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Limiting the Use of Expunged Offenses in Bar and Law School Admission Processes: A Case for Not Creating Unnecessary Problems

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LIMITING THE USE OF EXPUNGED OFFENSES IN BAR AND LAW SCHOOL ADMISSION PROCESSES: A CASE FOR NOT CREATING UNNECESSARY PROBLEMS

MITCHELL M. SIMON*

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INTRODUCTION

Those working in law school administration, lawyers who do bar admission and discipline work, and law students will recognize the following fact pattern as all too familiar. A sixteen year old gets arrested for underage drinking. His mother asks her business lawyer to talk to the prosecutor to see if this can be resolved. The prosecutor agrees to dispose of the case by designating it as one that will remain in the court’s files, but without a finding of guilt. This designation is contingent on the young man completing a diversion program on the dangers

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of drinking and performing fifty hours of community service. The prosecutor tells the lawyer that the case will also be eligible to be “expunged” in the future.

Parents and child are happy with the resolution. Lawyer, based on a rudimentary understanding of expungement from his distant law school days, tells the family that they will not have to be concerned with this arrest in the future.

Almost ten years later, son applies to law school. Based on the advice he received from the business lawyer, he does not include the arrest in his answer to the question about past crimes. He is admitted to law school, succeeds in his studies, and prepares to apply for the bar.

Having now taken a course in professional responsibility where his professor emphasized the importance of full candor on bar applications and told the class that even expunged offenses may need to be disclosed in some jurisdictions, the young man includes the arrest on his bar application. With this new understanding, he may also seek to amend the law school application. The bar, during its investigation, requests a copy of his law school application and takes note of the discrepancy. After he passes the bar exam, he is summoned to appear before the Character and Fitness Committee to explain this. The underlying crime, being remote and minor, is not of concern to the Committee, but the discrepancy raises issues of candor and honesty. This process results in delay of his bar admission and necessitates him telling his employer about his situation. The obvious question this anecdote presents is whether such situations should raise serious concerns about an applicant’s fitness to practice law and whether law schools can take steps to limit the adverse consequences described above.

The character and fitness process is the method by which bar associations and courts determine if a law school graduate, who has demonstrated intellectual capacity by passing the state’s bar exam, is morally fit to be admitted to practice.¹ Typically, committees gather significant background on the applicant’s finances, employment history, criminal background, and history of substance use and abuse and attempt to predict from this information whether the applicant presents a risk to the public if admitted to the bar.²

Cases where the applicant has either been denied or where admission has been significantly delayed often look beyond the nature of the specific offenses and instead focus on the issue of the applicant’s candor.³ This, of course, makes sense since probity is an essential value

1. See Richard R. Arnold, Jr., *Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Character Standards for Bar Applicants*, 1997 UTAH L. REV. 63, 64 (1997).

2. See, e.g., Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491, 506 (1985).

3. Mitchell M. Simon, *What’s Remorse Got to Do, Got to Do with It? Bar Admission for Those with Youthful Offenses*, 2010 MICH. ST. L. REV. 1001, 1012–13 (2010).

that lawyers must possess.⁴ A number of these cases involve situations like that described above involving discrepancies between disclosures on the bar application and the applicant's law school application.⁵

At least one experienced practitioner has argued that the difficult issues such inconsistencies create both for bar authorities and law schools could be eliminated if law schools did a better job encouraging disclosure at the outset of law school.⁶ She cites as an exemplar current efforts by Georgia law schools to have law students early in their education complete an affidavit indicating that they have disclosed all prior offenses, regardless of the disposition and whether they have been expunged.⁷ This seems a reasonable approach, and one supported by Georgia law. But it does not fully answer several complex questions: 1. How should law schools in states with laws restricting inquiry about such offenses address the issue? 2. How should law schools resolve the conflict of laws question if an applicant's offense was expunged in a state with strict limits on disclosure of and inquiry about expunged offenses, but the law school is located in a state where state law permits this type of inquiry? 3. What policies should inform such decisions by law schools? This Article will address these issues.

To fully understand the impact that law school decisions in this area can have on the lives of law students, it is important to identify at the outset the sometimes unspoken assumption that many individuals, presumably including at least some members of Character and Fitness Committees, make about why law school applicants do not disclose past crimes—that the omissions were for a nefarious purpose. For example, Attorney Sexton, an experienced practitioner in this area, suggests in her Article that the main reason for nondisclosure is the law school applicant's fear of not being admitted to law school.⁸

While this motive is undoubtedly correct in some cases, prior empirical work of scholars comports with the author's experience over the last twenty-five years as the in-house ethics expert at his law school and suggests a more benign reason for many omissions—confusion as to whether offenses that were expunged or disposed of without formal court action are encompassed by the question asked on a law school's application.⁹ Since Committee members may attribute an improper and potentially disqualifying motive to the applicant's failure to disclose

4. See, e.g., O'Meara's Case, 54 A.3d 762, 771 (N.H. 2012) (stating in a disciplinary case that "[l]awyer[ing] involves a public trust and requires an unswerving allegiance to honesty and integrity." (quoting Bosse's Case, 920 A.2d 1203, 1205 (N.H. 2012))).

5. See, e.g., Fla. Bd. of Bar Exam'rs re R.L.W., 793 So.2d 918 (Fla. 2001).

6. See generally Patricia A. Sexton, *When Character and Fitness Disclosures Collide: The Dilemma of Inconsistent Law School and Bar Admission Applications*, 21 No. 2 PROF. LAW. 1 (2012).

7. *Id.* at 19.

8. *Id.* at 1.

9. Linda McGuire, *Lawyering or Lying: When Law School Applicants Hide Their Criminal Histories and Other Misconduct*, 45 S. TEX. L. REV. 709, 717–19 (2004) (identifying the difference between the motive suggested by those who failed to disclose—confusion—and the perceived motive identified by a focus group of classmates—fear of getting rejected and the general decline in disapproval of cheating among their generation).

prior offenses, law schools must be particularly thoughtful in their approach to these questions, be precise with the language used in their questions, and ask only for what the state law permits.¹⁰ Bar authorities and courts should also be urged to provide training to Character and Fitness Committees on the range of possible motives for nondisclosure to avoid crucial mistakes based on faulty and unexamined assumptions.

A study at the University of Iowa showed that the law school applicant most frequently faced with this situation is a young person with an embarrassing arrest for a minor drug or alcohol offense.¹¹ The underlying case is usually resolved through some informal means—e.g., diversion, or filing without a finding and subsequent dismissal.¹² Since these types of cases do not go through a formal adjudication and are often resolved through discussion between the prosecutor and the young person's parent or a lawyer hired by the parent, the specifics of the case are not well imprinted on the young person, who at the time of his or her application has not yet had the three years of legal training that are to follow.¹³

Also, the young person may have been told explicitly, sometimes correctly under state law and sometimes incorrectly, that he or she never has to disclose the arrest.¹⁴ If the case is diverted to a program for young offenders and the program is completed, the lawyer or family member, not understanding the difference between formal expunction and this type of informal court resolution, may explicitly indicate that the arrest should be treated as if this never happened.¹⁵ Thus, confusion and subsequent bar admission problems can be caused by a variety of situations beyond a desire to deceive.¹⁶

This Article will attempt to clarify these issues for law students, law schools, and bar authorities. Part I provides a brief overview of the character and fitness process. Part II categorizes the various types of expunction statutes that are most prevalent and provides a better

10. John S. Dzienkowski, *Character and Fitness Inquiries in Law School Admissions*, 45 S. TEX. L. REV. 921, 925 (2004).

11. McGuire, *supra* note 9, at 716. Also, expungement is normally allowed for minor offenses only when the offender has no previous record. See *infra* Part II.A.

12. See Dzienkowski, *supra* note 10, at 948–49.

13. *Id.*

14. See, e.g., *In re VMF*, 491 So.2d 1104 (Fla. 1986) (noting that applicant's father told him not to disclose the expunged offense); Kurt L. Schmoke, *Gone but Not Forgotten: Bar Examiners Cheat Would-be Lawyers of a Second Chance by Asking Them to Disclose Expunged Convictions*, LEGAL AFF. 27, 28 (Feb. 2006).

15. See, e.g., *Att'y Griev. Comm'n v. Joehl*, 642 A.2d 194 (Md. 1994) (noting that Maryland will consider all offenses unless expunged before the application).

16. It is not only those with limited experience who can be confused by the variety of ways in which states handle expungement. At a recent conference of the National Institute for the Teaching of Ethics and Professionalism, one of the sessions addressed this question. The participants were national leaders from law schools, private practice, and disciplinary boards. The fascinating discussion at the session on how to ensure full disclosure clearly demonstrated a lack of shared understanding of the concept of expunction or the differing models in the states. GEORGIA STATE UNIV., http://webdb.gsu.edu/dmg/mediaplayer/mediaplayer.cfm?file=/law/lawcdc/NIFTEP_SP2011/November_Conference/Workshop/Tch_Demo_Law_App.mov&thewidth=640&theheight=480 (last visited Jan. 25, 2014).

understanding of this somewhat murky process in order to clarify what information may be sought by the law school. Part III discusses the conflict of law principles and examine how this tension should be resolved. Finally, Part IV recommends how law schools should deal with expunged offenses to comply with governing expunction law, get the information they need for proper admission decisions, and avoid creating unnecessary bar admission problems for their students.

I. OVERVIEW OF THE CHARACTER AND FITNESS PROCESS¹⁷

Virtually all students entering law school are aware of the bar exam requirement.¹⁸ A less well-known requirement is that every state bar currently requires character certification as a prerequisite for bar admission.¹⁹ Each state conducts its own character investigations to determine whether an applicant is morally fit to practice law.²⁰ Although state legislatures may enact certain laws affecting the practice of law, they generally have not attempted to intervene in the legal profession's regulation of bar membership criteria.²¹

In most jurisdictions, the state bar controls character screening, subject to judicial oversight.²² Each state has discretion to determine its own standards for bar admissions subject to relatively minimal Fourteenth Amendment constraints. The Supreme Court has required only that the standards have a rational relationship to the "applicant's fitness or capacity to practice law" and are not related to political, religious, or racial status.²³

17. Part I draws on the author's description of the character and fitness process in his prior article on this topic. Simon, *supra* note 3, at 1005–09.

18. The standards for measuring intellectual fitness are generally uniform among the states, "which typically require completing at least three quarters of a baccalaureate degree at an accredited college or university, graduating from an approved law school, and passing a bar examination." Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection Upon Bar Admissions*, 39 CAL. W. L. REV. 1, 11 (2002); NATIONAL CONFERENCE OF BAR EXAMINERS & AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2014 3–5 (2013), available at http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf [hereinafter NCBEX Guide]. For one innovative alternative to the bar exam requirement, see the Daniel Webster Scholar Program, which is a joint effort of the University of New Hampshire School of Law (formerly Franklin Pierce Law Center) and the New Hampshire Supreme Court. See *Daniel Webster Scholars Honors Program*, UNIV. OF NEW HAMPSHIRE SCH. OF LAW, <http://law.unh.edu/academics/jd-degree/daniel-webster-scholars>. See generally John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE F. L. & SOC. CHANGE 101 (2009).

19. Rhode, *supra* note 2, at 493; NCBEX Guide, *supra* note 18, at 4–7.

20. Marcus Ratcliff, *The Good Character Requirement: A Proposal For a Uniform National Standard*, 36 TULSA L.J. 487, 492 (2000).

21. Rhode, *supra* note 2, at 496.

22. *Id.* at 505.

23. *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957); see also LA. SUP. CT. COMM. ON BAR ADMISSIONS, R. XVII, § 5(H)(1)(2) (2008), available at http://www.lascba.org/admission_rules.asp. § 5(H)(1)(2) states:

In determining an applicant's character and fitness to practice law in this state, the Panel shall not consider factors which do not directly bear a reasonable relationship to the practice of law, including, but not limited to, the following

Although all states have recognized the importance of evaluating bar applicants' character, procedures to determine moral fitness to practice law vary in scope and substance from state to state.²⁴ Despite differences among the states, the most common method for determining whether a bar applicant possesses the requisite good moral character to practice law is for a bar or court appointed character committee to examine a variety of information regarding the applicant.²⁵

When applicants seek admission to the bar, the applicants have placed their character at issue.²⁶ Therefore, the applicant bears the burden of producing information proving good moral character.²⁷ Information concerning the applicant "primarily comes from standardized bar applications, questionnaires, interviews, and letters of recommendation."²⁸

Typically, bar examiners will inquire into an applicant's past by asking questions about the applicant's education, employment history, finances, criminal and civil misconduct, mental health problems, and addictions.²⁹ Essentially, bar character committees determine an applicant's good moral character by "assessing all of the relevant facts before them."³⁰

If preliminary character investigations reveal that the "application is problematic in any way, heightened scrutiny" by the bar admission committee is typically triggered.³¹ The National Conference of Bar Examiners has set forth a list of conduct that warrants further investigation.³² The list includes:

impermissible factors: (1) The age, sex, race, color, national origin, religion, or sexual orientation of the applicant; or (2) A physical disability of the applicant that does not prevent the applicant from performing the essential functions of an attorney.

