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Ancillary Enforcement Jurisdiction: The Misinterpretation of Kokkonen and Expungement Petitions

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ANCILLARY ENFORCEMENT JURISDICTION: THE MISINTERPRETATION OF *KOKKONEN* AND EXPUNGEMENT PETITIONS

ABSTRACT

Criminal records do not always provide the disposition of the case. Therefore, in some circumstances, individuals who were arrested and subsequently had their charges dismissed or who were acquitted at trial are not always distinguishable from those convicted of a crime. For those individuals who were convicted of a crime, criminal records additionally do not always provide information on the crime you were convicted of. Consequently, the proliferation in access to background checks has resulted in the stigma associated with an arrest record becoming a significant barrier to employment and housing opportunities for individuals with a record.

Prior to the Supreme Court's decision in Kokkonen v. Guardian Life Insurance Co. of America, *nearly every federal circuit had held that district courts had ancillary jurisdiction to entertain motions to expunge criminal records solely under equitable considerations. District courts, in deciding these petitions, would balance the interests of the individuals in having their records expunged against the interests of the public in having the records widely available. Because of the great strength of the public interest in the availability of these records, a court would only grant these petitions in extraordinary circumstances.*

The Court in Kokkonen *attempted to clarify the scope of the murky and ill-defined ancillary jurisdiction doctrine. The Court set forth two circumstances in which ancillary jurisdiction had generally been asserted: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent . . . and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees . . . ." After this decision was cast down, there has been a domino effect of federal circuits holding they no longer have the authority to assert ancillary jurisdiction over equitable expungement motions reasoning that they do not fall within the reach of the test* Kokkonen *articulates.*

Unfortunately for individuals with criminal records, these circuit courts interpret the Court's decision in Kokkonen *far too narrowly. Accordingly, this Comment argues that neither the language of the holding in* Kokkonen *nor the holding itself warrant the restrictive interpretation that these circuits apply.*

These lower courts are disregarding the qualifying language the Court employed and the cues the Court gave that demonstrate its intent was not to set a strict standard for ancillary jurisdiction.

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"The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."

—Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957)

INTRODUCTION

The United States has a glaring need for an equitable mechanism to enable a federal court to expunge criminal records. This need is exemplified by the fact that out of the roughly 327 million people living in the United States today,[1] more than 100 million have arrest records.[2] To put that into perspective: If the 100 million people in the United States with arrest records formed their own country, that new country would rank in the top twenty countries by world population.[3] Even more startling, researchers have estimated that by the age of twenty-three, nearly one-third of Americans[4] and roughly 50% of African-American males will have been arrested.[5]

If an individual is arrested, that individual has a criminal record.[6] However, the fact that an individual has a record is not indicative of whether that individual committed any criminal act.[7] Accordingly, criminal records are misleading, which stems from the fact that they do not always distinguish between individuals who have had their charges dismissed, are acquitted at trial, or are convicted of a crime.[8]

This lack of delineation about the ultimate outcome of a case is displayed in a study conducted by the National Employment Law Project.[9] The study found

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[1] U.S. CENSUS BUREAU, https://www.census.gov/popclock/ (last visited Feb. 23, 2020).

[2] U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 1 (2016).

[3] Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), http://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas.

[4] Mark Memmott, *More Than 30 Percent of Americans Are Arrested by Age 23, Study Says*, NPR (Dec. 11, 2011, 9:00 AM), https://www.npr.org/sections/thetwo-way/2011/12/19/143947345/more-than-30-percent-of-americans-arrested-by-age-23-study-says.

[5] *Study: Nearly Half of Black Men Arrested by Age 23*, USA TODAY, https://www.usatoday.com/story/news/nation/2014/01/20/nearly-half-arrested/4669225/ (last updated Jan. 20, 2014, 5:23 PM).

[6] Tina Rosenberg, Opinion, *Have You Ever Been Arrested? Check Here*, N.Y. TIMES (May 24, 2016), https://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html.

[7] Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 241 (1957); United States v. Zapete-Garcia, 447 F.3d 57, 60 (1st Cir. 2006).

[8] *See* MADELINE NEIGHLY & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, WANTED, ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT, REWARD: GOOD JOBS 3 (2013).

[9] *Id.*

that 50% of FBI records do not include the final disposition of the case.[10] Additionally, the study discovered that "a majority of the U.S. population live in states where more than 30 percent of the arrest records . . . do not include . . . the final outcome of the case."[11] Thus, the stigma associated with a record, regardless of conviction, and what the conviction was for, can pose substantial problems for an arrestee in today's society. Loretta Lynch, while Attorney General of the United States, observed that in the current state of society in the United States, the stigma associated with a criminal record places an individual at a sometimes-insurmountable disadvantage:

> Too often, Americans who have paid their debt to society leave prison only to find that they continue to be punished for past mistakes. They might discover that they are ineligible for student loans, putting an education out of reach. They might struggle to get a driver's license, making employment difficult to find and sustain. Landlords might deny them housing because of their criminal records—an unfortunately common practice. They might even find that they are not allowed to vote based on misguided state laws that prevent returning citizens from taking part in civic life.[12]

This stigma has extreme negative consequences in employment and housing opportunities, as well as increases the chances of recidivism.[13] Accordingly, these consequences act as a catalyst for a self-feeding cycle that is arduous for a person with a criminal record to detach themselves from.

The cycle begins with an arrest. Afterwards, a person either has her charges dismissed, pleads guilty, or is convicted or acquitted at trial.[14] Regardless of the outcome of the case, that person now has a record[15] which plays a stifling role in her ability to gain employment.[16] This record, coupled with the struggle to find employment, further contributes to a lack of housing opportunities.[17] Altogether, the difficulty of finding adequate employment and stable housing

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[10] *Id.* at 1.

[11] *Id.* at 2.

[12] Loretta E. Lynch, U.S. Att'y Gen., Remarks at National Reentry Week Event in Philadelphia (Apr. 25, 2016).

[13] *See* United States v. McKnight, 33 F. Supp. 3d 577, 585–88 (D. Md. 2014); Zainab Wurie, *Tainted: The Need for Equity Based Federal Expungement*, 6 S. REGION BLACK L. STUDENTS ASS'N L.J. 31, 35–38 (2012); Anna Kessler, Comment, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 404–08 (2015).

[14] *Stages of a Criminal Case*, JUSTIA, https://www.justia.com/criminal/docs/stages-of-a-criminal-case/ (last updated Apr. 2018).

[15] Rosenberg, *supra* note 6.

[16] *See infra* notes 24–33 and accompanying text.

[17] *See infra* notes 36–48 and accompanying text.

has a strong correlation to increased recidivism rates.[18] Thus, the cycle starts over again, with an arrest.

Prior to the Supreme Court's decision in *Kokkonen v. Guardian Life Insurance Co. of America*,[19] a district court had the authority, through the exercise of ancillary jurisdiction, to save an individual from this vicious cycle solely under equitable considerations.[20] A court could exercise its ancillary jurisdiction in response to an individual's petition to have their record expunged.[21] However, after the Court decided *Kokkonen*, circuit courts, starting with the Ninth Circuit, began holding one by one that the Court's decision precluded district courts from exercising ancillary jurisdiction to hear expungement petitions that raise *solely* equitable considerations.[22] This Comment argues that this interpretation of *Kokkonen* is far narrower than the language of *Kokkonen* suggests and further asserts that a district court's jurisdiction to expunge criminal records under solely equitable considerations is not precluded by the Supreme Court's holding.

Part I of this Comment provides an overview of the employment and housing issues presented to individuals with criminal records as well as discusses how those issues lead into increased recidivism rates. Part II summarizes the three potential sources of authority for a court to hear expungement petitions and sets forth the different federal and state approaches to each source of authority. Part III examines the ancillary jurisdiction doctrine that survived the passage of the supplemental jurisdiction statue and analyzes the intricacies of the Supreme Court's decision in *Kokkonen*. Part IV sets forth the circuits' approaches to equitable expungement before and after *Kokkonen*. Lastly, Part V explains that the circuit courts are interpreting *Kokkonen* far too narrowly, describes the proper interpretation of *Kokkonen*, and illuminates how the expunging of criminal records *solely* under equitable considerations falls under the correct interpretation of *Kokkonen*.

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[18] *See infra* notes 53–58.

[19] 511 U.S. 375 (1994).

[20] *E.g.*, United States v. Friesen, 853 F.2d 816, 817 (10th Cir. 1988); Allen v. Webster, 742 F.2d 153, 154–55 (4th Cir. 1984); United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977).

[21] *E.g.*, *Friesen*, 853 F.2d at 817; *Allen*, 742 F.2d at 154–55; *Schnitzer*, 567 F.2d at 539.

[22] *E.g.*, United States v. Wahi, 850 F.3d 296, 302–03 (7th Cir. 2017); United States v. Coloian, 480 F.3d 47, 50–52 (1st Cir. 2007); United States v. Sumner, 226 F.3d 1005, 1014–15 (9th Cir. 2000).

I. ISSUES EQUITABLE EXPUNGEMENT HAS THE POTENTIAL TO REMEDY

The stigma that attaches to an individual with a criminal record places that individual at a significant disadvantage in various aspects of today's society. This effect is exacerbated by the increase in accessibility of background checks.[23] Therefore, today, more than ever before, there is a need for the ability to petition to get one's criminal record expunged. This Part first addresses the employment issues an individual with a criminal record faces. Second, this Part examines these individuals' difficulties in finding housing and observes how the government is not necessarily alleviating this problem. Lastly, this Part recognizes how the hurdles in gaining employment and finding housing act as a springboard for increased recidivism rates.

A. Employment Issues

The stigma attached to a criminal record presents a significant barrier to employment.[24] This barrier is further fortified with the proliferation of background checks.[25] The rise in background checks and an employer's access to them has been spurred by advances in technology.[26] According to a survey primarily of large employers, 92% of the employers stated that they conduct a background check on some, if not all, of their job candidates.[27] Furthermore, 63% of the employers in the study, despite knowing that a candidate was not convicted, stated that the arrest of a prospective candidate would still play at least a minimal role in deciding whether to extend an offer to that candidate.[28] Additionally, a survey conducted in major cities, regarding individuals that were

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[23] *See* Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 IND. L.J. 421, 428 (2018) (noting that "an entire industry has arisen to respond to the demand" for electronic criminal records). *See generally* United States v. McKnight, 33 F. Supp. 3d 577, 585–88 (D. Md. 2014); Wurie, *supra* note 13, at 35; Kessler, *supra* note 13, at 441; *Background Checking: Conducting Criminal Background Checks*, SOC'Y FOR HUM. RESOURCE MGMT. (Jan. 22, 2010), https://www.slideshare.net/shrm/background-check-criminal?from=share_email.

[24] *See generally McKnight*, 33 F. Supp. 3d at 585–88; Wurie, *supra* note 13, at 33; Kessler, *supra* note 13, at 404–08.

[25] *Supra* note 23.

[26] Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. CAL. INTERDISC. L.J. 395, 401 (2016).

[27] *Background Checking: Conducting Criminal Background Checks*, *supra* note 23.

[28] *Id.* An arrest record may not be the only reason for denying a prospective candidate. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012). However, this restriction is limited because an "employer may make an employment decision based on the conduct underlying an arrest. . . ." *Id.*

convicted of a crime, found that 65% of employers "would not knowingly hire an ex-convict."[29]

With that being said, there are federal and state regulations that attempt to tear down some of the barriers ex-convicts face in obtaining employment.[30] These regulations provide tax incentives to businesses that hire ex-convicts.[31] For example, to stimulate the hiring of ex-felons, the Internal Revenue Service gives a federal tax credit to employers that hire an ex-felon within a year of being convicted or released from prison.[32] Unfortunately, the harsh reality is that the consequences of increase in access to background checks are that individuals with criminal records often resort to taking less desirable, lower-paying jobs or no job at all, which feeds into a lack of housing opportunities and ultimately increased rates of recidivism.[33]

Although the proliferation in access to criminal background checks does have negative impact on individuals with records in the employment context, a lack of access to criminal records may likewise have a detrimental effect on employers. Stemming from the common law, an employer has a duty to protect her patrons and bystanders from reasonably foreseeable harm caused by her employees.[34] Accordingly, an employer could potentially open herself up to substantial liability if she is not vigilant in her hiring practices.[35] Thus, the interests of an employer and an individual with a record can be at odds with each other. A key to resolving these dueling interests is striking the balance between denying job applicants who pose a risk in a particular occupation and accepting the individuals that pose no risk and would excel in that role given the opportunity.

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[29] Joseph C. Dugan, Note, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L.J. 1321, 1323 (2015).

[30] *See, e.g.*, 35 ILL. COMP. STAT. 5/216 (2018) (tax credit for wages paid to ex-offenders); IOWA ADMIN. CODE r. 701-40.21 (2019) (tax credit for small businesses that hire ex-felons); *Work Opportunity Tax Credit*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit (last visited Jan. 30, 2020) (providing federal tax incentives to businesses that hire ex-felons within a year their conviction or release from prison).

[31] *See, e.g.*, *supra* note 30.

[32] *Work Opportunity Tax Credit*, *supra* note 30.

[33] *See* Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 162–63 (2010); *see also* Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WISC. L. REV. 321, 333 (noting studies that illustrate that individuals who are able to obtain employment have lower rates of recidivism).

[34] *See* Terence G. Connor & Kevin J. White, *The Consideration of Arrest and Conviction Records in Employment Decisions: A Critique of the EEOC Guidance*, 43 SETON HALL L. REV. 971, 974 (2013).

[35] *See id.* at 972–73.

B. Housing Issues

A person with a criminal record who is struggling to find employment is also presented with the issue of finding housing. Although an arrest record without a conviction alone is insufficient grounds for a private property owner to reject a housing application,[36] that does not preclude discrimination on the basis of arrest records.[37] This serves as a restriction on private property owners from having a broad policy of denying any applicant with a criminal record but does not prohibit landowners from considering arrest records.[38] The consideration of records, coupled with the multitude of other factors, such as income, credit, and job history, afford landlords wide discretion in contemplating housing applications.[39] Taking this into account, scholars have observed that, in practice, "the mere existence of [a] criminal record serves as a bar to obtaining suitable housing."[40]

For individuals who have been convicted of a crime, as opposed to those merely arrested, certain federal policies present a much larger problem for their search for housing. Under the Fair Housing Act, a private property owner may refuse a housing application because of the applicant's prior criminal conviction.[41] Hence, an ex-convict's best chance at having a roof over her head may be through public housing.[42] However, the guidelines for the Department of Housing and Urban Development (HUD) provide that a Public Housing Agency (PHA) has the discretion to rely on arrest records in determining whether to accept or deny a person's application.[43]

Further, HUD has adopted a "one strike policy" for certain criminal acts.[44] Under this policy, if a member of a household commits one of the enumerated

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[36] U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 2, at 5.

[37] *See* Schneider, *supra* note 23; *see also* Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 546 (2005).

[38] Camila Domonoske, *Denying Housing over Criminal Record May Be Discrimination, Feds Say*, NPR (Apr. 4, 2016, 1:14 AM), https://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say.

[39] *See generally Four Reasons Why a Landlord Can (and Can't) Reject a Rental Application*, LAW DICTIONARY, https://thelawdictionary.org/article/four-reason-landlord-can-cant-reject-rental-application/ (last visited Mar. 21, 2020).

[40] Schneider, *supra* note 23, at 424.

[41] U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 2, at 6. However, the property owner must have a nondiscriminatory and substantial interest in rejecting the housing application. *Id.*

[42] Carey, *supra* note 38, at 552.

[43] *Id.* at 566.

