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Federal Expungement: A Concept in Need of Definition

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FEDERAL EXPUNGEMENT: A CONCEPT IN NEED OF A DEFINITION*

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Oceania was at war with Eastasia: Oceania had always been at war with Eastasia. A large part of the political literature of five years was now completely obsolete. Reports and records of all kinds, newspapers, books, pamphlets, films, sound tracks, photographs—all had to be rectified at lightning speed. Although no directive was ever issued, it was known that the chiefs of the Department intended that within one week no reference to the war with Eurasia, or the alliance with Eastasia, should remain in existence anywhere.

*George Orwell
1984*

I. INTRODUCTION

It is a common occurrence. An individual, frequently a young person, is arrested for a criminal offense, and the charges are disposed of without a conviction. This disposition appears favorable until the person realizes that there is an arrest record on file that will create problems every time he or she seeks employment, applies for a professional license, or attempts to obtain a security clearance. Is there a way to remedy this situation? The answer is yes. The person can seek expungement of the criminal record. In fact, expungement may even be granted when the person has been convicted of an offense.

In many cases, our concept of fundamental fairness may appear to require expungement of the criminal record. Policy considerations, as well as factors such as the demonstrated innocence of the defendant, would seem to dictate that the person be spared the lifetime adverse effects of a criminal record. But the remedy of expungement is not without problems. In theory and in practice, it may be anomalous, if not impossible, for the courts to engage in the Orwellian exercise of rewriting history. The arrest or conviction having in fact occurred, it may be disingenuous to attempt to erase it from the historical record and pretend that it never happened. Problems also arise on a more practical level. There is the difficult question of whether the beneficiary of an expungement order should be permitted to deny under oath that the arrest or conviction occurred. Seldom, if ever, will the law be a party to excusing, much less promoting, perjurious testimony. On the other hand, expungement is of little value if its salutary effect can be overcome merely by requiring that the person provide a notarized statement regarding his or her criminal history. Legitimate concerns arise as

to whether the fact of the arrest or conviction should be concealed from those responsible for evaluating the person's fitness for sensitive positions such as judgeships, high level executive branch appointments, or admission to the bar. These are but a few of the fascinating issues raised by the use of this procedure.

It is doubtful whether questions relating to the place of expungement in our jurisprudence will be adequately resolved without federal legislation. The United States Supreme Court has provided an indication that federal authorities may not be bound by state expungement orders.¹ As a result, the beneficiary of such an order may be required to reveal the criminal history to federal authorities, and the record could possibly be considered at federal sentencing proceedings. Equally important, federal agencies such as the FBI may be justified in maintaining records of arrests or convictions that have been expunged on the state level. If so, the efficacy of state expungement orders would be substantially diminished.

While federal courts have addressed the issue of expungement, neither the term nor its application has ever been adequately defined. Similarly situated individuals have received disparate treatment, and it appears that if left to the courts, the area will remain turbid. Only a clear statement of policy in the form of federal legislation will resolve these issues and ensure just and consistent results.

This Article will begin with an examination of the policy considerations relating to expungement of criminal records. Next, it will review the criteria considered in the individual case, procedural matters, and the effects of the remedy. Finally, this Article will review the problems that currently exist and discuss the need for federal legislation.

II. POLICY CONSIDERATIONS

Our views of expungement are driven and shaped by a number of policy considerations, and a clear understanding of those considerations is important to our discussion. As noted above, it is theo-

¹ See *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 114-22 (1983). In *Dickerson*, the Court held that in prosecutions under federal gun control laws requiring a prior conviction, federal authorities are not bound by state expungement orders. *Id.* Although the holding relates only to the existence of a predicate offense in a federal criminal prosecution, the case has much broader implications. See *infra* text accompanying notes 130-39.

retically and practically impossible to alter a historical fact, and any attempt to do so can lead to a number of problems.

The expungement of a criminal record will be of little value if anyone acknowledges the record's existence. Although a court may provide for redaction or removal of physical records, expungement will be effective only if all parties, including the courts, engage in what can only be characterized as deception. A person whose criminal record has been expunged must be permitted to lie under oath, even in court proceedings, and to deny that he or she has a criminal history. This deception, however, places the court in the unseemly position of not only authorizing perjury, but also knowingly accepting the perjury as truthful testimony. The problem is then compounded by the realization by jurors and other citizens who have been exposed to media accounts of the prior arrest or conviction that the court is condoning perjury, which thereby further impugns the credibility of the court.² This is but one example of the multitude of difficulties created by an attempt to rewrite history.³

The use of expungement can lead to other concerns, some relating to the protection of the public at large. In most jurisdictions, the licensing of professionals in fields such as law, medicine, pharmacy, and accounting includes a review of criminal records to insure that the applicant is a person of integrity and deserving of the public trust. Serious problems may arise if the applicant's criminal record has been expunged. It is possible that members of a licensing board may receive information about the expunged record independently from another source, thus placing the board members in a difficult position. It is more likely, however, that the board will be totally unaware of these incidents, raising even greater concerns. One need only consider the public outcry that would ensue if it were revealed that a person with an expunged fraud conviction was thereafter admitted to practice law and proceeded to defraud

² This concept is analogous to a situation in which two witnesses to an event agree to testify falsely about the event. Their agreed version appears truthful unless one of them breaks the agreement or a third witness appears. In that case, the falsity of the agreed version may be exposed and the credibility of those so testifying destroyed. *See infra* text accompanying notes 121-26; *see also* Steven K. O'Hern, Note, *Expungement: Lies That Can Hurt You In and Out of Court*, 27 WASHBURN L.J. 574, 582-84 (1988) (discussing ethical and practical effects of government-sanctioned lies).

³ *See* *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972). "The judicial editing of history is likely to produce greater harm than that sought to be corrected." *Id.*

his or her clients.⁴ Similar problems can arise with regard to candidates for public office.⁵

Criminal records, including fingerprints, are of invaluable assistance to law enforcement in identifying perpetrators of criminal offenses.⁶ Fingerprints provide one of the few methods of positive identification, but only if the latent print left at the crime scene can be compared with a known print. The known print is usually obtained from criminal records.⁷ Also, perpetrators of serial offenses or repeat offenses involving a similar *modus operandi*, such as murder, rape, or child abuse, are frequently identified by consulting records of prior incidents.⁸ Here again, it would undoubtedly become a matter of grave public concern if it came to light that the identification of a murderer, rapist, or child abuser was delayed, and additional innocent persons were victimized, because expunged criminal records or fingerprints were unavailable to the investigating authorities.

Most jurisdictions have statutes requiring that a specified government agency maintain records of arrests and convictions.⁹ Courts have questioned the propriety of expunging criminal records in contravention of this statutory mandate, particularly in

⁴ *Cf.* *United States v. Lopez*, 704 F. Supp. 1055, 1057 (S.D. Fla. 1988) (licensing board for private investigators should have access to arrest record); *Commonwealth v. Richardson*, 511 A.2d 827, 829 (Pa. Super. Ct. 1986) (important to ensure availability of cab drivers' criminal records). *See generally* O'Hern, *supra* note 2, at 584-95 (discussing potential danger to public resulting from licensing boards' lack of awareness of expunged criminal records).

⁵ *See infra* text accompanying notes 120-25.

⁶ *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *United States v. Johnson*, 714 F. Supp. 522, 524 (S.D. Fla. 1989); *United States v. Rosen*, 343 F. Supp. 804, 809 (S.D.N.Y. 1972); *United States v. Kalish*, 271 F. Supp. 968, 970-71 (D.P.R. 1967). For this reason, some courts and legislatures have permitted expunged records to be available to law enforcement. *See, e.g., Doe v. Webster*, 606 F.2d 1226, 1239-41 (D.C. Cir. 1979) (permitting records of convictions expunged pursuant to Federal Youth Corrections Act, 18 U.S.C. § 5021(b) (repealed 1984), to be available to law enforcement); *State ex rel. Knight v. Barnes*, 723 S.W.2d 591, 592 (Mo. Ct. App. 1987) (Missouri by statute provides that records will be available to law enforcement and court personnel).

⁷ *Cf. Rosen*, 343 F. Supp. at 809 (noting importance of fingerprint records and other records in combatting crime).

⁸ *See Webster*, 606 F.2d at 1243 (noting importance of police access to criminal records in cases involving similar *modus operandi*); *Commonwealth v. McKee*, 516 A.2d 6, 9 (Pa. Super. Ct. 1986) (same), *appeal denied*, 527 A.2d 537 (Pa. 1987).

⁹ Courts have noted that Congress recognized the need for maintenance of criminal records by enacting 28 U.S.C. § 534(a) (1988). *See Schnitzer*, 567 F.2d at 539; *Johnson*, 714 F. Supp. at 524; *Rowlett v. Fairfax*, 446 F. Supp. 186, 188 (W.D. Mo. 1978).

the absence of specific statutory authority for expungement.¹⁰ Finally, it has also been noted that the expungement procedure places a substantial burden on law enforcement, a burden that is increased if the records have been disseminated to a number of agencies.¹¹

There are, however, equally cogent arguments in favor of expungement. History is, unfortunately, replete with examples of arrests that were effected solely for purposes of harassment. The records of those arrests remain with those arrested throughout their lives, impugning their reputations,¹² adversely affecting employment opportunities,¹³ and arousing the suspicion of law enforcement officers with regard to future and unrelated incidents.¹⁴ The existence of the baseless arrest record may be brought out in court proceedings,¹⁵ or haunt the individual in other ways. The person may encounter difficulties in securing a professional license,¹⁶ obtaining a security clearance,¹⁷ procuring government

¹⁰ See, e.g., *Loder v. San Diego Mun. Court*, 553 P.2d 624, 636 (Cal. 1976) (expungement granted only when legislature has provided remedy), *cert. denied*, 429 U.S. 1109 (1977); *State ex rel. Peach v. Tillman*, 615 S.W.2d 514, 519 (Mo. Ct. App. 1981) (same); *Stanton v. State*, 686 P.2d 587, 589 (Wyo. 1984) (expungement in absence of statute would encroach upon legislative authority and executive pardoning power).

¹¹ See *Crow v. Kelley*, 512 F.2d 752, 755 (8th Cir. 1975) (great administrative burden placed on FBI); *United States v. Lopez*, 704 F. Supp. 1055, 1057 (S.D. Fla. 1988) (requiring expungement each time case is dismissed would place "onerous burden" on law enforcement).

¹² See *Menard v. Saxbe*, 498 F.2d 1017, 1024 (D.C. Cir. 1974) (social stigma associated with arrest record); *Menard v. Mitchell*, 430 F.2d 486, 490 (D.C. Cir. 1970) (same); *Johnson*, 714 F. Supp. at 524 (same); *Sadiqq v. Bramlett*, 559 F. Supp. 362, 366 (N.D. Ga. 1983) (same). *But cf. Lopez*, 704 F. Supp. at 1057 (injury to reputation is not grounds for expungement but only a factor to be considered).

¹³ See *Saxbe*, 498 F.2d at 1024 (criminal record can have adverse effect on employment opportunities); *Mitchell*, 430 F.2d at 490 (same); *Morrow v. District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969) (speculating that main evil of dissemination of arrest records is adverse effect on job opportunities); *Johnson*, 714 F. Supp. at 524 (concluding that economic losses may result from lost opportunities for schooling or employment); *Sadiqq*, 559 F. Supp. at 366 (same); see also *United States v. Stromick*, 710 F. Supp. 613, 614 (D. Md. 1989) (expungement may be appropriate when individual can demonstrate denial of specific job opportunity). *But cf. Lopez*, 704 F. Supp. at 1057 (loss of employment is not grounds for expungement but only a factor to be considered).

¹⁴ See *Saxbe*, 498 F.2d at 1024 (person with criminal record more apt to come under police scrutiny); *Mitchell*, 430 F.2d at 491 (criminal record may affect decision whether to arrest or file charges); *Sadiqq*, 559 F. Supp. at 366 (individuals with arrest records more vulnerable to police scrutiny concerning later criminal activity).