24. Rhode, *supra* note 2, at 506; Ritter, *supra* note 18, at 14 (For example, character investigations may be undertaken "by a state bar association while the applicant is in law school, prior to sitting for the bar examination, or subsequent to successful completion of the bar examination In most states, the bar association processes the application; in fourteen states, however, a separate agency [evaluates character and fitness.]"); NCBE Guide, *supra* note 18, at 6-7.

25. See Rhode, *supra* note 2, at 506.

26. Ratcliff, *supra* note 20, at 493.

27. NCBE Guide, *supra* note 18, at viii; see, e.g., MINN. RULES FOR ADMISSION TO THE BAR, R. 5(B)(2) (2011), available at https://www.revisor.leg.state.mn.us/court_rules/rule.php?name=pradmi-5 ("The applicant bears the burden of proving good character and fitness to practice law."); CONN. REGS. OF THE BAR EXAMINING COMM. art. VI-3 (2008), available at <http://www.jud.state.ct.us/CBEC/regs.htm#VI> ("The applicant bears the burden of proving his or her good moral character and fitness to practice law by clear and convincing evidence.").

28. See Arnold, *supra* note 1, at 65.

29. See, e.g., N.H. SUP. CT., Petition and Questionnaire for Admission to the Bar of New Hampshire (2012) [hereinafter N.H. Bar Application], available at <http://www.courts.state.nh.us/nhbar/petition.pdf>.

30. Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 69 (1984).

31. Ritter, *supra* note 18, at 14.

32. NCBE Guide, *supra* note 18, at viii, III.13.

[U]nlawful conduct; academic misconduct; making of false statements, including omissions; misconduct in employment; acts involving dishonesty, fraud, deceit or misrepresentation; abuse of legal process; neglect of financial responsibilities; neglect of professional obligations; violation of an order of a court; evidence of mental or emotional instability; evidence of drug or alcohol dependency; denial of admission to the bar in another jurisdiction on character and fitness ground; disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction.³³

Many states have adopted these national guidelines and have incorporated the list of conduct into their published character and fitness guidelines.³⁴

If the bar committee makes a preliminary determination that the applicant does not meet the state's standard of good character, the bar notifies the applicant and gives him or her the opportunity, usually by formal hearing, to produce evidence that proves the applicant is of good moral character.³⁵ At this hearing, the applicant has the right to respond to the matters asserted or charged in the notice, including the right to present evidence and to question witnesses.³⁶

Once an applicant's conduct raises an issue of fitness to practice law, especially if prior misconduct involved unlawful acts, he or she may be obliged to demonstrate rehabilitation.³⁷ The National Conference of Bar Examiners has recommended certain factors, which "should be considered in assigning weight and significance to prior conduct."³⁸ Among these factors are:

[T]he applicant's age at the time of the conduct, the recency of the conduct, the reliability of the information concerning the conduct, the seriousness of the conduct, the cumulative effect of conduct or information, the evidence of rehabilitation, the applicant's positive social contributions since the conduct, the applicant's candor in the admissions process and the materiality of any omissions or misrepresentations.³⁹

Once the committee has made a determination as to the fitness of the applicant, it may either recommend the applicant to the state supreme court for admission to the bar, or decline to do so because of the applicant's failure to prove good moral character.⁴⁰ "Upon an

33. *Id.*

34. For example, Alaska, Arizona, Illinois, Indiana, Louisiana, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, are among the many states which have included this list of conduct in their published character and fitness guidelines.

35. See, e.g., OR. ATTY. ADMISSION RULES, R. 9.35 (2012), available at http://www.osbar.org/_docs/rulesregs/admissions.pdf.

36. *Id.* R. 9.35(6).

37. In re G.L.S., 439 A.2d 1107, 1117–18 (Md. 1982).

38. NCBEX Guide, *supra* note 18, at ix, III.15.

39. *Id.*

40. Ratcliff, *supra* note 20, at 493.

adverse moral character determination, the applicant possesses a procedural due process right of appeal” to the state supreme court.⁴¹

II. EXPUNGEMENT

To competently address the issue of inconsistent disclosures, all participants in the character and fitness process must gain a more nuanced understanding of the expungement process. As noted in the Introduction to this Article, expungement is not a major issue in most lawyers’ practices. Since it is usually a ministerial decision, used for minor offenses, courts and the participants do not devote significant time or resources to this process.⁴² Thus, it should come as no surprise that expungement is not well-understood in the law school and bar admissions contexts.

Put simply, expungement is a legal mechanism designed to provide eligible offenders with a fresh start and a blank slate.⁴³ State law primarily governs the process and no universally accepted definition exists, although the term generally connotes “the destruction or obliteration of an individual’s criminal file . . . in order to prevent employers, judges, police officers, and others from learning of that person’s prior criminal activities”⁴⁴ For the purposes of this Article, expungement will be defined as the removal of a criminal record, conviction, or arrest and all related documents from records generally available to the public domain.⁴⁵ The intent of the process is to prevent employers, universities, licensing boards (with the exception of designated agencies, like the bar in some states⁴⁶), and the public from gaining access to these records.⁴⁷ But the general rule is that the records remain available to courts for the purposes of sentencing and other administrative matters.⁴⁸ This Part analyzes the common understanding, purpose, and effect of expungement under current jurisprudence.

A. What May Be Expunged?

Although most states provide some means of expunging crimes, jurisdictions differ as to what and to what extent criminal records may

41. Ritter, *supra* note 18, at 15; see also OR. ATTY. ADMISSION RULES, R. 9.6.

42. See *supra* notes 9–11.

43. Tim Gallagher, *Innocent Until Proven Guilty? Not for Bar Applicants*, 31 J. LEGAL PROF. 297, 304–05 (2007). *Black’s Law Dictionary* defines expunge as “to erase or destroy.” BLACK’S LAW DICTIONARY 662 (9th ed. 2009).

44. T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 886 (1996).

45. Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 159–60 (2010). While many expungement laws mandate the deletion of records, they cannot, due to First Amendment concerns, require news organizations to take-down previously published material about a person’s crime that was subsequently expunged. See generally Carrie T. Hollister, *The Impossible Predicament of Gina Grant*, 44 UCLA L. REV. 913, 914–18 (1997) (discussing how Harvard University discovered an applicant’s juvenile record from press reports).

46. E.g., FL. STAT. ANN. § 943.0585(4)(a)(4–5) (West 2012).

47. *Id.* at § 943.0585(4).

48. *Id.*; see Silva, *supra* note 45, at 159–60.

be expunged.⁴⁹ As will be described below, most states expunge criminal records for first offenders of minor crimes and in cases involving a mistake of fact, such as mistaken identity.⁵⁰

Expungement most often occurs in juvenile cases, but depending on the statute, it can apply equally to adults.⁵¹ New Hampshire, for instance, allows expungement for misdemeanors, class B felonies, crimes of indecent exposure and lewdness, and other non-violent crimes.⁵² To qualify for expungement in New Hampshire, an offender must complete the “terms and conditions” of his sentence and thereafter remain conviction free for—depending on the conviction sought to be expunged—three to ten years.⁵³ Similarly, federal law mandates expungement for first-time drug convictions if the applicant was convicted under the age of twenty-one and has satisfied other probationary requirements.⁵⁴ The law aims to “restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings.”⁵⁵

Many states additionally recognize expungement where an arrest or conviction was procured through a mistake of fact.⁵⁶ Though not universal, the following situations are commonly regarded as expungable:

The arrestee is not convicted.

The arrestee is not charged.

Another person confesses to the crime with which the defendant is charged.

The person is falsely accused of the crime by the complaining witness.

The person is arrested on a mistake of fact and the charge are withdrawn.

The arrest is made solely on the basis of the arrestee’s statutes.

The arrest is made under an unconstitutional statute.

The arrest results from entrapment.

The purported arrest is not actually made.

The decision to indict was based on erroneous facts.

Defendant has successfully complete probation based on a prescribed showing of exemplary conduct during the entire period of probation.

49. See Schmoke, *supra* note 14, at 28–29.

50. See 21A AM. JUR. 2D *Crim. L.* § 1222 (2013).

51. See Funk, *supra* note 44, at 887–88.

52. N.H. REV. STAT. ANN. § 651:5 (III–IV) (2013); see also N.H. Rev. Stat. Ann. § 265-A:21 (2013).

53. § 651:5 (III–IV). Different states impose varying requirements; in Florida, a petitioner for expungement must submit a certificate of eligibility to qualify him or her for expungement. FLA. STAT. ANN. § 943.0585(2) (West 2013). In North Carolina, a petitioner must demonstrate “good behavior” for the two-year period following his or her conviction. N.C. GEN. STAT. ANN. § 15A-145(a)(1) (West 2013).

54. See 18 U.S.C. § 3607(c) (2006); Funk, *supra* note 44, at 887.

55. § 3607(c).

56. See 21A AM. JUR. 2D *Crim. L.* § 1222 (2013).

The underlying charge is dismissed after reversal of the defendant's conviction or adjudication.⁵⁷

Most of these examples depict situations in which a judicial or investigative error substantially affected the accused's arrest or conviction, and as a result, it seems only just to erase all evidence of the alleged incident.⁵⁸ Generally, however, insufficient evidence or an unwillingness to prosecute does not form a statutory basis for the expungement of arrest records.⁵⁹

B. Court Authority To Expunge

A court's authority to expunge criminal records is principally derived from statute, but some courts, like the federal courts, view this power as inherent to the court.⁶⁰

In many jurisdictions, the authority to expunge emanates from legislative decree.⁶¹ In this context, expungement is not an arm of the criminal process⁶² but rather is a civil action attainable only through a court granted motion.⁶³ To be eligible, the petitioner must comply with and prove compliance with all statutory requirements.⁶⁴ After this demonstration, the judge, depending on the jurisdiction, cannot discre-

57. *Id.*

58. *See id.*

59. *Id.*

60. *Id.* at §§ 1220–21; *see, e.g.*, *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004) (“The test for the expungement of judicial records is a balancing test: ‘if the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintenance of the records, then expunction is appropriate.’” (quoting *United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993))); *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977) (“[E]xpungement lies within the equitable discretion of the court, and relief usually is granted only in ‘extreme circumstances.’” (quoting *United States v. Rosen*, 343 F. Supp. 804, 807 (S.D.N.Y. 1972))). *But see* *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007) (“[T]he original claims brought before the district court in this case have nothing to do with the equitable grounds upon which [the petitioner] seeks the expungement of his criminal record. Moreover, ‘the power asked for here is quite remote from what courts require in order to perform their functions.’” (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994))). For a list of states with expungement statutes, see *infra* Appendix A.

61. *See* 21A AM. JUR. 2D *Crim. L.* §§ 1220–21 (2013). It is important to note, however, that a handful of state courts expunge records through its inherent powers; the trend, however, is that state courts act pursuant to a legislative directive. *E.g.*, *State v. S.L.H.*, 755 N.W.2d 271, 274 (Minn. 2008) (“The judiciary possesses inherent authority to expunge criminal records when expungement is ‘necessary to prevent serious infringement of constitutional rights.’” (quoting *State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981))).

62. George L. Blum, *Judicial Expunction of Criminal Record of Convicted Adult Under Statute-Expunction Under Statutes Addressing “First Offenders” and “Innocent Persons,” Where Conviction Was for Minor Drug or Other Offense, Where Indictment Has Not Been Presented Against Accused or Accused Has Been Released from Custody, and Where Court Considered Impact of Nolle Prosequi, Partial Dismissal, Pardon, Rehabilitation, and Lesser-Included Offenses*, 70 A.L.R. 6th 1, § 2 (2011).

63. *Id.* at § 3 (“Practice Pointers: A statutory expunction proceeding is civil, rather than criminal, in nature and the burden of proving compliance with statutory conditions rests with the petitioner.”).

64. 21A AM. JUR. 2D *Crim. L.* § 1221 (2013).

tionarily dismiss the petition unless the state establishes, through the preponderance of the evidence, a statutory bar to the petition.⁶⁵

Some state courts, like many federal courts, expunge records almost exclusively in equity.⁶⁶ These courts derive such authority from the inherent power of the court and may expunge criminal records when:

(1) [The] petitioner's constitutional rights may be seriously infringed by retention of the records; or (2) when constitutional rights are not involved, but the court determines that expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing, and monitoring an expungement order.⁶⁷

A federal court's power to expunge records in equity, however, is not a uniform theory.⁶⁸ The First Circuit, for example, has expressly declared that district courts lack the jurisdiction to adjudicate a defendant's motion to expunge that is predicated solely on the court's equitable powers.⁶⁹

C. Purpose and Intent of Expungement

Expungement surfaced in the 1940s and 1950s to remedy the inimical effects of youthful misconduct.⁷⁰ The idea behind the concept was to remove the social stigma associated with crime and incentivize troubled youths to reform.⁷¹ Young offenders, at the time, were considered easier to rehabilitate than adults.⁷² Before this, youthful offenders who committed crimes of indiscretion were too often labeled "juvenile delinquents," and were haunted by this stigma for life.⁷³ As one scholar wrote, "[a]s long as anyone other than the child or his representative has access to court records . . . these records will haunt him, labeling him a criminal and adversely affecting his future both economically and

65. *Id.* See also, e.g., N.C. GEN. STAT. ANN. § 15A-145(b) (West 2013) ("If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor . . . it shall order that such person be restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information." (emphasis added)); *Perdue v. Tex. Dep't of Pub. Safety*, 32 S.W.3d 333, 335 (Tex. Ct. App. 2000) ("Once an applicant demonstrates his eligibility under the provisions of this article, the trial judge does not have the discretion to dismiss the petition or deny the request for an expunction.").