[44] *See* 42 U.S.C. § 1437d(l)(6) (2012); Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4 (l)(5)(i)–(iv) (2017). *See generally* Burton v. Tampa Hous. Auth., 171 F. Supp. 2d 1314, 1315 (M.D. Fla. 2000) (drug-related activity); Lowell Hous. Auth. v. Melendez, 865 N.E.2d 741, 745 (Mass. 2007) ("violent crimes");

criminal acts or a criminal act that "threatens the health, safety or right to peaceful enjoyment of the other residents," she is to be evicted.[45] What exactly falls under the "threatens the health, safety or right to peaceful enjoyment of other residents" is largely up to the discretion of the PHA.[46] Hence, the breadth of these policies has had the detrimental effect of "increasing rates of recidivism, and harming public safety."[47]

Similar to the responsibility employers have to protect their patrons from foreseeable harm, landlords may be liable for the acts of their tenants and therefore also have a robust interest in widespread access to criminal background checks.[48] Landlords have been found liable for the actions of their tenants in an array of circumstances. Such circumstances include, *inter alia*, when a tenant commits a criminal act and the landlord should have known that the tenant was dangerous[49] and when a tenant's action or inaction results in a nuisance.[50] Furthermore, if a landlord's property is associated with illegal drugs, regardless of whether the landlord actually knew the drugs were present, the landlord's property may be subject to a civil forfeiture action.[51] Thus, analogous to the dueling interests of an employer and potential employee with a record, a balance needs to be struck between the clashing interests of a landlord and a prospective tenant.

C. Increase in Recidivism

The struggles to gain employment and find housing feeds into increased rates of recidivism for individuals with a criminal record.[52] These individuals are

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Hous. & Redevelopment Auth. v. Miller, 935 A.2d 1197, 1998 (N,J. Super. Ct. App. Div. 2007) ("disorderly persons offense").

[45] 24 C.F.R. § 996.4(f)(12)(i)(A)(1); *see Burton*, 171 F. Supp. 2d at 1315 (noting that, under the regulation, a lessee is obligated to ensure that a person under their control does not act in a way that "threatens the health, safety, or right to peaceful enjoyment" of other residents). A PHA is financed by the federal government and runs and operates its local housing programs. *HUD's Public Housing Program*, DEP'T HOUSING & URB. DEV., https://www.hud.gov/topics/rental_assistance/phprog (last visited Feb. 26, 2020).

[46] Mackenzie J. Yee, Note, *Expungement Law: An Extraordinary Remedy for an Extraordinary Harm*, 25 GEO. J. ON POVERTY L. & POL'Y 169, 173 (2017).

[47] Schneider, *supra* note 23, at 431–32; *see also* Carey, *supra* note 38, at 566 (arguing that "[h]omelessness itself is a predictor for recidivism").

[48] *See* Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 190–91 (2009).

[49] B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 711 (1992).

[50] *Id.* at 724.

[51] *Id.* at 740–41.

[52] *See* United States v. McKnight, 33 F. Supp. 3d 577, 586–87 (D. Md. 2014); *see also* Carey, *supra* note 38, at 566 (noting that "[h]omelessness itself is a predictor for recidivism").

more likely to commit crimes of survival such as burglary and theft to acquire money to support themselves.[53] A study conducted by the Federal Bureau of Prisons found that ex-offenders that were able to obtain post-release employment had a recidivism rate of 27.6 percent "compared to 53.9 percent" for those that did not obtain post-release employment.[54] Moreover, a survey conducted in New York of individuals released from prison determined that an ex-offender that is unable to find suitable housing is seven times more likely to recidivate than an ex-offender that does find housing.[55]

The increased recidivism, however, counteracts one of the chief goals of the criminal justice system. As the Supreme Court stated in *Kelly v. Robinson*, "[t]he criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. . . . [I]t is concerned not only with punishing the offender, but also rehabilitating him."[56] The clash between the goal of rehabilitation and the ultimate recidivism of a substantial portion of individuals with criminal records presents society with a catch-22—the public benefit of having criminal records liberally and widely available to the public[57] directly conflicts with the harm to the public as a consequence of substantial rates of recidivism.

II. SOURCES OF THE COURTS' JURISDICTION TO EXPUNGE RECORDS

There are three potential sources of jurisdiction for a federal court to expunge criminal records: (1) the exercise of ancillary jurisdiction to expunge criminal records on equitable grounds; (2) legislation passed by Congress granting the federal court jurisdiction; and (3) a cause of action brought in court by an individual whose constitutional rights have been violated.[58] Currently, a majority of federal circuits hold that courts do not have ancillary jurisdiction to expunge criminal records on equitable grounds.[59] This Comment argues that

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[53] *See* Schneider, *supra* note 23, at 432–33.

[54] MILES D. HARER, FED. BUREAU OF PRISONS OFFICE OF RESEARCH & EVALUATION, RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987, at 4–5 (1994).

[55] Schneider, *supra* note 23, at 432–33.

[56] 479 U.S. 36, 52 (1986).

[57] *Infra* note 73 and accompanying text.

[58] *See* United States v. Dunegan, 251 F.3d 477, 480 (3d Cir. 2001) ("[I]n the absence of any applicable statute enacted by Congress, or an allegation that the criminal proceedings were invalid or illegal, a District Court does not have the jurisdiction to expunge a criminal record . . . ."); United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977) ("No federal statute provide[d] for the expungement of an arrest record. Instead, expungement lies within the equitable discretion of the court . . . .").

[59] *See, e.g.*, United States v. Wahi, 850 F.3d 296, 298 (2017) (noting the trend of federal circuits holding that they do not retain ancillary jurisdiction after *Kokkonen*). *But see* United States v. McKnight, 33 F. Supp. 3d 577, 582–83 (D. Md. 2014) (holding the court had jurisdiction under the second circumstance in *Kokkonen*);

federal courts do, under Supreme Court jurisprudence, have the discretion to exercise ancillary jurisdiction to expunge criminal records based on solely equitable considerations. This Part will first provide a background on a federal court's equitable powers. Second, this Part will examine the different expungement statutes at the federal and state levels. Lastly, this Part will review federal and state court approaches to expunging records when there is a constitutional violation.

A. Equitable Powers

A federal court's equitable powers stem from the "principles of the system of judicial remedies" of the English Court of Chancery.[60] The Court of Chancery was only allowed to exercise its equitable powers when there was not an adequate common law remedy for a claimant.[61] This equitable power for federal courts in the United States is embedded in Article III, Section 2 of the Constitution.[62] Article III, Section 2 grants federal courts jurisdiction over cases or controversies in "law and equity."[63] Similar to the Court of Chancery in England, a federal court in the United States is only allowed to hear a case in equity when no "adequate and complete remedy may be had at law."[64]

Because a court may exercise equity jurisdiction when there are no adequate remedies at law, a court may only sit in equity in limited circumstances. In other words, as Alexander Hamilton wrote, "[t]he great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to the general rules."[65] Today, like the English chancery court, a federal court exercises its equity jurisdiction only in exceptional cases.[66] Examples of these scenarios include where a claimant, *inter alia*, seeks to enjoin or force another party to act in a specified manner by way of injunction or specific performance or attempts

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United States v. Allen, 57 F. Supp. 3d 533, 541 (E.D.N.C. 2014) (same).

[60] Atlas Life Ins. Co. v. W. I. S., Inc., 306 U.S. 563, 568 (1939).

[61] Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 218, 229 (2018). Historically, the Court of Chancery found there to be no adequate remedies at law when a party brought an action for "fraud, accident, or mistake" as well as other areas where the common law was insufficient. David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 555 (1986).

[62] U.S. CONST. art. III, § 2.

[63] *Id.*

[64] Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82. The Judiciary Act further provided that cases of equity were not subject to a trial by jury. *Id.* § 12, 1 Stat. at 80.

[65] Morley, *supra* note 62, at 231 (quoting THE FEDERALIST NO. 83, at 438 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001)).

[66] *Jurisdiction: Equity*, FED. JUD. CTR., https://www.fjc.gov/history/courts/jurisdiction-equity (last visited Feb. 26, 2020).

to gain title to real property against all other potential claimants through quiet title.[67]

In addition to the strict requirement that a claimant must exhaust all remedies at law before a court can administer an equitable remedy, courts will generally only administer an equitable remedy in particularized circumstances.[68] Such circumstances are imperative because the remedies tend to significantly implicate the rights of others.[69] For example, a plaintiff seeking a permanent injunction enjoining a person or entity permanently from doing some act must satisfy a stringent four-factor test.[70] Under the four-factor test, the plaintiff must show:

> (1) that it has suffered an irreparable injury;
> (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
> (3) that, considering the balance of hardships between the plaintiff and defendant a remedy in equity is warranted; and
> (4) that the public interest would not be disserved by a permanent injunction.71

Coupling the stringent inquiries, like that for an injunction, with the preliminary requirement of there being no adequate remedy at law, denotes that the chances of a litigant succeeding in an equitable action are often low.

1. A Court Should Only Expunge Criminal Records in Extreme Circumstances

Historically, like any equitable remedy, the expunction of criminal records was only granted in limited circumstances.[72] As one court noted, "expungement is, in fact, an extraordinary remedy and that 'unwarranted adverse consequences' must be uniquely significant to outweigh the strong public interest in

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[67] *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 541–42 (2016) ("The equitable remedies still used regularly in the United States are the injunction, specific performance . . . and a cluster of restitutionary remedies: accounting for profits . . . and equitable recession.").

[68] *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (noting the four-factor test applied in injunction actions); Ellis v. Dixie Highway Special Rd. & Bridge Dist., 138 So. 374, 375 (Fla. 1931) ("[A] court of equity will give relief in respect of personality and quiet title thereto when, owing to exceptional circumstances, there is no adequate remedy at law.").

[69] *See generally eBay Inc.*, 547 U.S. at 391 (injunction); King v. Hamilton, 29 U.S. 311, 328 (1830) (specific performance of a contract); *Ellis*, 138 So. at 375–76 (quiet title).

[70] *See, e.g.*, *eBay Inc.*, 547 U.S. at 391 (noting that this test was "[a]ccording to well-established principles of equity").

[71] *Id.*

[72] *See, e.g.*, United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977) (stating, absent a federal statute, a court may expunge records in "extreme circumstances" based on equitable considerations).

maintaining accurate and undoctored records."[73] Despite the issues that criminal records may present,[74] public policy considerations warrant this stringent inquiry for a variety of reasons.[75] First, the public has a "common law right of access to judicial records."[76] Additionally, the public has a strong interest in knowing the potential risks their neighbors may present.[77] Similarly, individuals engaging in business or in search of a licensed professional have a significant interest in being fully informed of the character of the person they are interacting with.[78]

The expungement of criminal records further presents problems for employers and law enforcement.[79] The problems presented to employers originate from their responsibility for their employee's actions and their duty to hire employees that do not present a threat to others.[80] Regarding law enforcement practices, the information that accompanies criminal records is also instrumental to investigations.[81] Information about a prior act may aid in identifying a potential criminal by providing insight on the *modus operandi* of the offender and the fingerprint and DNA data imbedded in the record may play a crucial role in identification.[82]

Expunging criminal records also poses an issue for the judicial system.[83] A criminal record can only be effectively expunged if the person whose record was expunged is allowed to deny that she has been arrested, no matter the occasion.[84] An issue arises, then, when an individual whose record has been expunged is called to testify at a public trial, as a character witness for example, and is asked if she has ever been arrested.[85] Forcing the individual to answer affirmatively defeats the purpose of expunging the criminal record in the first place.[86] However, if the individual is allowed to answer in the negative, it is essentially

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[73] United States v. Flowers, 389 F.3d 737, 739 (7th Cir. 2004).

[74] *See supra* Part I.

[75] *See* Dugan, *supra* note 29, at 1329–30; Yee, *supra* note 47, at 178–79; Kessler, *supra* note 13, at 414–15.

[76] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

[77] *See* Dugan, *supra* note 29, at 1329–30; Yee, *supra* note 47, at 178–79.

[78] *See* James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHNS L. REV. 73, 76–77 (1992); Dugan, *supra* note 29, at 1329–30; Yee, *supra* note 47, at 178–79.

[79] *See* Diehm, *supra* note 79, at 77; Kessler, *supra* note 13, at 414.

[80] *See* Kessler, *supra* note 13, at 414.

[81] Diehm, *supra* note 79, at 77.

[82] *Id.*; *see also DNA Sample Collection from Arrestees*, NAT'L INST. JUST. (Dec. 6, 2012), https://www.nij.gov/topics/forensics/evidence/dna/pages/collection-from-arrestees.aspx.

[83] *See* Diehm, *supra* note 79, at 76.

[84] *See id.*

[85] *See id.*

[86] *See id.*

court-sponsored perjury.[87] This grey area accompanying the expunging of criminal records has the potential to be extremely difficult for a judge to navigate through. In balancing the public interest and the interest of the person with the record, this ambiguity favors the public interest and cuts against the arguments for expunging criminal records.

B. Expungement Statutes

Another basis on which a court may derive the power to expunge criminal records is an express legislative grant.[88] However, currently no general expungement statutes exist at the federal or state level allowing a court to expunge records on the basis of fundamental fairness.[89] In light of the encumbering consequences faced by individuals with criminal records, there has been a substantial amount of scholarship pressuring Congress and state legislatures to pass a general expungement statute.[90] Much of this scholarship maintains that Congress and state legislatures are better-equipped than the courts to provide for the expungement of criminal records.[91]

This Section will first discuss the few federal statutes that grant federal courts the power to expunge criminal records. Second, this Section will expound upon the variety of approaches to expungement taken by state legislatures as well as examine the different views adopted by state courts on their authority to expunge records.

1. Federal Statutes

Although Congress has not passed a general expungement statute, it has passed a few statutes that grant courts the power to expunge records in specific circumstances.[92] The three premier statutes that provide for the expunging of records concern (1) DNA records of a person after their military conviction is

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[87] *See id*. *But see* Kessler, *supra* note 13, at 446 ("Expungement law is not an effort to rewrite history, but 'reflects the fact that past convictions followed by a lengthy period of law-abiding conduct simply are not relevant in predicting future criminal activity or assessing credibility.'").

[88] *See, e.g.*, Diehm, *supra* note 79, at 80.

[89] *Id.*; Kessler, *supra* note 13, at 427–29.

[90] *See generally* Diehm, *supra* note 78, at 102–06 (arguing that a federal statute on expungement "will eliminate many of the uncertainties that now exist" on the issue of whether federal courts have the to expunge criminal records); Yee, *supra* note 47, at 188 (asserting there should be a "comprehensive statute"); Kessler, *supra* note 13, at 428–29 (urging state legislatures to pass expungement statutes).

[91] *See* Diehm, *supra* note 79, at 102–06; *see also* Kessler, *supra* note 13, at 431–33.

[92] 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE & PROCEDURE § 3523.2 (3d ed. 2008) [hereinafter 13 FEDERAL PRACTICE & PROCEDURE].

overturned;[93] (2) certain FBI DNA records of a person after her conviction is overturned;[94] and (3) records of persons under the age of twenty-one convicted under Section 404 of the Controlled Substances Act.[95]

These statutes suggest that Congress engaged in a balancing of public policy interests with fundamental fairness to the individuals with records.[96] Although Congress is not currently entertaining the idea of a general expungement statute,[97] these three statutes do provide Congress with a potential framework to pass a more comprehensive statute in the future. The Second Circuit noted these statutes and conspicuously hinted to Congress that it might want to consider a more comprehensive approach:[98] "[T]hat the District Court had no authority to expunge records of a valid conviction in this case says nothing about Congress's ability to provide jurisdiction in similar cases . . . . Congress has done so in other contexts. It might consider doing so again . . . ."[99]

2. State Statutes

While Congress has not addressed the expunging of criminal records outside of the limited circumstances stated above, state expungement provisions vary greatly.[100] For crimes other than misdemeanors and petty offenses,[101] some states, much like Congress, provide little to no opportunity for the expungement of records.[102] Conversely, other state legislatures, such as Alabama and Maryland, have passed statutes that contain provisions for the automatic expungement of arrest records for certain felonies, where the charges were dropped, dismissed, or the person was acquitted.[103] Moreover, several state legislatures have enacted statutes that allow for the expungement of convictions for a variety of crimes and some further permit expungement after the

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93 10 U.S.C. § 1565(e) (2012).