¹⁵ Courts have noted that the presence of a criminal record may affect the defendant's decision to testify as well as bail and sentencing. See *Saxbe*, 498 F.2d at 1024; *Mitchell*, 430 F.2d at 491.

¹⁶ See *Saxbe*, 498 F.2d at 1024 (criminal record may affect license to engage in certain

benefits,¹⁸ or retaining immigration status.¹⁹ An annotation of the record reflecting that the charges have been dismissed will not totally eliminate the detrimental effects of the unlawful arrest. Nullification can be accomplished only if the record is expunged and the individual is permitted to deny that the arrest occurred.²⁰

Even in cases of a lawful arrest, it may be inappropriate to expose the person to the adverse effects of a criminal arrest record if the charges have been dismissed,²¹ the person has been acquitted at trial,²² or the conviction has been reversed on appeal.²³ The presumption of innocence provides a compelling argument that in the absence of a conviction, a person should suffer no adverse consequences as a result of an arrest.²⁴ A more difficult question is presented when a defendant's conviction has been affirmed on appeal. However, the benefits of expungement have been afforded in

fields of work); *Mitchell*, 430 F.2d at 490 (criminal record may restrict or render nonexistent opportunity for professional license); *Johnson*, 714 F. Supp. at 524 (economic losses may result from lost opportunities for professional licenses); *United States v. Bohr*, 406 F. Supp. 1218, 1220 (E.D. Wis. 1976) (granting expungement to individual seeking admission to bar).

¹⁷ See *Stromick*, 710 F. Supp. at 614.

¹⁸ See, e.g., *Dubuclet v. Division of Employment Sec.*, 483 So. 2d 1183, 1184 (La. Ct. App.) (teacher discharged on basis of expunged conviction could be denied unemployment compensation benefits), *writ denied*, 488 So. 2d 693 (La. 1986).

¹⁹ See *United States v. Benlizar*, 459 F. Supp. 614, 621-22 (D.D.C. 1978) (granting expungement to individual whose criminal record could have affected immigration status).

²⁰ See *Doe v. Webster*, 606 F.2d 1226, 1239-44 (D.C. Cir. 1979) (construing 18 U.S.C. § 5021(b) as permitting person whose conviction has been set aside under Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (repealed 1984), to deny that conviction occurred).

²¹ See *Commonwealth v. Armstrong*, 434 A.2d 1205, 1206 (Pa. 1981) (granting expungement of arrest record after successful completion of accelerated rehabilitative disposition program). An interesting issue arises in cases where charges have been dismissed because of the suppression of evidence. See *United States v. Bagley*, 899 F.2d 707, 708 (8th Cir.), *cert. denied*, 111 S. Ct. 343 (1990) (expungement should not be granted in every case where dismissal results from suppressed evidence); see also *infra* note 58 and accompanying text.

²² See *United States v. Kalish*, 271 F. Supp. 968, 970 (D.P.R. 1967) ("no public good is accomplished by retention of criminal identification records" after acquittal or dismissal); *Commonwealth v. Capone*, 422 A.2d 1383, 1385 (Pa. Super. Ct. 1980) (presumption of innocence precludes requiring acquitted defendant to prove nonculpability in expungement proceeding); *infra* note 51.

²³ See *Benlizar*, 459 F. Supp. at 621-22 (granting expungement to individual whose conviction was reversed on appeal); *Kowall v. United States*, 53 F.R.D. 211, 212 (W.D. Mich. 1971) (granting expungement to individual whose conviction was set aside pursuant to 28 U.S.C. § 2255); *Rambo v. Commissioner of Police*, 447 A.2d 279, 281-82 (Pa. Super. Ct. 1982) (granting expungement to individual whose conviction was reversed on appeal); *infra* note 57.

²⁴ See *Menard v. Mitchell*, 430 F.2d 486, 490 (D.C. Cir. 1970) (adverse inference from arrest record based on erroneous assumptions); *Capone*, 422 A.2d at 1385 (allowing presumption of innocence to preclude requiring acquitted defendant to prove nonculpability in expungement proceeding).

such cases, particularly when the defendants were young at the time of the offense and have since led an exemplary life. Here again, the courts and legislatures have been concerned about the adverse effects that a criminal record may have upon the individual's future, and have concluded that providing the defendant with an opportunity to start anew with a clean record will promote rehabilitation.²⁵

III. BASES OF AUTHORITY FOR EXPUNGEMENT OF CRIMINAL RECORDS

At the outset the court must determine what, if any, basis exists for its authority to grant expungement. This presents no problem if the legislature has enacted a statute specifically providing for the remedy. However, on the federal level Congress has not provided a general expungement statute.²⁶ A few state courts have held that a judicial grant of expungement in the absence of such a statute would violate the doctrine of separation of powers.²⁷ Yet, the federal courts have not seen this as an obstacle to the exercise of their authority. They have, instead, found other bases upon which to grant the relief.

²⁵ See, e.g., *Doe v. Webster*, 606 F.2d 1226, 1239-41 (D.C. Cir. 1979) (construing 18 U.S.C. § 5021(b) as requiring that conviction set aside under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (repealed 1984), be partially expunged). *But see* *Commonwealth v. Cook*, 518 A.2d 858, 860 (Pa. Super. Ct. 1986) (quoting *Commonwealth v. Magdon*, 456 A.2d 194, 196 (Pa. Super. Ct. 1983) for proposition that due process right to expungement hearing does not apply when defendant adjudged guilty). Expungement of convictions, however, then presents questions about the use of those convictions as predicates for other offenses or for sentencing under habitual offender statutes. See *Commonwealth v. Cremins*, 514 A.2d 945, 946 (Pa. Super. Ct. 1986) (in administering habitual offender statutes, state has interest in maintaining records of conviction); see also *infra* text accompanying notes 143-48 (discussing whether federal authorities are bound by state expungement orders).

²⁶ Congress has enacted statutes that deal with expungement in specific situations. For example, 18 U.S.C. § 3607(c) provides for expungement of the criminal records relating to certain minor narcotics offenses committed by first offenders under the age of twenty-one. Congress also directed that state law on expungement be controlling under the federal gun control laws. 18 U.S.C. § 921(a)(2) (1988); *infra* notes 139-41 and accompanying text; see also 56 Fed. Reg. 22,762, 22,773 (1991) (commentary to amendments to Sentencing Guidelines for United States courts making definition of "prohibited person" dependent upon provisions of 18 U.S.C. § 921(a)(20)). These statutes, however, are narrow in scope and provide neither a federal policy nor general authority for expungement.

²⁷ *State v. Gilkinson*, 790 P.2d 1247, 1249-50 (Wash. Ct. App. 1990) (disposition of criminal records is uniquely within legislative domain so court could not grant expungement absent statutory grant of authority); *Stanton v. State*, 686 P.2d 587, 588-89 (Wyo. 1984) (court-ordered expungement in absence of statute would have effect of pardon, thereby violating separation of powers doctrine).

While occasionally noting that their authority for granting expungement may have a constitutional basis,²⁸ federal courts have most frequently based their decisions on their inherent equity power. The courts view this common-law power as providing authority to establish a remedy when necessary and appropriate to preserve basic legal rights.²⁹ Other decisions have been grounded on statutes which, though not specifically providing for expungement, have been interpreted by the courts to afford the relief. These statutes include the Privacy Act of 1974,³⁰ the Civil Rights

²⁸ *Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986) (court may order expungement in action brought directly under Constitution); *Hobson v. Wilson*, 737 F.2d 1, 64-65 (D.C. Cir. 1984) (rationalizing that expungement of criminal records is, under certain circumstances, proper remedy in action brought directly under Constitution), *cert. denied*, 470 U.S. 1084 (1985). Other courts, however, have indicated that there is no constitutional right to expungement. *E.g.*, *Ortega v. Kansas City*, 723 F. Supp. 1426, 1427 (D. Kan. 1989) (refusing to accept existence of constitutional right to expungement); *United States v. Johnson*, 714 F. Supp. 522, 523 (S.D. Fla. 1989) (expungement is not federal constitutional right); *see also McKnight v. Webster*, 499 F. Supp. 420, 422 (E.D. Pa. 1980) (no direct cause of action lies against federal agency for mere possession of inaccurate or constitutionally tainted information about individual's criminal record); *Rowlett v. Fairfax*, 446 F. Supp. 186, 188-89 (W.D. Mo. 1978) (concluding that Supreme Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976) foreclosed arguments for expungement on constitutional basis). Courts have also stated that the mere retention of an arrest record does not violate any constitutional right of privacy. *See Herschel v. Dyra*, 365 F.2d 17, 20 (7th Cir.), *cert. denied*, 385 U.S. 973 (1966); *Antonelli v. Burnham*, 582 F. Supp. 1067, 1070-71 (E.D. Ill. 1984); *United States v. Rosen*, 343 F. Supp. 804, 807-09 (S.D.N.Y. 1972). Usually, however, courts avoid predicating their decisions on constitutional grounds when another basis is available. *See Tarlton v. Saxbe*, 507 F.2d 1116, 1124 (D.C. Cir. 1974); *Menard v. Saxbe*, 498 F.2d 1017, 1029 (D.C. Cir. 1974).

²⁹ *See Saxbe*, 498 F.2d at 1023 (judicial remedy of expungement is inherent and not dependent on express statutory provision); *Sullivan v. Murphy*, 478 F.2d 938, 968, 971 (D.C. Cir.) (federal court in exercise of its equitable powers "may order the expungement of records, including arrest records, when necessary and appropriate to preserve basic legal rights"), *cert. denied*, 414 U.S. 880 (1973); *McKnight*, 499 F. Supp. at 422 (same); *United States v. Henderson*, 482 F. Supp. 234, 243 (D.N.J. 1979) (courts' equitable power of expungement not dependent on express statutory provision); *United States v. Benlizar*, 459 F. Supp. 614, 623 (D.D.C. 1978) (court's equitable power to expunge based on common-law principles); *United States v. Bohr*, 406 F. Supp. 1218, 1219 (E.D. Wis. 1976) (court's plenary power to do complete justice includes authority to order expunction of criminal records); *Kowall v. United States*, 53 F.R.D. 211, 213 (W.D. Mich. 1971) (any challenge to court's inherent power to order expungement is foreclosed by prior decision).

³⁰ 5 U.S.C. § 552a(e)(7) (1988); *see also Smith*, 807 F.2d at 204 (court may order expungement of records in action brought under Privacy Act); *Hobson*, 737 F.2d at 64-65 (under proper circumstances, expungement of criminal records is permissible remedy for agency's violation of Privacy Act). Conversely, mere retention of an arrest record has been held not to violate any constitutional right of privacy. *Herschel*, 365 F.2d at 20; *Antonelli*, 582 F. Supp. at 1070-71. Similarly, the Supreme Court has held that no infringement on a privacy right results from the dissemination of an arrest record, even though the charges have been dropped. *Paul*, 424 U.S. at 720.

Act,³¹ and the Youth Corrections Act.³² At least one court has based its decision on the federal statute authorizing the Attorney General to maintain arrest records.³³

State courts have also taken different positions on this issue. As noted above, several state courts have held that they have no authority to grant expungement in the absence of a statute.³⁴ Others have followed the federal approach and found that they have the inherent power to order this relief.³⁵ Most states, however, have enacted statutes that provide for expungement in certain well-defined situations.³⁶ In enacting such statutes, these state legislatures have provided much needed guidance to the courts as to both the policies that should govern expungement and the manner in which it should be applied. The courts of these states have split on the issue of whether such legislation precludes a judicial grant of expungement in other situations.³⁷

³¹ 42 U.S.C. § 1983 (1988); *see also* *Wheeler v. Goodman*, 306 F. Supp. 58, 65 (W.D.N.C. 1969) (expunction granted pursuant to request for equitable relief under 42 U.S.C. § 1983), *vacated*, 401 U.S. 987 (1971).

³² 18 U.S.C. §§ 5005-5026 (repealed 1984). The circuits split as to whether § 5021, the set-aside provision of the Youth Corrections Act, provided statutory authority for expungement. *See United States v. Stromick*, 710 F. Supp. 613, 614 (D. Md. 1989).