66. See 21A AM. JUR. 2D *Crim. L.* § 1220 (2013).

67. *Id.*

68. See *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007).

69. *Id.*

70. Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1708-09 (2003).

71. *Id.* at 1709.

72. *Id.*

73. Schmoke, *supra* note 14, at 28.

socially, regardless of the noble intentions of legislators to the contrary.”⁷⁴

The effects of this stigma have been well documented.⁷⁵ According to one court, juvenile delinquencies subject youths to additional investigation, prejudice them in future criminal proceedings, and cause employers to discriminate against them.⁷⁶ An author has posited that, “[s]omething as simple as checking a box indicating a conviction bars a person from employment, housing, educational assistance, and government benefits.”⁷⁷ Thus, criminal records linked to juvenile delinquents have historically branded the youth with a scarlet letter and forced him or her to endure far-reaching consequences for youthful misconduct.⁷⁸

Expungement statutes sought to eliminate these disproportional consequences, or, at very least, “lessen the additional penalty that public opinion places upon former offenders”⁷⁹ By deleting criminal records, the youthful offender was given a fresh start, a blank slate, and a chance at redemption.⁸⁰ Delaware, for example, in its policy statement in support of expungement proclaimed that:

The General Assembly finds that juvenile arrest records are a hindrance to a person’s present and future ability to obtain employment, obtain an education, or to obtain credit. This subchapter is intended to protect children and citizens from unwarranted dam-

74. Adrienne Volenick, *Juvenile Court and Arrest Records*, 9 CLEARINGHOUSE REV. 169, 170 (1976); see Love, *supra* note 70, at 1707–08 (“These reformers recognized that it was not enough simply to restore legal rights; they would also have to address the more subtle punishment represented by societal prejudice against the criminal offender that lingers long after the penalties prescribed by law have been fully satisfied.”).

75. *Journey v. State*, 895 P.2d 955, 959 (Alaska 1995).

76. *Id.*

77. Silva, *supra* note 45, at 164; see Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 594–99 (2006). Contemplating the adverse affects of convictions on gainful employment directly, the Arkansas legislature enacted a statute permitting employers to consider criminal convictions that were not expunged but declaring that “such convictions shall not operate as an automatic bar to registration, certification, or licensing for any trade, profession, or occupation.” ARK. CODE ANN. § 17-1-103(b)(1)(A)-(B) (West 2013). In support of this law, the legislature provided that: “[i]t is the policy of the State of Arkansas to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the assumption of the responsibilities of citizenship.” *Id.* § 17-1-103(a)(1). Records that have been expunged cannot “be used, distributed, or disseminated in connection with an application for a registration, license, or certificate.” *Id.* § 17-1-103(b)(2).

78. See Silva, *supra* note 45, at 164–65; see also Funk, *supra* note 44, at 885–86, 891 (recognizing the stigmatizing label that affixes to youthful offenders but arguing that this stigma “should be of concern to society only insofar as it leads to the *incorrect* characterization of an individual who since has reformed his [or her] life.”).

79. Funk, *supra* note 44, at 891. When a youthful offender completes a sentence, the government restores his or her legal rights. Love, *supra* note 70, at 1708. But until the evolution of expungement, nothing was being done to address the public stigma. *Id.* As one scholar has commented, “reformers recognized that it was not enough simply to restore legal rights; they would also have to address the more subtle punishment represented by societal prejudice against the criminal offender that lingers long after the penalties prescribed by law have been fully satisfied.” *Id.* at 1707–08.

80. Gallagher, *supra* note 43, at 304–05.

age which may occur as a result of a juvenile arrest record, even if the arrest resulted in an adjudication of delinquency.⁸¹

This process recognizes that “while [a youth] did something ‘young and irresponsible,’ there is enough good about his character to justify preventing that youthful act from limiting his prospects for a bright future.”⁸²

Despite its altruistic origins, expungement has been a controversial issue since its inception.⁸³ This controversy stems from the societal balance upon which expungement is predicated.⁸⁴ On the one hand, we, as a society, want to reduce recidivism and eliminate the stigma associated with youthful indiscretion. On the other hand, when examining the philosophical tenets of expungement, one must inevitably weigh the altruistic motives against public safety, the public’s right-to-know, and the public’s interest in making character judgments on certain individuals.⁸⁵ One court has even suggested that “[p]ublic policy requires . . . the retention of records of the arrest . . . [and that] [t]he judicial editing of history is likely to produce a greater harm than that sought to be corrected.”⁸⁶

Trying to achieve this balance raises two important questions. The first is normative: in light of this balance, what specific crimes should we allow to be expunged?⁸⁷ And second, what legal effect, beyond the mere destruction of the records, should expungement have?⁸⁸ The first question, though important, exceeds the scope of this Article. Scholars, legislatures, politicians, activists, and judges have addressed this question for the past fifty years and have yet to arrive at a uniform

81. DEL. CODE ANN. tit. 10, § 1014 (West 2013).

82. Schmoke, *supra* note 14, at 28.

83. See generally Funk, *supra* note 44; T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287 (1999).

84. See Lori M. Nehls, Note, *Juvenile Record Expunction: The Rehabilitating Remedy*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 91, 95 (2002); Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1502 (2003).

85. Mukamal & Samuels, *supra* note 84, at 1502. They state:

Government can and should have legitimate concerns about protecting the public safety from people who might do the public harm and about allowing employers and others to disqualify those whose criminal records demonstrate their unsuitability. At the same time, government also has an obligation to ensure fairness and opportunity for people who were arrested but never convicted or, if convicted, satisfied or are complying with their sentences, so they can obtain employment, housing, food, and other necessities of life.

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

87. See *supra* Part II.A for a discussion of what crimes can be expunged under existing law.

88. See Pierre H. Bergeron & Kimberly A. Eberwine, *One Step in the Right Direction: Ohio’s Framework for Sealing Criminal Records*, 36 U. TOLEDO L. REV. 595, 609 (2005) (“For those able to successfully navigate the expungement framework, such relief is certainly welcome. However, the lingering question[] that remain[s] [is] how effective is expungement . . .”).

understanding of the specific crimes that are deemed sufficiently minor to be expunged.⁸⁹

Understanding the second issue—the effect of expungement—is crucial to answering the first of the three questions posed in the Introduction: How should law schools in states with laws restricting inquiry about such offenses address the issue? To address this question, the Article will analyze varying types of expungement statutes and consider how law schools in these states approach their own statutes.

D. *Effect of Expungement*

In order to discuss expunged records in the context of law schools and bar admission, one must first explore the practical and legal effect of expungement, which fluctuates among states and hinges on each state statute's specific language. While the practical effect of expungement "allow[s] a person to say legally that he was never arrested, charged, convicted, or sentenced in connection with the crime involved in an expunged case,"⁹⁰ states effectuate this principle differently.⁹¹

A survey of all expungement statutes suggests that they may be classified into one of three categories: the defense to perjury statutes, the prohibition statutes, and the mere destruction statutes.⁹² While each category achieves the practical effect described above, the varying scope and level of enforcement between the categories impacts how law schools and bar examiners should approach requesting applicants to disclose expunged records.

1. Defense to Perjury Statutes

The defense to perjury statutes dominate the expungement landscape.⁹³ In fact, over fifty percent of states have adopted the defense to perjury rule—or the equivalent thereof—for their expungement statutes.⁹⁴ Defined generally, these statutes permit a juvenile or adult offender to deny the existence of an expunged offense.⁹⁵ Like nearly all subjects dealing with expungement, however, the defense to perjury category is not uniform within itself and, in fact, may be subdivided into two varieties based on the breadth of the statute's effect.⁹⁶

89. See generally Volenick, *supra* note 74, at 170–71 (arguing that expungement will help bury the stigma of convictions and may decrease recidivism); Funk, *supra* note 44, at 916 (arguing that availability of expungement may perpetuate youthful crimes and arguing that expungement in many instances is unwarranted); Funk, *The Dangers of Hiding Criminal Pasts*, *supra* note 83.

90. Schmoke, *supra* note 14, at 28.

91. *Id.*

92. Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer's Need to Know About Juvenile Misdemeanors and an Employee's Need to Keep Them Secret*, 41 WASH. U. J. URB. & COTEMP. L. 3, 34–35 (1992).

93. See *infra* Appendix C; see also Snow, *supra* note 92, at 34–35.

94. Snow, *supra* note 92, at 34–35.

95. See, e.g., N.C. GEN. STAT. § 15A-145 (1973); ARK. CODE ANN. § 16-90-902 (West 2012).

96. *Id.*

The first variety has a narrow scope and limits the effect of expungement to matters of perjury.⁹⁷ Mississippi's expungement statute effectively represents this variety:

No person as to whom an expunction order has been entered shall be held thereafter under any provision of law to be guilty of perjury or to have otherwise given a false statement by reason of his failure to recite or acknowledge such arrest, indictment or conviction in response to any inquiry made of him for any purpose other than the purpose of determining, in any subsequent proceedings under this section, whether the person is a first offender.⁹⁸

This statute does not explicitly prohibit inquiries into expunged records; it merely arms the offender with an immunity from perjurying him or herself. Though phrased differently, Texas's expungement statute carries a similar effect by dictating the offender's response to inquiries regarding his or her expunged offense: "the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged."⁹⁹

The second variety is broader, more protective, and extends the offender's rights beyond the context of perjury while still providing immunity against perjury.¹⁰⁰ Under this variety, the underlying offense is often deemed never to have *legally* occurred¹⁰¹ and the offender may, therefore, deny the existence of the underlying offense seemingly without any regard for the context or the inquirer.¹⁰² Illinois's expungement statute, for instance, provides that: "once the case is expunged, it shall be treated as if it never occurred . . . once he or she obtains an expungement, he or she may not be required to disclose that he or she had a juvenile record . . ." ¹⁰³ Even more protective, Kentucky's expungement statute declares that, upon entry of expungement: "the persons and the court may properly reply that no record exists with respect to the persons upon any inquiry in the matter; and the person whose record is expunged shall not have to disclose the fact of the record *or any matter relating thereto on an application for employment, credit, or other type of application.*"¹⁰⁴ As discussed below, the statutory right not to disclose an expunged offense on applications creates grave problems for law school and bar applicants. Other states that have enacted stat-

97. MISS. CODE ANN. § 99-19-71(3) (2010).

98. *Id.*

99. TEX. CODE CRIM. PROC. ANN. art. 55.03(3) (West 2005).

100. Because this variety still arms the offender with a defense to perjury and vests all power with the offender, it is classified in the defense to perjury category. It is important to note, however, that the plain language of these statutes provide a broader context of protection for the offender.

101. As we will see later, expungement does not change the metaphysical reality of the underlying offense, and as such, the offense will still be deemed to have occurred for the purposes of sentencing, defamation claims, and the like. See *infra*, III(d)(3).

102. See KY. REV. STAT. ANN. § 431.078(5) (West 2013).

103. 705 ILL. COMP. STAT. ANN. 405/5-915(2.6) (West 2014).

104. KY. REV. STAT. ANN. § 431.078(5) (West 2013) (emphasis added).

utes similar to this second variety include Illinois, Idaho, Arkansas, Kansas, and Michigan, just to reference a few.¹⁰⁵

All these expungement statutes carry a clear, principled effect for an offender—that he or she may legally deny the offense as if it never occurred—but the statutes are silent with respect to third party duties.¹⁰⁶ It seems that employers, government agencies, universities, licensing boards, and other similar institutions, may operate—and in fact do operate—within a statutory grey-area, arguing that the plain-language of the statute does not preclude these institutions from inquiring into expunged offenses; the statute merely arms the offender with a legal out for not disclosing.¹⁰⁷

For offenders seeking employment or appearing before an agency, the institution's capacity to inquire into expunged offenses may not transmit an adverse effect because the juvenile offender can simply deny the offense. According to one author, “[i]f hired, the denial does not jeopardize the individual's employment at a later date for falsifying documents.”¹⁰⁸

But for those offenders applying to law school and eventually the bar, the defense to perjury statutes—particularly the latter variety—create a serious catch-22. Many law schools in perjury states ask applicants to disclose expunged offenses.¹⁰⁹ Presumably, this is because the statute does not bar a third party from asking for this information. Of course, pursuant to a defense to perjury-style expungement statute, the applicant may elect not to disclose an expunged offense and will not perjure himself as a result.