94 34 U.S.C. §12592(d) (2012).

95 18 U.S.C. § 3607(c) (2012).

96 *See supra* notes 73–88 and accompanying text.

97 There is one bill currently in the House Judiciary Committee that, if passed, would grant a federal court the authority to expunge criminal records for non-violent offenders under certain conditions. Expungement Act of 2017, H.R. 3578, 115th Cong. (2017).

98 Doe v. United States, 833 F.3d 192, 199 (2d Cir. 2016).

99 *Id.*

100 *See generally 50-State Comparison: Judicial Expungement, Sealing, and Set-Aside*, RESTORATION RTS. PROJECT (Dec. 2019), http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/.

101 Wurie, *supra* note 13, at 41 (noting at the state and local level, "misdemeanors and petty offenses are relatively easy to get expunged").

102 Kessler, *supra* note 13, at 417–18. For a comprehensive list of the different approaches states take, see *50-State Comparison*, *supra* note 101.

103 Kessler, *supra* note 13, at 417–18, 418 n.123 (discussing Alabama and Maryland statutes).

completion of rehabilitation programs.[104] Although state legislatures do generally provide more guidance than Congress, there still is a significant lack of statutory authority in the area of expungement that is begging to be filled.[105]

This void leaves the opportunity for state courts to fill it. However, just as state statutes vary greatly, state courts, absent statutory authorization, also vary regarding their power to expunge criminal records.[106] A number of state courts have held they do not have the authority to expunge records without express authorization from a state legislature, because doing so would violate separation of powers.[107] Nevertheless, the state courts that agree that expunging records would raise a separation of powers issue disagree over which branch is being encroached upon.[108]

Other courts take a different view. A handful of courts assert, absent statutory authority, that they have the inherent power to expunge criminal records.[109] In Pennsylvania, for example, the supreme court asserted this inherent power and explained that "there is a long-standing right," rooted in due process, to petition the court to exercise its discretion to expunge a criminal record.[110] Nonetheless, in the spirit of ambiguity and a lack of conformity, some courts have refused to fully address the issue.[111]

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104 *See 50-State Comparison*, *supra* note 101.

105 *See generally id.*

106 Kessler, *supra* note 13, at 417–18.

107 *See* Commonwealth v. Jones, 406 S.W.3d 857, 861 (Ky. 2013); Stanton v. State, 686 P.2d 587, 589 (Wyo. 1984). Federal courts, however, have not traditionally viewed separation of powers as a barrier to expunging records. Diehm, *supra* note 79, at 80. *But see* United States v. Lucido, 612 F.3d 871, 877 (6th Cir. 2010) ("[O]ne person's equitable power is another person's authority to remake federal law and to cross serious separation-of-power divides in the process.").

108 *See, e.g.*, *Jones*, 406 S.W.3d at 861 (holding that where a statute does not provide for expungement, it would encroach upon legislative power for a court to expunge criminal records); *Stanton*, 686 P.2d at 589 (holding a court cannot expunge criminal records without statutory authority because doing so would encroach upon the pardon power of the governor).

109 *See* Mulkey v. Purdy, 234 So. 2d 108, 111 (Fla. 1970) (holding a court may retain jurisdiction to expunge records in cases of "overriding equitable considerations"); Commonwealth v. Moto, 23 A.3d 989, 991 (Pa. 2011) (noting the trial court's discretion to expunge arrest records); *In re* A.N.T., 798 S.E.2d 623, 626 (W. Va. 2017) (maintaining there are two potential bases of authority for expunging records: (1) statutory grant and (2) the courts inherent power).

110 *Moto*, 23 A.3d at 993.

111 *See* Farmer v. State, 235 P.3d 1012, 1014–15 (Alaska 2010). In *Farmer*, the court noted that on a previous occasion the court dodged resolving the issue of whether a trial court has inherent authority to expunge records. *Id.* at 1014. Likewise, here the court refused to resolve the issue and held "even if Alaska courts do have inherent authority to expunge . . . this case does not present circumstances that would justify expungement." *Id.*

C. Violations of the Constitution

The Constitution is the third and final potential authority for a court to expunge criminal records. Courts appear have the authority to expunge criminal records to remedy an arrest or conviction that was in violation of the Constitution.[112] Constitutional violations are the one area where both federal and state courts agree that their authority to expunge records is substantiated.[113] This is not to be conflated or confused with the argument that there is a constitutional right to expungement.[114] This Section will first discuss the approach used in federal courts and then discuss the approach used in state courts.

1. Federal Courts

In the federal system, there is a semblance of a general agreement that a court retains the authority to expunge arrest records if the arrest or conviction violated the Constitution or a federal statute.[115] There is an expansive amount of case law where courts have refused to expunge records because the petitioner did not allege that the arrest or conviction was illegal.[116] However, there is a paucity of case law illustrating situations where courts have, in fact, granted a petition for the expungement of criminal records on the basis of a constitutional violation. Nevertheless, courts repeatedly appear to reserve this power on bases such as "the defendant filed a motion in the original criminal case seeking expungement

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[112] *Infra* note 117 and accompanying text.

[113] *See, e.g.*, United States v. Wahi, 850 F.3d 296, 303 (7th Cir. 2017); United States v. Field, 756 F.3d 911, 915–16 (6th Cir. 2014); United States v. Coloian, 480 F.3d 47, 49 n.4 (1st Cir. 2007); United States v. Meyer, 439 F.3d 855, 861–62 (8th Cir. 2006); *Farmer*, 250 P.3d at 1015; State v. S.L.H., 755 N.W.2d 271, 274 (Minn. 2008); *In re A.N.T.*, 798 S.E.2d at 626–28.

[114] *See* Sealed Appellant v. Sealed Appellee, 130 F.3d 695, 699 (5th Cir. 1997) ("There is no constitutional basis for a 'right to expungement.'"); United States v. Johnson, 714 F. Supp. 522, 523 (S.D. Fla. 1989) ("[T]he right to the expungement of a criminal record is not a federal constitutional right.").

[115] *See Field*, 756 F.3d at 915–16; *Coloian*, 480 F.3d at 49 n.4; *Meyer*, 439 F.3d at 861–62.

[116] *See Wahi*, 850 F.3d at 303 ("Expungement authority must . . . have a source in the Constitution or statutes."); *Field*, 756 F.3d at 915–16 (assuming that a federal court has the authority to expunge criminal records when there was a violation of the constitution); *Coloian*, 480 F.3d at 49 n.4 (denying the petitioner's expungement application because he did not seek expungement under a federal statute nor for a violation of the Constitution); United States v. Rowlands, 451 F.3d 173, 177–78 (3d Cir. 2006) (noting that a court has the inherent authority to expunge records to preserve "basic legal rights" (quoting United States v. McMains, 540 F.2d 387, 389–90 (8th Cir. 1976))); *Meyer*, 439 F.3d at 861–62 (refusing to assert jurisdiction over the petitioner's expungement application because he did not allege there was a violation of a federal statute or the Constitution); United States v. Sumner, 226 F.3d 1005, 1014 (9th Cir. 2000) ("[A] district court's ancillary jurisdiction is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error."). *But see* Rogers v. Slaughter, 469 F.2d 1084, 1084–85 (5th Cir. 1972) (reversing the district courts expunction of the defendant's records where the defendant was not advised of his right to counsel).

of his record[] . . . but did not allege any unlawful arrest or other legal infirmity."[117]

The courts that have expunged arrest records for illegal arrests or convictions have done so in a narrow set of egregious circumstances.[118] One court ordered the expungement of arrest records of innocent individuals swept up in a mass arrest, without a proper showing of probable cause, during a protest about the U.S. military activity in Southeast Asia.[119] Another court ordered expungement of the arrest and conviction records of African Americans who were prosecuted in an attempt to discourage them from exercising their right to vote.[120] A third court expunged the criminal records of an individual's conviction after the government had "destroyed" evidence of entrapment.[121] These decisions strongly represent the tradition of federal courts expunging criminal records only under the most extraordinary circumstances, even when it comes to a constitutional violation.[122]

2. State Courts

Similar to how state courts take a wide variety of approaches when it comes to their power to expunge criminal records absent the express statutory authority,[123] they also differ in their views of their authority to act when there is a constitutional violation. A number of state courts take a similar approach to

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[117] United States v. Haslett, No. 2:83–cr–37–1, 2009 WL 819004, at *2 (S.D. Ohio Mar. 26, 2009) (summarizing *Sumner*, 226 F.3d at 1014–15).

[118] *See* Sullivan v. Murphy, 478 F.2d 938, 971 (D.C. Cir. 1973); United States v. McLeod, 385 F.2d 734, 750 (5th Cir. 1967); United States v. Benlizar, 459 F. Supp. 614, 624–25 (D.D.C. 1978).

[119] *Sullivan*, 478 F.2d at 971; *see also* Urban v. Breier, 401 F. Supp. 706, 713 (E.D. Wis. 1975) (ordering the records of fifty-four suspect members of a known motorcycle gang to be expunged because they were arrested without probable cause); Kowall v. United States, 53 F.R.D. 211, 214–16 (W.D. Mich. 1971) (expunging records of an arrest under a statute that was later held unconstitutional).

[120] *McLeod*, 385 F.2d at 750.

[121] *Benlizar*, 459 F. Supp. at 624–25 (holding that the government conduct was "reprehensible" and expunged the defendant's criminal record).

[122] There is an interesting strand of case law in the Sixth Circuit that maintains, in response to a habeas petition under 28 U.S.C. § 2243 (2012), a federal court has the authority to expunge *state* criminal convictions. *E.g.*, Gentry v. Deuth, 456 F.3d 687, 696–97 (6th Cir. 2006). In *Gentry*, the petitioner filed a habeas petition alleging that in her conviction her Sixth Amendment Confrontation Clause rights were violated. *Id.* at 690–91. The district court granted the petitioner's request and nullified her conviction. *Id.* at 691. On appeal, the Sixth Circuit ordered the expungement of the petitioner's state criminal record. *Id.* at 696–97. The court held "the law is absolutely clear that the writ releases the successful petitioner from the states custody . . . relief from the collateral consequences of an unconstitutionally obtained state criminal conviction effectively requires expungement of the conviction from the petitioner's record." *Id.* However, the relief granted by the court in *Gentry* was not total. The nullification of the petitioner's conviction did not preclude the Commonwealth from retrying the petitioner. *Id.* at 697.

[123] *See supra* note 107 and accompanying text.

federal courts and will only expunge criminal records when there has been an unlawful arrest or conviction.[124] One court noted that "courts 'may order expunction in cases where there has been an unlawful arrest, where an arrest has been made merely for harassment purposes, or where the statute under which an individual was prosecuted has subsequently been determined to be unconstitutional.'"[125]

A Texas appellate court, on the other hand, took a markedly different approach from the majority of courts.[126] The Texas court viewed expungement as neither a constitutional nor a common law issue.[127] Instead, the court believed the sole judicial authority to expunge criminal records was created by statute.[128] Although a Texas statute provides for the expungement of records in an array of circumstances,[129] Texas courts lack the flexibility to equitably expunge records not covered in the statute.

Other courts have taken a more novel approach. These state courts, in response to expungement petitions, hold that in some circumstances, public access to criminal records violates an individual's right to privacy and thus, the court will expunge the individual's records.[130] Under this approach, a court expunged the records of a domestic violence civil protection order where charges were never filed.[131] The court conducted a balancing test, based on the constitutional right to privacy, that weighed "the interest of the accused in his good name and right to be free from unwarranted punishment against the legitimate need of government to maintain records."[132] In balancing, the court

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[124] Farmer v. State, 235 P.3d 1012, 1015 (Alaska 2010); State v. S.L.H., 755 N.W.2d 271, 274 (Minn. 2008); *In re* A.N.T., 798 S.E.2d 623, 628 (W. Va. 2017); *see also* State v. Howe, 308 N.W.2d 743, 748–49 (N.D. 1981) (holding that courts have the "obligation" to expunge the records of someone that was unlawfully arrested).

[125] *Farmer*, 235 P.3d at 1015 (quoting United States v. G., 774 F.2d 1392, 1394 (9th Cir. 1985)).

[126] *See Ex parte* Ammons, 550 S.W.3d 235, 237 (Tex. Ct. App. 2018).

[127] *Id.* (quoting *Ex parte* Myers, 24 S.W.3d 477, 480 (Tex. Ct. App. 2000)).

[128] *Id.* (referring to TEX. CODE CRIM. PROC. ANN. art. 55.01 (West 2017)).

[129] *See generally* TEX. CODE CRIM. PROC. ANN. art. 55.01 (West 2017).

[130] Davidson v. Dill, 503 P.2d 157, 161 (Colo. 1972) (en banc); Schussheim v. Schussheim, 998 N.E.2d 446, 448 (Ohio 2013) (noting a basis of authority to expunge criminal records is the right to privacy).

[131] *Schussheim*, 998 N.E.2d at 449–50.

[132] *Id.* at 449 (quoting City of Piper Pike v. Doe, 421 N.E.2d 1303, 1306 (Ohio 1981), *overruled on other grounds by* State v. Radcliff, 28 N.E.3d 69 (Ohio 2015)). A similar balancing test was adopted in *Davidson*, 503 P.2d at 161. In this case, the Colorado Supreme Court reversed and remanded a lower court's decision to dismiss, for failure to state a claim, an individual's petition to expunge her criminal records. *Id.* at 158. The supreme court ordered the lower court to balance "the state's interest in efficient law enforcement procedures as against a particular citizen's right to be let alone." *Id.* at 162–63.

found that the petitioner's interest "outweigh[ed] the legitimate need of the government to maintain records."[133]

Although the right to privacy argument has largely been rejected by federal courts,[134] the balancing tests these courts employ provide a useful framework for federal courts, sitting in equity, and legislatures, state and federal, to construct a general expungement statute. Moreover, these tests are not that distinct from the test for injunctions noted above.[135] Stressing and balancing the interests of the party petitioning for expungement with the government's interests in protecting the public provides a court with the flexibility necessary to grant relief in the appropriate circumstances.[136]

III. OVERVIEW OF ANCILLARY JURISDICTION AND THE *KOKKONEN* DECISION

As discussed above, the consequences of an arrest or criminal record, in some respects, has the real potential to be a scarlet letter. There is a glaring need for a mechanism that, in limited circumstances, provides an individual with a record the opportunity to have that record expunged for considerations of equity and fundamental fairness alone. Under the current state of the law, the doctrine of ancillary enforcement jurisdiction should provide courts with an avenue to equitably expunge criminal records. This Part will first provide a definition of ancillary jurisdiction along with a brief history of the doctrine. Second, this Part gives an overview of the circumstances in which ancillary jurisdiction has traditionally been asserted. Third, this Part will review the Supreme Court's decision in *Kokkonen v. Guardian Life Insurance Co. of America*. Finally, this Part will analyze case law the Court relied upon in setting forth the two-pronged ancillary jurisdiction inquiry.