³³ *See Saxbe*, 498 F.2d at 1030 (interpreting 28 U.S.C. § 534 as precluding Identification Division of FBI from maintaining in its criminal files, as arrest record, encounter with police established not to constitute arrest); *see also Tarlton v. Saxbe*, 507 F.2d 1116, 1122 (D.C. Cir. 1974) (interpreting 28 U.S.C. § 534 as preventing government dissemination of criminal information without reasonable precautions to ensure accuracy). *But see Rowlett v. Fairfax*, 446 F. Supp. 186, 188-89 (W.D. Mo. 1978) (other courts view Supreme Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), as foreclosing this argument).

³⁴ *See, e.g., State v. Gilkinson*, 790 P.2d 1247, 1249-50 (Wash. Ct. App. 1990) (in absence of statute, court lacks authority to grant expungement).

³⁵ *See, e.g., Bradford v. Mahan*, 548 P.2d 1223, 1231 (Kan. 1976) (court has equitable power to correct or expunge); *State v. P.A.D.*, 436 N.W.2d 808, 810-11 (Minn. Ct. App. 1989) (same); *see also Commonwealth v. Armstrong*, 434 A.2d 1205, 1206 (Pa. 1981) (petition for expungement is adjunct of due process and not dependent upon express statutory authority); *In re Pflaum*, 451 A.2d 1038, 1041 (Pa. Super. Ct. 1982) (same).

³⁶ *See infra* note 163 (quoting *Dickerson v. New Banner Inst.*, 460 U.S. 103, 121 (1983)); *infra* notes 38-39.

³⁷ *Compare Gilkinson*, 790 P.2d at 1249-50 (disposition of criminal records is uniquely within legislature's domain and court may not grant expungement absent statutory grant of authority) and *Springer v. State*, 621 P.2d 1213, 1218-19 (Or. Ct. App.) (state statutes did not provide for expungement in situation where individual was arrested but not convicted, and inherent power was not essential to judicial function), *review denied*, 631 P.2d 340 (Or. 1981) with *State v. Stadler*, 469 N.E.2d 911, 913 (Ohio Ct. App. 1983) (in addition to expunging criminal record under statutes, court also has inherent power to expunge in exceptional or unusual cases).

IV. CRITERIA FOR APPLICATION OF THE REMEDY

If it is determined that expungement of a criminal record is an appropriate remedy and that a common-law, constitutional, or statutory basis for a grant of expungement exists, the court must then decide the circumstances under which the relief will be granted. This presents few problems if the court has statutory guidance.³⁸ However, if the statute does not set out the specific situations where expungement should be granted,³⁹ or the court is proceeding solely on a common-law or constitutional basis,⁴⁰ this task may be difficult.

A few courts have attempted to simplify the task and to ensure equal treatment by compiling judicial lists of situations where expungement will be appropriate. These lists typically include situations where the arrest was unlawful,⁴¹ where mass arrests rendered judicial determination of probable cause impossible,⁴² where the court determined that the sole purpose of the arrest was to

³⁸ See, e.g., 18 U.S.C. § 3607(c) (1988) (authorizing expungement of records relating to arrest and conviction of individuals under twenty-one years of age for simple possession of small amount of controlled substance); *State v. Smith*, 735 S.W.2d 795, 796 (Mo. Ct. App. 1987) (under Missouri statute, defendant was not entitled to expungement when he violated probation by being convicted of subsequent vehicle offenses); *State v. Bissantz*, 532 N.E.2d 126, 128-29 (Ohio 1988) (although person convicted of bribery in public office could have conviction expunged under Ohio statute, that conviction could still bar defendant from holding public office); *Springer*, 621 P.2d at 1217-18 (expungement unavailable under applicable Oregon statutes); *In re Crepeau-Cross*, 385 A.2d 658, 663 (R.I. 1978) (same for felony convictions under applicable Rhode Island statute).

³⁹ See, e.g., *Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986) (court can order expungement under Privacy Act of 1974, 5 U.S.C. § 552a(e)(7) (1988)); *Hobson v. Wilson*, 737 F.2d 1, 65 (D.C. Cir. 1984) (same), *cert. denied*, 470 U.S. 1084 (1985). As previously noted, the circuits are split as to whether the set-aside provisions of the Youth Corrections Act, 18 U.S.C. § 5021(a) (repealed 1984), required that the record be expunged. Compare *United States v. Doe*, 859 F.2d 1334, 1335-36 (8th Cir. 1988) (18 U.S.C. § 5021(a) does not authorize expunction of records) and *United States v. Doe*, 732 F.2d 229, 230-31 (1st Cir. 1984) (same) with *Doe v. Webster*, 606 F.2d 1226, 1238-45 (D.C. Cir. 1979) (18 U.S.C. § 5021(a) requires expungement of criminal record) and *United States v. Henderson*, 482 F. Supp. 234, 238 (D.N.J. 1979) (same).

⁴⁰ See *supra* notes 28-29; see also *City of Bowling Green v. Logan*, 532 N.E.2d 220, 222 (Bowling Green Mun. Ct. 1987) (although court has inherent authority to expunge arrest record, it has no authority to expunge conviction).

⁴¹ See *United States v. G.*, 774 F.2d 1392, 1394 (9th Cir. 1985) (court may order expungement if arrest was unlawful).

⁴² See *Sullivan v. Murphy*, 478 F.2d 938, 968-73 (D.C. Cir.) (expungement appropriate if, because of mass arrests, government cannot demonstrate probable cause), *cert. denied*, 414 U.S. 880 (1973); *United States v. Johnson*, 714 F. Supp. 522, 524 (S.D. Fla. 1989) (same).

harass the defendant,⁴³ where the authorities have misused criminal records to the detriment of the defendant,⁴⁴ where the arrest, although proper, was based upon a statute that was later declared unconstitutional,⁴⁵ and where the expungement was necessary to preserve basic human rights.⁴⁶ The courts have expressed different views as to whether these lists are exclusive or whether other grounds may be considered.⁴⁷ The rather broad terms also can lead to difficulties in deciding whether a specific situation fits within one of the delineated categories.

Most courts have eschewed such lists and have adopted the position that the issue must be determined on a case-by-case basis.⁴⁸ While this approach has a certain appeal, it can lead to disparate holdings, and similarly situated individuals may receive dissimilar treatment. For example, courts have taken different positions as to the propriety of expungement when the defendant has completed a pretrial diversion program,⁴⁹ when the government demonstrated probable cause prior to the dismissal of the case,⁵⁰ and when the defendant was acquitted at trial.⁵¹ Similarly,

⁴³ See *G.*, 774 F.2d at 1394 (court may order expungement if arrest made merely to harass); *Johnson*, 714 F. Supp. at 524 (same).

⁴⁴ See *Johnson*, 714 F. Supp. at 524 (expungement proper if police misuse police records to defendant's detriment).

⁴⁵ See *G.*, 774 F.2d at 1394 (court may order expungement if statute under which individual prosecuted later declared unconstitutional); *Johnson*, 714 F. Supp. at 524 (same).

⁴⁶ See *Johnson*, 714 F. Supp. at 524 (expungement proper if necessary to preserve basic legal rights).

⁴⁷ Compare *Diamond v. United States*, 649 F.2d 496, 497-98 (7th Cir. 1981) (listed circumstances are only illustrative of situations if expungement is appropriate) with *Johnson*, 714 F. Supp. at 524 (implying that expungement is proper only if situation falls within one of listed circumstances).

⁴⁸ See *United States v. Bagley*, 899 F.2d 707, 708 (8th Cir.) (district court should decide expungement cases on case-by-case basis), *cert. denied*, 111 S. Ct. 343 (1990); *Diamond*, 649 F.2d at 497 (no definitive all-purpose rule governing grants of expungement exists, therefore each case must stand on its own two feet).

⁴⁹ Compare *Gregg v. Commonwealth*, 316 S.E.2d 741, 742-43 (Va. 1984) (successful completion of pretrial diversion program does not permit expungement) with *Canter v. State*, 448 So. 2d 64, 65-66 (Fla. Dist. Ct. App. 1984) (successful completion of pretrial diversion program permits expungement) and *Commonwealth v. Armstrong*, 434 A.2d 1205, 1206 (Pa. 1981) (same).

⁵⁰ Compare *Menard v. Mitchell*, 430 F.2d 486, 492 (D.C. Cir. 1970) (even if arrest was made with probable cause, FBI may be under duty to supplement its files if defendant is later exonerated) and *United States v. Benlizar*, 459 F. Supp. 614, 615 (D.D.C. 1978) (arrest record may be expunged even if probable cause basis for arrest exists) with *Drake v. State*, 318 S.E.2d 721, 722 (Ga. Ct. App. 1984) (under Georgia statute indicted defendant not entitled to expungement after entry of nolle prosequi).

⁵¹ Compare *Geary v. United States*, 901 F.2d 679, 680 (8th Cir. 1990) (mere acquittal

the courts have reached different conclusions on the issue of whether the federal government has a legal obligation to ensure the accuracy of its records.⁵²

Questions have also arisen as to whether expungement should be granted when the defendant was found not guilty by reason of insanity,⁵³ when the defendant was convicted of prior or subsequent offenses,⁵⁴ when a person was named in an indictment as an unindicted co-conspirator,⁵⁵ when the person charged was shown to be innocent,⁵⁶ when a conviction was reversed on appeal,⁵⁷ and

insufficient to warrant expunction) and *United States v. Friesen*, 853 F.2d 816, 818 (10th Cir. 1988) (same) and *United States v. Linn*, 513 F.2d 925, 927-28 (10th Cir.) (same), *cert. denied*, 423 U.S. 836 (1975) and *Sadiqq v. Bramlett*, 559 F. Supp. 362, 366 (N.D. Ga. 1983) (same) and *Coleman v. United States Dep't of Justice*, 429 F. Supp. 411, 413 (N.D. Ind. 1977) (same) and *State v. Sadler*, 469 N.E.2d 911, 913 (Ohio Ct. App. 1983) (same) with *Commonwealth v. Richardson*, 511 A.2d 827, 829-30 (Pa. Super. Ct. 1986) (on facts of case, defendant's acquittal required expungement) and *Commonwealth v. Rank*, 459 A.2d 369, 371-72 (Pa. Super. Ct. 1983) (presumption of innocence entitled defendant to expungement after acquittal).

⁵² Compare *Crow v. Kelley*, 512 F.2d 752, 755 (8th Cir. 1975) (although FBI has duty to ensure accuracy of information it disseminates, constitutional validity of state court convictions must be determined in state courts); *Tarlton v. Saxbe*, 507 F.2d 1116, 1122-26, 1131 (D.C. Cir. 1974) (imposing some duty on FBI to ensure accuracy of information that it disseminates) and *Menard v. Saxbe*, 498 F.2d 1017, 1027-30 (D.C. Cir. 1974) (imposing duty on FBI to prevent criminal identification files from containing inappropriate material) with *McKnight v. Webster*, 499 F. Supp. 420, 422 (E.D. Pa. 1980) (FBI's duty is fulfilled when it makes request of local authorities for accurate information) and *Coleman*, 429 F. Supp. at 413 (FBI may not have duty to expunge criminal records).

⁵³ See, e.g., *State v. Salmon*, 306 S.E.2d 620, 621 (S.C. 1983) (denying expungement under South Carolina statute upon finding of not guilty by reason of insanity).

⁵⁴ See, e.g., *People v. Blanchura*, 440 N.W.2d 1, 2 (Mich. Ct. App. 1989) (under Michigan statute defendant was not eligible for expungement when convicted of five counts of perjury occurring over two days of testimony); *State v. Smith*, 735 S.W.2d 795, 796 (Mo. Ct. App. 1987) (under Missouri statute defendant was not eligible for expungement because he pleaded guilty to subsequent vehicle offenses); *State v. A.N.J.*, 487 A.2d 324, 328 (N.J. 1985) (under New Jersey expungement statute multiple disorderly person convictions may be expunged); *State v. H.G.G.*, 494 A.2d 841, 848-49 (N.J. Super. Ct. 1985) (under New Jersey statute expungement barred by prior fraud conviction); *Commonwealth v. McKee*, 516 A.2d 6, 9-10 (Pa. Super. Ct. 1986) (prior criminal record was an important factor in denying expungement), *appeal denied*, 527 A.2d 537 (Pa. 1987).

