

CRIMINAL PROCEDURE — ANCILLARY JURISDICTION —  
DISTRICT COURT GRANTS MOTION TO EXPUNGE CONVICTION  
FOR EQUITABLE REASONS. — *Doe v. United States*, No. 14-MC-  
1412, 2015 WL 2452613 (E.D.N.Y. May 21, 2015).

Ancillary jurisdiction refers to the power of a court to adjudicate proceedings that — while not properly before the court themselves — are related to a matter within the court’s jurisdiction.<sup>1</sup> Though similar to statutory supplemental jurisdiction within the federal system, ancillary jurisdiction lies outside the bounds of 28 U.S.C. § 1367<sup>2</sup> and implicates the limits of the inherent powers of a federal court.<sup>3</sup> Disputes over ancillary jurisdiction most often arise in civil litigation.<sup>4</sup> However, attempts to mitigate the collateral effects of arrest and conviction records have pushed reform-minded courts to examine the boundaries of their jurisdiction in criminal cases.

Recently, in *Doe v. United States*,<sup>5</sup> the United States District Court for the Eastern District of New York granted a request to expunge a criminal conviction. The district court based its decision on purely equitable considerations, finding that the employment consequences the petitioner had suffered were sufficiently extraordinary to warrant expungement.<sup>6</sup> The court also identified what it perceived as a circuit split on ancillary jurisdiction over equitable expungement motions, and used the disagreement to buttress its jurisdiction.<sup>7</sup> This reading of the case law, though, failed to distinguish between decisions addressing arrest and conviction records, and did not differentiate among judicial and executive records.<sup>8</sup> On the narrower question of expunging execu-

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<sup>1</sup> See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523.2, at 213 (3d ed. 2008) (defining ancillary jurisdiction as “jurisdiction over related *proceedings* that are technically separate from the initial case that invoked federal subject matter jurisdiction” and distinguishing it from “supplemental jurisdiction over *claims* asserted in federal court”).

<sup>2</sup> 28 U.S.C. § 1367 (2012) (granting federal courts jurisdiction to hear matters “so related to claims in the action within such original jurisdiction that they form part of the same case or controversy” despite otherwise lacking jurisdiction).

<sup>3</sup> WRIGHT ET AL., *supra* note 1, § 3523.2, at 213 (“It seems clear that § 1367 does not apply to [ancillary] jurisdiction.”).

<sup>4</sup> See *id.* § 3523.2, at 214–21 (discussing multiple situations in civil cases implicating ancillary jurisdiction but only two — expungement and fee disputes — within the criminal law).

<sup>5</sup> No. 14-MC-1412, 2015 WL 2452613 (E.D.N.Y. May 21, 2015).

<sup>6</sup> See *id.* at \*1.

<sup>7</sup> See *id.* at \*4 & n.16.

<sup>8</sup> Records of arrests and convictions for federal crimes can be stored by both executive branch agencies and courts. Compare 28 U.S.C. § 534(a)(1) (2012) (“The Attorney General shall . . . preserve identification, criminal identification, crime, and other records . . .”), with *United States v. Flowers*, 389 F.3d 737, 738 (7th Cir. 2004) (referencing records “kept by the judicial branch”). The literature echoes *Doe*’s imprecision, creating confusion. See WRIGHT ET AL., *supra* note 1, § 3523.2, at 218 (noting disagreement on jurisdiction over expungement of “records” without specifying type or holder of files); see also *Joefield v. United States*, No. 13-MC-367, 2013

tive branch records of lawful convictions, circuits that have considered the issue are unanimous in their rejection of jurisdiction. Despite this misplaced reliance on a superficial circuit split, the district court offered a plausible interpretation of the Supreme Court's ancillary jurisdiction jurisprudence. *Doe* therefore provides a template for addressing the collateral consequences of overcriminalization, but reveals serious constitutional concerns surrounding the Supreme Court's test for ancillary jurisdiction.

Jane Doe immigrated to the United States from Haiti in 1983 "in search of a better life."<sup>9</sup> Fourteen years later she was raising four children on her own in Queens and working as a home health aide.<sup>10</sup> Around that time, Doe participated in an automobile insurance fraud scheme.<sup>11</sup> She also filed a fraudulent lawsuit.<sup>12</sup> In 2001, a jury convicted Doe of committing health care fraud in violation of 18 U.S.C. § 1347.<sup>13</sup> On March 25, 2002, Judge Gleeson of the Eastern District of New York sentenced Doe to five years of probation, imposed a short term of home confinement, and ordered restitution.<sup>14</sup>

