would likely be difficult to pass legislation on the federal level of the same nature.[335] Instead, federal legislation could at least mandate the use of a COR in a federal employment discrimination case as presumptive evidence of discrimination if the employer chose to hire a similarly situated candidate over the ex-offender and the ex-offender possessed a COR. This proposal would balance the need to strengthen the practice of the COR program with an employer's need to effectively hire employees. If an ex-offender with a COR consistently faces similar challenges when applying for jobs, and recognizes that a person with the same qualifications is hired over the ex-offender, the ex-offender may pursue a claim as long as there is no other legitimate reason for the employer to hire the other candidate.[336]

Lastly, to ensure prospective employers know about the COR, an independent federal database for COR recipients should be created—like the PACER system.[337] Proper notification of accurate criminal records is an issue;[338] to alleviate any issues that may arise with federal CORs, federal legislation should require background check companies to provide evidence of where an ex-offender possesses a COR if they are also providing evidence of a criminal record. Furthermore, if employers decide to ask about a criminal record, there should be a box where prospective employees can check a rehabilitated status in addition to checking a box that indicates they have a criminal record. The phenomena of the "ban the box" proposal, whereby employers are prohibited from asking about prospective employees' criminal history on a job application, thereby delaying a background check inquiry until later in the hiring process, shows support for increasing ex-offender hiring prospects.[339] If a federal COR is

---

[334] *Certificates of Rehabilitation Can Help Promote Successful Re-Entry Outcomes*, *supra* note 317.

[335] *See* Tammy R. Pettinato, *Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory*, 98 MARQ. L. REV. 831, 835–40 (2014) (pointing out that employers may have legitimate reasons to be concerned about liability when hiring ex-offenders—this may explain why there is a lack of federal legislation as a supreme directive eliminating employment discrimination against ex-offenders).

[336] This is by no means a comprehensive consideration of employment discrimination law, but a mere possibility to bolster a federal COR program.

[337] *See* JACOBS, *supra* note 2, at 132.

[338] *See id.*; Kessler, *supra* note 17, at 441.

[339] MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT'L EMP'T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANGE POLICIES TO

established, there may be a similar movement in the employment arena. Although adding a COR box would not prevent employers from knowing upfront about criminal records (which is an argument against ban the box—it merely delays the flow of information, but does not prevent it entirely),[340] it would perhaps provide a way to track whether or not employers are discriminating against ex-offenders. Employers would know upfront about a person's rehabilitated status and therefore have less of a defense against an employment discrimination claim if they hire a similar candidate without a criminal record or COR. Moreover, if participation in the COR grows, there may even be discrimination between those job applicants with a COR and without a COR, with employers hiring more of the former. Normally discrimination carries a negative connotation, however, in the context of minimizing collateral consequences, this type of discrimination could incentivize ex-offenders to obtain a COR, which would necessarily require them to live lawfully, to become rehabilitated, and to apply for a COR. As previously stated, there is no one solution to the problem of collateral consequences but without an attempt to provide resolution, such as a federal COR program, the status quo for ex-offenders will remain particularly problematic in the employment context.

B. Increased Employer Tax Incentives

Because certificates of rehabilitation cannot completely prohibit employment discrimination,[341] Congress should also augment the use and publicity of the Work Opportunity Tax Credit (WOTC) program.[342] The WOTC's goal is to "further the partnership between the employment and training system and the private sector in dealing with problems of the disadvantaged and the unemployed."[343] Employers who enroll in the program can receive a tax credit for hiring ex-offenders

---

ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (2017), http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf [https://perma.cc/NKP2-VFBC].

340 *See* JACOBS, *supra* note 2, at 297.

341 *Id.* at 129–30.

342 *See Work Opportunity Tax Credit*, U.S. DEP'T OF LABOR (Apr. 8, 2010), https://www.doleta.gov/business/incentives/opptax/eligible.cfm [https://perma.cc/YT4S-WT7J]; *see also* Adele Burney, *Tax Breaks for Employers Who Hire Felons*, CHRON, http://smallbusiness.chron.com/tax-breaks-employers-hire-felons-14421.html [https://perma.cc/R8LE-H7K9].

343 U.S. DEP'T OF LABOR, ETA HANDBOOK NO. 408, at I-4 (2002), https://www.doleta.gov/business/incentives/opptax/pdf/ETA_Handbook_408_Nov_2002_3rd_Edition.pdf [https://perma.cc/R5CH-GV9K].