⁵⁵ See *United States v. International Harvester Co.*, 720 F.2d 418, 420 (5th Cir. 1983) (named but uncharged co-conspirator does not have right to expungement when charged with same offenses in another indictment); *United States v. Briggs*, 514 F.2d 794, 808 (5th Cir. 1975) (named but uncharged co-conspirators have right to expungement of references to them by name).

⁵⁶ *Rambo v. Commissioner of Police*, 447 A.2d 279, 281-82 (Pa. Super. Ct. 1982) (defendant whose conviction was reversed for insufficiency of evidence entitled to expungement); *Gregg v. Commonwealth*, 316 S.E.2d 741, 742-43 (Va. 1984) (Virginia expungement statute applies only to innocent defendants).

⁵⁷ See *Bromley v. Crisp*, 561 F.2d 1351, 1364 (10th Cir. 1977) (federal habeas corpus

when a case was dismissed because of the suppression of evidence.⁵⁸ Finally, issues have been raised with regard to the applicability of expungement to crimes committed by corporate defendants,⁵⁹ to records of mental commitments,⁶⁰ and to environmental crimes.⁶¹ Courts have, in individual cases, also given consideration to the position taken by the prosecutor.⁶²

The variety of situations in which the issue can arise, coupled with the inconsonant court opinions, provide some indication of the difficulty and complexity of the problem. While it is important that the criteria for the grant of expungement be established, it is equally important that the remedy be administered in a just and equitable fashion. Rigid criteria, by their nature, exclude situations that are worthy of consideration, but leaving the matter to the absolute discretion of the courts leads to disparate results and unequal treatment. While legislation does not provide a complete answer, it at least establishes the general criteria to be considered in granting expungement. Equally important, the legislation itself and the legislative history would provide policy guidelines to assist the courts in reaching consistent decisions.

relief holding conviction invalid does not automatically require expungement of criminal record), *cert. denied*, 435 U.S. 908 (1978); *United States v. Benlizar*, 459 F. Supp. 614, 621 (D.D.C. 1978) (granting expungement where conviction reversed on appeal); *Kowall v. United States*, 53 F.R.D. 211, 213 (W.D. Mich. 1971) (granting expungement where conviction set aside pursuant to 28 U.S.C. § 2255); *Commonwealth v. Miller*, 473 A.2d 193, 194-95 (Pa. Super. Ct. 1984) (federal habeas corpus relief holding conviction invalid qualified defendant for expungement of criminal record); *Rambo*, 447 A.2d at 281-82 (defendant whose conviction was reversed for insufficiency of evidence was entitled to expungement).

⁵⁸ *United States v. Bagley*, 899 F.2d 707, 708 (8th Cir.) (affirming district court's denial of expungement where case was dismissed because of suppression of evidence), *cert. denied*, 111 S. Ct. 343 (1990).

⁵⁹ *See, e.g., State v. XYZ Corp.*, 575 A.2d 423, 426-27 (N.J. 1990) (corporations may seek expungement of criminal records under New Jersey statute).

⁶⁰ *See, e.g., Commonwealth v. C.B.*, 452 A.2d 1372, 1375 (Pa. Super. Ct. 1982) (person illegally committed to state mental institution has right to destruction of hospital records created as result of illegal commitment); *Commonwealth v. J.T.*, 420 A.2d 1064, 1065-66 (Pa. Super. Ct. 1980) (records of commitment to mental institution originating as result of illegal proceeding are subject to expungement).

⁶¹ *See, e.g., XYZ Corp.*, 575 A.2d at 426-27 (corporations may seek expungement of records of environmental crimes under New Jersey statute).

⁶² *See United States v. Bohr*, 406 F. Supp. 1218, 1219 (E.D. Wis. 1976) (expungement granted where prosecutor did not oppose); *see also United States v. Cook*, 480 F. Supp. 262, 263-64 (S.D. Tex. 1979) (refusing to set aside expungement agreement entered into by prosecutor).

V. PROCEDURAL CONSIDERATIONS AND RELATED ISSUES

If it is decided that expungement is an appropriate remedy, that the court has a basis for granting the relief, and that the situation meets the court's criteria for issuing an expungement order, a number of procedural issues must be considered. These issues are of great importance both jurisprudentially and in practice. Decisions on these issues may frequently be dispositive of the case.

A. *Procedural Setting*

Individuals have sought expungement of their criminal records in a number of procedural settings. Perhaps the most common is the filing of a motion for expungement in the original criminal action that arose out of the charges. It has generally been held that the courts have jurisdiction to consider such a motion as an ancillary matter and to grant expungement when appropriate.⁶³ Courts have also found jurisdiction when direct actions have been filed against the custodian of the criminal records.⁶⁴ These direct actions have taken a number of forms, based both on statutes and the inherent equity power of the court.⁶⁵ Furthermore, attempts have been made to seek expungement by bringing post-conviction proceedings, but these efforts have met with mixed results.⁶⁶

⁶³ See *United States v. G.*, 774 F.2d 1392, 1394 (9th Cir. 1985) (courts may have authority to order expungement as part of their ancillary jurisdiction over original criminal action); *United States v. Schnitzer*, 567 F.2d 536, 538 (2d Cir. 1977) (court sitting in criminal prosecution has ancillary jurisdiction to issue protective orders regarding dissemination of arrest records), *cert. denied*, 435 U.S. 907 (1978); *United States v. Linn*, 513 F.2d 925, 927 (10th Cir.) (expungement requests may be considered in criminal proceeding in which arrestee was acquitted), *cert. denied*, 423 U.S. 836 (1975); *Morrow v. District of Columbia*, 417 F.2d 728, 740 (D.C. Cir. 1969) (court sitting in criminal proceeding had ancillary jurisdiction to grant expungement); *United States v. Johnson*, 714 F. Supp. 522, 523 (S.D. Fla. 1989) (motion for expungement usually treated as matter ancillary to criminal action).

⁶⁴ See *Linn*, 513 F.2d at 927 (expungement actions may be brought directly against actual custodian of records sought to be expunged); *Tarlton v. Saxbe*, 507 F.2d 1116, 1131 (D.C. Cir. 1974) (individual may bring action against FBI seeking expungement of criminal records maintained by that agency).

⁶⁵ See *Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986) (court may order expungement of records in action brought against custodian of records under Privacy Act); *Tarlton*, 507 F.2d at 1131 (individual may bring action against FBI seeking expungement of criminal records maintained by that agency based upon agency's duty to ensure accuracy of its records under 28 U.S.C. § 534); *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974) (action may be brought directly against custodian of record based upon inherent power of court).

⁶⁶ See *Bromley v. Crisp*, 561 F.2d 1351, 1364 (10th Cir. 1977) (habeas corpus relief voiding conviction does not automatically result in expungement of conviction; rather, expunge-

B. Forum

One of the most interesting procedural issues is the determination of the appropriate forum. Should the individual bring the expungement action in federal court or state court, and what effect will this decision have upon the relief available? The question is of great practical significance, but it also implicates fundamental considerations of federalism.

Procedural issues arise, at least in part, from the methods that are employed in maintaining and disseminating criminal records. The federal government maintains records relating to federal offenses,⁶⁷ and the states maintain records of arrests and convictions occurring in their own jurisdiction.⁶⁸ Therefore, if an action is brought in federal court to expunge records pertaining to federal offenses, or an action is brought in state court to expunge records relating to an arrest or conviction in that state, conflicts rarely occur. However, the federal government also maintains records of state arrests and convictions based on information provided by state and local law enforcement agencies.⁶⁹ Issues of federalism are raised when a party brings a federal action to expunge a state record or a state action to expunge a federal record. Related issues arise when a federal litigant seeks to expunge a federal record relating to a state offense.⁷⁰

ment may be considered within court's discretion), *cert. denied*, 435 U.S. 908 (1978); *Linn*, 513 F.2d at 927 (requests for expungement frequently made in post-conviction proceedings); *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972) (federal court's declaration that conviction under city ordinance was unconstitutional improperly included order of expungement of city's criminal records). Since expungement of criminal records is a form of collateral attack, the habeas corpus law on exhaustion of state remedies is a particularly persuasive if not controlling analogy. *See Tarlton*, 507 F.2d at 1127-28 & n.34.

⁶⁷ *See, e.g., Menard*, 498 F.2d at 1020-22 (describing FBI's record maintenance system).

⁶⁸ *See, e.g., Dunn v. Rulli*, 531 A.2d 103, 104-05 (Pa. Commw. Ct. 1987) (noting that Pennsylvania State Police maintain criminal records relating to state offenses). For purposes of this Article, the term "state" includes both state and local governments.

⁶⁹ *See Menard*, 498 F.2d at 1020-22 (describing system of records maintained by FBI as including state arrests and convictions).

⁷⁰ While problems would arise if an action were brought in state court to expunge a federal conviction or arrest, it appears that the state courts would not have jurisdiction to grant such a request. *See Doe v. FBI*, 718 F. Supp. 90, 97 n.7 (D.D.C. 1989) (noting that state court has no authority to order FBI to expunge its records), *aff'd in part, rev'd in part on other grounds*, 936 F.2d 1346 (D.C. Cir. 1991); *see also Schwab v. Gallas*, 724 F. Supp. 509, 510-11 (N.D. Ohio 1989) (federal defendant could not seek expungement of federal conviction on basis of Ohio expungement statute). *But see State v. L.K.*, 359 N.W.2d 305, 308 (Minn. Ct. App. 1984) (ordering FBI to return fingerprints, photographs, and other identification data).

The possibility exists that a federal court could declare a state conviction void on constitutional or other grounds and order the expungement of the state's records, particularly if the state record-keeping agency has been made a party to the action.⁷¹ However, considerations of comity and federalism have made the federal courts reluctant to expunge state records.⁷² This reluctance has led some federal courts to hold that they are without jurisdiction to do so. Accordingly, they have dismissed federal cases seeking expungement of state records for failure to state a cause of action.⁷³

A different issue is presented if a person brings an action in federal court seeking to expunge a federal record relating to a state arrest or conviction. It has been held that a federal court, based on the duty of the federal agency to ensure the accuracy of its records, may order the expungement of federal records of state arrests or convictions.⁷⁴ However, other courts have questioned this approach and have declined to order the expungement,⁷⁵ especially when the federal agency has taken steps to ensure that its records are accurate.⁷⁶ Federal courts have also held that cases relating to a state's

⁷¹ See *Menard*, 498 F.2d at 1025 (with local record-keeping agency as defendant in federal action, court can obtain any action needed on local records).

⁷² See *Crow v. Kelley*, 512 F.2d 752, 755 (8th Cir. 1975) (requiring that state courts be afforded initial opportunity to pass upon validity of state's convictions in consideration of federal-state comity); *Tarlton v. Saxbe*, 507 F.2d 1116, 1127-28 & n.34 (D.C. Cir. 1974) (considerations of federal-state comity mandate that local court supervising arrest or entering conviction make initial determination as to validity); *Rogers v. Slaughter*, 469 F.2d 1084, 1084 (5th Cir. 1972) (federal court's "order requiring that all references to a conviction which was overturned on constitutional grounds be struck from the city's official records. . . . was overbroad"); *Antonelli v. Burnham*, 582 F. Supp. 1067, 1070-71 (N.D. Ill. 1984) (because of concerns of federalism, federal court will not expunge state criminal records in action brought under 42 U.S.C. § 1983); *Hearn v. Hudson*, 549 F. Supp. 949, 957-58 (W.D. Va. 1982) (when federal court's order of expungement of local record would conflict unnecessarily with state's administration of affairs, court must abstain from entering such order).

⁷³ See *Tarlton*, 507 F.2d at 1127-28 & n.35 (in ordinary course, federal court has no jurisdiction to order expungement of records from files of local governmental agencies); see also *Crow*, 512 F.2d at 754-55 (federal court is without jurisdiction to entertain request for expungement of allegedly invalid state convictions from federal criminal records).