A. Ancillary Jurisdiction

"[F]ederal courts are courts of limited jurisdiction."[137] A federal court may properly assert jurisdiction *only if* the court has subject matter jurisdiction.[138] This jurisdiction is limited to two potential sources: (1) the Constitution or (2) a

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133 *Schussheim*, 998 N.E.2d at 449.

134 *See, e.g.*, Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995) ("[G]overnment disclosures of arrest records, judicial proceedings, and information contained in police reports do not implicate the right to privacy." (citations omitted)).

135 *Supra* note 72 and accompanying text.

136 For a suggested ten-factor balancing test, see Kessler, *supra* note 13, at 436.

137 Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

138 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 92, § 3523.

federal statute.[139] Once a case invokes the court's jurisdiction,[140] however, a federal court has the authority to hear actions that are ancillary to the original case.[141] These "ancillary" proceedings, on their own, do not need to invoke a federal courts original jurisdiction.[142]

The ancillary jurisdiction doctrine developed with an eye towards protecting the interests of both parties and nonparties from infringement by any individual that has invoked a court's jurisdiction.[143] Accordingly, one of the chief focuses of ancillary jurisdiction is to allow a court to give complete relief between the parties and to avoid duplicative or piecemeal litigation.[144] In an attempt to codify ancillary jurisdiction, Congress enacted a statute that labeled ancillary jurisdiction as "supplemental jurisdiction."[145] The language of the statute grants a federal court the authority to entertain "all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy."[146]

Although Congress codified part of what was recognized as ancillary jurisdiction, a common law version of ancillary jurisdiction—or "ancillary enforcement jurisdiction"—still exists.[147] Quoting a leading treatise, the Fourth Circuit delineated between what was codified in the supplemental jurisdiction statute and what remained in the common law version.[148] The court stated,

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139 *Id.*

140 See 13E CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE §§ 3601–3610 (3d ed. 2008) [hereinafter 13E FEDERAL PRACTICE & PROCEDURE] (diversity of citizenship) and 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, RICHARD D. FREER, FEDERAL PRACTICE & PROCEDURE §§ 3561–3566 (3d ed. 2008) [hereinafter 13D FEDERAL PRACTICE & PROCEDURE] (federal question) for a comprehensive discussion of a federal court's subject matter jurisdiction.

141 Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934).

142 Aldinger v. Howard, 427 U.S. 1, 9–10 (1976); 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 92, § 3523.2.

143 *See* Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 579 (2005) ("Ancillary jurisdiction evolved primarily to protect defending parties, or others whose rights might be adversely affected if they could not air their claims in an ongoing federal action."); United States v. Mettetal, 714 Fed. App'x 230, 234 (4th Cir. 2017) (same).

144 George B. Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 27 (1964).

145 28 U.S.C. § 1367 (2012); *see* 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 92, § 3523.2.

146 § 1367(a). The excerpt quoted above pertains to federal question actions. When the action invoking federal jurisdiction is in diversity, Congress has carved out certain situations where a federal court may not exercise supplemental jurisdiction. *See* § 1367(b). These carve outs include "claims by *plaintiffs* against persons made parties under Rule 14 [(interpleader)], 19 [(necessary parties)], 20 [(permissive joinder)], or 24 [(intervention)] of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules . . . ." *Id.*

147 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 92, § 3523.2 (explaining that it is "clear" that this version of ancillary jurisdiction was not altered by the passage of the supplemental jurisdiction statute).

148 Robb Evans & Assocs., LLC v. Holibaugh, 609 F.3d 359, 363 (4th Cir. 2010) (quoting 13 FEDERAL

"[a]lthough § 1367 governs ancillary jurisdiction over *claims* asserted in a case . . . it does not affect common law ancillary jurisdiction 'over related *proceedings* that are technically separate from the initial case that invoked federal subject matter jurisdiction,' which remains governed by case law."[149] In other words, the supplemental jurisdiction statute applies to individual claims in a case, whereas common law ancillary jurisdiction applies to the controversy more generally.[150]

B. Traditional Exercises of Ancillary Jurisdiction

A traditional manner in which ancillary jurisdiction had been asserted, codified in the supplemental jurisdiction statute,[151] is over related claims that themselves do not invoke the subject matter jurisdiction of a federal court.[152] *Moore v. New York Cotton Exchange* is thought by scholars to be a substantial expansion of this doctrine.[153] Prior to the Court's decision in *Moore*, ancillary jurisdiction, according to the Supreme Court case law, could only be asserted if it related to "property or assets actually or constructively drawn into the courts possession or control by the principal suit."[154] Conversely, after *Moore*, for a court to have the authority over an ancillary claim it only need to arise out of the event that precipitated the original action.[155]

This exercise of ancillary jurisdiction, codified in the supplemental jurisdiction statute, is distinct from the common law ancillary jurisdiction, or ancillary enforcement jurisdiction, doctrine which has survived the passage of the supplemental jurisdiction statute.[156] The ancillary enforcement jurisdiction doctrine gives courts authority over "related *proceedings*,"[157] which courts have

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PRACTICE & PROCEDURE, *supra* note 92, § 3523.2); *see* Peacock v. Thomas, 516 U.S. 349, 354 n.5 (1996) (noting that "much of," but not all, the common law ancillary jurisdiction doctrine was codified in 28 U.S.C. § 1367).

149 *See Robb Evans & Assocs.*, 609 F.3d at 363 (quoting 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 92, § 3523.2 (emphasis in original)); *see also* Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 784 (3d Cir. 1995) (recognizing that the supplemental jurisdiction statute codified "some forms of 'ancillary jurisdiction'").

150 *See Robb Evans & Assocs.*, 609 F.3d at 363.

151 *See* 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 92, § 3523.2.

152 *See, e.g.*, Sandlin v. Corp. Interiors Inc., 972 F.2d 1212, 1215–16 (10th Cir. 1992) (holding that a district court may exercise ancillary jurisdiction "over certain cross-claims, counter claims and third-party claims that are related to the principle case"); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633 (3d Cir. 1961) (citing Moore v. N.Y. Cotton Exch., 270 U.S. 593, 607–09 (1926)).

153 *See, e.g.*, 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 92, § 3523 (noting that the *Moore* holding was a "major expansion" of the ancillary jurisdiction doctrine).

154 *See* 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 92, § 3523.2 n.10.

155 *Moore*, 270 U.S. at 610.

156 *See* 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 92, § 3523.2.

157 Robb Evans & Assocs., LLC v. Holibaugh, 609 F.3d 359, 363 (4th Cir. 2010) (quoting 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 92, § 3523.2).

exercised in a variety of circumstances. One scenario where a federal court retains enforcement jurisdiction, or has "inherent authority" to act, is to implement the court's orders.[158] This authority allows a federal court to cast a wide net over proceedings related to the original action, including over proceedings involving a third party.[159]

For example, in *Local Loan Co. v. Hunt*, a bankruptcy court order discharged the respondent "from all provable debts."[160] Subsequently, the petitioner, to whom the respondent owed money, filed an action in state court to recover the money that he loaned to the respondent.[161] In response, the respondent returned to the bankruptcy court that had discharged him from his debts and pled the court to enjoin the petitioner from pursuing the state court action.[162] The bankruptcy court sided with the respondent and the petitioner appealed, claiming that the bankruptcy court lacked jurisdiction to preclude him from asserting a claim in state court.[163] Ultimately, on appeal, the Supreme Court affirmed the bankruptcy court's ruling.[164] The Supreme Court reasoned that, because the bankruptcy court was acting "in aid of and to effectuate [an] adjudication" previously rendered, the bankruptcy court retained the authority to enjoin the defendant from pursuing the state court action.[165]

In addition to implementing a court order against a third party, courts may exercise ancillary enforcement jurisdiction to resolve disputes between attorneys and their clients.[166] A court has jurisdiction to entertain these disputes despite

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158 *See generally* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379–80 (1994) (holding that ancillary jurisdiction has typically been asserted to "effectuate" the courts judgments); Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991) (sanctioning a party for bad-faith conduct through the court's inherent authority to "vindicat[e] [its] judicial authority"); Universal Oil Prod. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946) (noting it is unquestionable that a federal court has the inherent power "to investigate whether a judgment was obtained by fraud" (citing Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 248–49 (1944))); Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934) (holding a federal court retains jurisdiction to enforce its orders to "preserve the fruits and advantages of a judgment or decree rendered").

159 *See, e.g.*, Peacock v. Thomas, 516 U.S. 349, 356–57 (1996). According to the Court, the proceedings involving third parties "includ[e] attachment, mandamus, garnishment, and the prejudicial avoidance of fraudulent conveyances." *Id.*

160 *Local Loan Co.*, 292 U.S. at 238.

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.* at 245.

165 *Id.* at 239–42.

166 *See, e.g.*, K.C. *ex rel*. Erica C. v. Torlakson, 762 F.3d 963, 968 (9th Cir. 2014) (explaining that there is "no debate" a federal court has ancillary jurisdiction, even after the litigation has ended, "over attorney fee disputes collateral to the underlying litigation" (quoting Fed. Sav. & Loan Ins. Corp. v. Ferrante, 364 F.3d 1037, 1041 (9th Cir. 2004))); Levitt v. Brooks, 669 F.3d 100, 102–03 (2d Cir. 2012) (noting that it is "well settled" a federal court may hear fee disputes (quoting Chesley v. Union Carbide Corp., 927 F.2d 60, 64 (2d Cir. 1991)));

the notion that these proceedings are entirely separate from the proceeding that initially invoked the court's jurisdiction.[167] Furthermore, these proceedings are usually governed by state contract law, not by federal law.[168] A prime example of a court entertaining an attorney-client dispute is the Second Circuit's decision in *Levitt v. Brooks*.[169]

In *Levitt*, an accused criminal defendant ran out of funds and ceased paying his attorney's bills during his trial.[170] The attorney therefore moved for the district court to require the criminal defendant to pay his fee.[171] On appeal, the appellate court held that the district court did not err in asserting ancillary jurisdiction.[172] The court reasoned that the district court had ancillary enforcement jurisdiction to effectively manage the case by "ensur[ing] defendant does not become indigent and that he has representation throughout the proceedings."[173]

Furthermore, the Ninth Circuit has held that a district court has jurisdiction over attorney's fees disputes even when the underlying case is moot.[174] In *Zucker v. Occidental Petroleum Co.* there was a dispute over the amount of attorney's fees the plaintiffs' attorney was to receive in an approved class action settlement.[175] The plaintiffs' attorneys argued that the district court did not have the jurisdiction to revise the award of attorney's fees granted in the settlement agreement because the case was moot.[176] The Ninth Circuit held that the district court had the authority to alter the award of attorney's fees because the "district court retains equitable jurisdiction even when the underlying case is moot" because its jurisdiction "outlasts the case or controversy."[177]

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see also Torres v. O'Quinn, 612 F.3d 237, 241 n.1 (4th Cir. 2010) ("[T]he continuing collection of appellants filing fees is ancillary to the court's original jurisdiction over Torres's appeals . . . .").

167 *E.g.*, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395–96 (1990) (citing White v. N.H. Dep't of Emp't Sec., 455 U.S. 445, 451 n.13 (1982)).

168 *E.g.*, Novinger v. E.I. Dupont Nemours & Co., 809 F.2d 212, 217 (3d Cir. 1987) ("Attorneys' fee arrangements . . . are matters primarily of state contract law.").

169 *Levitt*, 669 F.3d at 101–03.

170 *Id.* at 102–03.

171 *Id.* at 102. The court also noted there is a consensus that a court has ancillary jurisdiction to resolve fee disputes when it is relevant to the "main action." *Id.* at 103 (quoting Chesley v. Union Carbide Corp., 927 F.2d 60, 64 (2d Cir. 1991)).

172 *Id.* at 103.

173 *Id.*

174 Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1329 (9th Cir. 1999).

175 *Id.* at 1325.

176 *Id.* at 1325–26, 1329.

177 *Id.* at 1329.

These decisions exemplify a court's utilization of ancillary enforcement jurisdiction over collateral proceedings and the potential breadth of the doctrine.[178] In *Local Loan Co.*, a court was able to enjoin a third party from pursuing a separate action in a different court because it was effectuating an adjudication.[179] Further, the attorney–client disputes in *Levitt* and *Zucker* had little or nothing to do with the substance of the action that invoked the court's jurisdiction.[180] Nonetheless courts routinely exercise their discretion to resolve these disputes which are collateral to the original proceeding because "[i]t is well established that a federal court may consider collateral issues" and motions for attorney's fees are "supplemental to the original proceeding."[181]

C. The Kokkonen *Decision*

Although there are some relatively well-defined areas in which a court may exercise the ancillary enforcement jurisdiction that survived the passage of the supplemental jurisdiction statute, there is confusion surrounding how far it reaches.[182] This lack of clarity was acknowledged by the Supreme Court in *Kokkonen*.[183] The Court recognized that "[t]he doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise," and attempted to provide a narrower definition for when a court may exercise it.[184]

In *Kokkonen*, the parties reached an oral settlement agreement after their closing arguments at trial.[185] Because they had settled all claims and counterclaims, "the parties executed," and the district judge signed, "a Stipulation and Order of Dismissal with Prejudice" f or the claims and the

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[178] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 238 (1934); Levitt v. Brooks, 669 F.3d 100, 100–04 (2nd Cir. 2012); *Zucker*, 192 F.3d at 1325–29.

[179] *Local Loan Co.*, 292 U.S. at 239–42.

[180] *Levitt*, 669 F.3d at 100–04; *Zucker*, 192 F.3d at 1325–29.

[181] Cooter & Gell v. Hartmarx Corp. 496 U.S. 384, 395–96 (1990) (quoting Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 170 (1939)).

[182] *E.g.*, Morrow v. District of Columbia, 417 F.2d 728, 739 (D.C. Cir. 1969) ("At least so far as we are aware no court has ever tried to fix [the limits of ancillary jurisdiction] with any degree of precision."); 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, RICHARD D. FREER, FEDERAL PRACTICE & PROCEDURE §3523.2 (3rd ed. 2008) (noting that the concept of ancillary jurisdiction has "uncertain limits"); Fraser, *supra* note 145 (observing that the limits of ancillary jurisdiction are "not clear").

[183] Kokkonen v. Guardian Life Ins. Co. of Am. 511 U.S. 375, 379 (1994).

[184] Id. at 379–80. The court stated that prior to *Kokkonen*, it had only provided "limited description[s]" in dicta regarding the scope of ancillary jurisdictions that were "equally inaccurate." *Id.* at 378–79 (discussing Julian v. Central Trust Co., 193 U.S. 93, 113–14 (1904) and Fulton Nat'l Bank v. Hozier Intervener, 267 U.S. 276, 280 (1925)).

[185] *Id.* at 376–77

counterclaims.[186] The court's order, however, neither incorporated nor referenced the parties' settlement agreement in any capacity.[187]

Unsurprisingly, a dispute arose concerning the terms of the oral settlement agreement.[188] As a result, the respondent requested that the district court enforce the terms of the settlement agreement, and the petitioner objected, asserting that the district court did not have jurisdiction to enforce the agreement because it was not referenced in the Court's order.[189] The district court and the court of appeals, siding with the respondent, both held that a federal court has the "inherent" authority to enforce settlement agreements in a case or controversy over which they have original jurisdiction.[190] The Supreme Court granted certiorari to decide whether the district court had subject matter jurisdiction.[191]

As an initial matter, the Supreme Court explained that because the respondent was requesting the court to *enforce* the settlement agreement, and not to continue or renew the original suit, the enforcement of the settlement agreement "require[d] its own basis for jurisdiction."[192] The respondent, however, argued that the court had ancillary jurisdiction over the enforcement of the agreement via the dismissal of the original suit, and therefore, the agreement did not need to invoke the original jurisdiction of the court.[193] To buttress its argument, the respondent relied upon language in the Court's prior holding in *Julian v. Central Trust Co*.[194] The Court found that argument unpersuasive, explaining that the holding in *Julian* is not as "permissive" as its language suggests because in that case, the court "*expressly reserved* jurisdiction."[195]

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[186] *Id.* at 376–77.