In 2014, Doe petitioned Judge Gleeson to expunge her conviction.<sup>15</sup> She argued that she had lost at least six jobs as a health care aide and cited the employment consequences of her conviction as the basis of her request for relief.<sup>16</sup> Judge Gleeson drew upon letters from Doe to her probation officer to agree that when employers "learn of Doe's conviction, she gets fired."<sup>17</sup> He also noted the consequences of felony convictions more generally, emphasizing the number of employers who conduct criminal background checks and the difficulty of finding housing.<sup>18</sup> Judge Gleeson wrote that until the "commendable systemic efforts to correct the long-lasting and often disproportionate consequences of criminal convictions" reached cases like Doe's,<sup>19</sup> "expungement lies within the equitable discretion of the court."<sup>20</sup> He stated that such recourse, though, requires balancing the government's need to maintain

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WL 3972650, at \*2 (E.D.N.Y. Aug. 5, 2013) ("A near-even circuit split exists . . . [on] whether federal courts have the inherent authority to expunge criminal records.").

<sup>9</sup> *Doe*, 2015 WL 2452613, at \*1.

<sup>10</sup> *Id.* Doe earned \$783 a month. *Id.*

<sup>11</sup> *Id.* at \*2. After an intentional car crash, Doe feigned injury. *Id.* She signed over her rights to insurance benefits to a clinic, which then billed for unneeded services. *Id.* at \*2 & n.1.

<sup>12</sup> *Id.* at \*2. Doe received \$2500 from a settlement of the suit. *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*1.

<sup>16</sup> *Id.* at \*1, \*3, \*5.

<sup>17</sup> *Id.* at \*3.

<sup>18</sup> *See id.* at \*4.

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

<sup>20</sup> *Id.* (quoting *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977)).

records — largely for public safety — against the damage criminal records can cause.<sup>21</sup>

Noting that Doe wished to expunge “a valid conviction, not a suspect arrest,” the court acknowledged that “sufficiently extraordinary circumstances” must be present.<sup>22</sup> The court first examined the facts of Doe’s record to determine whether keeping the files improved public safety.<sup>23</sup> Observing the time since Doe’s conviction, her age, and her otherwise clean record, the court found that her “risk of recidivism [mirrors that of] someone who has never committed a crime.”<sup>24</sup> The employment consequences Doe continued to suffer were thus “excessive and counter-productive.”<sup>25</sup> The court then rejected the government’s argument that preserving the health care fraud conviction of a person seeking employment as a home health aide protects the public interest.<sup>26</sup> Judge Gleeson emphasized how unrelated the substance of Doe’s participation in the fraud was to health care, and found “no specter . . . that she poses a heightened risk to prospective employers in the health care field.”<sup>27</sup> Having discerned “sufficiently extraordinary circumstances,” the court “ordered that the government’s arrest and conviction records” be sealed.<sup>28</sup>

Neither party raised the issue, but the court found that it possessed jurisdiction to decide Doe’s motion despite a lack of statutory authorization.<sup>29</sup> Addressing its power in a lengthy footnote, the court identified the Supreme Court’s decision in *Kokkonen v. Guardian Life Insurance Co. of America*<sup>30</sup> as setting the limits of a federal court’s ancillary jurisdiction. The *Kokkonen* Court held that jurisdiction was proper only “(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent,” or “(2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.”<sup>31</sup> The district court noted consensus among the circuits that jurisdiction over the expungement of “unlawful convictions or arrests” existed under this test, but stated that the expungement of “records of lawful convictions based on equitable considerations” was the subject of a circuit

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<sup>21</sup> *Id.* (citing *United States v. Doe*, No. 71-CR-892, 2004 WL 1124687, at \*2 (S.D.N.Y. May 20, 2004)).

<sup>22</sup> *Id.* at \*5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at \*6.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at \*4 n.16.

<sup>30</sup> 511 U.S. 375 (1994).

<sup>31</sup> *Id.* at 379–80.

split.<sup>32</sup> Judge Gleeson characterized decisions in the First, Third, Sixth, Eighth, and Ninth Circuits as interpreting *Kokkonen* to preclude jurisdiction, but wrote that courts in the Second, Fourth, Seventh, Tenth, and D.C. Circuits found ancillary jurisdiction.<sup>33</sup>

Seizing on this disagreement, the district court read *Kokkonen* to allow jurisdiction. Judge Gleeson reasoned that an expungement hearing's "sole focus is the record of the conviction . . . and the exercise of discretion it calls for is informed by, *inter alia*, the facts underlying the conviction and sentence and the extensive factual record created" during Doe's probation.<sup>34</sup> This factual relation fit within *Kokkonen*'s first purpose for ancillary jurisdiction.<sup>35</sup> Further, given that "few things could be more essential to 'the conduct of federal-court business' than the appropriateness of expunging the public records that business creates," the court found *Kokkonen*'s second purpose satisfied.<sup>36</sup>