105. ARK. CODE ANN. §§ 16-90-902 (a–b) (West 2013):

(a) An individual whose record has been expunged in accordance with the procedures established by this subchapter shall have all privileges and rights restored and shall be completely exonerated, and the record which has been expunged shall not affect any of his or her civil rights or liberties unless otherwise specifically provided by law. (b) Upon the entry of the uniform order to seal records of an individual, the individual's underlying conduct shall be deemed as a matter of law never to have occurred, and the individual may state that no such conduct ever occurred and that no such records exist.

CAL. PENAL CODE § 851.7 (b) (West 2011) (“If the court finds that the petitioner is eligible for relief . . . it shall issue its order granting relief prayed for. Thereafter, the arrest, detention, and any further proceedings in the case shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence.”); IDAHO CODE ANN. § 20-525A(5) (West 2012) (“Upon the entry of the order the proceedings in the petitioner's case shall be deemed never to have occurred and the petitioner may properly reply accordingly upon any inquiry in the matter.”); OHIO REV. CODE ANN. § 2151.358(f) (West 2012) (“After the records have been expunged under this section, the person who is the subject of the expunged records properly may, and the court shall, reply that no record exists with respect to the person upon any inquiry in the matter.”).

106. See 705 ILL. COMP. STAT. ANN. 405/5-915 9(2.6) (West 2013); KY. REV. STAT. ANN. § 431.078(5); N.C. GEN. STAT. § 15A-145 (2013).

107. Snow, *supra* note 92, at 35.

108. *Id.* at 34.

109. See *infra* Appendix A. See, e.g., North Carolina. Interestingly, North Carolina has had a very recent legislative change that now bars schools from asking about expunged offenses. See N.C. GEN. STAT. § 15A-153 (2013).

If in those same states the bar asks for disclosure of expunged offenses, either because it believes it has the power to do so based on the reasoning described above or because of a statutory exemption specifically making the defense to perjury statute inapplicable to the bar,¹¹⁰ the applicant, regardless of the expunged record, must disclose—and in light of the strict candor requirements in bar admission cases, may be well-counseled to disclose—the expunged offense. In this situation, there would be an inconsistency that the committee, if in a state that looks into law school applications, will most likely discover. This inconsistency will result in heightened scrutiny and possible delay in processing. Or, if as discussed in the Introduction, members of the character and fitness committee harbor the belief that law school application omissions are done for nefarious purposes, it could even result in a denial. In this competitive job market, it is not hard to imagine such a delay resulting in revocation of a job offer. Even though the applicant acted within the precise color of the law, he or she may still face consequences for the nondisclosure.¹¹¹

Given these deleterious consequences, one key question is whether the defense to perjury expungement statute should have a more pronounced legal scope than its plain language suggests. The Supreme Court of Mississippi implied such an interpretation.¹¹²

Like many defense to perjury statutes, Mississippi's expungement statute provides that a person with an expunged offense shall not be, "guilty of perjury or otherwise for giving a false statement by reason of his failures to recite or acknowledge such arrest, indictment or trial in response to any inquiry made of him for any purpose."¹¹³ Interpreting this statute in a case where a bar applicant failed to disclose his expunged criminal conviction, the Court held that statute "seemingly prevents the Bar from inquiring about an expunction" ¹¹⁴ Ulti-

110. See, e.g., FLA. STAT. ANN. § 943.0585(4)(a) (West 2013). This statute provides: The person who is the subject of a criminal history record that is expunged under this section . . . may lawfully deny or fail to acknowledge the arrests covered by the expunged record, *except when the subject of the record*: 1. Is a candidate for employment with a criminal justice agency; 2. Is a defendant in a criminal prosecution; 3. Concurrently or subsequently petitions for relief under this section . . . 4. *Is a candidate for admission to The Florida Bar*; 5. Is seeking to be employed or licensed by or to contract with the Department of Children and Family Services . . . the Agency for Health Care Administration . . . or to be employed or used by such contractor or licensee in a sensitive position having direct contact with children. . . 6. Is seeking to be employed or licensed by the Department of Education

(emphasis added).

111. See *In re VMF*, 491 So.2d 1104, 1105–06 (Fla. 1986) (affirming a bar applicant's delayed admission for failing to disclose an expunged offense); *Gagne v. Trs. of Ind. Univ.*, 692 N.E.2d 489, 492–93 (Ind. Ct. App. 1998) (expelling a student from law school for, in part, failing to disclose sealed arrests).

112. See *Stewart v. Miss. Bar*, 84 So.3d 9 (Miss. 2011).

113. MISS. CODE ANN. § 41–29–150(d)(2) (West 2010); see also MISS. CODE ANN. § 99–19–71(3) (West 2013).

114. *Stewart*, 84 So.3d at 16. Petitioner was disbarred after he pleaded guilty in federal court to one court of conspiracy to commit extortion under color of official right. *Id.* at 11. Upon re-application for the bar, the Bar examiners denied Stewart re-admis-

mately, the Court found that a defense to perjury expungement statute bars interested parties from inquiring about expunged offenses, unless the third party has a statutorily or judicially prescribed right to inquire.¹¹⁵ Here, the Court concluded that the Mississippi Bar had a judicially prescribed right.¹¹⁶

Notwithstanding the arguable effect of the defense to perjury statutes, most law schools either require or encourage students to disclose expunged offenses.¹¹⁷ As of the 2011–2012 academic year, all of North Carolina’s law schools—with the exception of Wake Forest—either expressly require applicants to disclose expunged offenses or mandate that the applicant disclose whether “you [have] EVER in YOUR LIFE been convicted, charged, arrested, given a written warning, taken into custody, or accused, formally or informally, of the violation of a law for an offense other than parking violations?”¹¹⁸ A similar trend has emerged in Illinois where seven of the state’s law schools require expunged offenses to be disclosed.¹¹⁹

These law schools, though perhaps not in violation of their statute’s technical interdictions, seem to stand in direct contravention of the purpose and intent of expungement—to be considered for admission without the stigma of a youthful indiscretion and to allow the applicant a fresh start.

2. Prohibition Statutes

The prohibition statutes, in contrast to the defense to perjury statutes, expressly prohibit interested parties from inquiring into expunged offenses or limit the weight interested parties may give to an expunged offense. Unlike the defense to perjury statutes, these expungement provisions are rare and exist in only a minority of states.

New Hampshire, for instance, proscriptively limits all such inquiries “regardless of context.”¹²⁰ According to the statute:

In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record *only* in terms such as “*Have you ever been arrested for or convicted of a crime that has not been annulled by a court?*”¹²¹

sion because “he [had] not been forthcoming about his prior criminal history.” *Id.* at 12. In particular, Stewart twice denied in a bar conducted deposition whether he “ever had anything non-adjudicated or expunged.” *Id.* at 13–15. Because of these false statements, the Court upheld the bar’s decision to deny Stewart re-admission.

115. *See id.*

116. *See generally id.*

117. 58% of law schools require applicants to disclose expunged offenses. *See infra* Appendix B.

118. *See infra* Appendix A.

119. *See infra* Appendix A.

120. Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J.C. & U.L. 419, 462 (2008).

121. N.H. REV. STAT. ANN. § 651:5 (X)(f) (West 2013) (emphasis added).

This language strictly prohibits all interested parties—including universities and licensing boards—from inquiring into expunged offenses.¹²² Prior to 2013, any person who violated this statute was guilty of a misdemeanor.¹²³ As of January 1, 2013, however, the statute was stripped of the criminal penalty.¹²⁴

Some scholars have identified New Hampshire’s expungement statute as the ideal expungement provision because it is unambiguous and includes a comprehensive effect.¹²⁵ Notwithstanding this clarity in New Hampshire law and that the New Hampshire Bar question, which consistent with state law explicitly exempts applicants from disclosing expunged offenses,¹²⁶ the University of New Hampshire (UNH) School of Law, due to a concern for applicants who apply to bars outside of New Hampshire, “encouraged” applicants to disclose any expunged offenses on their law school application. The question, prior to 2013 when UNH adopted the position urged in this article, read:

Have you ever been arrested or charged with any offense by complaint or indictment, or convicted of a crime, or are any charges now pending against you? . . . [i]f your conviction was annulled [New Hampshire’s term for expungement], we encourage you to disclose this information. Many bars require you to submit information of annulled records prior to admission.¹²⁷

It had been debated for years within the UNH Law community whether this approach was beneficial to law students who ultimately choose to apply in states other than those with prohibition statutes or whether having a question that encouraged disclosure lead to increased problems for them if they choose not to disclose in their law school application. The 2013 change, which excludes expunged offenses, acknowledges that the prior question created more problems than it solved.

Massachusetts walks the line between a prohibition and a defense to perjury statute.¹²⁸ Most notably, the state statutorily distinguishes between sealed and expunged records. Both protect individuals “in any examination, appointment or application for public employment in the service of the commonwealth” from compulsorily disclosing their past convictions.¹²⁹ But the expungement statute additionally provides that any expunged conviction cannot be “used against the claimant in any way in any court proceedings or hearings before any court, board or

122. *Id.*

123. *Id.*

124. *Id.*

125. See Dickerson, *supra* note 120, at 462; McQuire, *supra* note 9, at 736–37, n.66.

126. N.H. Bar Application, *supra* note 29. Question eight asks applicants to provide: “Criminal Offenses. NOTE: In answer to questions 8 (a)(b) and (c) below, DO NOT include offenses for which the record of your arrest, conviction, or sentence was annulled after a petition brought by you pursuant to statute was granted.” *Id.*

127. University of New Hampshire School of Law Application, see *infra* Appendix A.

128. See MASS. GEN. LAWS ANN. ch. 258D, § 7(C)–(D) (West 2013); *Id.* at ch. 276, § 100C.

129. *Id.* at ch. 276, § 100C.

commission to which the claimant is a party to the proceeding.”¹³⁰ On its face, this statute seems to prohibit the Board of Bar Examiners from inquiring about expunged offenses.¹³¹ In fact, a law school applicant might reasonably interpret the statute’s application of “boards” and “commissions” as barring the Board of Bar Examiners from examining expunged offenses; nevertheless, applicants to the bar are required to disclose expunged offenses.¹³²

Common law further illustrates the effect of expungement. According to the Massachusetts Supreme Court, when a record is expunged, “all traces of it vanish, and no indication is left behind that information has been removed,” but sealed records are merely made unavailable to the public.¹³³ Without any indication otherwise, the statutes and common law create a reasonable presumption that expunged records cannot be accessed and that law school applicants can safely omit expunged offenses from their law school applications.

It is unclear whether Massachusetts’s law schools adhere to this presumption.¹³⁴ Boston College, Boston University, and Northeastern instruct applicants to omit “vacated” convictions,¹³⁵ but vacated convictions are not the same as expunged ones. More to the point, these law schools do not even address how an applicant should regard expunged offenses. This silence likely creates immense confusion for the average law school applicant. On the one hand, an unassuming applicant might erroneously assume that “vacated” is synonymous with “expunged” and omit his expunged offense. On the other hand, an applicant who catches this subtlety, will, nonetheless, remain oblivious as to how to treat his expunged offense. This type of correctable confusion creates a perilous environment for any law school applicant and may unfairly punish applicants who are not trying to be dissembling.

Prohibition statutes aim to avoid these situations. Instead of arming the juvenile offender with a potentially obscure defense, they prohibit interested parties from even inquiring into expunged offenses and avoid the catch-22 often implicated by the defense to perjury statutes.

130. *Id.* at ch. 258D, § 7(D).

131. Applicants to the Massachusetts Bar are warned that “nondisclosure of a material fact on [their] application(s) to the bar, law school or undergraduate school is prima facie evidence of the lack of good character.” *Character and Fitness Standards for Admission, MASS. BD. OF BAR EXAM’RS, R. v.1* (July 1, 2009), <http://www.mass.gov/bbe/charandfitness.pdf> (emphasis added).

132. *Massachusetts Bar Application, NCBEX*, <https://secure.ncbex2.org/php/ea/view.php> (last visited Mar. 3, 2013) (“NOTE: Your responses to Questions 21A and 21B must include matters that have been dismissed, expunged, subject to a diversion or deferred prosecution program, or otherwise set aside.”).

133. *Commonwealth v. Boe*, 924 N.E.2d 239, 240 n.2 (Mass. 2010).

134. Western New England Law School is the only institution in Massachusetts that specifically instructs applicants to omit any expunged records from their applications. *See infra* Appendix A.

135. *See infra* Appendix A.