⁷⁴ See *Tarlton*, 507 F.2d at 1131 (FBI may have duty to ensure accuracy of information in its files); *Menard*, 498 F.2d at 1030 (ordering expungement of FBI records relating to individual's arrest by state officials based on FBI's duty to maintain accurate records).

⁷⁵ See *Crow*, 512 F.2d at 754-56 (an action seeking expungement of allegedly invalid state convictions cannot be initiated in federal court against federal record-keeping agency); *Rowlett v. Fairfax*, 446 F. Supp. 186, 188-89 (W.D. Mo. 1978) (duty of federal agencies to maintain accurate records may have been extinguished by *Paul v. Davis*, 424 U.S. 693 (1976)).

⁷⁶ See *McKnight v. Webster*, 499 F. Supp. 420, 422-24 (E.D. Pa. 1980) (FBI fulfilled any duty to ensure accuracy of its files by forwarding requests for correct information to

proceedings should first be brought in the courts of that state; therefore, they have dismissed such cases initiated in federal court for failure to exhaust state remedies.⁷⁷

Similarly, it would appear that state courts are without jurisdiction to order expungement of federal records, even if those records relate to state proceedings.⁷⁸ However, at least one state court has intimated that it may have the authority to do so.⁷⁹

C. *Scope of the Expungement Order*

Courts have generally been deemed to have authority to order expungement of administrative, as well as criminal, records.⁸⁰ However, problems may arise if a federal court attempts to expunge state administrative records,⁸¹ a state court attempts to expunge federal administrative records,⁸² or a court otherwise lacks

local law enforcement agencies).

⁷⁷ See *Crow*, 512 F.2d at 754-56 (dismissing action to expunge federal records of state criminal conviction because more appropriate to initiate action in state court); *Tarlton*, 507 F.2d at 1127-28 & n.34 (because expungement of criminal records is form of collateral attack, habeas corpus law on exhaustion of state remedies is "a particularly persuasive, if not controlling, analogy"); *Hearn v. Hudson*, 549 F. Supp. 949, 957-58 (W.D. Va. 1982) (abstaining from entering expungement order regarding local records in action brought under 42 U.S.C. § 1983 because state courts should be permitted to implement their own expungement statute).

⁷⁸ See *Doe v. FBI*, 718 F. Supp. 90, 97 n.7 (D.D.C. 1989) (state court has no authority to order FBI to expunge its records), *aff'd in part, rev'd in part on other grounds*, 936 F.2d 1346 (D.C. Cir. 1991); *cf. Schwab v. Gallas*, 724 F. Supp. 509, 510-11 (N.D. Ohio 1989) (federal defendant could not seek expungement of federal conviction on basis of Ohio expungement statute).

⁷⁹ See *State v. L.K.*, 359 N.W.2d 305, 308 (Minn. Ct. App. 1984) (state court may order "FBI to return fingerprints, photographs, and other identification data").

⁸⁰ See *Chastain v. Kelley*, 510 F.2d 1232, 1235-36 (D.C. Cir. 1975) (expungement may be invoked when government records in question are administrative rather than criminal); *State v. P.A.D.*, 436 N.W.2d 808, 810-11 (Minn. Ct. App. 1989) (all public arrest records, including records held by all entities that gather this information, may be expunged); *Commonwealth v. C.B.*, 452 A.2d 1372, 1375 (Pa. Super. Ct. 1982) (person who has been unlawfully committed to state mental institution has right to destruction of hospital records "created as a result of the illegal commitment"). *But see* Department of Pub. Safety v. Woodhall, 376 N.W.2d 897, 899 (Iowa 1985) (Iowa statute providing court with authority to expunge its own records does not authorize expungement of records maintained by executive branch); *State v. C.A.*, 304 N.W.2d 353, 361 (Minn. 1981) (court lacks inherent power to order hospital under executive branch of government not to disclose information); *Conroy v. Department of Transp.*, 509 A.2d 941, 942 (Pa. Commw. Ct. 1986) (order addressed to keepers of criminal records "does not embrace civil or administrative proceedings"), *appeal denied*, 522 A.2d 51 (Pa. 1987).

⁸¹ See *supra* notes 71-73 and accompanying text.

⁸² See *supra* notes 78-79 and accompanying text.

jurisdiction over the agency in which the records are kept.⁸³ Barring such problems, courts may expunge civil service records,⁸⁴ records of mental institutions,⁸⁵ law enforcement personnel records,⁸⁶ and similar records of an administrative nature.

D. Hearing Requirement

The decision on expungement is generally entrusted to the discretion of the trial judge, but this discretion is not without limitation.⁸⁷ Frequently a hearing will be required.⁸⁸ In fact, the courts of at least one state have held that the right to a hearing is afforded by the due process clause.⁸⁹ The record developed at the hearing then permits an appellate court to examine the evidence and determine whether expungement was appropriate in the particular case.⁹⁰

E. Allocation of Burden of Proof

Courts have reached different conclusions on the allocation of

⁸³ See, e.g., *Rulli v. Dunn*, 544 A.2d 1094, 1095 (Pa. Commw. Ct. 1988) (agency not required to expunge when apparently not party to expungement action and not directed to expunge under court's order).

⁸⁴ See *Chastain*, 510 F.2d at 1235-36 (citing *Peters v. Hobby*, 349 U.S. 331 (1955)).

⁸⁵ See *Commonwealth v. C.B.*, 452 A.2d 1372, 1375 (Pa. Super. Ct. 1982) (granting person unlawfully committed to state mental institution right to destruction of hospital records "created as a result of the illegal commitment").

⁸⁶ See *Chastain*, 510 F.2d at 1236-38 (court may order expungement of FBI personnel records).

⁸⁷ See *United States v. Bagley*, 899 F.2d 707, 708 (8th Cir.) (district court's decision on expungement is reviewed under abuse of discretion standard), *cert. denied*, 111 S. Ct. 343 (1990); *United States v. Friesen*, 853 F.2d 816, 817-18 (10th Cir. 1988) (decision on expungement is "committed to the discretion of the trial court"); *United States v. International Harvester Co.*, 720 F.2d 418, 419 (5th Cir. 1983) (decisions on requests to expunge are reviewed under abuse of discretion standard), *cert. denied*, 466 U.S. 939 (1984).

⁸⁸ See, e.g., *Friesen*, 853 F.2d at 818 (remanding to district court for hearing); *United States v. G.*, 774 F.2d 1392, 1395 (9th Cir. 1985) (remanding to district court for taking of testimony and development of factual record); *Chastain*, 510 F.2d at 1237-38 (vacating expungement order and denying reissue prior to hearing); *Strohecker v. Gwinnett County Police Dep't*, 357 S.E.2d 305, 307 (Ga. Ct. App. 1987) (under Georgia statute hearing is required on request for expungement); *Commonwealth v. Hughes*, 441 A.2d 1244, 1246 (Pa. Super. Ct. 1982) (requiring hearing upon petition to determine whether circumstances called for expungement).

⁸⁹ See *In re Pflaum*, 451 A.2d 1038, 1041 (Pa. Super. Ct. 1982) (due process requires that hearing be held on motion to expunge).

⁹⁰ See *Friesen*, 853 F.2d at 818 (appellate court could not decide propriety of expunction without evidentiary record); *G.*, 774 F.2d at 1395 (failing to make decision because of insufficient factual record); see also *Chastain*, 510 F.2d at 1237-38 (requiring hearing on merits before expungement could be granted).

the burden of proof. Some courts have decided that the burden should be borne by the person seeking expungement,⁹¹ while others have determined that it should fall on the government.⁹² These differences exist even when the remedy is provided by statute.⁹³

VI. THE EFFECTS OF EXPUNGEMENT

A. Generally

A court considering a motion to expunge can, of course, deny the motion.⁹⁴ However, if expungement is granted, more questions remain. Decisions must then be made concerning the relief that will be provided and the effect that will be given to the expungement order.

The expungement order could provide for the destruction of all documents that in any way relate to the incident.⁹⁵ This would eliminate all traces of the event except for the residuum that remains in the memories of those having knowledge. Destruction of the records has some appeal, particularly if the objective of expungement is viewed as attempting to place the individual in the same position as he or she would have been in had the incident not

⁹¹ The person seeking expungement usually files the motion or action, and the burden of proof traditionally falls upon the moving party or the plaintiff. *See, e.g., Sadiqq v. Bramlett*, 559 F. Supp. 362, 368-69 (N.D. Ga. 1983) (plaintiff in action under 42 U.S.C. § 1983 has burden of proof and must establish prima facie case).

⁹² *See, e.g., Commonwealth v. McKee*, 516 A.2d 6, 9 (Pa. Super. Ct. 1986) (allocating burden of proof and persuasion to government), *appeal denied*, 527 A.2d 537 (Pa. 1987).

⁹³ *Compare State v. XYZ Corp.*, 575 A.2d 423, 426-27 (N.J. 1990) (government bears burden of proof under New Jersey statute) *with Harris v. State*, 733 S.W.2d 710, 711 (Tex. Ct. App. 1987) (person seeking expungement bears burden of proof under Texas statute).

⁹⁴ *See, e.g., United States v. Bagley*, 899 F.2d 707, 708 (8th Cir.) (denying expungement where case dismissed because of suppression of evidence), *cert. denied*, 111 S. Ct. 343 (1990); *United States v. Doe*, 859 F.2d 1334, 1335-36 (8th Cir. 1988) (denying expungement based on holding that Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (repealed 1984), did not authorize expungement of record); *United States v. Schnitzer*, 567 F.2d 536, 540 (2d Cir. 1977) (problem of rabbinical student requiring explanation of arrest did not justify expungement), *cert. denied*, 435 U.S. 907 (1978); *United States v. Linn*, 513 F.2d 925, 928 (10th Cir.) (mere acquittal insufficient to require expungement), *cert. denied*, 423 U.S. 836 (1975); *Crow v. Kelley*, 512 F.2d 752, 755-56 (8th Cir. 1975) (expungement denied because of failure to exhaust state and local remedies); *see also Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972) (court's limited privilege of expungement should be exercised sparingly and decision should be made by appropriate authorities).

⁹⁵ *See, e.g., Commonwealth v. J.T.*, 420 A.2d 1064, 1065-66 (Pa. Super. Ct. 1980) (ordering mental commitment record to be destroyed rather than sealed).

occurred.⁹⁶ In reality, the physical destruction of all records presents great difficulties. Many jurisdictions limit the number of times that expungement may be granted.⁹⁷ Thus, at a minimum, the records of expungement must be available to determine whether expungement should be ordered in a subsequent case. Courts have, therefore, rarely ordered the physical destruction of the documents, but have instead simply enjoined dissemination of the information or provided that the records be sealed.⁹⁸

B. Disclosure of Expunged Information

Questions relating to the physical maintenance of the expunged records are easily resolved. A more difficult issue is whether the expunged information should be disclosed, and, if so, under what circumstances. Here again, the court could order that all records be expunged,⁹⁹ and that the information not be available for any purpose. As previously noted, however, in many jurisdictions the records must at least be available to determine whether expungement should be granted in a subsequent case.¹⁰⁰

Courts and legislatures have determined that considerations of public policy may compel the disclosure of expunged records in other circumstances as well.¹⁰¹ In those jurisdictions, the records may be available for certain limited purposes, including consideration in background investigations for employment in government

⁹⁶ See *United States v. Fryer*, 402 F. Supp. 831, 834 (N.D. Ohio 1975) (expungement redefines defendant's status to position occupied before event), *aff'd*, 545 F.2d 11 (6th Cir. 1976); *J.T.*, 420 A.2d at 1065-66 (justice demands that person deserving of expungement order be returned to same position as prior to incident).

⁹⁷ See, e.g., *Commonwealth v. Iacino*, 411 A.2d 754, 756 (Pa. Super. Ct. 1979) (under Pennsylvania statute expungement available as matter of right only once and list maintained to determine eligibility for future expungement).

⁹⁸ See, e.g., *Doe v. Webster*, 606 F.2d 1226, 1244 (D.C. Cir. 1979) (placing expunged FBI records in separate storage facility to preserve availability in course of bona fide criminal investigation); *United States v. Henderson*, 482 F. Supp. 234, 245 (D.N.J. 1979) (same); *Commonwealth v. Vickey*, 412 N.E.2d 877, 879 (Mass. 1980) (under Massachusetts statutes records are sealed).