While the district court correctly identified case law supporting the exercise of jurisdiction over *certain* motions to expunge records, jurisdiction to grant the relief Doe sought required a more novel reading of *Kokkonen*. On the narrow question of whether jurisdiction exists to expunge executive branch records of lawful convictions for equitable reasons, no circuit court has interpreted *Kokkonen* to answer in the affirmative. Rather, in limited instances, courts have found jurisdiction to expunge or seal judicial records, and to expunge executive branch records of arrests or unlawful convictions. However, Judge Gleeson's application of *Kokkonen* remains plausible even absent support from the other circuits. *Doe* therefore reveals latent separation of powers concerns in the Supreme Court's ancillary jurisdiction jurisprudence by suggesting a district court may have the power to order executive branch agencies to disregard statutory recordkeeping requirements.

The district court began its jurisdictional analysis by accurately — if incompletely — describing the case law interpreting *Kokkonen* to preclude ancillary jurisdiction over equitable expungement of lawful convictions.<sup>37</sup> However, its citation of cases finding jurisdiction erred

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<sup>32</sup> *Doe*, 2015 WL 2452613, at \*4 n.16.

<sup>33</sup> *See id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> *Id.* (quoting *Kokkonen*, 511 U.S. at 381).

<sup>37</sup> *Id.* The *Doe* court accurately characterized the interpretation of *Kokkonen* to preclude jurisdiction in the First, Third, Sixth, Eighth, and Ninth Circuits. *See* *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007); *United States v. Rowlands*, 451 F.3d 173, 177–78 (3d Cir. 2006); *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001); *United States v. Field*, 756 F.3d 911, 915 (6th Cir. 2014); *United States v. Lucido*, 612 F.3d 871, 875–76 (6th Cir. 2010); *United States v. Meyer*, 439 F.3d 855, 860 (8th Cir. 2006); *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000). Similarly, Judge Gleeson correctly described the case law in the Fourth Circuit, where district courts have interpreted circuit precedent in light of *Kokkonen* to preclude jurisdiction. *See, e.g., United States v. McKnight*, 33 F. Supp. 3d 577, 582 (D. Md. 2014) (“[E]xpungement of a criminal

on two counts. First, the decision failed to distinguish cases in which courts have found jurisdiction to expunge judicial, rather than executive, records. For example, Judge Gleeson stated that the Seventh Circuit had found jurisdiction over applications to expunge records, without specifying who held them.<sup>38</sup> In the cited case, *United States v. Flowers*,<sup>39</sup> the Seventh Circuit found that while jurisdiction existed “to expunge records maintained by the judicial branch,”<sup>40</sup> circuit precedent made clear that “courts are without jurisdiction to order an Executive Branch agency to expunge what are admittedly accurate records of a person’s indictment and conviction.”<sup>41</sup> Unlike the executive branch records central to the employment consequences Doe suffered, the files in *Flowers* were only those kept by the courts.

The Fifth Circuit has made a similar distinction between judicial and executive records. The *Doe* court failed to identify a case from that circuit bearing on the issue, and a panel has yet to directly address *Kokkonen*. However, in *Sealed Appellant v. Sealed Appellee*,<sup>42</sup> the court found that absent “affirmative misuse of the subject information,”<sup>43</sup> no jurisdiction existed to hear a motion to expunge executive branch records.<sup>44</sup> The court found only that unspecified “supervisory powers” allowed expunging judicial branch records.<sup>45</sup> Applying ancillary jurisdiction as articulated in *Sealed Appellant* to the facts of *Doe* would thus not result in the expansive remedy ordered.

The second error in the *Doe* court’s analysis of the broader jurisdictional precedent was the failure to distinguish between arrest and conviction records. Though the Tenth Circuit has yet to squarely address *Kokkonen*,<sup>46</sup> the *Doe* court cited *United States v.*

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*conviction* runs counter to the court’s ability to facilitate and manage its proceedings, vindicate its authority, and effectuate its decrees . . . .”); *United States v. Mitchell*, 683 F. Supp. 2d 427, 433 (E.D. Va. 2010). Judge Gleeson failed to note that district courts in the Eleventh Circuit have similarly found jurisdiction to require more than equitable considerations. See *United States v. Paxton*, No. 3:99CR91, 2007 WL 2081483, at \*2 (M.D. Ala. July 20, 2007) (noting that under “the post-*Kokkonen* analysis” the court “does not have ancillary jurisdiction to expunge criminal records on equitable grounds alone”); accord *United States v. Carson*, 366 F. Supp. 2d 1151, 1155 (M.D. Fla. 2004).

<sup>38</sup> *Doe*, 2015 WL 2452613, at \*4 n.16 (identifying *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004), as supporting jurisdiction).