3. Mere Destruction/Sealing Statutes

The mere destruction statutes are particularly unique. These statutes neither arm the juvenile defender with a defense to perjury nor prohibit interested parties from inquiring into expunged offenses; rather, they authorize the Court to have the record either destroyed or sealed—nothing more.¹³⁶

Minnesota's expungement statute, for example, fails to specify any remedy other than the mere sealing of the criminal record.¹³⁷ As the statute provides: "The remedy available is limited to a court order sealing the records and prohibiting the disclosure of their existence or their opening except under court order or statutory authority."¹³⁸ As one author has commented, "[i]n these states it is unclear whether the juvenile offender may be subsequently discharged if the employer discovers the truth."¹³⁹ These statutes arm offenders only with the hope that an employer, school, agency, or any other institution will not discover the expunged offense. Perhaps because of the ambiguity of this type of statute, all of Minnesota's law schools expressly require applicants to disclose expunged offenses.¹⁴⁰

In an interesting recent case, the New Jersey Supreme Court looked at the impact its expungement statute has on the use of truth as a defense to a defamation action.¹⁴¹ The plaintiff sought to bar use of the defense of truth, arguing "his expunged conviction is deemed not to have occurred under the expungement statute . . ."¹⁴² Defendant countered by asserting that the expungement statute does not render a true statement false. He also maintained that the statute does not obliterate the history or memory of a criminal conviction, but only restricts use and access to the records of the conviction.¹⁴³

The court came down on the side of the defendant. It found that expungement does not "obliterate the record of a conviction."¹⁴⁴ Rather, it strictly interpreted the law and found that the law's impact was merely to bar certain agencies from disclosing the expunged information. In addressing the use by persons not specifically governed by the law, it wrote:

However, no one has argued that a newspaper that has reported on the arrest or conviction of a person whose record is later expunged must excise from its archives a past story or, similarly, that the New Jersey judiciary must razor from the bound volumes of its reporters a published case. Common sense tells us that an arrest or conviction may become general knowledge within a com-

136. See, e.g., GA. CODE ANN. § 35-3-37(d)(4) (West 2013); MINN. STAT. ANN. § 609A.01 (West 2013).

137. § 609A.01.

138. *Id.*

139. Snow, *supra* note 92, at 35.

140. See *infra* Appendix A.

141. G.D. v. Kenny, 15 A.3d 300 (N.J. 2011).

142. *Id.* at 308.

143. *Id.* at 309.

144. *Id.* at 313.

munity and that people will not banish from their memories stored knowledge even if they become aware of an expungement order. And long before the entry of an expungement order, information about an arrest and conviction may be compiled by data aggregators and disseminated to companies interested in conducting background checks. Through the internet, today, information is transmitted instantaneously to countless recipients everywhere around the globe. All of the beneficial purposes of the expungement statute, and the protections it provides, will not allow a person to fully escape from his past. The expungement statute—enacted at a time when law enforcement and court documents may have been stored in the practical obscurity of a file room—now must coexist in a world where information is subject to rapid and mass dissemination.¹⁴⁵

While not specifically addressing the propriety of inquiry by third parties, this case suggests a modest reach of many expungement statutes. However, this case should be read with some caution, since it involves defamation, which is heavily regulated by First Amendment concerns. Nonetheless, the Court's limited application of the expungement statute is relevant to understanding the scope of statutes, other than prohibition-type ones.¹⁴⁶

III. CONFLICTS OF LAW QUESTIONS—FULL FAITH AND CREDIT: THE INTERSTATE EFFECT OF EXPUNGEMENT

As noted above, expungement is a fairly murky topic. Not only is there no universal consensus regarding its procedure and effect, at the end of the day, it does not change the metaphysical reality of an underlying offense. These realities force one, in light of student mobility, to question whether one state must, at least, respect another state's expungement order under the full faith and credit and clause of the Constitution. If so, some of the uncertainty would be removed.

For this analysis, let us entertain the following scenario: a student from New Hampshire—a complete prohibition state—applies to the bar in Texas—a defense to perjury state. The Texas Bar application requires applicants to disclose expunged offenses. Suppose the student discloses the offense, is denied admission as a result, and subsequently challenges the Board's denial on the grounds that New Hampshire's expungement statute prohibits state agencies from inquiring into expunged offenses.¹⁴⁷ Does the full faith and credit clause bar Texas from asking about or considering the New Hampshire offense?

145. *Id.* (citations omitted).

146. *See id.* at 311 ("New Jersey's expungement-of-records statute, is intended to provide relief to the one-time offender who has led a life of rectitude and disassociated himself with unlawful activity. The relief provided by the expungement statute, however, does not include the wholesale rewriting of history." (citations omitted) (internal quotation marks omitted)).

147. Notice, the student's challenge must be more than a mere assertion that the record is expunged. As we have seen, expungement is measured by its effect. A court order expunging a criminal record is meaningless unless the record is protected from

In its entirety, the full faith and credit clause provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”¹⁴⁸ By this clause’s plain terms, it appears that expungement orders and the statutory constraints attached to them should be respected by every state. Thus, in the scenario above, it might be argued that the Texas Bar would be precluded from inquiring into the expunged records of a New Hampshire applicant. As it turns out, however, the full faith and credit does not so operate.

Despite its robust language, the full faith and credit clause is quite elastic.¹⁴⁹ In *Hughes v. Fetter*, the Supreme Court established that, “full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state”¹⁵⁰ Every state has the constitutional right to enact laws and the corollary right to enforce those laws within its borders; the full faith and credit clause does not compel the displacement of local law without a showing that “upon some rational basis . . . [the foreign state’s interests] are superior to those of the forum.”¹⁵¹ Whenever conflicting interests emerge, therefore, the forum state must assert a legitimate interest for applying its own law.¹⁵² So long as this legitimate interest endures, the forum state does not offend full faith and credit.¹⁵³

In the expungement context, the foreign state’s interest is unlikely to be superior. In *White v. Thomas*, for example, a Texas deputy sheriff was fired for failing to reveal an expunged arrest in California on his employment application.¹⁵⁴ He challenged his termination on full faith and credit grounds.¹⁵⁵ The Fifth Circuit unequivocally dismissed his claim stating that, “[t]he clause does not require a Texas sheriff to obey California law.”¹⁵⁶

In *Delehant v. Bd. on Police Standards & Training*, the Oregon Board on Police Standards and Training denied the petitioner’s application on the grounds that he had been previously convicted of several crimes in Idaho.¹⁵⁷ Because the petitioner had these crimes expunged in Idaho, he averred that full faith and credit precluded the Board from

disclosure in some capacity. Thus, the student must assert a limiting principle as to why the record cannot be disclosed or inquired into.

148. U.S. CONST. art. IV, § 1.

149. See *Barker v. State*, 402 N.E.2d 550, 552–53 (Ohio 1980).

150. 341 U.S. 609, 611 (1951).

151. *Alaska Packers Ass’n v. Indus. Accident Comm’n.*, 294 U.S. 532, 547–48 (1935).

152. See *id.*

153. *Id.*

154. 660 F.2d 680, 682 (5th Cir. 1981).

155. *Id.* at 685.

156. *Id.*

157. *Delehant v. Bd. on Police Standards & Training*, 855 P.2d 1088, 1089 (Or. 1993).

considering his prior arrests.¹⁵⁸ The Supreme Court of Oregon rejected this argument stating that “Oregon can give full faith and credit to the Idaho policy choice as to when to allow dismissal or expunction of criminal convictions, without in any sense obligating itself to observe a parallel policy here.”¹⁵⁹ To put it simply, a state’s interest in expunging a criminal record and eliminating the stigma associated with that record is rarely superior to another state’s interest in regulating its police, applying habitual offender laws, or any other matter for which expungement conflicts with a state interest.¹⁶⁰

Bar examiners—like other licensing examiners—have a substantial interest in assessing an applicant’s character and fitness to practice law, which according to Bar authorities involves an investigation into an applicant’s past criminal records—expunged or not. Considering the above scenario, therefore, Texas’s interest in vetting candidates for the bar will trump New Hampshire’s interest in eliminating the stigma associated with youthful offenses because the Texas Bar is aiming to protect its public from, at least what it deems likely to be, unscrupulous Texas lawyers. Thus, an expungement order from New Hampshire and the provisions associated with it seems unlikely to have any mandatory effect in Texas, and Texas’s law will prevail.

With this said, the Texas Bar will nevertheless remain bound by its own expungement principles and policies. Full faith and credit requires a balancing of state interests; it does not create a vacuum for the forum to create new law after rejecting a sister state’s interest. If Texas law were to prohibit inquiries into expunged offenses, it would have to abide by this principle.

The limited effect of full faith and credit seems to make some sense in this context. New Hampshire should not be able to legislate how Texas administers its bar admissions process.¹⁶¹ Such a conclusion would not only impede state sovereignty, but would create a pragmatic nightmare. For instance, how would Texas avoid asking questions about records expunged in New Hampshire unless it knew that an applicant had an expunged record in New Hampshire? Also, Texas and New Hampshire impose different requirements for expungement. Consequently, two applicants may commit the same crime but only one

158. *Id.* at 1090.

159. *Id.* at 1092.

160. *See generally* Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974) (noting that full faith and credit does not prohibit the IRS from denying a firearm license to a person whose prior state conviction had been pardoned); Groseclose v. Plummer, 106 F.2d 311 (9th Cir. 1939) (holding that full faith and credit did not preclude the court from considering the petitioner’s pardoned Texas conviction for sentencing purposes under California’s habitual offender law); Ballard v. Bd. of Trs. of Police Pension Fund, 452 N.E.2d 1023 (Ind. Ct. App. 1983) (declaring that full faith and credit does not require Indiana to subvert its own public policy against extending pension fund rights to convicted felons because Arizona expunged the petitioner’s felonies).

161. One could certainly make the argument that New Hampshire, as the state that chose to impose the criminal sanction, should retain the ability to alter the designation of the offender as a criminal. However logical that proposition might be, it does not seem compelled by the full faith and credit clause.

applicant will have a criminal record. Commenting on this schism, the President of the NCBE has expressed that when evaluating character “[y]ou want to be sure that behavior is not obscured by process.”¹⁶²

On the other hand, the limited effect of full faith and credit certainly undercuts the value of expungement. Expungement appears to be a powerful tool on the surface, but in actuality, the effect of an expunged record is limited to the state in which it was expunged. On a national scale, one wonders whether expungement is merely a fiction, especially in the law school and bar admission arena. Students, therefore, must be made aware of this limitation and cautioned before applying to law schools and bars in various states.

IV. WHAT LAW SCHOOLS SHOULD ASK IN ADMISSIONS TO MEET THEIR RESPONSIBILITIES AND TO AVOID CREATING UNNECESSARY BAR ADMISSION PROBLEMS

As demonstrated above, the scope and impact of expungement statutes is at best unclear and differs in each state. This lack of statutory clarity combines with the often inaccurate advice given to young offenders to create subsequent bar admission issues.¹⁶³ The matter is further exacerbated by the fact that fifty-eight percent of law schools explicitly require the disclosure of expunged offenses, while thirty-two percent either do not address the issue or barrage the applicant with subtle hints about whether to disclose an expunged offense or not.¹⁶⁴

Regardless of the actual language of a state’s expungement statute, it is almost folklore in much of the noncriminal bar and in the community at large that if something is expunged, one need never disclose it.¹⁶⁵ When the confluence of these factors produce inconsistent disclosures on the law school and bar applications, the bar admission consequences, including delay, anxiety, and possible refusal to admit the applicant, are significant. In light of this, the key question is what law schools should do to best balance the multiple interests at stake here.

There can, of course, be no dispute that law schools must abide by their state law on expungement. But as has been noted above, the

162. Schmoke, *supra* note 14, at 2 (quoting NCBE President Erica Moeser).

163. See McGuire, *supra* note 9, at 716–18. Professor McGuire reported that between 2001 and 2004, as part of University of Iowa Law School’s partial amnesty period, fifty-nine students came forward and amended their applications. Over two-thirds reported confusion with the application’s wordings, referencing terms like “charged,” “expunged,” “annulled,” and “minor traffic offense.” *Id.* Also, Ohio Legal Services’ online website states that “[e]xpunging a juvenile record means the record is permanently destroyed and never available to be viewed by anyone ever again.” *Reentry: Expungement*, OHIO LEGAL SERVS., http://www.ohiolegalservices.org/public/legal_problem/reentry/expungement/qandact_view?log=2&searchterm=expungment (last visited Jan. 25, 2014). While that is true in the abstract, it does not necessarily reflect reality.

164. See *infra* Appendix A.

165. For an example of the misconception and naivety surrounding expungement, particularly in the law school and bar context, look at law school blogs and forums where throngs of hopeful applicants post questions seeking advice concerning their expunged offenses. See, e.g., *Expunged Offenses*, TOP-LAW-SCHOOLS.COM, <http://www.top-law-schools.com/archives/viewtopic.php?f=2&t=26533> (last visited Jan. 25, 2014).

more difficult question, especially in states without specific prohibitory statutes, is whether the particular statute bars a law school from asking about expunged offenses. Unfortunately, there is not definitive case law answering this question for each jurisdiction.¹⁶⁶ In light of this, each law school should carefully evaluate, based on the statutory purpose of expungement, the law school and the bar's needs to ensure quality, and the practical realities of this issue, whether it should ask for this information. This Article urges law schools not to seek this information and to make it clear that it is not seeking expunged offenses so that there can be no issue of candor at the character and fitness level.