⁹⁹ See, e.g., *United States v. Johnson*, 714 F. Supp. 522, 525 (S.D. Fla. 1989) (ordering expungement of arrest record and all other records relating to case); *United States v. Benlizar*, 459 F. Supp. 614, 623-25 (D.D.C. 1978) (records of conviction and arrest destroyed after reversal on appeal); *United States v. Bohr*, 406 F. Supp. 1218, 1218 (E.D. Wis. 1976) (expunging all references to arrest and indictment); *State v. P.A.D.*, 436 N.W.2d 808, 810 (Minn. Ct. App. 1989) (authorizing expungement of all criminal records); *J.T.*, 420 A.2d at 1065-66 (ordering that mental commitment record be destroyed rather than sealed).

¹⁰⁰ See *supra* note 97 and accompanying text.

¹⁰¹ See *infra* notes 102-06 and accompanying text.

positions,¹⁰² criminal investigations or other legitimate law enforcement purposes,¹⁰³ and affording protection against secret arrests.¹⁰⁴

The issue of disclosure of expunged records has also arisen in cases involving the hiring or retention of individuals in sensitive positions such as court administrators,¹⁰⁵ school teachers,¹⁰⁶ corrections guards, and police officers.¹⁰⁷ In such cases it must be decided whether policy considerations militate more strongly in favor of preserving the confidentiality of the criminal record or protecting the public at large. Similar concerns may arise when the person is running for public office,¹⁰⁸ applying for admission to the bar,¹⁰⁹

¹⁰² See, e.g., *Dubuclet v. Division of Employment Sec.*, 483 So. 2d 1183, 1185 (La. Ct. App.) (under Louisiana statute expunged conviction could be considered with regard to employment as public school teacher), *writ denied*, 488 So. 2d 693 (La. 1986); *In re Diane M.*, 566 A.2d 108, 110 (Md. 1989) (under Maryland statute expungement did not extend to juvenile court or Department of Juvenile Services); *Vickey*, 412 N.E.2d at 879 (under Massachusetts statutes sealed records may be made available to any appointing agency).

¹⁰³ See, e.g., *Doe v. Webster*, 606 F.2d 1226, 1244 (D.C. Cir. 1979) (expunged FBI records must be placed in separate storage facility and used only in connection with bona fide criminal investigation); *United States v. Henderson*, 482 F. Supp. 234, 245 (D.N.J. 1979) (same); *State v. L.K.*, 359 N.W.2d 305, 308-09 (Minn. Ct. App. 1984) (under Minnesota statute police reports and audio tapes are not subject to expungement); *State ex rel. Knight v. Barnes*, 723 S.W.2d 591, 592 (Mo. Ct. App. 1987) (under Missouri statute expunged criminal records available to courts, law enforcement, and administrative agencies for prosecution, sentencing, parole consideration, and investigative purposes); *State v. A.N.J.*, 487 A.2d 324, 328 (N.J. 1985) (law enforcement would be aware of expunged record if individual applied for pretrial intervention or handgun license).

¹⁰⁴ See *Sullivan v. Murphy*, 478 F.2d 938, 973 (D.C. Cir.) (inappropriate to expunge precinct arrest books of value in preventing secret arrests), *cert. denied*, 414 U.S. 880 (1973); *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969) (expungement of precinct arrest books that prevent secret arrests is not required).

¹⁰⁵ See, e.g., *Diamond v. United States*, 649 F.2d 496, 497 n.2 (7th Cir. 1981) (person seeking expungement represented that criminal record would prevent his consideration for position of chief administrator of court).

¹⁰⁶ Compare *Dubuclet*, 483 So. 2d at 1185 (expunged conviction could be considered in discharging teacher) with *Warren County Sch. Dist. v. Carlson*, 418 A.2d 810, 813 (Pa. Commw. Ct. 1980) (expunged criminal record could not be considered in discharging teacher).

¹⁰⁷ See, e.g., *Barnett v. Department of Employment Servs.*, 491 A.2d 1156, 1158, 1164 (D.C. 1985) (corrections guard who failed to disclose expunged felony conviction when applying for position did not obtain employment by fraudulent means and upon discharge was entitled to unemployment compensation); *Doe v. Department of Pub. Safety*, 782 P.2d 489, 494-95 (Utah 1989) (under Utah expungement statute, Department of Public Safety could not consider expunged conviction record of applicant for employment with Department of Corrections).

¹⁰⁸ See, e.g., *State v. Bissantz*, 532 N.E.2d 126, 130 (Ohio 1988) (under Ohio statute person convicted of bribery in office is barred from holding public office even though conviction expunged); see also *Bahr v. Statesman Journal Co.*, 624 P.2d 664, 666-67 (Or. Ct. App.) (dismissing defamation suit brought by former candidate for public office because defendant permitted to rely on expunged conviction to prove veracity of statement), *review denied*,

seeking a license to practice medicine or pharmacy,¹¹⁰ or requesting a permit to carry a firearm.¹¹¹

Courts traditionally consider prior criminal records in determining the sentence to be imposed in a criminal case,¹¹² and prior convictions serve as the bases of prosecutions under predicate offense statutes and recidivist statutes.¹¹³ Thus, if the confidentiality of an expunged criminal record were preserved, a defendant could receive a substantially lighter sentence or perhaps even escape prosecution. Insurers have sought information about expunged traffic convictions for use in determining whether to afford coverage,¹¹⁴ and parties have attempted to use expunged records to attack the credibility of witnesses in court proceedings.¹¹⁵

631 P.2d 341 (Or. 1981).

¹⁰⁸ *In re Howard C.*, 407 A.2d 1124, 1124 (Md. 1979) (over strong dissent, expunged convictions of petty theft were not considered in admission to bar); *State ex rel. Oklahoma Bar Ass'n v. Denton*, 598 P.2d 663, 664-65 (Okla. 1979) (expunged conviction not considered in bar association disciplinary proceeding).

¹¹⁰ *State ex rel. Peach v. Tillman*, 615 S.W.2d 514, 518-19 (Mo. Ct. App. 1981) (denying expungement of medical doctor's conviction of mingling poison with food or medicine under Missouri statute); *Ohio State Bd. of Pharmacy v. Friendly Drugs*, 499 N.E.2d 361, 363-64 (Ohio Ct. App. 1985) (under Ohio statute Board of Pharmacy could question applicant for pharmacy license about expunged drug convictions).

¹¹¹ *See People v. Bell*, 778 P.2d 129, 152-54 (Cal. 1989) (defendant whose felony conviction was expunged under California statute could thereafter be convicted of felony offense of possession of concealable firearm), *cert. denied*, 110 S. Ct. 2576 (1990); *State v. Thomas*, 665 P.2d 914, 916 (Wash. Ct. App. 1983) (under Washington statute expunged felony could serve as predicate offense for crime of possession of pistol by felon).

¹¹² *See State ex rel. Knight v. Barnes*, 723 S.W.2d 591, 592 (Mo. Ct. App. 1987) (under Missouri statute expunged criminal records were available to courts for purposes of sentencing); *State v. XYZ Corp.*, 575 A.2d 423, 426 (N.J. 1990) (same under New Jersey statute); *see also People v. Smith*, 470 N.W.2d 70, 75 (Mich. 1991) (expunged juvenile record could be considered when sentencing adult defendant); *People v. Jones*, 433 N.W.2d 829, 830 (Mich. Ct. App. 1988) (allowing expunged juvenile record to be considered at sentencing in order to properly tailor sentence to particular offender). *But see United States v. Beaulieu*, No. 91-1290 (2d Cir. Mar. 5, 1992) (expunged juvenile conviction may not be considered under federal sentencing guidelines).

¹¹³ *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 122 (1983) (federal authorities prosecuting federal gun control laws requiring predicate offense were not bound by state expungement orders); *Thomas*, 665 P.2d at 916 (under Washington statute expunged felony could serve as predicate offense for crime of possession of pistol by felon); *see also Stanton v. State*, 686 P.2d 587, 589 (Wyo. 1984) (expungement not granted to person concerned about being sentenced as habitual criminal—control over punishment is province of legislature).

¹¹⁴ *See, e.g., Brown v. Passidomo*, 486 N.Y.S.2d 986, 990 (Sup. Ct. Erie Cty. 1985) (prohibiting Department of Motor Vehicles from furnishing insurance companies with expunged records pertaining to vehicle violations).

¹¹⁵ *See State v. Sims*, 746 S.W.2d 191, 199 (Tenn. 1988) (prosecutor wrongly permitted to ask character witness about defendant's expunged arrest record); *Meyer v. Kendig*, 641

The decision of whether to permit disclosure can affect the outcome of civil cases.¹¹⁶ For example, newspapers seek to use the expunged records in the defense of defamation actions,¹¹⁷ and consideration of such records can result in the disqualification of a person from entitlement to government benefits.¹¹⁸

C. *Permitting a Negative Response*

One of the most fascinating questions relating to expungement is whether the person whose record has been expunged will be permitted to deny that the incident occurred. As noted above, this question raises interesting theoretical and practical issues.¹¹⁹

The case of *Bahr v. Statesman Journal Co.*¹²⁰ provides an excellent example of the difficulties that can arise when a beneficiary of an expungement order is permitted to deny that the incident occurred. The plaintiff, Mr. Bahr, was convicted of embezzlement in 1964, but the record was later expunged under an Oregon statute providing that "such conviction, arrest or other proceeding shall be deemed not to have occurred, and the applicant may answer accordingly any questions relating to their occurrence."¹²¹ In 1978, Mr. Bahr was a candidate for county commissioner when, in

P.2d 1235, 1241-42 (Wyo. 1982) (trial court properly excluded cross-examination concerning expunged felony conviction). See generally Allyson Dunn, Note, *Juvenile Court Records: Confidentiality vs. The Public's Right to Know*, 23 AM. CRIM. L. REV. 379, 393-96 (1986) (discussing use of juvenile records at trial for impeachment and other purposes); O'Hern, *supra* note 2, at 590-600 (discussing admissibility of expunged convictions at trial for impeachment and other purposes).

¹¹⁶ See, e.g., *Barnes*, 723 S.W.2d at 593 (insurance carrier unable to defend against breach of contract suit because not entitled to confidential closed criminal file of employee of insured).

¹¹⁷ Compare *Stephens v. Van Arsdale*, 608 P.2d 972, 985-86 (Kan. 1980) (Kansas expungement statute does not deny press right to assert truth as defense in libel and slander actions) and *Bahr v. Statesman Journal Co.*, 624 P.2d 664, 666-67 (Or. Ct. App.) (defamation suit against newspaper brought by former candidate for public office with expunged conviction dismissed), *review denied*, 631 P.2d 341 (Or. 1981) with *State ex rel. Curtis v. Crow*, 580 S.W.2d 753, 758 (Mo. 1979) (expunged criminal file not available to newspaper in defense against libel action).

¹¹⁸ Compare *Barnett v. Department of Employment Servs.*, 491 A.2d 1156, 1164 (D.C. 1985) (corrections guard who failed to disclose expunged felony conviction when applying for position did not obtain employment by fraudulent means and upon discharge was entitled to unemployment compensation) with *Dubuclet v. Division of Employment Sec.*, 483 So. 2d 1183, 1185 (La. Ct. App.) (teacher discharged because of expunged conviction could be denied unemployment compensation benefits), *writ denied*, 488 So. 2d 693 (La. 1986).

¹¹⁹ See *supra* text accompanying notes 2-3.

¹²⁰ 624 P.2d 664 (Or. Ct. App.), *review denied*, 631 P.2d 341 (Or. 1981).

¹²¹ OR. REV. STAT. § 137.225(4) (1989).

response to a newspaper reporter's question, he stated, "I have no record of convictions. My record is clean. I have never been convicted of embezzlement."¹²² In a report of the interview, the defendant newspaper related that although Mr. Bahr denied having a criminal record, he had in fact served a four-month jail sentence following his conviction for embezzlement.¹²³ Mr. Bahr was therefore not only accused of being a criminal, but a liar as well. He brought a defamation action against the newspaper, but the court dismissed the action, holding that truth was an absolute defense.¹²⁴ It is rather interesting that the same court system, if not the same court, that expunged Mr. Bahr's conviction and decreed that it never occurred, then held a recitation of the event to be the truth.