"equal to 25% or 40% of a new employee's first year wages, up to the maximum for the target group to which the employee belongs."[344] The WOTC refers to ex-offenders as the target group called "Ex-Felons" and requires a person to be

> convicted of a felony under any statute of the United States or any State; and has a hiring date which is not more than one (1) year after the last date on which he/she was so convicted or was released from prison; and is a member of an economically disadvantaged family.[345]

Moreover, based upon the ex-felon target group, a business can receive a maximum tax credit of anywhere from $1500 to $2400 depending on the number of hours an ex-felon works.[346]

Scholars argue that money might not be "the ultimate motivator" and tax incentives should be provided to "disadvantaged workers generally."[347] With some improvements to the ex-felon target group of the WOTC, employers might view tax incentives as not simply "motivators" to hire ex-offenders, but rather beneficial aids to help weigh the risks of hiring an ex-offender.[348] To increase the potential positive effects of the WOTC on ex-offender employment discrimination, Congress can make the following adjustments: extend the hiring date limitation to not more than three years after an offender is convicted or released from prison; relax the requirement that an ex-felon be a member of an economically disadvantaged family by increasing the percentage threshold of the Lower Living Standard Income Levels to 90% or 100%; and increase the maximum tax credit an employer may receive per ex-offender.[349]

In 2001, a study in California showed that "over 40 percent of employers indicated that they would 'probably' or 'definitely' not be willing to hire an applicant with a criminal record" even for a

---

[344] *WOTC Tax Credit Amounts*, U.S. DEP'T OF LABOR (Apr. 8, 2010), https://www.doleta.gov/business/incentives/opptax/benefits.cfm [https://perma.cc/QN6Q-3NCX].

[345] U.S. DEP'T OF LABOR, *supra* note 343, at II-5. A certain income level threshold, calculated by the Bureau of Labor's "Lower Living Standard Income Levels," defines the economically disadvantaged family. *Id.*

[346] *WOTC Tax Credit Amounts*, *supra* note 344.

[347] Under the WOTC, a number of disadvantaged groups are helped. *See generally* U.S. DEP'T OF LABOR, *supra* note 343; *see also* JACOBS, *supra* note 2, at 300; Drake Baer, *Why Incentives Don't Actually Motivate People to Do Better Work*, BUS. INSIDER (Apr. 1, 2014), http://www.businessinsider.com/why-incentives-dont-actually-make-people-do-better-work-2014-3 [https://perma.cc/NGH4-PMTB] (discussing why monetary incentives fail to incentivize individual workers).

[348] A tax benefit may financially persuade an employer to hire an ex-offender because it provides the employer with economic assistance that can balance out any economic risk that hiring an ex-offender may present.

[349] *Cf.* U.S. DEP'T OF LABOR, *supra* note 343, at II-5–II-6.

job that did not require a college degree.[350] Although professors conducted this survey fifteen years ago, employment discrimination is still a deleterious collateral consequence of a criminal conviction.[351] Combining economic incentives to hire ex-offenders,[352] along with certificates of rehabilitation,[353] can promote the hiring of ex-offenders to help achieve the ultimate goal of rehabilitating those individuals into free society.

CONCLUSION

In the reality of the twenty-first century, expanding federal expungement of criminal records to handle the problem of societal exclusion of ex-offenders is simply a patch or Band-Aid for the larger problems of the criminal justice system.[354] History demonstrates that expungement is a limited remedy reserved for correcting violations of personal rights.[355] It is not a catch-all provision to abolish the workings of the American criminal prosecution structure.[356]

To create a more workable solution to federal ex-offender reentry problems, we must go to the root of the problem—how we, as a society, view and prejudice ex-offenders.[357] Federal criminal prosecution serves the country by bringing justice to many victims of crime; pretending as though criminal prosecution never occurred can undermine the very purpose of the federal district courts and ultimately not solve the employment maintenance issue many ex-offenders face. As previously demonstrated, the federal judiciary is unwilling and unable to expand jurisdiction over equitable expungement motions—therefore the equitable federal expungement applications cannot help overcome barriers ex-offenders face in obtaining employment. Creating economically viable incentives for employers to hire ex-offenders can help alleviate employment issues that face the federal ex-prison population while keeping federal criminal expungement within its proper confines.[358] Additionally, exploring the use of federal certificates of rehabilitation can give federal district courts a

---

[350] Harry J. Holzer et al., *How Willing Are Employers to Hire Ex-offenders?*, 23 FOCUS 40, 40–41 (2004), http://www.irp.wisc.edu/publications/focus/pdfs/foc232h.pdf [https://perma.cc/JZ54-3FF7].

[351] JACOBS, *supra* note 2, at 264.

[352] *See WOTC Tax Credit Amounts*, *supra* note 344.

[353] Love, *supra* note 322, at 22.

[354] *See* JACOBS, *supra* note 2, at 120, 130–31.

[355] United States v. Schnitzer, 567 F.2d 536, 540 (2d Cir. 1977).

[356] *See* Love, *supra* note 13, at 753, 755, 759.

[357] *Id.* at 755.

[358] *See supra* Section IV.B.

more proper authority with which to resolve what they may deem extreme injustices.

Alexia Lindley Faraguna[†]

[†] J.D. Candidate, Brooklyn Law School, 2017; B.A., Stony Brook University 2013. Thank you to the entire *Brooklyn Law Review* team for their dedication to revising this note. I would also like to thank my husband for supporting me throughout law school and this writing process. Your patience, love, and understanding were instrumental throughout the past three years.