In order to reach a judgment on this question, law schools will need to look at the competing values. On one hand, society, through expungement, seeks to reduce recidivism by opening opportunities that might not otherwise be available. Society also has an interest in allowing qualified past offenders to attend law school with the hope that some will be committed to increasing access to justice during their careers.

Basic tenets of equity and fairness, as well as the underlying purpose of expungement statutes, seem to mandate that a person convicted of an isolated shoplifting offense, public intoxication, a marijuana possession, or similar offenses, are not to be forever stigmatized by employers, licensing boards, and universities. They should—for all intents and purposes—be given a second chance to pursue their career goals free of the societal stigma of arrest for a minor offense. However, one must not minimize the public's interest in safety and its right to make character judgments on individuals in certain professions.¹⁶⁷

Several scholars have analyzed law schools' interests in asking about an applicant's criminal history.¹⁶⁸ Among the important law school and professional interests identified as supporting these inquiries are: (1) the interest in making good admission decisions; (2) protecting the applicant from investing in a law school education if he or she will be unable to be admitted to the bar; (3) protecting the reputation of the law school; (4) supporting a healthy learning community by not admitting students who are more likely to create disharmony among the student body; and (5) protecting the profession by assisting

166. Even in a prohibition state, like New Hampshire, the state's law school, acting in good faith and seeking to protect those who may seek bar admission in another state from the consequences of inconsistent disclosures, encourages disclosure of expunged offenses. See *infra* Appendix A.

167. Mukamal & Samuels, *supra* note 84, at 1502. They state:

Government can and should have legitimate concerns about protecting the public safety from people who might do the public harm and about allowing employers and others to disqualify those whose criminal records demonstrate their unsuitability. At the same time, government also has an obligation to ensure fairness and opportunity for people who were arrested but never convicted or, if convicted, satisfied or are complying with their sentences, so they can obtain employment, housing, food, and other necessities of life.

168. See, e.g., McGuire, *supra* note 9; see also Dzienkowski, *supra* note 10.

in the character and fitness process.¹⁶⁹ While all of these are legitimate interests of law schools and the bar and likely justify asking about crimes that have not been expunged, there does not seem to be a sufficient nexus between these goals and gathering information about expunged offenses to outweigh the practical problems described above and the undermining of expungement goals.

Turning to the first interest—making proper law school admissions decisions—one must ask if expunged offenses are significant in admission decisions. One scholar, with significant experience in the admission field, has written:

I believe that most law schools tend to exclude consideration of character and fitness except in [serious cases] Given that such incidents [underage drinking or illegal drug use addressed through deferred adjudication or ticket-like offenses] are more commonplace, academic institutions tend to view them with less concern and scrutiny. In other words, they are viewed as part of growing up and not as an indication of a flaw in character or a situation requiring consideration in admission.¹⁷⁰

If these offenses are not in fact used in admission decisions, this rationale does not seem to be persuasive, especially in light of the legislative judgment to provide a fresh start to those with expunged offenses.

The interest in fostering a healthy learning environment similarly does not hold water in the context of expunged offenses. One searches in vain for evidence that those with a minor offense in their distant past are more likely to pollute the learning environment. Rather, the legislature of each state has made a judgment that any possible negative, predictive impact of offenses eligible to be expunged is outweighed by the benefits of a fresh start.

The law school's reputational interest, while important, similarly does not justify inquiry into expunged offenses. It is certainly true that a law school's reputation is damaged whenever anyone identified as a student acts badly.¹⁷¹ However, the fact that a school admitted a student who had a minor offense and had the offense expunged by the sentencing court pursuant to a statute seems unlikely to aggravate the condemnation. If there is any public cost for admitting someone with an expunged offense who commits an embarrassing act, that cost is so

169. McGuire, *supra* note 9, at 727–30. Professor McGuire also very effectively analyzes the perennial question in admission decisions, which is whether “law school is purely an academic enterprise, [where the] admission process can be designed solely to exclude applicants who cannot meet its intellectual demands” or whether educators are “at least ‘temporal partners’ with state bar authorities in selecting and preparing future lawyers to meet high character and fitness qualifications.” *Id.* at 724–30.

170. Dzienkowski, *supra* note 10, at 940; *see also* McGuire, *supra* note 9, at 736 (“In states without an explicit prohibition, public policy considerations might restrain law schools from requiring applicants to report annulled or expunged records.”).

171. This is likely even more true with the explosive growth of law blogs. *See, e.g.*, Joe Patrice, *Stanford-Educated Attorney Convicted of Racketeering Jumps Off Bridge*, ABOVE THE LAW (Feb. 28, 2013, 2:31 AM), <http://abovethelaw.com/2013/02/stanford-educated-attorney-convicted-of-racketeering-jumps-off-bridge>.

clearly irrational that it should not form a basis for a law school to override carefully considered judgments of the judiciary and the legislature.

The interest of protecting the profession by assisting in the character and fitness process is a somewhat controversial proposition within the academe.¹⁷² Bar authorities argue that law schools serve as a professional training ground.¹⁷³ However, all involved in the law school community know that there are many individuals who attend law school as a graduate program, and never seek bar admission. Regardless of where one comes down on this debate, it is clear that the bar will still be able to ask about expunged offenses, unless prohibited by statute. Law schools will also be key participants in the character and fitness process by providing information on the law student's tenure at the school in dean's certificates and full information on any conduct violations the law student may have had during his or her career.

The fundamental point is that since, as demonstrated above, inconsistencies can be devastating and confusion about expungement is rampant, law schools do not further the certification process by seeking this information; in fact, such questions may unfortunately provide a basis to deny or delay the application of a fully qualified person who received conflicting legal advice in their youth.¹⁷⁴

The final interest—in not permitting an applicant to invest in a law school education if the student will be barred from admission to the bar—is certainly quite important as a consumer protection matter. It is also true that bar authorities are more likely to be concerned with any type of alcohol or drug conviction than law school admission personnel.¹⁷⁵ Yet, there is little reason to believe that admission personnel, who are certainly not experienced in all fifty states' bar admission processes, will be able to effectively determine which applicants with minor offenses will have bar admission problems three years in the future. Nor is there evidence that the underlying expunged offenses, as opposed to the candor problems that arise from inconsistencies or serious criminal conduct, will result in negative bar admission decisions.

The simple fact is that the types of offenses that are expunged are not the types of crime that will prevent an applicant from gaining admission to the bar.¹⁷⁶ While under ABA rules law schools must warn applicants with serious crimes of bar admission problems,¹⁷⁷ it would

172. See McGuire, *supra* note 9, at 729–34.

173. *Id.* at 730.

174. Dzienkowski, *supra* note 10, at 948.

175. *Id.* at 940.

176. See Simon, *supra* note 3, at 1012–13.

177. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, 2012-2013 ABA STANDARDS AND RULES OF PROCEDURE OR APPROVAL OF LAW SCHOOLS 35 (2012–2013), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/chapter_5_2012_2013_aba_standards_and_rules.authcheckdam.pdf (“A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.”). For the purpose of character and fitness, the ABA requires laws to abide by the following:

be near impossible to provide any type of effective warning to those with minor expunged offenses.

CONCLUSION

After reviewing the confusing law surrounding the process of expungement and reflecting on my experience with law students over twenty-five years, I believe that law schools should revise their applications to make explicit that they are not seeking information on expunged offenses. This step will avoid the subsequent bar admission issues described in this Article.

There simply do not seem to be compelling policy justifications supporting the inquiry necessary to override the legislative judgment that such individuals should be given a fresh start. While the steps being taken by Georgia law schools to lessen the confusion are worthy steps, the program does not really answer why the question is being asked in the first place and the role of state expungement law. That said, a school that decides its state law permits it to ask about expunged offenses and chooses to do so, should, at a minimum, adopt the Georgia procedure.

We should all share the goal of avoiding unnecessary harm to our students, while supporting the bar admission process. However, the situation too many of us face during a student's sixth semester of law school, where we see before us a gifted law student of high character, who did not understand the disclosure obligation at the time of her law school admission, and is now panicked about bar admission and losing the job she worked so diligently to find in this tough economy solely due to the inconsistency between their law school and bar applications, is unnecessary harm. Law schools can avoid this situation, without sacrificing anything of value to the school or the bar, by making clear on their applications that they are not seeking information on expunged offenses.

(a) A law school shall advise each applicant that there are character, fitness and other qualifications for admission to the bar and encourage the applicant, prior to matriculation, to determine what those requirements are in the state(s) in which the applicant intends to practice. The law school should, as soon after matriculation as is practicable, take additional steps to apprise entering students of the importance of determining the applicable character, fitness and other qualifications.

(b) The law school may, to the extent it deems appropriate, adopt such tests, questionnaires, or required references as the proper admission authorities may find useful and relevant, in determining the character, fitness or other qualifications of the applicants to the law school.

(c) If a law school considers an applicant's character, fitness or other qualifications, it shall exercise care that the consideration is not used as a reason to deny admission to a qualified applicant because of political, social, or economic views that might be considered unorthodox.

APPENDIX A:

TABLE OF STATE EXPUNGEMENT STATUTES AND LAW
SCHOOL APPLICATIONS¹⁷⁸

Delaware: (Defense to Perjury State)	Statute: “An offense for which records have been expunged pursuant to this section does not have to be disclosed as an arrest, by the petitioner for any reason.” ¹⁷⁹
<u>Law School:</u>	<u>Application Text:</u>
I. Widener University School of Law	“2. Have you ever been arrested, taken into custody, or accused formally or informally of the violation of a law for any offense other than a minor traffic violation? If “Yes,” you must use an electronic attachment to provide your detailed explanation. Your explanation must include the nature of the offense, the facts surrounding the offense, all relevant dates, disposition and sanctions. If currently on probation or parole, you must provide all terms and conditions. Please note any instance of driving under the influence, and offenses which have been expunged or occurred while a juvenile, including disorderly persons’ offenses. Note: You have a continuing duty to update the information you provided in response to this question. You must notify Widener Law of any legal violations occurring after submission of this application.”
Florida: (Defense to Perjury State)	Statute: “(a) The person who is the subject of a criminal history record that is expunged under this section . . . may lawfully deny or fail to acknowledge the arrests covered by the expunged record, except when the subject of the record: . . . 4. Is a candidate for admission to The Florida Bar. . . .” ¹⁸⁰
<u>Law School:</u>	<u>Application Text:</u>
I. Ave Maria School of Law	“Have you ever been charged with, arrested for, pleaded guilty to, or been convicted of any crime other than a minor traffic violation? Please disclose this information even if the charges were dismissed or you were acquitted, the conviction was stayed or vacated, the record was sealed or expunged, or if you were advised not to disclose this information.”

178. In the interest of simplicity and space, the tables included in this appendix refer only to states and law schools referenced in the article. These states include Delaware, Florida, Illinois, Massachusetts, Minnesota, New Hampshire, and North Carolina. Note all the applications are from the 2011–2012 academic year.

179. DEL. CODE ANN. tit. 10, § 1018(h) (West 2013).

180. FLA. STAT. ANN. § 943.0585(4)(a) (West 2013).

2. Barry University School of Law	“In your entire life, have you ever been arrested, detained, or restrained, taken into custody, or accused formally or informally of a felony, whether or not the charge was later reduced to a misdemeanor or other lesser charge? If yes, provide a complete explanation of the circumstances leading to the arrest, the subsequent action taken by the authorities, and the final disposition including information about the conviction, incarceration, probation, and restoration of civil rights.”
3. Florida A&M College of Law	“1. In your entire life, have you ever been arrested, detained, restrained, taken into custody or formally or informally accused of violating a law or ordinance? Please include all matters (including traffic violations resulting in a fine of \$200 or more) regardless of final disposition (dismissal, acquittal, expungement or other resolution).”
4. Florida Coastal School of Law	“1. Have you ever been arrested, detained, or restrained, taken into custody, accused formally or informally of a violation of law or ordinance? You should disclose each instance even though the charges may have been dismissed, or you were acquitted, or adjudication was withheld, or a conviction was reversed, set aside, or vacated. However, if your records were expunged pursuant to applicable law and documented by the court, you are not required to answer yes to this question.”
5. Florida International University School of Law	“3. Have you ever been arrested, detained or restrained, taken into custody or accused formally or informally of a violation of law or ordinance (whether or not the record has been sealed or expunged)?; You should disclose each instance regardless of sanctions or outcomes in the attachment section.”
6. Florida State University College of Law:	“1. Law Violation Duty to Disclose: Have you ever been arrested, detained or restrained, taken into custody, accused formally or informally of a violation of law or ordinance? You should disclose each instance even though the charges may have been dismissed, or you were acquitted, or adjudication was withheld, or a conviction was reversed, set aside, or vacated. <i>However, if your records were expunged pursuant to applicable law, you are not required to answer yes to this question.</i> ”