Problems may also develop if the organization making an inquiry, such as a committee of bar examiners in another jurisdiction, refuses to recognize an expungement order that permits the beneficiary to deny that the incident ever occurred. On the other hand, an expungement order is of little value if the beneficiary is not permitted to make such a denial.¹²⁵ It is not surprising that the courts have expressed conflicting views on this issue.¹²⁶

A related issue deserving consideration is whether the states can provide that the individual may deny the criminal record in connection with a federal investigation or federal proceeding. It may well be that any attempt to do so would be ineffective.¹²⁷

¹²² *Bahr*, 624 P.2d at 666.

¹²³ *Id.* at 665-66.

¹²⁴ *Id.* at 666-67.

¹²⁵ See *supra* text accompanying note 2.

¹²⁶ Compare *Commonwealth v. Vickey*, 412 N.E.2d 877, 879 (Mass. 1980) (under Massachusetts statutes, person whose record is sealed may deny record of arrest or conviction on employment applications, and Commissioner must corroborate statement) and *State v. C.A.*, 304 N.W.2d 353, 362 (Minn. 1981) (under Minnesota controlled substances statute, person with expunged record is free to deny or omit mention of arrest, charge, and trial without running afoul of perjury statutes) and *Doe v. Department of Pub. Safety*, 782 P.2d 489, 491 (Utah 1989) (Utah statute provides that person whose criminal record has been expunged may respond to employer inquiries as though arrest or conviction had not occurred) with *Dubuclet v. Division of Employment Sec.*, 483 So. 2d 1183, 1185 (La. Ct. App.) (under Louisiana expungement statute, proceedings not deemed conviction could disqualify person from unemployment compensation benefits), *writ denied*, 488 So. 2d 693 (La. 1986) and *State v. Chambers*, 533 P.2d 876, 878 (Utah 1975) (under applicable expungement statute, court could not provide that defendant could respond to inquiries as though conviction never occurred).

Similar conflicting opinions arose under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (repealed 1984). See *supra* note 39.

¹²⁷ See *infra* text accompanying notes 145-48.

D. Sanctions for Unauthorized Disclosure

Courts and legislatures have also provided for sanctions for the unauthorized disclosure of expunged criminal records. These have ranged from civil liability to criminal penalties.¹²⁸ The possibility of sanctions can create difficult situations for custodians of records, particularly if they are called upon personally to provide information when disclosure may be authorized. In such cases, the custodian may be well advised to seek a court order authorizing release of the records.

VII. *Dickerson v. New Banner Institute*

A. *The Dickerson Case and the Congressional Response*

The United States Supreme Court had the opportunity to provide guidance in the area of federal expungement when the case of *Dickerson v. New Banner Institute*,¹²⁹ came before the Court in 1983. *Dickerson* arose out of the revocation of New Banner's federal licenses to manufacture, collect, and sell firearms.¹³⁰ The Gun Control Act of 1968¹³¹ disqualified a corporation from obtaining such licenses if an individual in a management or control position had been convicted of a felony.¹³² The United States Treasury's Bureau of Alcohol, Tobacco and Firearms issued the licenses to New Banner, but later moved to revoke them when it learned that the chairman of the board, Mr. Kennison, had been convicted of a state felony in Iowa.¹³³ Mr. Kennison's conviction for carrying a concealed weapon had not been reported on New Banner's license application because the criminal record had been expunged under Iowa law.¹³⁴

¹²⁸ See, e.g., *State ex rel. Knight v. Barnes*, 723 S.W.2d 591, 592 (Mo. Ct. App. 1987) (under Missouri statute violation of confidentiality requirements constituted misdemeanor); *Warren County Sch. Dist. v. Carlson*, 418 A.2d 810, 813 n.5 (Pa. Commw. Ct. 1980) (Pennsylvania statute provided criminal sanctions if expunged criminal record used for public or private purpose); see also *Doe v. FBI*, 718 F. Supp. 90, 94 (D.D.C. 1989) (Privacy Act, 5 U.S.C. § 552a(g)(1)(C), provides for civil action in certain situations where agency maintains inaccurate information), *aff'd in part, rev'd in part on other grounds*, 936 F.2d 1346 (D.C. Cir. 1991).

¹²⁹ 460 U.S. 103 (1983).

¹³⁰ *Id.* at 108-09.

¹³¹ 18 U.S.C. §§ 921-930 (1988).

¹³² *Id.* § 923(d)(1)(B).

¹³³ *Dickerson*, 460 U.S. at 108-09.

¹³⁴ *Id.* at 106-08.

In the majority opinion devoted largely to statutory construction and Congressional intent in enacting the Gun Control Act, Justice Blackmun held that federal authorities were not bound by the Iowa expungement order.¹³⁵ Accordingly, the Bureau of Alcohol, Tobacco and Firearms was permitted to consider the Iowa conviction.¹³⁶ More important, however, is the Court's holding that federal disabilities may be constitutionally attached to an expunged conviction.¹³⁷ Justice Blackmun discussed the national patchwork of expungement laws and the perplexing problems that would arise if federal authorities were required to give individualized treatment to each state expungement statute.¹³⁸

Congress decided to reintroduce these perplexing problems into federal jurisprudence. The Firearms Owners' Protection Act enacted in 1986 consolidated the federal gun control statutes.¹³⁹ The Act prohibits the shipping, transporting, possessing, or receiving of firearms by persons who have been convicted of crimes punishable by imprisonment for more than one year.¹⁴⁰ The Act also specifically provides that a conviction expunged by a state, in most cases, cannot be considered as a predicate conviction.¹⁴¹

B. Federal Expungement Law Post-Dickerson

It is clear that state law on expungement controls cases coming under the Firearms Owners' Protection Act. However, both the United States Supreme Court and the lower federal courts have expressed the view that the *Dickerson* holding has continued vitality with regard to matters not covered by the Act.¹⁴² An examina-

¹³⁵ *Id.* at 114-15.

¹³⁶ *Id.* at 110-22.

¹³⁷ *See id.* at 115.

¹³⁸ *Id.* at 121-22.

¹³⁹ Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. § 921 (1988)).

¹⁴⁰ *Id.* § 102(6), 100 Stat. at 452 (amending 18 U.S.C. § 922(g) (1988)).

¹⁴¹ *Id.* § 101(5), 100 Stat. at 450 (amending 18 U.S.C. § 921(a)(20)).

¹⁴² *See, e.g.,* Taylor v. United States, 110 S. Ct. 2143, 2154 (1990) (citing *Dickerson* for proposition that federal laws, absent plain indication to contrary, are not to be construed so that their application depends on state law); United States v. Holley, 818 F.2d 351, 352-54 (5th Cir. 1987). The *Holley* court declined to annul *Dickerson*, rejecting the argument that the Court in *Dickerson* misinterpreted the law, and held that *Dickerson* applies to cases brought before the enactment of the Firearms Owners' Protection Act. *Id.* The court further noted that the Act's legislative history does not suggest an intent to affect the holding of *Dickerson* other than as to its specific prospective application to gun control. *Id.*; *see also* United States v. Pennon, 816 F.2d 527, 529 (10th Cir.) (noting Congressional intent that

tion of post-*Dickerson* developments supports this conclusion. In the *Dickerson* opinion, the Court held that "absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, 'because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control.'" ¹⁴³ Congress was aware of this holding when it passed the Firearms Owners' Protection Act. Nonetheless, the Act is narrow in scope, changing only the prospective effect of state expungement on cases arising under the federal gun control laws. Apparently, Congress made a conscious decision not to otherwise alter the effect of *Dickerson*, either on federal gun control cases brought before the adoption of the Act or on other areas such as the federal narcotics laws.¹⁴⁴ This history indicates a Congressional intent that *Dickerson* should continue to control in areas not specifically covered by the Act.

If the courts are correct, and this application of *Dickerson* was the intent of Congress, the result is important: in areas where there is no federal legislation, *Dickerson* controls. In these areas, disabilities can be constitutionally attached to expunged convictions, and "expunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty."¹⁴⁵ More important, "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law."¹⁴⁶ In other words, in the absence of statute, federal authorities are not bound by state ex-

Dickerson should control cases arising before adoption of Firearms Owners' Protection Act), cert. denied, 484 U.S. 987 (1987).

¹⁴³ *Taylor*, 110 S. Ct. at 2154 (citing *Dickerson* for quoted proposition and quoting in part from *Dickerson*, 460 U.S. at 119-20).

¹⁴⁴ See *Holley*, 818 F.2d at 352-54 (holding that *Dickerson* applies to cases brought before enactment of Firearms Owners' Protection Act). One federal district court noted that when Congress adopted the Firearms Owners' Protection Act and made the determination of the presence or absence of a conviction dependent on state law, it did not amend the narcotics statute, 21 U.S.C. § 841 (1988), which provides for enhanced penalties based on prior convictions. See *United States v. Petros*, 747 F. Supp. 368, 375 (E.D. Mich. 1990). The court in *Petros* implied that the failure of Congress to amend the narcotics statute may indicate a Congressional intent that *Dickerson* apply to narcotics cases. *Id.* If so, state expungement orders would not be binding on federal authorities in those cases.

¹⁴⁵ *Dickerson*, 460 U.S. at 115.

¹⁴⁶ See *Taylor*, 110 S. Ct. at 2154 (quoting *United States v. Turley*, 352 U.S. 407, 411 (1957)); see also *Dickerson*, 460 U.S. at 119-20 (implying that Congress did not intend to allow state expunction laws to remove disabilities imposed by federal firearms statutes).

pungement orders.

It is not clear that this broad statement always holds true. If, however, in the absence of statute, federal authorities are not bound by state expungement orders, the results would be significant. Expunged state criminal records could be considered with regard to federal employment, and applicants for federal positions could be required to reveal the expunged records. In the absence of a statute, such records could be considered in connection with bail or sentencing proceedings in federal court. Moreover, expunged state convictions could serve as predicate offenses or could enhance penalties under federal criminal statutes. This application would lead to the rather anomalous result of precluding the use of the conviction as a predicate offense under the gun control laws, while permitting it to be used to enhance a penalty under other provisions, such as the federal narcotics statute.¹⁴⁷ Perhaps most important, these uses would provide federal record-keeping agencies, such as the FBI, with justification for maintaining these records and for providing the information to other federal agencies. In fact, federal law may require that they do so.¹⁴⁸ The combined effect of these developments would substantially reduce the effectiveness of state expungement orders.

VIII. THE NEED FOR FEDERAL LEGISLATION

A. Background

At first glance, expungement appears to be a rather simple concept. Upon further reflection, however, it becomes apparent that this area, far from being simple, is a labyrinth of complex legal issues and difficult value judgments. The determination of whether to expunge a criminal record is further complicated in cases where the person has been convicted of a serious offense or where expungement of the record could lead to rapes or child abuse that might otherwise have been prevented.¹⁴⁹ Similarly, issues of expungement may be viewed differently when a person

¹⁴⁷ Compare 18 U.S.C. § 921(a)(20) (1988) (state expunged conviction cannot be considered as predicate conviction) with *Petros*, 747 F. Supp. at 375 (implying that federal authorities may not be bound by state expungement orders when applying federal narcotics statute, 21 U.S.C. § 841).

¹⁴⁸ See 28 U.S.C. § 534 (1988) (requiring Attorney General to acquire, preserve, and exchange identification records).