[187] *Id.* at 377.

[188] Id.

[189] Id.

[190] *Id.*

[191] *Id.* A federal court has original subject matter jurisdiction when it is granted jurisdiction either by (1) statute or (2) the constitution. *Supra* note 140 and accompanying text.

[192] *Kokkonen*, 511 U.S. at 378.

[193] *Id.* at 378. A claim or proceeding need not invoke the courts original jurisdiction if it is ancillary or collateral to the original claim invoking the court's jurisdiction. *See* Aldinger v. Howard, 427 U.S. 1, 10 (1976); Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934); ; 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, RICHARD D. FREER, FEDERAL PRACTICE & PROCEDURE §3523.2 (3rd ed. 2008).

[194] *Kokkonen*, 511 U.S. at 378. The language the respondent relied upon was the court's assertion that "[a] bill filed to continue a former litigation in the same court . . . to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties . . . or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court . . . is an ancillary suit." *Id.* (quoting Julian v. Central Trust Co., 193 U.S. 93, 113–14 (1904)).

[195] *Kokkonen*, 511 U.S. at 379 (emphasis in original).

Accordingly, because the district court did not reserve jurisdiction or incorporate the settlement agreement into the order dismissing the claims, the court held that the district court did not have ancillary jurisdiction to enforce the settlement agreement.[196] In reaching its conclusion, the court enumerated what came to be the two-pronged inquiry to decide if a court has ancillary jurisdiction:[197]

> Generally speaking, we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees factually independent . . . and (2) to enable the court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees. . . .[198]

In addressing the first prong, the Court reasoned that the petitioner's claim for breach of the settlement agreement and the respondent's substantive claim which had invoked jurisdiction "have nothing to do with each other."[199] Because of this lack of interconnectedness, the Court held that ancillary jurisdiction could not be invoked under the first prong.[200] In analyzing second prong, the Supreme Court found the fact that the district court did not expressly reserve jurisdiction over settlement agreement to be dispositive.[201] The Court explained the because

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[196] *Id.* at 381. Because the district court could not assert ancillary jurisdiction and therefore the respondents claim was, in effect, simply a breach of contract claim, the court held that the settlement agreement had to be enforced through the state court system. *Id.* Up until this point in time there was a circuit split as to whether a court retained ancillary jurisdiction to enforce a settlement agreement that was not incorporated into the court's order dismissing the action. *Compare* Sawka v. Healtheast, Inc., 989 F.2d 138, 141 (3rd Cir. 1993) (holding a district court does not have jurisdiction to enforce an unincorporated settlement agreement), *and* Fairfax Countywide Citizens Ass'n v. Cty. Of Fairfax, 571 F.2d 1299, 1303 (4th Cir. 1978) (same), *and* Langley v. Jackson St. Univ., 14 F.3d 1070, 1074–75 (5th Cir. 1994) (same), Adduono v. World Hockey Ass'n 824 F.2d 617, 621–22 (8th Cir. 1987) (same), *and* McCall-Bey v. Franzen, 777 F.2d 1178, 1189–90 (7th Cir. 1985) (requiring explicit retention of jurisdiction), *with* Kokkonen v. Guardian Life Ins. Co. of Am., No. 92-11628, 1993 WL 164884, at *1 (9th Cir. May 18, 1993) (holding the district court had the 'inherent power" to enforce the settlement agreement despite it not being incorporated into the order dismissing the action), *and* Dankese v. Defense Logistics Agency 693 F.2d 13, 16 (1st Cir. 1982) (holding, without specifying if the agreement must be incorporated into the order, that the trial court retains authority to "enforce settlement agreements entered into by parties . . . before the court"), *and* Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1371 (6th Cir. 1976) (same), *and* Kent v. Baker, 815 F.2d 1395, 1398–1400 (11th Cir. 1987) (same).

[197] *Kokkonen*, 511 U.S. at 379–80.

[198] *Kokkonen*, 511 U.S. at 379–80 (citing United States v. Hudson, 11 U.S. 32, 34 (1812); 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, RICHARD D. FREER, FEDERAL PRACTICE & PROCEDURE §3523 (3rd ed. 2008)).

[199] *Kokkonen*, 511 U.S. at 380.

[200] *Id.*

[201] *Id.* at 380–81. The court additionally noted that the district court could have retained jurisdiction by incorporating the agreement into the order of dismissal or by including a provision specifically "retaining jurisdiction." *Id.* at 381

the district court did not include the settlement agreement in the order, it could hardly be claimed that enforcing the settlement agreement would be "require[d] in order [for a court] to perform their functions."[202] Because jurisdiction was not supported by either prong, the Court held that the district court improperly asserted jurisdiction.[203]

Although the two prongs of *Kokkonen* provide more clarity and structure to the ancillary jurisdiction analysis, in enumerating these prongs, the court used rather ambiguous language.[204] For example, in introducing the two prongs, the court stated, "Generally speaking, we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related purposes. . . ."[205] On its face, it seems clear that the Court was not intending to set out an entirely new standard for ancillary jurisdiction, nor was the court attempting to establish concrete outer limits of the doctrine.[206] The court left the outer limits of ancillary jurisdiction to be decided on a case-by-case basis. The Second Circuit, citing *Kokkonen*, recognized the remaining ambiguity in a 2006 decision: "[T]he boundaries of ancillary jurisdiction are not easily defined and the cases addressing it are hardly a model of clarity."[207]

D. The Two Prongs of Kokkonen

The *Kokkonen* decision added some clarity to the murky ancillary enforcement jurisdiction doctrine, but besides the enforcement of settlement agreements and the exact language of the prongs, the Supreme Court provided little guidance on how far each of the prongs extend.[208] Moreover, the Court did not create a test or set out factors to determine whether a claim or proceeding falls under either of the two prongs.[209] What the Court did do, however, was plant citations at the tail end of each factor in what seems to be an attempt to impart some guidance on the scope of the test.[210] This Section will, in turn, examine the case law the Court cited after each prong.

The first prong in the *Kokkonen* inquiry authorizes a federal court to assert ancillary jurisdiction to "permit disposition by a single court of claims that are,

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202 *Id.*
203 *Id.* at 381.
204 *Id.* at 379–80.
205 *Id.* at 379.
206 See id.
207 Garcia v. Teitler 443 F.3d 202, 208 (2d Cir. 2006).
208 *See Kokkonen*, 511 U.S. at 379–82.
209 See id.
210 *See id.* at 379–80.

in varying respects and degrees, factually interdependent. . . ."[211] This language is similar to the supplemental jurisdiction statute that was passed roughly four years prior to this decision.[212] That being said, the Court did not cite to the supplemental jurisdiction statute after the first prong,[213] and therefore was referencing the version of ancillary jurisdiction that survived the passage of the supplemental jurisdiction statute.[214] Thus, it is unclear whether that prong is intended to be as broad or broader than the statutory grant of supplemental jurisdiction. The court did, however, cite to *Baker v. Gold Seal Liquors, Inc.* and *Moore v. New York Cotton Exchange* in support of this prong.[215]

In *Baker v. Gold Seal Liquors, Inc*., the petitioner was a trustee of a railroad company that was in bankruptcy reorganization.[216] The trustee brought a claim against the respondent for a debt that it owed to the railroad company and the respondent filed a counterclaim.[217] The petitioners, at the district court, filed a motion for summary judgment and asked the court to set off their claim with the respondent's claim.[218] The district court granted summary judgment and the Seventh Circuit affirmed.[219]

The Supreme Court granted certiorari because of a conflict between the Seventh Circuit holding and separate Third Circuit and Supreme Court decisions in which claims were not permitted to offset against the petitioner.[220] Unrelated to the purview of this Comment, the Supreme Court reversed.[221] Pertinent, however, was the Court's discussion regarding jurisdiction over counterclaims.[222] The Court, citing Federal Rule of Civil Procedure 13 noted

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[211] *Id.*

[212] *See generally*, 28 U.S.C. 1367 (2012); 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, RICHARD D. FREER, FEDERAL PRACTICE & PROCEDURE § 3567 (3rd ed. 2008) ("[T]his form of jurisdiction permits a federal court to entertain a *claim* over which it would have no independent basis of subject matter jurisdiction.").

[213] *See Kokkonen*, 511 U.S. at 379–80.

[214] *E.g.*, 13 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Richard D. Freer, Federal Practice & Procedure § 3523.2 (3rd ed. 2008).

[215] *Kokkonen*, 511 U.S. at 380.

[216] Baker v. Gold Seal Liqours, Inc., 417 U.S. 467, 468 (1974). According to Black's Law Dictionary, "when bankruptcy is file[d] [bankruptcy reorganization] occurs. The company is analyzed by a trustee to liquidate assets and pay off claims." *What is Reorganization?*, BLACK'S LAW DICTIONARY, https://thelawdictionary.org/reorganization/ (last visited Jan. 27, 2020).

[217] *Baker*, 417 U.S. at 468.

[218] *Id.* This would have resulted in a net gain for the respondent of over 11,000 dollars. *Id.*

[219] *Id.*

[220] *See generally id.* The conflict between *Baker* and the Third Circuit and Supreme Court cases is not relevant to the discussion of ancillary jurisdiction.

[221] *Id.* The Supreme Court reversed because the district court and court of appeals' holdings resulted in a form of discrimination against creditors that §77 of the Bankruptcy Act precluded. *Id.* at 474.

[222] *See id.* at 469 n.1.

that "[i]f a counterclaim is compulsory, the federal court will have ancillary jurisdiction over it even though ordinarily it would be a matter for a state court. . . ."[223] The Court further noted that under Rule 13(b), a party may assert a counterclaim even if it doesn't arise from the same "transaction or occurrence that is the subject matter of the opposing parties claim."[224]

Furthermore, in *Moore*, the plaintiff's original claim properly invoked the court's jurisdiction under a federal statute.[225] The defendant asserted a counterclaim that did not itself invoke the court's jurisdiction.[226] The district court dismissed the original claim by the plaintiff and despite not having original jurisdiction over the defendant's counterclaim, entered an order granting the counterclaim.[227] The Supreme Court, in affirming the district and appellate courts, held that the district court had properly asserted jurisdiction over the counterclaim because it was so closely intertwined with the claim originally invoking the court's jurisdiction.[228]

The first *Kokkonen* prong, in the context of the court's holdings in *Baker* and *Moore*, which both involve counterclaims, appears to track the federal court's authority to entertain counterclaims pursuant to Rule 13.[229] The widest grant of jurisdiction in Rule 13 is for permissive counterclaims under subpart (b) of the rule.[230] A court's authority to hear permissive counterclaims under Rule 13(b) stems from the statutory grant of supplemental jurisdiction which allows a

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223 *Id.*; *see* FED. R. CIV. P. 13(a).

224 *Baker*, 417 U.S. at 469 n.1. However, if the counterclaim does not arise from the same transaction or occurrence, it is therefore not compulsory, and either has to invoke the court's jurisdiction itself, or qualify under supplemental jurisdiction to be heard by a district court. 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1422 (3rd ed. 2010) (explaining that permissive counterclaim must independently invoke the court's jurisdiction or fall under the supplemental jurisdiction statute or, in some circuits, qualify as a setoff). The test for supplemental jurisdiction is fittingly boarder than the transaction or occurrence inquiry for Rule 13(a). *See id.* Supplemental jurisdiction permits a federal court to resolve claims that are part of the same case or controversy as the claim originally invoking the court's jurisdiction. *See id.* ("[I]f a counterclaim is permissive it . . . nonetheless may qualify for supplemental jurisdiction if . . . it may be deemed part of the same controversy."); Michelle S. Simon, *Defining the Limits of Supplemental Jurisdiction Under 28 U.S.C. § 1367: A Hearty Welcome to Permissive Counterclaims*, 9 LEWIS & CLARK L. REV. 295, 306 (2005) (noting that the supplemental jurisdiction statute "extended supplemental jurisdiction to the constitutional limitation of 'case or controversy' under Article III").

225 Moore v. N.Y. Cotton Exchange, 270 U.S. 593, 604 (1926).

226 *Id.* at 607–09.

227 *Id.* at 603.

228 *Id.* at 610.

229 *See Baker*, 417 U.S. at 469, n.1; *Moore*, 270 U.S. at 610 (*Moore* was decided prior to the passage of the Federal Rules of Civil Procedure); FED. R. CIV. P. 13.

230 FED. R. CIV. P. 13(b). Compulsory counterclaims under Rule 13(a) require a party to assert the counterclaim if it arises from the same transaction or occurrence as the event invoking the court's jurisdiction. *Supra* note 228.

federal court to hear claims that are part of the same case or controversy as the primary claim.[231] Nevertheless, the court did not mention Rule 13 at any point in the opinion.[232] Therefore, in citing to *Baker* and *Moore*, it is unclear whether the court intended the outer limits of the first prong to extend as far as, or farther than, the outer limits of permissive counterclaims under Rule 13(b).[233]

The language of the first prong could be construed to support a court's exercise of ancillary enforcement jurisdiction that is broader than the grant of supplemental jurisdiction for a few reasons. First, the fact that the Court did not employ any of the language found in the supplemental jurisdiction statute or Rule 13,[234] which were both effective at the time of the decision,[235] indicates that the court did not intend to confine the first prong to the jurisdictional limits of either.[236] Second, the language authorizing a court to resolve claims that are "in varying respects and degrees, factually interdependent," is notably permissive.[237] Lastly, there is no temporal component, unlike a Rule 13 counterclaim which must be asserted during the original case, to the first prong.[238] Hence, a claim related to the original case or controversy conceivably might be asserted several years down the line.[239]

The second *Kokkonen* prong permits a federal court to assert ancillary enforcement jurisdiction "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees. . . ."[240] In *Kokkonen*, the fact that the respondent was asking the Court to enforce a settlement agreement that was *not* incorporated into the Court's order was the driving force behind the Court's holding that it did not have jurisdiction to enforce the agreement.[241] In support of the Supreme Court's assertion that a federal court retains ancillary jurisdiction to enforce its orders,

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231 *Supra* note 228 and accompanying text.

232 *See* Kokkonen v. Guardian Life Ins. Co. of Am. 511 U.S. 375 (1994).

233 *See* Fed. R. Civ. P. 13(b).

234 *See Kokkonen*, 511 U.S. at 379–80.

235 Supplemental jurisdiction statute was passed in 1990. 28 U.S.C. §1367 (2012). And Rule 13 was adopted in 1937. FED R. CIV. P. 13.

236 *See Kokkonen*, 511 U.S. at 379–80.

237 See *id.*

238 See id.

239 *See, e.g.*, Cooter & Gell v. Hartmarx Corp. 496 U.S. 384, 395–96 (1990) ("[E]ven 'years after the entry of a judgment on the merits' a federal court could consider an award of counsel fees." (quoting White v. N.H. Dep't. of Emp't Security, 455 U.S. 445, 451 n.13 (1982))).

240 *Kokkonen*, 511 U.S. at 380 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *United States v. Hudson*, 11 U.S. 32, 34 (1812)).