<p>7. Florida University Levin College of Law</p>	<p>“If your records have been expunged pursuant to applicable law, you are not required to answer “yes” to question 3, 4 or 5 with respect to that particular charge. It is your responsibility to know whether your records have been expunged pursuant to applicable law. You should be aware that a state Board of Bar Examiners investigation into your fitness to practice law can extend beyond the scope of this question (as well as questions 1 and 2), and you might be required by a state Board of Bar Examiners to disclose expunged records as well as any convictions or charges that you are required to disclose in answering these questions. If you are unsure whether to answer “yes,” we strongly recommend answering “yes” and fully disclosing all incidents. By doing so, you can avoid risk of disciplinary action and/or revocation of an admission offer, and possibly minimize the investigations conducted by the applicable Board of Bar Examiners”</p>
<p>8. Nova Southwestern University</p>	<p>“At a minimum you should include a brief statement of what happened, the date of the law violation or accusation, the original charge or accusation, and disposition of the matter. If a court expunged or sealed the records, then you may answer “no,” but you must provide us with a copy of the court order expunging or sealing the records.8. Have you ever been convicted of a crime?”</p>
<p>9. St. Thomas University School of Law</p>	<p>“1. Have you ever been arrested for, charged with, or convicted of a crime? You must include juvenile offenses, alcohol offenses, including driving under the influence of alcohol or drugs and any adjudication withheld by court. Also include any misdemeanor or felony offenses for which the charges were dropped, dismissed, referred to a pretrial interventional program, deferred prosecution, and/or for which the records have been sealed or expunged. If you have ever been arrested for, charged with, or convicted of a felony you must include copies of official documentation that demonstrates the disposition of the matter. Please explain in detail the circumstances surrounding the incident(s) and the disposition of each matter. The school has the right to conduct a criminal background check on all applicants to verify information disclosed. Additionally, the school may revoke an acceptance if the applicant has not made a full disclosure.”</p>

<p>10. Stetson University College of Law</p>	<p>“In answering questions on The Florida Bar application, the Board of Bar Examiners states that applicants are warned that no statute, court order, or legal proceeding withholding adjudication, expunging the information required herein from any record, sealing the records which contained the information required herein, or dismissing, vacating or setting aside any arrest, accusation or conviction, or purporting to authorize any person to deny the existence of such matters shall excuse less than full disclosure, IRRESPECTIVE OF ANY ADVICE FROM ANY SOURCE (INCLUDING LEGAL COUNSEL) THAT SUCH INFORMATION NEED NOT BE DISCLOSED. It is further required that records will have to be unsealed and released to the Board of Bar Examiners even if sealed or expunged.</p> <p>In question #2, you should disclose each instance even though charges may have been dismissed, or you were acquitted, or adjudication was withheld, or a conviction was reversed, set aside, or vacated. If you have any charges pending or active warrants for your arrest, you are required to answer yes. This question includes periods before you turned 18. If your records were expunged pursuant to applicable law, you may not be required to answer yes, but you should carefully read the Character and Fitness Disclosure below.”</p>
<p>11. University of Miami School of Law</p>	<p>“2. Have you ever been charged with a crime resulting in conviction, probation, community service, withholding of adjudication, diversion, a jail sentence, or revocation/suspension of your driver’s license? You may omit minor traffic offenses for which the penalty was a fine of \$200 or less. If your record was expunged pursuant to applicable law, you are not required to answer yes to this question (but you will probably have to disclose any charges and results in any application you submit for admission to practice).”</p>
<p>Illinois: (Defense to Perjury State:)</p>	<p>Statute: “[E]xpungement instructions that shall include information informing the minor that (i) once the case is expunged, it shall be treated as if it never occurred, (ii) he or she may apply to have petition fees waived, (iii) once he or she obtains an expungement, he or she may not be required to disclose that he or she had a juvenile record”¹⁸¹</p>

181. 705 ILL. COMP. STAT. ANN. 405/5-915 (2.6) (West 2013).

<u>Law School:</u>	<u>Application Text:</u>
1. Chicago-Kent College of Law	<p>“1. Have you ever been convicted of, pled guilty or nolo contendere to, or received a period of supervision for, any offense other than a minor traffic or parking violation, or is any charge now pending against you concerning such an offense? (A “minor traffic violation” is a violation for which only a citation was issued, e.g., speeding. You must report any other traffic offense, including any offense in which acting under the influence of a drug or alcohol was an element of the offense.) You must disclose each instance regardless of whether a conviction was reversed, set aside or vacated, or the record sealed or expunged.”</p>
2. DePaul University College of Law	<p>“3. Have you been detained, arrested, summoned into court, cited, indicted or convicted in any criminal, military or juvenile proceeding? If yes, you must disclose each instance even though the charges have been dismissed or you were acquitted or adjudication was withheld or a conviction was reversed, set aside, vacated or the record sealed or expunged and regardless of whether you have been told you need not disclose any such instances.”</p>
3. University of Illinois College of Law	<p>“2. Have you ever been convicted of a crime, either as a juvenile or adult, including misdemeanors and infractions, but excluding minor traffic violations, or are such criminal charges pending or expected to be brought against you? This includes matters that have been expunged or subject to a diversionary program.”</p>
4. John Marshall Law School	<p>“4. Have you ever, either as an adult or as a juvenile, been cited, arrested, charged or convicted for violation of any law other than a minor traffic or parking violation? (A “minor traffic violation” is a violation for which only a citation was issued, e.g. speeding or other moving violations. Other traffic offenses, including any in which acting under the influence of a drug or alcohol was an element of the offense, must be reported). NOTE: Please answer regardless of the final disposition. If Yes, please state the facts fully on a separate attachment and attach a copy of the arresting officer’s report, complaint, indictment, trial disposition, sentence and appeal, if any (see Attachments section). You must disclose each instance even though charges may not have been formally brought against you or they were dismissed or you were acquitted or adjudication was withheld or a conviction was reversed, set aside or vacated regardless of whether you have been told that you need not disclose any such instance.”</p>
5. Loyola University Chicago School of Law	<p>“4. Have you ever been convicted of, pleaded guilty or nolo contendere (no contest) to a criminal offense other than a minor traffic offense, or is any criminal charge now pending against you? Offenses involving the use of drugs or alcohol are not considered minor offenses and must be reported.”</p>

6. Northern Illinois University College of Law	<p>“3. Have you ever, including when you were a juvenile, been formally or informally detained, restrained, cited, summoned into court, taken into custody, arrested, accused, convicted, placed on probation, placed on supervision, or forfeited collateral in connection with any offense against the law or an ordinance, or accused of committing a delinquent act?”</p>
7. Northwestern University School of Law	<p>“2. Have you ever, either as an adult or a juvenile, been cited, arrested, taken into custody, charged with, indicted, convicted or tried for, or pleaded guilty to, the commission of any felony or misdemeanor or the violation of any law, except minor parking or traffic violations, or been the subject of any juvenile delinquency or youthful offender proceeding?”</p> <p>Please note that although a conviction may have been expunged from the records by an order of a court, it nevertheless should be disclosed in the answer to this question.”</p>
8. Southern Illinois University School of Law	<p>“NOTE: Full disclosure applies to any charges that have been dismissed, you were acquitted, adjudication was withheld or deferred, a conviction was reversed, set aside, or vacated, any records were sealed or expunged, you received court supervision, or you pled guilty or nolo contendere to the charge, and regardless of whether you have been told previously that you need not disclose any such instance.”</p>
9. University of Chicago Law School	<p>“2. Have you ever been charged with or convicted of any crime or offense other than a minor traffic violation? This includes any charges, complaints or citations that were filed against you as a juvenile or as an adult, formal or informal, pending or closed, dismissed, expunged, sealed or subject to a diversionary program, and includes any charges, complaints or citations that you reasonably expect to be brought against you. If so, please provide all material facts and an explanation of the circumstances.”</p>
<p>Massachusetts (Prohibition State)</p>	<p>Statute: “(C) Any order to expunge or seal entered by the court shall provide that, in any employment application, the claimant may answer ‘no record’ as to any charges expunged or sealed pursuant to this section in response to an inquiry regarding prior felony arrests, court appearances or criminal convictions.</p> <p>(D) The charges and convictions expunged or sealed shall not operate to disqualify the claimant in any examination, appointment or application for public employment in the service of the commonwealth or any other political subdivision thereof, nor shall such charges and convictions be used against the claimant in any way in any court proceedings or hearings before any court, board or commission to which the claimant is a party to the proceedings.”¹⁸²</p>

<u>Law School:</u>	<u>Application Text:</u>
1. Boston College Law School	<p>“2. Are you currently charged with (note: we are not inquiring about arrests) any violation of the law other than minor traffic violations with a fine of less than \$100.00 per violation? 3. Have you ever been:</p> <ol style="list-style-type: none"> 1. convicted of a felony and that conviction has not been vacated; 2. sentenced to imprisonment on conviction of any misdemeanor and that conviction has not been vacated; 3. convicted within the last five years of a misdemeanor (other than a first conviction of any of these misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace) and that conviction has not been vacated. <p>Note: Bar examiners may require other information that we are not permitted to seek under Massachusetts statutes.</p> <p>If your answer is yes to any of these questions, please upload (in the “Attachments” section) a detailed statement addressing the situation/circumstances.”</p>
2. Boston University School of Law	<p>“1. Have you ever been convicted, without such conviction being vacated, of a misdemeanor for which the sentence was imprisonment?</p> <p>2. Have you ever been convicted, without such conviction being vacated, of a felony?</p> <p>3. Other than a first conviction for any of the following crimes — drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace — have you been convicted of any misdemeanor within the past five years?”</p>
3. Harvard University School of Law	<p>“If you answer “yes” to any of the questions below, you must provide details on a separate attachment.</p> <p>* Please note that although a conviction may have been expunged from the records by an order of the court, it nevertheless should be disclosed in the answer to this question. 4. Have you been convicted of a felony?*; 5. Have you been convicted of a misdemeanor (excluding speeding tickets)?*; 6. Are any charges pending which, if you were to be convicted, would require your answer to either of the two previous questions to be “yes”?”</p>

4. New England School of Law	<p>“2. Have you ever, either as an adult or juvenile, been cited, arrested, taken into custody, charged with, indicted, convicted or tried for, received deferred adjudication or probation, or pleaded guilty or nolo contendere to the commission of any felony or misdemeanor or the violation of any law, except minor speeding and parking violations? Note: Some states’ bars require disclosure of criminal proceedings even if they have subsequently been expunged or sealed. If yes, include a separate statement describing the nature of the charge, the circumstances involved, the sentence imposed, and the court in which the case was heard (may be electronically attached).”</p>
5. Northeastern School of Law	<p>“1. Have you ever been convicted (without the conviction being vacated) of a felony or is any such charge now pending against you? If yes, please include all relevant court documents.</p> <p>2. Have you ever been convicted (without the conviction being vacated) of 1) a misdemeanor for which the sentence was imprisonment, or 2) any other misdemeanor excluding a first-time conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace within the last five years? If yes, please include all relevant court documents.”</p>
6. Suffolk University Law School	<p>Note: Bar Examiners may require more detailed information regarding unlawful conduct, including charges brought, academic misconduct, including events that you may believe have been sealed, expunged or otherwise removed from your record, making false statements or omissions, and misconduct in employment. Applicants should direct all questions regarding bar admission to the board of bar examiners of the state in which they intend to practice.</p> <p>3. Have you ever been charged with or been the subject of any investigation for a felony or misdemeanor or other criminal charge other than a minor traffic charge? If yes, state the dates, courts, details and results on an electronic attachment.</p>
7. Western New England School of Law	<p>“2. Have you ever been charged with a felony?*</p> <p>*Without the record later being sealed or expunged.</p> <p>3. Have you been charged with a misdemeanor within the five years preceding the date of this application?*</p> <p>*Without the record later being sealed or expunged.”</p>
Minnesota (Mere Destruction State)	<p>Statute: “The remedy available is limited to a court order sealing the records and prohibiting the disclosure of their existence or their opening except under court order or statutory authority.”¹⁸³</p>

183. MINN. STAT. ANN. § 609A.01 (West 2013).

<u>Law School:</u>	<u>Application Text:</u>
1. Hamline University School of Law	“4. Have you EVER been charged with, arrested for, pleaded guilty to, or been convicted of ANY LEGAL VIOLATION? Examples include, but are not limited to any traffic moving violation, petty misdemeanor, underage consumption, felony charge, etc. Exclude paid parking tickets. Applicants MUST disclose this information even if the record was sealed or expunged; you were told you need not disclose it; the charges were dismissed; you were acquitted; and/or the conviction was stayed or vacated.”
2. University of Minnesota School of Law	“1. Have you ever in your entire life been charged with, or arrested for, the violation of any law? This includes traffic laws (including moving violations), misdemeanors, gross misdemeanors, felonies, or the equivalent. If yes, attach a narrative statement (see Attachments tab) describing the circumstances. You must disclose this requested information even if the charges were dismissed or you were acquitted, the conviction was stayed or vacated, the record sealed or expunged, or you were told you need not disclose this information.”
3. University of St. Thomas School of Law.	“1. Have you ever been charged with, arrested for, pleaded guilty to, or been convicted of any crime other than a minor traffic violation? Please disclose this information even if the charges were dismissed or you were acquitted, the conviction was stayed or vacated, the record was sealed or expunged, or you were told you need not disclose this information.”
4. William Mitchell School of Law	<p>“Matriculating students have a continuing duty to disclose information regarding any charges they have received for violations of the law until graduation from William Mitchell, with the following exception: speeding tickets do not need to be disclosed by matriculating students unless more than three occur during your enrollment at Mitchell, then all speeding tickets that occur (or occurred) during your enrollment at Mitchell and not previously disclosed, must be disclosed. In all cases (even if just one offense), speeding tickets and other traffic offenses involving alcohol or drugs must be disclosed.</p> <p>3. Have you ever in your life been charged with the violation of any law, including traffic laws? (Exclude paid parking tickets.) You must disclose this requested information even if the charges were dismissed, you were acquitted, the conviction was stayed or vacated, the record was sealed or expunged, or you were a juvenile.”</p>