¹⁴⁹ See *supra* text accompanying notes 6-8.

with an expunged conviction is admitted to the bar and once again perpetrates offenses on innocent clients.¹⁵⁰ We have also seen the difficulties that can arise when an individual whose criminal record has been expunged is permitted to deny that the event ever occurred.¹⁵¹ On the other hand, expungement may appear to be appropriate, or even required, when an obvious injustice has occurred or when the circumstances indicate that the individual should be given the opportunity to start anew with a clean record.¹⁵²

If the remedy of expungement is made available, many difficult issues remain. Do the courts have the inherent power to act, or is this matter solely within the province of the legislature? What criteria will be used in determining whether expungement will be granted in a particular case? What positions will be taken on the issue of federalism and the other important procedural issues that will arise? What effect will be given to the expungement order? Will the beneficiary of the order be permitted to deny that the event ever occurred? Resolution of these issues requires the balancing of a number of important and competing policy considerations.

B. *The Problem*

Efforts to resolve these issues on the federal level have been, for the most part, unsuccessful. The federal law on expungement is in a state of uncertainty and confusion. It is unclear whether federal authorities, in areas not covered by a specific federal statute, are bound by state expungement orders.¹⁵³ If they are not, we are left with a situation in which a state conviction that may serve as a predicate offense under one federal statute will not constitute a predicate offense under another.¹⁵⁴ In the area of gun control, residents of one state are treated differently from the residents of another,¹⁵⁵ and state legislatures can nullify the effect of the federal

¹⁵⁰ See *supra* text accompanying note 4.

¹⁵¹ See *supra* text accompanying notes 2, 121-26.

¹⁵² See *supra* text accompanying notes 12-26.

¹⁵³ See *supra* text accompanying notes 142-148.

¹⁵⁴ For example, while an expunged state conviction may not serve as a predicate offense under the Firearms Owners' Protection Act, 18 U.S.C. § 921(a)(20), it may be considered for purposes of enhancing the sentence in a narcotics case under 21 U.S.C. § 841. See *United States v. Petros*, 747 F. Supp. 368, 375 (E.D. Mich. 1990) (implying that failure of Congress to amend 21 U.S.C. § 841 may indicate Congressional intent that federal authorities not be bound by state expungement orders in narcotics cases).

¹⁵⁵ Under the Firearms Owners' Protection Act, individuals convicted of felonies in

criminal law merely by passing a statute.¹⁵⁶ In most cases, the effects of expungement are less than clear, and the beneficiary of an expungement order will be unsure of his or her rights.

It is clear that resolution of these issues cannot be left to the courts. The present state of federal law is, to a great extent, the result of our attempt to develop a coherent body of expungement law through the decisional rather than the legislative process. The courts themselves have recognized that determinations regarding expungement are more appropriately made by the legislature.¹⁵⁷ Although there are a few federal statutes addressing expungement,¹⁵⁸ they are concerned with specific areas and provide little assistance in answering the difficult questions and formulating a consistent policy. As a result, these questions have been left to the courts. The courts, in turn, have taken divergent views and, with some candor, have openly stated that they do not feel obliged to follow each other's decisions.¹⁵⁹ We are left with a turbid body of

New Jersey, Missouri, and Indiana may be subject to federal criminal prosecution for possessing a firearm, while those similarly convicted in Idaho and Minnesota may be immune from federal prosecution. *Compare* *United States v. Breckenridge*, 899 F.2d 540, 543 (6th Cir.) (felon convicted in New Jersey could be convicted under federal law of possession of firearm), *cert. denied*, 111 S. Ct. 119 (1990); *Presley v. United States*, 851 F.2d 1052, 1053 (8th Cir. 1988) (same in Missouri) *and* *United States v. Landaw*, 727 F. Supp. 481, 483 (N.D. Ind. 1989) (same in Indiana) *with* *United States v. Gomez*, 911 F.2d 219, 222 (9th Cir. 1990) (felon convicted under Idaho law could not be convicted under federal law for possessing firearm) *and* *United States v. Traxel*, 914 F.2d 119, 125 (8th Cir. 1990) (same under Minnesota law).

¹⁵⁶ *But see Landaw*, 727 F. Supp. at 483. The *Landaw* court indicated that, notwithstanding a provision in the Indiana statute restoring civil rights upon the completion of sentence, a felon could still be prosecuted under the Firearms Owners' Protection Act. *Id.* The court noted that any other interpretation would render the federal gun control laws a nullity in the state of Indiana. *Id.*

¹⁵⁷ *See* *United States v. Doe*, 732 F.2d 229, 232 (1st Cir. 1984) (decision whether record should be expunged under Youth Corrections Act, 18 U.S.C. § 5021 (repealed 1984), was matter for legislative, not judicial, determination); *United States v. Linn*, 513 F.2d 925, 927 (10th Cir.) (historically, courts have viewed matter of expungement of record of acquitted defendant as more appropriately left to legislature), *cert. denied*, 423 U.S. 836 (1975); *Tarleton v. Saxbe*, 507 F.2d 1116, 1131 (D.C. Cir. 1974) (recognizing Congress as more appropriate forum for making determinations regarding expungement); *Springer v. State*, 621 P.2d 1213, 1217 (Or. Ct. App.) (decisions about expungement best left to legislature), *review denied*, 631 P.2d 341 (Or. 1981). In an interesting analysis, the Supreme Court of Wyoming held that court-ordered expungement in the absence of statute would have the effect of a pardon and would therefore constitute an unconstitutional violation of the separation of powers doctrine. *See Stanton v. State*, 686 P.2d 587, 588-89 (Wyo. 1984).

¹⁵⁸ *See supra* note 26.

¹⁵⁹ *See* *United States v. Henderson*, 482 F. Supp. 234, 237 (D.N.J. 1979) (noting split among circuits on issue of whether expungement was required under Youth Corrections Act, 18 U.S.C. § 5021 (repealed 1984)); *Rowlett v. Fairfax*, 446 F. Supp. 186, 188-89 (W.D. Mo.

law that leads to uncertainty in an area where certainty is required.

Moreover, the determination of these issues cannot be left to the states. The nationwide character of federal law requires that it be uniformly applied to all citizens from coast to coast.¹⁶⁰ If the application of federal statutes is made dependent upon state law, a state legislature, merely by passing a law, can defeat the purpose and effect of a federal criminal statute.¹⁶¹ Residents of different states will be treated differently. A person imprudent enough to commit a crime in a state that does not have an expungement statute may be left with a predicate offense and subject to prosecution for a federal crime, while a person convicted in a state with an expungement statute may be immune from federal prosecution.¹⁶² Inequality may also arise with regard to consideration of the conviction for purposes of setting bail or sentencing.

The Court in *Dickerson* noted the perplexing problems that arise when federal authorities are required to interpret and give effect to the patchwork of state laws on expungement. These problems inhibit the effective enforcement of federal criminal law and create uncertainty for both law enforcement and those subject to the law.¹⁶³ Both prosecutors and potential defendants are re-

1978) (remarking that District of Columbia Circuit's holding in *Tarlton*, 507 F.2d at 1122, that FBI has duty to ensure its records are accurate has not been well received by other federal courts); *Coleman v. United States Dep't of Justice*, 429 F. Supp. 411, 413 (N.D. Ind. 1977) (court not bound by expungement cases from District of Columbia Circuit).

¹⁶⁰ See *Taylor v. United States*, 110 S. Ct. 2143, 2154 (1990) (refusing to make application of federal criminal statute dependent upon state definition of burglary because identical conduct would receive different treatment under federal law depending on state of conviction).

¹⁶¹ See *supra* note 156 and accompanying text (discussing power of state legislatures to nullify effects of federal criminal law).

¹⁶² See *supra* note 155 (discussing disparate results among states in area of gun control).

¹⁶³ *Dickerson*, 460 U.S. at 121. The Court stated the following:

Finally, a rule that would give effect to expunctions under varying state statutes would seriously hamper effective enforcement of Title IV. Over half the States have enacted one or more statutes that may be classified as expunction provisions that attempt to conceal prior convictions or to remove some of their collateral or residual effects. These statutes differ, however, in almost every particular. Some are applicable only to young offenders, *e.g.*, Mich. Comp. Laws §§ 780.621 and .622 (1982). Some are available only to persons convicted of certain offenses, *e.g.*, N. J. Stat. Ann. § 2C:52-2(b) (West 1982); others, however, permit expunction of a conviction for any crime including murder, *e.g.*, Mass. Gen. Laws Ann., ch. 276, § 100A (West Supp. 1982-1983). Some are confined to first offenders, *e.g.*, Okla. Stat., Tit. 22, § 991c (Supp. 1982-1983). Some are discretion-

quired to speculate whether a conviction has been expunged under the law of the state with jurisdiction. In many cases, the issue is determined by an appellate court years after the arrest. This subsequent determination does not provide the certainty that is required for fair notice to potential defendants.¹⁶⁴

C. *The Solution—Federal Legislation*

The certainty and consistency so critical in the law of expungement will be achieved only when Congress passes legislation that does not defer to state law, but instead states with clarity the federal policy on this issue. Only then will all citizens be treated equally, and both law enforcement and potential defendants be provided with adequate notice of their rights and responsibilities. The legislative process is particularly well-suited to developing a coherent policy. The United States Senate and House of Representatives can hold hearings and solicit comments from both state and federal agencies. A designated committee can devote the necessary time and resources to developing information and analyzing the issues. Congress can then deliberate and formulate both a policy and the legislation to effectuate that policy on a nationwide basis.¹⁶⁵

Resolution of the problem as a whole is more important than decisions made on particular issues. It may be decided that expungement is inappropriate in any situation and that the remedy will therefore not be granted or recognized in the federal system.

ary, *e.g.*, Minn. Stat. § 638.02(2) (Supp. 1982), while others provide for automatic expunction under certain circumstances, *e.g.*, Ariz. Rev. Stat. Ann. § 13-912 (1978). The statutes vary in the language employed to describe what they do. Some speak of expunging the conviction, others of "sealing" the file or of causing the dismissal of the charge. The statutes also differ in their actual effect. Some are absolute; others are limited. Only a minority address questions such as whether the expunged conviction may be considered in sentencing for a subsequent offense or in setting bail on a later charge, or whether the expunged conviction may be used for impeachment purposes, or whether the convict may deny the fact of his conviction. Some statutes, too, clearly were not meant to prevent use of the conviction in a subsequent prosecution.

Id.

¹⁶⁴ See, *e.g.*, *Palmer v. City of Euclid*, 402 U.S. 544, 545-46 (1971) (holding that potential defendant is constitutionally entitled to notice that his or her acts would constitute criminal violation, and that no person should be held criminally responsible for conduct that could not reasonably be understood to be proscribed).

¹⁶⁵ See *Tarlton v. Saxbe*, 507 F.2d 1116, 1131 (D.C. Cir. 1974) (with its resources and fact-finding apparatus, Congress is more appropriate forum for making determinations regarding expungement law).

On the other hand, the statute may provide that federal courts may grant expungement, and that state convictions may not be considered by federal authorities, under certain circumstances. If this remedy is adopted, the statute may provide that the beneficiary of the expungement order is permitted to deny that the event ever occurred. On the other hand, it may be decided that, while the record generally will not be considered to the person's prejudice, no attempt will be made to rewrite history. Whatever decision is made on the specific issues, the federal statute will eliminate many of the uncertainties that now exist.

IX. CONCLUSION

Expungement of criminal records is an interesting and controversial area of the law. Whether expungement is an appropriate remedy is a very real question, and strong policy considerations militate both in favor of, and in opposition to, its adoption. If the remedy is adopted, the formulation of the law governing its application implicates a complex matrix of difficult value judgments.

Federal jurisprudence in this area is of great importance. It determines not only the applicability of expungement to federal cases, but also the relationship between state and federal law and the effect that federal authorities will give to state expungement orders. In the past, Congress has elected not to confront the difficult issues presented by expungement, but instead has deferred to the courts or has made the effect of federal statutes dependent upon state law. This position has led to unfortunate results. The federal courts have openly disagreed on significant issues, potential defendants and law enforcement have been uncertain of their respective rights and responsibilities, similarly situated defendants have been treated differently, and states have been able to render federal criminal statutes nugatory merely by passing legislation.

A definite need exists for legislation that clearly sets forth the federal policy on expungement of criminal records. The legislative process is particularly well-suited to formulating a coherent policy and drafting statutes to ensure its implementation. By enacting such legislation Congress can provide the certainty required by the Constitution and guarantee that all citizens receive equal treatment under the law.