241 *Id.* at 376–77. The court dismissed the respondent's assertion that this fell under the first prong rather swiftly and effortlessly. *Id.* at 380–81.

the Court cited to its decisions, discussed in greater detail below, in *United States v. Hudson* and *Chambers v. NASCO*.[242]

The *Hudson* decision was rendered not long after the Constitution was passed and was a catalyst for the idea of "inherent power" in federal courts.[243] The question presented to the Court was whether a federal court could hear state-law criminal actions.[244] In resolving this question, the Court acknowledged that because Congress has the authority to create inferior courts,[245] Congress could necessarily limit them.[246] That being said, the Court acknowledged that there are "[c]ertain implied powers [that] must necessarily result to our Courts of justice from the nature of their institution."[247] The Court further went on to say that there "are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . . ."[248] In other words, the Supreme Court recognized that for the judicial branch to have any backbone, some implied powers must inevitably flow directly from their grant of authority.[249] Despite being drafted in 1812, these statements were immensely important to the development of a federal court's authority to exercise "inherent power" to carry out its judgments.

The issue of a court's "inherent power" also arose in *Chambers v. NASCO*.[250] In *Chambers*, throughout the course of "a simple action for specific performance of a contract," the petitioner and his counsel "emasculated and frustrated the purposes of these rules and the powers of the District Court . . . to prevent [the respondent's] access to the remedy of specific performance."[251] Accordingly, after repeated egregious actions and misconduct by the petitioner and repeated threats of sanctions,[252] the respondent moved for sanctions to be imposed.[253]

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242 *Kokkonen*, 511 U.S. at 380.

243 The decision was rendered in 1812. *Hudson*, 11 U.S. 32 (1812).

244 *Id.* at 32. The court ultimately held that the federal court did not have jurisdiction in this case. *Id.* at 34.

245 *See* U.S. CONST. art. III, §1.

246 *Hudson*, 11 U.S. at 33.

247 *Id.* at 34.

248 *Id.*

249 *See id.*

250 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 (1991)..

251 *Id.* at 35–36 (citing NASCO Inc., v. Calcasieu Television & Radio, Inc., 623 F. Supp. 1372, 1383 (W.D. La. 1985)).

252 *Id.* at 36–41. The actions of the petitioner and their counsel can be summed up as: "(1) attempt[ing] to deprive this Court of jurisdiction by acts of fraud, nearly all of which were performed outside the confines of this Court, (2) fil[ing] false and frivolous pleadings, and (3) attempt[ing], by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance." *Id.* at 41 (quoting NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 138 (W.D. La. 1989), *aff'd and remanded*, 894 F.2d 696 (5th Cir. 1990), *aff'd sub nom.* Chambers v. NASCO, Inc., 501 U.S. 32 (1991)).

253 *Chambers*, 501 U.S. at 40.

Although the district court recognized neither statutes nor the Federal Rules of Civil Procedure provided it with authority to impose sanctions in this situation, it nevertheless imposed sanctions, by invoking its "inherent power."[254] By relying on its inherent power, the district court imposed sanctions "in the form of attorney's fees and expenses totaling" almost a million dollars.[255]

On appeal, the petitioner argued that the district court did not have the inherent authority to impose sanctions for its conduct, but rather the court needed to look at state law in determining sanctions because this was a diversity case.[256] The court of appeals rejected the petitioner's argument and stressed that a federal court's inherent authority is independent but limited, to be used only when necessary.[257] The Supreme Court granted certiorari "because of the importance" of the issues in the case.[258]

The Supreme Court affirmed and provided a lengthy discussion of the breadth of courts' inherent power.[259] As an initial matter, in response to the petitioner's argument that the court could only impose sanctions if given the authority by the Federal Rules or a statute, the Court explained that, "[t]hese other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than the other means of imposing sanctions."[260] These "implied powers" derive from the court's need to have the authority to fully carry out its judgments and to control the parties and proceedings before the court.[261]

This inherent authority, according to the Supreme Court, in the context of attorney's fees, acts as an exception to the traditional "American Rule" of not shifting attorney's fees.[262] The exception that applied in this case was the court's inherent power to "assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[263] Finding that this exception

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254 *Id.* The statutory authorities that the Court noted did not grant it authority were 28 U.S.C. §1927 (2012) and the Federal Rule was Rule 11. *Id.* at 40–42.

255 *Id.* at 40.

256 *Id.* at 42.

257 *Id.*

258 *Id.*

259 *See generally id.* at 43–55.

260 *Id.* at 46. The court explained that to effectively carry out its functions, it needed the ability to act, in some circumstances, outside of the express grants of the Federal Rules and statutes. In support of this, the court stated that inherent power "extends to a full range of litigation abuses." *Id.*

261 *See id.*

262 The "American Rule" is that the losing party in a case does not have to pay the prevailing party's attorney's fees. Alyeska Pipeline and Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

263 *Chambers*, 501 U.S. at 45–46. (quoting *Alyeska Pipeline*, 421 U.S. at 258–59).

was met, the court held that the use of sanctions "in this instance transcends a court's equitable power" and allows the court to "vindicat[e] judicial authority."[264]

In addition to examining the court's inherent power in the attorney's fees context, the Court in *Chambers* reviewed other areas and circumstances where courts have traditionally asserted their inherent authority.[265] For instance, the Court expressed that "the power to punish for contempts is inherent in all courts" regardless of whether the contempt occurred inside or outside the walls of the court.[266] The Court also noted that a federal court, through the exercise of its inherent authority, may vacate a judgment it rendered if "fraud has been perpetrated upon the court."[267] In enumerating these circumstances, the Court repeatedly stressed that a federal court's inherent authority should not be employed liberally and should be exercised with restraint.[268]

The Supreme Court's decisions in *Hudson* and *Chambers* provide insight on how expansively to construe the facially broad language of the second *Kokkonen* prong.[269] Although, the Court articulated in both *Hudson* and *Chambers* that inherent powers should be asserted only in limited circumstances, once a court's ability to carry out its functions is impeded, the circumstances under which a court may assert its inherent powers do not appear all that limited.[270] An impediment to the court's ability to function properly does not have to be something that occurred inside the courtroom or relevant to the substantive claims of the suit.[271] Furthermore, what threatens a courts ability to function may change over time and what is encompassed within the scope of the court's authority to enforce its orders is not well-defined. A court may invalidate an order if it was perpetrated by fraud,[272] but may a court lessen the penalty that an order imposed after a showing that the order resulted in more punishment than the court had intended to implement?

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264 *Chambers*, 501 U.S. at 46 (quoting Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978)).

265 *See Chambers*, 501 U.S. at 43–44.

266 *Id.* at 44 (citing *Ex Parte* Robinson, 86 U.S. 505, 510 (1874)).

267 *Chambers*, 501 U.S. at 44. In addition to circumstances noted in the text above, the court noted several other circumstances where a federal court may assert its inherent power. These circumstances include, *inter alia*: forbidding a disruptive criminal defendant from reentering the court room, "dismiss[ing] a suit for failure to prosecute," and "the power to control admission to its bar and to discipline attorneys who appear before it." *Id.* at 43–44.

268 *Id.* at 44–46.

269 *See* Kokkonen v. Guardian Life Ins. Co. of Am. 511 U.S. 375, 380 (1994).

270 *See Chambers*, 501 U.S. at 44–45; *Hudson* 11 U.S. at 34.

271 *See, e.g.*, *Chambers*, 501 U.S. at 44.

272 Universal Oil Prod. Co. v. Root Refining Co., 328 U.S. 575, 580 (1946).

IV. EQUITABLE EXPUNGEMENT BEFORE AND AFTER *KOKKONEN*

Before *Kokkonen*, it was well-settled amongst the circuit courts of appeal that a federal court retained ancillary enforcement jurisdiction and had the inherent power to expunge records based solely on equitable considerations.[273] A court, sitting in equity, would only grant expungement petitions in rare or extreme circumstances, balancing public policy considerations with the burden to the person with the record.[274] However, after *Kokkonen*, the federal circuits began holding that expunging criminal records *solely* for equitable considerations did not fall under either of the two prongs enumerated in *Kokkonen*.[275]

This Part will first discuss specific cases, prior to *Kokkonen*, that held federal courts had ancillary jurisdiction to expunge criminal records solely based on equitable considerations and provide examples of the balancing tests these courts used. Second, this Part will discuss the case law after *Kokkonen* that interpreted the two prongs to preclude the exercise of ancillary jurisdiction. Last, this Part will examine the decisions, mostly in the district courts in the Fourth Circuit, that have interpreted the second prong of *Kokkonen* to allow a court to exercise ancillary jurisdiction.

A. Equitable Expungement Prior to Kokkonen

This Section will examine pre-*Kokkonen* cases from the Second,[276] Seventh,[277] and Eighth Circuits[278] holding that a federal court has the inherent authority to expunge criminal records solely under equitable considerations. These same Circuits, however, subsequently found that *Kokkonen* overruled these prior decisions.[279] After reviewing the pre-*Kokkonen* cases, this Section

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[273] *See, e.g.*, United States v. Friesen, 853 F.2d 816, 817–18 (10th Cir. 1988) (holding the district court has the authority to expunge records in narrow circumstances); Allen v. Webster, 742 F.2d 153, 154–55 (4th Cir. 1984) (holding the district court, in equity, did not abuse its discretion in denying a expungement petition based on equitable considerations); United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977) (holding that absent a statute, expungement of criminal records "lies within the equitable discretion of the court").

[274] *See, e.g.*, *Friesen*, 853 F.2d at 817; *Allen*, 742 F.2d at 155; *Schnitzer*, 567 F.2d at 539.

[275] *See, e.g.*, United States v. Wahi, 850 F.3d. 296, 302–03 (7th Cir. 2017); United States v. Coloian, 480 F.3d 47, 50–52 (1st Cir. 2007); United States v. Sumner, 226 F.3d 1005, 1014 (9th Cir. 2000). The 4th and D.C. Circuits have not spoken on this issue.

[276] *Schnitzer*, 567 F.2d at 539.

[277] United States v. Flowers, 389 F.3d 737, 739 (7th Cir. 2004). Although *Flowers* was decided in 2004, after *Kokkonen*, the court in *Flowers* did not consider *Kokkonen* in its decision and relied on prior precedent within the circuit. *See id.* at 739. Hence, this case is being treated as if it were decided prior to *Kokkonen*.

[278] United States v. Bagley, 899 F.2d 707, 708 (8th Cir. 1990).

[279] *See infra* notes 332–356 and accompanying text; Meyer 439 F.3d at 861–62.

will then discuss a narrow strand of district court case law where the government supports the expungement motion and jurisdiction to expunge records has been maintained.

In the Second Circuit, before *Kokkonen*, it was well-settled that a federal court had the inherent authority to expunge criminal records based solely on equitable considerations.[280] In *United States v. Schnitzer*, the appellant was accused of conspiring with another party to defraud the Federal Insurance Administration and turned himself into the FBI.[281] The FBI subsequently took the appellant's photographs and thumbprints.[282] The other party pled guilty, and the criminal charges were dropped against the appellant and instead, a civil action, that would later be dismissed, was filed by the government against the appellant.[283] As part of the original criminal action against the appellant, he filed a petition for his records to be expunged as well as the photographs and fingerprints that were taken to be returned.[284] After balancing the government's and law enforcement's interests against the appellants, the district court denied the petition.[285]

On appeal, the appellant asserted that the district court lacked ancillary jurisdiction and because the criminal charges were dropped and civil suit was dismissed, his petition for expungement should have been sent to the Department of Justice and the FBI.[286] In response, the Second Circuit explained that, irrespective of statutory authority, the criminal proceedings were rightfully within the jurisdiction of the district court.[287] The Second Circuit further noted that "[a] court, sitting in a criminal prosecution, has ancillary jurisdiction to issue protective orders regarding dissemination of arrest records,"[288] and made clear that a district court judge would have ancillary jurisdiction over any civil suit that was "related to the criminal action."[289] Ultimately the Second Circuit affirmed the district court's decision and explained that expungement is only to be granted after the court has considered the "delicate balancing of the equities

280 *E.g.*, *Schintzer*, 567 F.2d at 539.
281 *Schnitzer*, 567 F.2d at 537.
282 *Id.*
283 *Id.* at 537–38.
284 *Id.* at 538.
285 *Id.*
286 Id.
287 *Id.*
288 *Id.*
289 *Id.*

between the right of privacy of the individual and the right of law enforcement officials to perform their necessary duties."[290]

Likewise, in another pre-*Kokkonen* case, the Seventh Circuit reversed a district court's grant of an expungement petition by reaching a similar conclusion to the court in *Schnitzer*. In *United States v. Flowers*, the appellee petitioned the district court to have her criminal records expunged to avoid any future employment barriers.[291] The criminal record the appellee was attempting to have expunged was a guilty plea to "interfering with housing rights on the account of race" when she was eighteen.[292] The district court found that the appellee had rehabilitated herself and that her interest in having her records expunged outweighed the public interest in preserving her records.[293] Thus, the district court ordered the expunction of the record of her plea.[294]

On appeal, the Seventh Circuit emphasized that the court had jurisdiction to hear the expungement petition[295] but nonetheless held that the district court abused its discretion in granting expungement to the appellee.[296] The court reasoned that the "unwarranted adverse consequences"[297] required to grant an expungement petition were not present because the appellee did not supply the court with sufficient evidence to outweigh the public interest.[298] The exercise of jurisdiction in this case is distinct from the exercise in *Schnitzer*.[299] Here, the expungement petition was filed nearly eight years after the conclusion of the original case and primarily concerned actions that occurred after the original case concluded and actions that might occur in the future.[300] This distinction is significant because the court in *Flowers* retained jurisdiction over an expungement petition where its relation to the original action was tenuous both temporally and in substance.[301]

Further, in *United States v. Bagley*, another pre-*Kokkonen* case, the Eighth Circuit recognized the district court's inherent jurisdiction to consider

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290 *Id.* at 539 (quoting United States v. Rosen 343 F. Supp 804, 806 (S.D.N.Y. 1972)).

291 United States v. Flowers, 389 F.3d 737, 738 (7th Cir. 2004).

292 *Id.*

293 *Id.*

294 *Id.*

295 *Id.* at 739.

296 *Id.* at 740.

297 *Id.* at 739.

298 *Id.* at 740.

299 In *Schnitzer*, the expungement petition was filed during the original criminal action. United States v. Schnitzer, 567 F.2d 536, 536 (2d Cir. 1977).

300 *See Flowers*, 389 F.3d at 740.

301 *Id.*

expungement petitions[302] and despite the dubious circumstances surrounding the petitioner's arrest, nonetheless denied the petition.[303] The evidence that resulted in the petitioner's arrest and indictment was discovered in an illegal search.[304] Because the evidence was discovered in an illegal search, the district court granted the petitioner's motion to suppress and ultimately, dismissed the indictment against the petitioner.[305] With that being said, the district court denied the petitioner's motion to expunge.[306] On appeal, the Eighth Circuit reiterated that the court had jurisdiction to entertain this motion and affirmed the district court's decision because the "adverse consequences" the petitioner showed were only "minimal."[307]

In addition to these three Circuit decisions, some district courts, prior to *Kokkonen*, wrestled with equitable expungement in an interesting context. This context developed regarding the expungement of records for individuals who were arrested, eventually found innocent, and the government supported the petitioner's motion.[308] In these exceptional circumstances, where the government concedes that harm to the defendant significantly outweighs the benefit to the public, district courts have ordered the expungement of the defendant's records.[309] However, there has been no appellate decision to date that has adopted these district court opinions.