<p>New Hampshire (Prohibition State)</p>	<p>Statute: “In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record only in terms such as ‘Have you ever been arrested for or convicted of a crime that has not been annulled by a court?’”¹⁸⁴</p>
<p><u>Law School:</u></p>	<p><u>Application Text:</u></p>
<p>I. University of New Hampshire School Law</p>	<p>“1. Have you ever been arrested or charged with any offense by complaint or indictment, or convicted of a crime, or are any charges now pending against you? “Convicted of a crime” includes pleading guilty to any charge, a deferred judgment or deferred sentencing arrangement. “Offenses” includes felonies, misdemeanors, and motor vehicle violations. This does not include traffic or parking tickets, unless there are three (3) or more in a twelve (12)-month period. If “yes,” please explain by attaching a full descriptive statement that includes dates, charges, and current dispositions. Failure to disclose an arrest, charge, or conviction that has not been annulled can lead to disciplinary action and revocation of an admission offer. If your conviction was annulled, we encourage you to disclose this information. Many bars require you to submit information of annulled records prior to admission.”</p>
<p>North Carolina (Defense to Perjury State)</p>	<p>Statute: “No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person’s failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him or her for any purpose.”¹⁸⁵</p>

184. N.H. REV. STAT. ANN. § 651:5(X)(f) (2013).

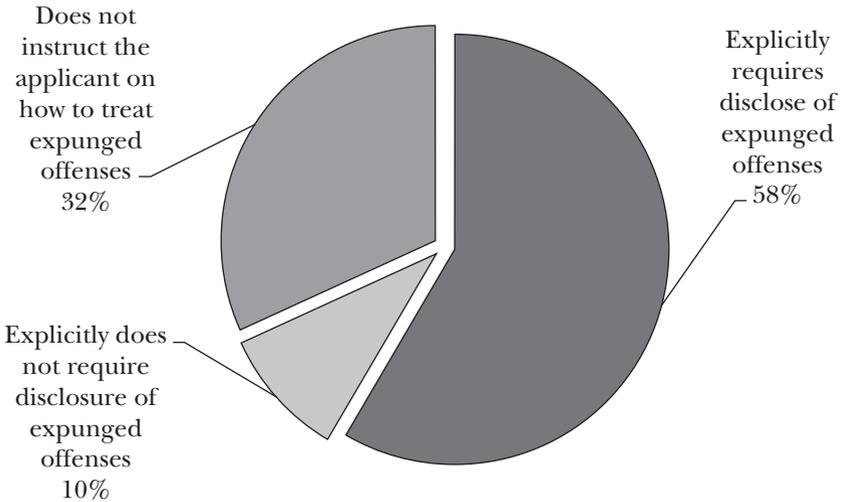
185. N.C. GEN. STAT. ANN. § 15A-145.2(b) (West 2013).

<u>Law School:</u>	<u>Application Text:</u>
1. Campbell University School of Law	<p>“If you fail to fully disclose information in this application, the subsequent background check conducted by the state board of law examiners will reveal the discrepancy between your actual record and your law school application. This discrepancy will cause concern for the character and fitness committee of the state bar as they evaluate your character and fitness to practice law. The failure to fully, completely, and candidly answer all of the following questions, therefore, may result in the rejection of your application to law school, expulsion from law school if admitted, or denial of admission to a state bar . . .</p> <p>5. Have you EVER IN YOUR ENTIRE LIFE been convicted, charged, arrested, given a written warning, taken into custody, or accused, formally or informally, of the violation of a law for an offense other than parking violations?”</p>
2. Charlotte School of Law	<p>“1. Have you EVER been arrested, given a written warning, been taken into custody, or accused formally or informally of a violation of the law for any offense other than minor traffic violations? (Expunged or sealed records must be reported.) Minor traffic violations, except those involving drugs or alcohol, need not be reported.”</p>
3. Duke Law School	<p>“Duke Law requires that you reveal knowledge of all criminal incidents and disciplinary charges, even if expunged, sealed, or otherwise removed from your records. When in doubt, you should err on the side of full disclosure, as subsequent discovery of a failure to fully and accurately answer these questions may have serious consequences.”</p>
4. Elon University School of Law	<p>“With respect to the questions below, Elon University School of Law requires that an applicant disclose ALL criminal incidents and disciplinary charges, even if the charges were dismissed or expunged, the applicant was acquitted, adjudication was withheld or conviction was reversed, set aside or vacated. ; 3. Have you ever received a citation for, been arrested for, charged with, or convicted of, or pled guilty, no contest, nolo contendere, entered an Alford plea, or otherwise accepted responsibility for a crime, or have you received a deferred prosecution or prayer for judgment continued, for any criminal charge?”</p>

5. North Carolina Central University School of Law	<p>“You must answer all of the following seven questions below. For the purpose of these questions, “crime” or “criminal charge” refers to any crime other than a traffic-related misdemeanor or an infraction. You must, however, include alcohol or drug offenses whether or not they are traffic related.</p> <ol style="list-style-type: none"> 1. Have you been convicted of a crime? 2. Have you entered a plea of guilty, a plea of no contest, a plea of nolo contendere, or an Alford plea, or have you received a deferred prosecution or prayer for judgement continued, to a criminal charge? 3. Have you EVER IN YOUR LIFE been arrested, given a written warning, or taken into custody, or accused, formally or informally, of the violation of a law for an offense other than traffic violations? 4. Have you otherwise accepted responsibility for the commission of a crime? 5. Have you ever been charged or convicted of DWI/ DUI or driving under the influence of drugs? 6. Do you have any criminal charges pending against you?”
6. University of North Carolina School of Law	<p>When completing this application for admission, all applicants are required to disclose the details and results of any criminal charges (except for minor traffic violations). Even if charges were dismissed, or a conviction reversed, set aside, or vacated, the matters must be disclosed to the School of Law. Contrary advice by legal counsel does not exempt an applicant from this requirement. Juvenile records that have been sealed or expunged by order of a court need not be disclosed on this application.”</p>
7. Wake Forrest School of Law	<p>“Unless a court has ordered your records expunged or sealed, you must disclose all criminal charges or convictions irrespective of any advice from any source, including legal counsel. An expunged or sealed record requires a formal court order; the dismissal of a charge does NOT mean that it has been expunged. Juvenile records are not automatically sealed.”</p>

APPENDIX B:

CHART OF EXPUNGEMENT REQUIREMENTS FOR LAW SCHOOL APPLICATIONS



This chart represents how all accredited law schools in the U.S. treat expunged criminal offenses on their applications. Based on the language used in each application, the questions regarding criminal offenses can be separated into three categories: (1) those which explicitly require disclosure of expunged criminal offenses¹⁸⁶; (2) those which explicitly do not require disclosure of expunged criminal offenses¹⁸⁷; and (3) those which do not explicitly instruct the applicant whether to disclose or withhold expunged offenses.¹⁸⁸

186. For example, Charlotte School of Law's instructions clearly state: "Have you EVER been arrested, given a written warning, been taken into custody, or accused formally or informally of a violation of the law for any offense other than minor traffic violations? (*Expunged or sealed records must be reported.*)" See *supra* Appendix A (emphasis added).

187. For example, Wake Forest's application clearly states that "[u]nless a court has ordered your records expunged or sealed, you must disclose all criminal charges or convictions irrespective of any advice from any source, including legal counsel." See *supra* Appendix A.

188. For example, Northern Illinois University College of Law asks: "[h]ave you ever, including when you were a juvenile, been formally or informally detained, restrained, cited, summoned into court, taken into custody, arrested, accused, convicted, placed on probation, placed on supervision, or forfeited collateral in connection with any offense against the law or an ordinance, or accused of committing a delinquent act?" See *supra* Appendix A.

APPENDIX C:

TABLE CLASSIFYING STATE EXPUNGEMENT STATUTES

State	Citation(s)	Defense to Perjury	Mere Destruction	Prohibition
Alabama	No Clear Statutory Authority ¹⁸⁹			
Alaska	No Clear Statutory Authority ¹⁹⁰			
Arizona	ARIZONA REV. STAT. ANN. § 13-907		X	
Arkansas	ARK. CODE ANN. § 16-60-902	X		
California	CAL. PENAL CODE § 851.7	X		
Colorado	COLO. REV. STAT. ANN. §§ 19-1-306, 24-72-308	X		
Connecticut	CONN. GEN. STAT. ANN. § 54-142a(3)	X		
Delaware	DEL. CODE ANN. tit. 10, § 1018, tit. 11, § 4376	X		
Florida	FLA. STAT. § 943.0585 (4) (a)	X		
Georgia	GA. CODE ANN. § 35-3-37		X	
Hawaii	HAW. REV. STAT. ANN. § 571-88	X		
Idaho	IDAHO CODE ANN. § 20-525A(5)	X		
Illinois	705 ILL. COMP. STAT. ANN. § 405/5-915	X		
Indiana	IND. CODE § 35-38-5-3		X	
Iowa	IOWA CODE § 907.9	X		
Kansas	KAN. STAT. ANN. § 21-6614	X		
Kentucky	KY. REV. STAT. ANN. § 431.078(5)	X		
Louisiana	LA. CHILD. CODE ANN. art. 922	X		

189. Kristin K. Henson, Comment, *Can You Make this Go Away?: Alabama's Inconsistent Approach to Expunging Criminal Records*, 35 CUMB. L. REV. 385, 387 (2005) (“Courts in Alabama, however, are often asked to expunge criminal records despite the fact that no statutory authority expressly grants them the power to do so.”).

190. *Journey v. State*, 850 P.2d 663, 665 (Alaska Ct. App. 1993) (“[T]he parties agree that no Alaska statute, rule, or judicial decision expressly vests sentencing courts with the power to expunge criminal records; nor is the exercise of such power expressly prohibited.”).

Maine	General Expungement Statute Repealed. Sealing of Juvenile Records. ME. REV. STAT. tit. 15, § 3308(8)	X		
Maryland	MD. CODE ANN., CRIM. PROC. §10-109			X
Massachusetts	MASS. GEN LAWS ANN. ch. 258D, § 7(c)-(d).			X
Michigan	MICH. COMP. LAWS § 780.622	X		
Minnesota	MINN. STAT. ANN. § 609A.01		X	
Mississippi	MISS. CODE ANN. § 99-19-71	X		
Missouri	MO. REV. STAT. § 610.140	X		
Montana	No Clear Statutory Authority			
Nebraska	NEB. REV. STAT. ANN. § 29-3523		X	
Nevada	NEV. REV. STAT. ANN. § 179.285		X	
New Hampshire	N.H. REV. STAT. ANN. § 651:5			X
New Jersey	N.J. STAT. ANN. § 2C:52-27	X		
New Mexico	N.M. STAT. ANN. § 32A-3B-21	X		
New York	No Clear Statutory Authority			
North Carolina	N.C. GEN. STAT. § 15A-145	X		
North Dakota	No Clear Statutory Authority			
Ohio	OHIO REV. CODE ANN. § 2151.358(f)	X		
Oklahoma	OKLA. STAT. ANN. tit. 22, §19.	X		
Oregon	OR. REV. STAT. ANN. § 419A.262	X		
Pennsylvania	18 PA. STAT. ANN. § 9122		X	
Rhode Island	R.I. GEN LAWS ANN. § 12-1.3-4	X		
South Carolina	S.C. CODE ANN. §§ 22-5-910, 22-5-920		X	
South Dakota	S.D. CODIFIED LAWS § 23A-3-22	X		
Tennessee	TENN. CODE ANN. § 40-35-313	X		

Texas	TEX. CODE CRIM. PROC. ANN. art. 55.03(3)	X		
Utah	UTAH CODE ANN. § 77-40- 108	X		
Vermont:	VT. STAT. ANN. tit. 13, § 7606	X		
Virginia	VA. CODE ANN. § 19.2- 392.4			X
Washington	WASH. REV. CODE ANN. § 13.50.050	X		
West Virginia	W. VA. CODE ANN. § 61- 11-26	X		
Wisconsin	WIS. STAT. ANN. § 973.015		X	
Wyoming	WYO . STAT. ANN. § 7-13- 1401	X		