B. Equitable Expungement After Kokkonen

After *Kokkonen* was decided, the prior agreement amongst the circuit courts, that they had the ancillary enforcement jurisdiction to equitably expunge criminal records, was called into question. The Supreme Court's decision in *Kokkonen* was intended to clarify the reach of the ancillary jurisdiction doctrine.[310] However, the test the Court adopted in *Kokkonen* was vague, and it is unclear if the Court intended the test to be the sole analysis a court should undertake in determining whether it may exercise ancillary jurisdiction.[311]

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302 United States v. Bagley, 899 F.2d 707, 708 (8th Cir. 1990). *See* United States v. Meyer 439 F.3d 855, 860 (8th Cir. 2006) (citing *Bagley*, 899 F.2d at 707–08) ("We have recognized, in cases predating *Kokkonen*, an inherent but narrow power to expunge federal criminal records in extreme cases.").

303 *Bagley*, 899 F.2d at 708.

304 *Id.* at 707.

305 *Id.*

306 *Id.* at 708.

307 *Id.*

308 *See* United States v. Van Wagner, 746 F. Supp. 619, 621–23 (E.D. Va. 1990); United States v. Cook, 480 F. Supp. 262, 263 (S.D. Tex. 1979); United States v. Bohr, 406 F. Supp. 1218, 1219–20 (E.D. Wis. 1976).

309 *See Van Wagner*, 746 F. Supp. at 621–23; *Cook*, 480 F. Supp. at 263–64; *Bohr*, 406 F. Supp. at 1220.

310 Kokkonen v. Guardian Life Ins. Co. of Am. 511 U.S. 375, 379–80 (1994)..

311 *Id.* at 379-80.

Regarding expungement under equitable considerations, the *Kokkonen* decision resulted in circuit courts reconsidering whether their current position of retaining jurisdiction was still valid.[312] All circuits that have directly addressed[313] the issue have held that in light of *Kokkonen*, they no longer have the jurisdiction to entertain expungement petitions based solely on equitable grounds.[314] Conversely, there are several district court opinions, mainly in the Fourth,[315] Tenth[316] and D.C. Circuits[317] that buck this trend of determining that courts do not have jurisdiction to entertain these petitions.

This Section will first analyze decisions from the Ninth,[318] Second[319] and Seventh[320] Circuits, that hold that *Kokkonen* strips courts of the authority to expunge criminal records under equitable considerations. Then, this Section will review the district court jurisprudence that has come out on the other side of this issue.

The Ninth Circuit was the first court of appeals to hold that *Kokkonen* precluded a district court from asserting ancillary jurisdiction to expunge criminal records solely under equitable considerations.[321] In *United States v. Sumner*, the issue of whether a district court retained jurisdiction for expungement was a case of first impression in the Ninth Circuit.[322] The court applied *Kokkonen* and concluded that the second prong "permits a district court to order the expungement of criminal records in cases over which it once exercised jurisdiction."[323] However, the court held that if the sole basis for the expungement petition is equity, then a court's assertion of jurisdiction over the

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312 *See supra* note 280 and accompanying text.

313 The 5th, 10th, and D.C. Circuits have not addressed this issue.

314 *See* United States v. Coloian, 480 F.3d 47, 51 n.6 (1st Cir. 2007); Doe v. United States, 833 F.3d 192, 198 (2nd Cir. 2016); United States v. Rowlands 451 F.3d. 173, 177–78 (3rd. Cir. 2006); United States v. Mettetal, 714 Fed.Appx. 230, 234–35 (4th Cir. 2017); United States. v. Field, 756 F.3d. 911, 916 (6th Cir. 2014); United States v. Wahi, 850 F.3d. 296, 302–03 (7th Cir. 2017); United States v. Meyer 439 F.3d 855, 861–62 (8th Cir. 2006); United States v. Sumner, 226 F.3d 1005, 1014 (9th Cir. 2000); United States v. Adalikwu, No. 18-12591, 2018 WL 6528446, at 2* (11th Cir. Dec. 12, 2018).

315 *See, e.g.*, United States v. McKnight, 33 F. Supp. 3d 577, 582 (D. Md. 2014); United States v Allen, 57 F. Supp. 3d 533, 541 (E.D.N.C. 2014).

316 *See, e.g.*, United States v. Williams, 582 F. Supp. 2d 1345, 1346-47 (D. Utah 2008); United States v. Brennan, No. 06–cr–00182–RBJ–1, 2015 WL 2208532, at 4* (D. Colo. Apr. 27, 2015).

317 *See, e.g.*, United States v. Douglas, 282 F. Supp. 3d 275, 277 (D.D.C. 2017).

318 *See Sumner*, 226 F.3d at 1014.

319 *See Doe*, 833 F.3d at 198.

320 *See* United States v. Wahi, 850 F.3d. 296, 302–03 (7th Cir. 2017).

321 *See Sumner*, 226 F.3d at 1014.

322 *Id.*

323 *Id.*

petition would not further either of the "goals" of the *Kokkonen* test.[324] The court reasoned that such a petition would not advance either of the "goals" because it neither facilitated the resolution of interrelated claims nor helped the court "vindicate its authority."[325] The court further clarified that for a district court to have jurisdiction over such a claim, it must obtain jurisdiction via a constitutional violation or a federal statute.[326]

The Second Circuit in *Doe v. United States* followed the Ninth Circuit's lead. When the Second Circuit decided *Doe*, several district courts in the Second Circuit had been presented with, and refused to determine, the jurisdictional issue that equitable expungement presents.[327] These courts acknowledged that under pre-*Kokkonen* Second Circuit jurisprudence,[328] their jurisdiction over equitable expungement petitions was unquestionable; however, in light of *Kokkonen*, they were uncertain if those earlier decisions were still good law.[329] In refusing to determine the jurisdictional issue, these courts uniformly denied the expungement petitions they were presented with.[330] The courts reasoned that even if pre-*Kokkonen* precedent was still good law, the petitioners would not satisfy the standards for equitable expungement.[331]

However, the district court in *Doe v. United States* reached a different conclusion.[332] The district court held that it did have jurisdiction, under the second *Kokkonen* prong,[333] to entertain the application to expunge the applicant's fraud conviction.[334] The district court's rationale was that "few things could be more essential to 'the conduct of federal-court business' than the appropriateness of expunging the public records that business creates."[335] The

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[324] *Id.*

[325] *Id.*

[326] *Id.*

[327] *See* United States v. Burzynski, No. 10-MJ-1134, 2016 WL 1604491, at 2* (W.D.N.Y. Apr. 22, 2016) (noting that the jurisdictional question was "unsettled" and denying the petition because "even if jurisdiction did exist" it would not constitute an extreme circumstance); United States v. DeBerry, No. 05–MJ–62, 2013 WL 6816626, at 2* (W.D.N.Y. Dec. 20, 2013) (same); United States v. Barlow, No. 01–CR–114–A, 2012 WL 125150, at 2* (W.D.N.Y Jan. 17, 2012) (same).

[328] *See supra* notes 292–294 and accompanying text.

[329] *See Burzynski*, 2016 WL 1604491, at *2; *DeBerry*, 2013 WL 6816626, at *2; *Barlow*, 2012 WL 125150, at *2.

[330] *See Burzynski*, 2016 WL 1604491, at *3; *DeBerry*, 2013 WL 6816626, at *3; *Barlow*, 2012 WL 125150, at *3.

[331] *See Burzynski*, 2016 WL 1604491, at *2; *DeBerry*, 2013 WL 6816626, at *2; *Barlow*, 2012 WL 125150, at *2.

[332] Doe v. United States, 110 F. Supp. 3d 448, n.16 (E.D.N.Y 2015).

[333] *See supra* note 244 and accompanying text.

[334] *Doe*, 110 F. Supp. 3d at 454 n.16.

[335] *Id.*

government appealed, resulting in the Second Circuit's first encounter with expungement after *Kokkonen*.[336]

On appeal, the Second Circuit reversed.[337] The court rejected the assertion by the applicant and the district court that expunging "vindicate[d] its sentencing decree" and therefore satisfied *Kokkonen's* second prong.[338] The Second Circuit maintained the time period between the applicant's motion and the serving of her sentence[339] was too great and therefore expunging the applicants record was "unnecessary to . . . effectuate its decrees."[340] The applicant alternatively claimed that her petition for expungement was "factually interdependent" with her criminal proceedings and therefore qualified under the first prong.[341] The appellate court was unpersuaded and rejected the applicant's argument because "analytically" the original criminal proceedings and the motion for expungement were too far apart in time.[342] Although the Second Circuit denied the applicant's motion, the court suggested that legislative action could prevent "unfortunate" outcomes such as this one.[343] The court hinted that Congress "might consider" passing another expungement statute.[344]

Similar to the Second Circuit, the Seventh Circuit had already developed a strong body of case law supporting jurisdiction over the expunging of criminal records solely under equitable considerations before *Kokkonen* was decided.[345] This topic was revisited in *United States v. Wahi*, where the Seventh Circuit overruled prior precedent and held that district courts could no longer exercise its ancillary jurisdiction in the equitable expungement context.[346]

The Seventh Circuit held that its prior precedent could not be "reconciled" with the *Kokkonen* decision because neither prong could be satisfied.[347] In addressing the interrelatedness prong, the court held that this type of expungement petition will always rely on events and circumstances that arise

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336 Doe v. United States, 833 F.3d 192, 194–95 (2d Cir. 2016).

337 *Id.* at 200.

338 *Id.* at 198.

339 The applicants sentence ended seven years prior. *Id.* at 194.

340 *Id.* at 198 (quoting Kokkonen v. Guardian Life Ins. Co. of Am. 511 U.S. 375, 380 (1994)).

341 *Id.* (quoting *Kokkonen*, 511 U.S. at 379 (1994)).

342 *Id.*

343 *Id.* at 199.

344 *Id.*

345 *See, e.g.*, United States v. Flowers, 389 F.3d 737, 739 (7th Cir. 2004); United States v. Janik, 10 F.3d 470 (7th Cir. 1993).

346 United States v. Wahi, 850 F.3d. 296, 298 (7th Cir. 2017).

347 *Id*.

after the case has ended and that this inquiry was "frankly, a policy choice."[348] Moreover, concerning whether equitable expungement aids a court in "manag[ing] its proceedings" or "effectuat[ing] its decrees," the court held that the power to provide that remedy was neither necessary nor corollary for the court to able to carry out its business.[349] This remedy was not necessary for the conduct of court business because "the criminal proceedings [were] over."[350] In addition to finding that equitable expungement did not satisfy the *Kokkonen* test, the court disconcertingly explained that the Seventh Circuit's "status as an outlier" amongst the circuit courts was a "compelling reason" to overturn prior precedent.[351]

Notwithstanding the fact every federal appellate court that has directly addressed the issue of expungement since *Kokkonen* has held that courts lack ancillary jurisdiction, there have been several district court decisions, in addition to the district court in *Doe v. United States*,[352] that have found to the contrary.[353] One of the leading decisions favoring a court's jurisdiction to hear expungement petitions arose in the context where the charges against the defendant had been dismissed.[354] In that case, the court ordered the expunction of the defendant's five-year-old arrest record for shoplifting.[355] Although the court found that the motion was not interrelated enough to warrant jurisdiction under the first *Kokkonen* factor, the court analogized an expungement petition to a "modification or revocation of supervised release" and found that it satisfied the second factor because it helped the court "effectuate its decrees."[356]

Intriguingly, multiple district courts within the Tenth Circuit, citing post-*Kokkonen* Tenth Circuit authority, have asserted jurisdiction over equitable expungement motions and rejected the argument that *Kokkonen* precludes jurisdiction.[357] The decision these courts cite to is *Camfield v. City of Oklahoma*

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348 *Id.* at 302.

349 *Id.* (quoting Kokkonen v. Guardian Life Ins. Co. of Am. 511 U.S. 375, 380 (1994)).

350 *Id.*

351 *Id.* at 303.

352 Doe v. United States, 110 F. Supp. 3d 448, n.16 (E.D.N.Y 2015).

353 *See* United States v. McKnight, 33 F. Supp. 3d 577 (D. Md. 2014); United States v Allen, 57 F. Supp. 3d 533 (E.D.N.C. 2014).; United States v. Williams, 582 F. Supp. 2d 1345 (D. Utah 2008) United States v. Douglas, 282 F. Supp. 3d 275 (D.D.C. 2017).

354 *See McKnight*, 33 F. Supp. 3d at 582.

355 *Id.* at 587.

356 *Id.* at 582.

357 *See, e.g.*, United States v. Brennan, No. 06–cr–00182–RBJ–1, 2015 WL 2208532, at 5* (D. Colo. Apr. 27, 2015); United States v. Williams, No. 08–CR–0021–CVE, 2011 WL 489771, at *3 (N.D. Okla. Feb. 7, 2011). Both decisions cite to Camfield v. City of Okla. City, 248 F.3d 1214, 1234 (10th Cir. 2001), which was decided seven years after *Kokkonen*.

City,[358] decided seven years after *Kokkonen*, where the Tenth Circuit stressed that "[i]t is well settled in this circuit that courts have inherent equitable authority to order the expungement of an arrest record or a conviction in rare or extreme instances."[359] In further support of their position, the district courts maintain that because *Kokkonen* does not address ancillary jurisdiction in criminal actions, they are bound by prior precedent that asserts jurisdiction over these motions.[360] However, *Camfield* does not address *Kokkonen*.[361]

V. THE CONSTRAINING MISINTERPRETATION OF *KOKKONEN*

The Supreme Court in *Kokkonen* stated that the "expansive language" it employed in a prior ancillary jurisdiction decision was being construed too broadly, and its holding in *Kokkonen* was intended to clarify the scope of the doctrine.[362] The test that *Kokkonen* articulated explained that ancillary jurisdiction had traditionally been asserted "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."[363] This decision has led to an unwarranted and constricting interpretation of the ancillary jurisdiction doctrine in the expungement context. This Comment argues that the holding and language of *Kokkonen* coupled with traditional assertions of ancillary jurisdiction and the case law cited after the enumeration of the prongs do not warrant such a constraining interpretation.

Further, this Comment concedes that expunging of criminal records under solely equitable considerations may not fall fully in either of the prongs as separate entities. However, this Comment argues that equitable expungement falls in between the two prongs. This *Kokkonen* (1.5) area between the two prongs consists of a melding of the "sometimes related purposes" language in *Kokkonen* as it links the two prongs[364] and the philosophy behind supplemental jurisdiction.[365]

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358 248 F.3d 1214 (10th Cir. 2001).

359 *Id.* at 1234.

360 *See Williams*, 2011 WL 489771, at 3* n.2; *Brennan*, 2015 WL 2208532, at *5.

361 *See Camfield*, 248 F.3d at 1234–35 (discussing the expungement issue without mentioning *Kokkonen*).

362 Kokkonen v. Guardian Life Ins. of Am., 511 U.S. 375, 378–79 (1994) (citing Julian v. Cent. Tr. Co., 193 U.S. 93, 113–14 (1904)).

363 *Id.* at 379–80 (citations omitted).

364 *Id.*

365 *See supra* notes 144–147.

A. The Misinterpretation

In the paragraph before the Supreme Court enumerated the *Kokkonen* prongs, the Court acknowledged that "[t]he doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise . . . ."[366] This was in response to the argument that, based on the language in the Supreme Court's holding in *Julian v. Central Trust Co.*, a federal court could exercise its ancillary jurisdiction to enforce a settlement agreement that was not incorporated into the order dismissing the suit.[367]

The language from *Julian* relied upon in support of this argument was "[a] bill filed to continue a former litigation . . . to obtain and secure the fruits, benefits and advantages of the proceedings . . . or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding . . . is an ancillary suit."[368] Unquestionably, under this language a district court would have, and in fact did have,[369] ancillary jurisdiction over a motion to expunge criminal records for solely equitable considerations. However, in *Kokkonen*, the Supreme Court back-tracked on that language and concluded that "the holding of *Julian* was not remotely as permissive as its language . . . ."[370]

Similarly, the holding of *Kokkonen* is not as restrictive as it is being interpreted. The holding was that a federal court did not have ancillary jurisdiction over a settlement agreement, which is a separate contract, that was not incorporated into the order dismissing the suit.[371] In other words, the Court held that a federal court cannot assert jurisdiction over a breach of contract claim, which is governed by state law, unless it has its own basis for subject matter jurisdiction.[372] This holding, coupled with the language preceding the *Kokkonen* prongs and the case law that is cited after each prong, demonstrate that the circuit courts have been construing *Kokkonen* far too narrowly regarding a court's jurisdiction over expungement petitions.

The language that precedes the two *Kokkonen* prongs is notably amorphous. The Supreme Court first acknowledged that the scope of the ancillary jurisdiction doctrine was ill-defined,[373] and then directly before enumerating the

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366 *Kokkonen*, 511 U.S. at 379.
367 *Id.* at 378–79.
368 *Id.* at 379 (citing Julian v. Cent. Tr. Co., 193 U.S. 93, 113–14 (1904)).
369 *See supra* note 20 and accompanying text.
370 *Kokkonen*, 511 U.S. at 379.
371 *Id.* at 380–81.
372 *See supra* note 199.
373 *Kokkonen*, 511 U.S. at 379–80.

test added a qualifier: "[g]enerally speaking, we have asserted ancillary jurisdiction . . . for two separate, though sometimes related, purposes . . . ."[374] By mentioning that the scope of the ancillary jurisdiction doctrine was ill-defined and then prefacing the prongs with a qualifier, the Court was not intending to have the two prongs be a strict standard for a court's ability to assert ancillary jurisdiction.[375] Instead, the court was likely attempting to avoid defining the parameters of the doctrine, as the Court referred to it, that could "hardly be criticized for being overly rigid or precise."[376] Moreover, it is highly doubtful that the Supreme Court, in deciding *Kokkonen* and setting out the prongs, was attempting to overrule circuit court decisions in nearly every circuit that held that district courts had ancillary jurisdiction to expunge criminal records solely under equitable considerations.[377]

Further supporting the idea that equitable expungement falls within the Supreme Court's holding in *Kokkonen* are historical exercises of ancillary jurisdiction[378] and the case law cited to after each of the prongs.[379] Regarding historical exercises of ancillary jurisdiction, drawing parallels between a court's ability to exercise ancillary jurisdiction to resolve attorney's fees disputes is particularly illustrative. Unlike equitable petitions for the expunging of criminal records, attorney's fees disputes have nothing to do with substance of the action invoking the court's jurisdiction.[380] Moreover, similar to how the balancing test for equitable expungement petitions may depend on events that transpire after the decision has been rendered,[381] an attorney's fees dispute may require an inquiry into actions that occurred outside of the court room and potentially after the suit had concluded. However, courts routinely exercise jurisdiction over these issues.[382] It can hardly be argued that in this manner, under the test *Kokkonen* articulates and particularly in light of the "sometimes related purposes" language, a federal court would be able to assert ancillary jurisdiction to resolve an attorney's fee dispute, but not an equitable expungement petition.[383]

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374 *Kokkonen*, 511 U.S. at 379.
375 *See id*.
376 See *id*.
377 *See supra* note 20 and accompanying text.
378 *See supra* notes 156–182 and accompanying text.
379 *See supra* notes 212–276 and accompanying text.
380 *Supra* notes 181–182 and accompanying text.
381 *Supra* note 353 and accompanying text.
382 *Supra* note 182 and accompanying text.
383 *See* Kokkonen v. Guardian Life Ins. of Am., 511 U.S. 375, 379–80 (1994).

In addition to the traditional exercises of ancillary jurisdiction, the cases cited after each of the *Kokkonen* prongs weigh in favor of a broad interpretation of the *Kokkonen* holding. For example, the cases that are cited after the first prong, both of which involve counterclaims,[384] are related to FED. R. CIV. P. 13, which encompasses counterclaims.[385] However, the Court did not address Rule 13 in enumerating this prong nor at any point in its decision.[386] This lack of reference to Rule 13, coupled with the broad scope of permissive counterclaims pursuant to Rule 13(b),[387] militates towards the interpretation that the first prong casts a wide net over related claims and proceedings. Additionally, the case law that the Court employed to support its assertion that a federal court retains ancillary jurisdiction to "effectuate" its orders and "manage its proceedings" further gives credence to a broader interpretation of the prongs.[388] These cases involve situations in which a court's ability to function and carry out its proceedings properly is impeded.[389] They hold that once a court's ability to function is obstructed, the court has the inherent authority to alleviate the issue in a manner that allows the court to function properly.[390] In the equitable expungement context, the assertion that a court's exercise of ancillary jurisdiction does not tend to support a court's ability to carry out its functions, by ensuring that its decrees are not given more effect than intended,[391] is shaky at best. The assertion is shaky because the stigma attached to a criminal record reasonably can be, and should be, viewed as an "invisible punishment."[392]

With that being said, the language of *Kokkonen* further supports the grounds for district courts to assert ancillary jurisdiction over equitable expungement motions.[393] Admittedly, if the prongs were to be taken distinctly as two separate avenues for jurisdiction, as interpreted by the circuits that now hold they lack jurisdiction over these motions,[394] the argument for ancillary jurisdiction becomes more tenuous. However, the Court in *Kokkonen* stated that, on

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384 *Supra* notes 215–243 and accompanying text.

385 *See supra* note 233 and accompanying text.

386 *See supra* note 233 and accompanying text.

387 *See supra* note 228 and accompanying text.

388 *Supra* notes 244–277 and accompanying text.

389 *Supra* notes 244–277 and accompanying text.

390 *Supra* notes 244–277 and accompanying text.

391 *See* United States v. McKnight, 33 F. Supp. 3d 577, 582 (D. Md. 2014); United States v. Allen, 57 F. Supp. 3d 533, 541 (E.D.N.C. 2014); Doe v. United States, 110 F. Supp. 3d 448, 454 n.16 (E.D.N.Y. 2015).

392 *See* Carey, *supra* note 38, at 546.

393 *See* Kokkonen v. Guardian Life Ins. of Am., 511 U.S. 375, 379–80 (1994).

394 *See, e.g.*, Doe v. United States, 833 F.3d 192, 198 (2d Cir. 2016) (addressing each prong separately); United States v. Wahi, 850 F.3d 296, 302–03 (7th Cir. 2017) (same); United States v. Sumner, 226 F.3d 1005, 1014 (9th Cir. 2000) (same).

occasion, the prongs are grounds for ancillary jurisdiction for "sometimes related purposes,"[395] and that is squarely where equitable expungement falls.

B. The Area in Between the Prongs: Kokkonen *(1.5)*

Although expungement under solely equitable considerations may not fall precisely in either of the two prongs distinctly, when *Kokkonen* is considered in light of the "sometimes related purposes" language[396] and the philosophy behind supplemental jurisdiction,[397] the notion that it falls between the two prongs becomes clear.

The traditional balancing test for the expungement of criminal records is one of the strongest indicators that equitable expungement falls into the "sometimes related purposes" language of *Kokkonen*.[398] Historically, the balancing test for the expungement of criminal records weighs the petitioner's interest in having their records expunged against the public's interest in having the records widely available.[399] Here is where the "sometimes related purposes" of the two prongs arises.[400]

The first prong of the *Kokkonen* analysis allows the exercise of ancillary jurisdiction to "permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent . . . ."[401] Concededly, a considerable portion of the balancing test will require examining facts that occurred after the conclusion of the case, such as a lack of housing and employment opportunities.[402] However, nowhere in the *Kokkonen* test does the Court place a temporal restriction on the assertion of ancillary jurisdiction.[403] Additionally, the balancing test also necessarily requires an inquiry into the facts of the original case.[404] These facts include what the crime was, whether the petitioner was found guilty, whether this was the petitioner's first offense, and whether there was sufficient evidence presented for a jury to convict.[405] The

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395 *Kokkonen*, 511 U.S. at 379.

396 *Id.*

397 *Supra* notes 144–147 and accompanying text.

398 *Kokkonen*, 511 U.S. at 379.

399 *E.g.*, United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977).

400 *Kokkonen*, 511 U.S. at 379–80.

401 *Kokkonen*, 511 U.S. at 379–80.

402 *E.g.*, United States v. McKnight, 33 F. Supp. 3d 577, 584–85 (D. Md. 2014).

403 *Kokkonen*, 511 U.S. at 379–80.

404 Doe v. United States, 110 F. Supp. 3d 448, 454 n.16 (E.D.N.Y. 2015).

405 *See* United States v. Bagley, 899 F.2d 707, 708 (8th Cir. 1990) (explaining that because the defendant's arrest records and indictment "represent valuable law enforcement records," balancing of the interests weighed in favor of denying expungement); United States v. Friesen, 853 F.2d 816, 818 (10th Cir. 1988) (examining

utilization of these facts further have the potential to play a factor in determining whether a court's order is effectuated properly and has not resulted in over-punishment. Moreover, a substantial part of weighing the public's interest in having the records available is what the public is being protected from.[406] This additionally will hinge on the facts of the prior case.[407]

Similar to the inquiry under the first prong, the assertion of jurisdiction for equitable expungement may not fall precisely within the language of the second prong.[408] The second prong stipulates that ancillary jurisdiction may be asserted "to enable the court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees . . . ."[409] The court and the public as a whole have an interest in the court's ability to ensure that its decrees are effectuated appropriately and its sentencing has not resulted in over-penalizing.[410] The stigma attached to a criminal record and the consequences that flow from it[411] can be in in direct conflict with the interests of a court and the public in this regard. Moreover, this stigma can be analogized to a supervised release[412] or an "invisible punishment"[413] not intended to be levied by the court. In this framework, it logically follows that expunging a criminal record under solely equitable considerations would aid a court in "effectuat[ing] its decrees" and "vindicat[ing] its authority."[414]

When this inquiry is taken in tandem with, or for the "related purposes" of,[415] the inquiry under the first prong, the concept that equitable expungement falls within the language of *Kokkonen* between the two prongs is solidified. The concept of a *Kokkonen* (1.5) area in between the two prongs is supported by a

whether there was sufficient evidence to convict the petitioner); United States v. Linn, 513 F.2d 925, 927 (10th Cir. 1975) (recognizing the relevance of the validity of the arrest); Doe v. United States, 168 F. Supp. 3d. 427, 440 (E.D.N.Y. 2016) (holding that the defendant's "criminal case and her expungement motion" satisfied the first prong); United States v. Brennan, No. 06–cr–00182–RBJ–1, 2015 WL 2208532, at *3 (D. Colo. Apr. 27, 2015) ("jurisdiction is inextricably linked to the unique facts of this case").

406 *See Criminal Procedure—Ancillary Jurisdiction—District Court Grants Motion to Expunge Conviction for Equitable Reasons.—Doe v. United States, No. 14-MC-1412, 2015 WL 2452613 (E.D.N.Y. May 21, 2015)*, 129 HARV. L. REV. 582, 588 (2015).

407 *Id.*

408 *See, e.g.*, *supra* note 319.

409 Kokkonen v. Guardian Life Ins. of Am., 511 U.S. 375, 380 (1994).

410 *See Doe*, 168 F. Supp. 3d at 440 ("I have an interest in ensuring that the sentence is 'effectuated' properly.").

411 *Supra* notes 24–52 and accompanying text.

412 *See* United States v. McKnight, 33 F. Supp. 3d 577, 582 (D. Md. 2014).

413 *See* Carey, *supra* note 38 at 546.

414 *See Kokkonen*, 511 U.S. at 380.

415 *Kokkonen*, 511 U.S. at 379.

merging of the philosophy embedded in the supplemental jurisdiction statute[416] and the exercise of ancillary enforcement jurisdiction that survived the passage of the statute.[417] Although the Supreme Court did not reference supplemental jurisdiction in *Kokkonen*[418] and therefore was likely not intending to comment on supplemental jurisdiction, when the language of the first prong is mirrored against the language of the supplemental jurisdiction statute it is apparent that, at the least, the philosophy behind the statute is doing some work. The first *Kokkonen* prong states that ancillary jurisdiction has commonly been exercised "to permit disposition by a single court of *claims* that are, in varying respects and degrees, factually interdependent . . . ."[419] In comparison, the supplemental jurisdiction statue, with some exceptions, permits a court to exercise jurisdiction "over all other *claims* that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III . . . ."[420]

The similarities in these grants of jurisdiction are striking and thus the philosophy behind the supplemental jurisdiction statue does appear to be of consequence. This philosophy is that, although a *claim* may not invoke a court's original jurisdiction, it is more efficient and convenient for the parties to have the related claim resolved in one forum.[421] Superimposing this philosophy onto the "related purposes" of the two *Kokkonen* prongs it is apparent how "permit[ing] disposition by a single court of claims that are, in varying respects and degrees, factually interdependent . . . to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees,"[422] promotes efficiency and convenience. Thus empowering a court to assert ancillary jurisdiction over equitable expungement petitions that have some factual interdependence to the original action and further a court's interest in not having its decrees results in unintended punishment.

This interpretation of *Kokkonen* will restore the district courts' ability to exercise ancillary enforcement jurisdiction to entertain expungement petitions under *solely* equitable considerations. District courts will not have to look far for

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416 *See* 28 U.S.C. § 1367 (2012).

417 *Supra* note 146–151 and accompanying text.

418 *See Kokkonen*, 511 U.S. at 379–80.

419 *Kokkonen*, 511 U.S. at 379–80 (emphasis added).

420 28 U.S.C. § 1367(a) (emphasis added).

421 *See* 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3567 (3d ed. 2008).

422 *Kokkonen*, 511 U.S. at 379–80 (citations omitted).

the appropriate balancing test to resolve expungement petitions because there are circuit court decisions in nearly every circuit that perform the balancing test.[423] The implications of this jurisdiction will not result in a mass granting of expungement petitions. Expungement is still warranted only in the "exceptional circumstances" where the private interests outweigh the public interests in expungement.[424] Hopefully, however, this will allow for individuals, whose record has acted as a moratorium on their ability to function in society, to be able to live their lives without having to be encumbered by a criminal record.

CONCLUSION

This Comment argues that all but three of the circuit courts have misinterpreted the Supreme Court's holding in *Kokkonen v. Guardian Life Insurance Co. of America* by holding that it precludes district courts from asserting ancillary jurisdiction over motions to expunge criminal records *solely* under equitable considerations. The Supreme Court in *Kokkonen* was attempting to clarify a prior ancillary jurisdiction holding that, in its view, was being read too expansively. Coincidentally, *Kokkonen* led to the circuit courts' interpreting ancillary jurisdiction too narrowly regarding its jurisdiction over equitable expungement petitions.

This narrow reading of *Kokkonen* has removed a tool that district courts had traditionally used to alleviate some of the issues, through expungement, that criminal records present. Although expungement is a limited remedy, only to be granted in extraordinary circumstances, it has the potential to help some individuals where their interests and fundamental fairness outweigh the public's interest in maintaining the records. Thus, this detaches individuals from the cycle of lack of employment and housing opportunities and ultimate recidivism.

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423 *Supra* note 20 and accompanying text.

424 *Supra* note 74 and accompanying text.

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