<sup>39</sup> 389 F.3d 737.

<sup>40</sup> *Id.* at 739. The *Flowers* court never referred to *Kokkonen*.

<sup>41</sup> *Id.* at 738 (quoting *United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993)).

<sup>42</sup> 130 F.3d 695 (5th Cir. 1997).

<sup>43</sup> *Id.* at 702.

<sup>44</sup> See *id.* at 697–99; accord *Melawer v. United States*, 341 F. App’x 83, 84 (5th Cir. 2009). The Fifth Circuit characterized the inquiry as relating to standing. *Sealed Appellant*, 130 F.3d at 697–99.

<sup>45</sup> *Sealed Appellant*, 130 F.3d at 697 n.2.

<sup>46</sup> See *United States v. Ward*, No. 2:06-cr-538, 2009 WL 5216861, at \*1 n.1 (D. Utah Dec. 29, 2009) (“Several circuit courts have considered w[he]ther the district courts have jurisdiction to grant motions for expungement in light of *Kokkonen* . . . . The Tenth Circuit has not . . .”).

*Linn*<sup>47</sup> to support jurisdiction.<sup>48</sup> The *Linn* court stated that “courts do possess the power to expunge an arrest record where the arrestee has been acquitted.”<sup>49</sup> More recently, in *United States v. Pinto*,<sup>50</sup> the Tenth Circuit found that because of the “large difference between expunging the arrest record of a presumably innocent person, and expunging the conviction of a person adjudged as guilty in a court of law,” only “when a conviction is somehow invalidated” does jurisdiction exist.<sup>51</sup> *Pinto* thus makes clear that *Linn* does not support jurisdiction in the situation faced by the *Doe* court.

The D.C. Circuit recognizes a similar distinction. The *Doe* opinion cited *Livingston v. Department of Justice*<sup>52</sup> to support the proposition that the D.C. Circuit has found that jurisdiction exists over motions for equitable expungement.<sup>53</sup> The *Livingston* court, however, discussed only “the inherent, equitable power to expunge arrest records.”<sup>54</sup> More recently, the D.C. Circuit narrowed this conception of expungement even further in *Abdelfattah v. Department of Homeland Security*,<sup>55</sup> finding that “expungement is a remedy that may be available to vindicate statutory or constitutional rights.”<sup>56</sup> Under *Abdelfattah*, absent a predicate “violation of an established legal right,” the court has no power to expunge even an arrest record.<sup>57</sup>

Thus, on the issue of jurisdiction over motions to expunge executive branch records of lawful convictions for equitable reasons, the case law in eleven of the circuits weighs against the *Doe* court’s conclusion.

<sup>47</sup> 513 F.2d 925 (10th Cir. 1975). *Linn* was decided nineteen years before *Kokkonen*.

<sup>48</sup> *Doe*, 2015 WL 2452613, at \*4 n.16 (citing *Linn*, 513 F.2d at 927).

<sup>49</sup> *Linn*, 513 F.2d at 927. Judge Gleeson also cited *Allen v. Webster*, 742 F.2d 153 (4th Cir. 1984), for support. *Doe*, 2015 WL 2452613, at \*4 n.16. Like *Linn*, *Allen* dealt with an arrest record in the aftermath of an acquittal, though it involved a suit against the record-holding agency. *Allen*, 742 F.2d at 154. District courts in the Fourth Circuit have persuasively distinguished *Allen*. See, e.g., *United States v. Harris*, 847 F. Supp. 2d 828, 833 (D. Md. 2012) (“*Allen* . . . involv[ed] a criminal arrest and acquittal record, not a conviction.”). Seeking injunctive relief against the agency directly, though, may avoid the jurisdictional concerns raised in *Doe* and bypass the separation of powers issues noted by several circuits. See *United States v. Janik*, 10 F.3d 470, 473 (7th Cir. 1993) (“To obtain expungement of records maintained by the FBI or any other Executive Branch agency [one] must go directly to the Executive Branch.”).

<sup>50</sup> 1 F.3d 1069 (10th Cir. 1993).

<sup>51</sup> *Id.* at 1070.

<sup>52</sup> 759 F.2d 74 (D.C. Cir. 1985).

<sup>53</sup> *Doe*, 2015 WL 2452613, at \*4 n.16.

<sup>54</sup> *Livingston*, 759 F.2d at 78.

<sup>55</sup> 787 F.3d 524 (D.C. Cir. 2015).

<sup>56</sup> *Id.* at 536.

<sup>57</sup> See *id.* By limiting expungement to instances when a rights violation has occurred, the D.C. Circuit’s reasoning reflects the same separation of powers concerns raised by the Fifth and Seventh Circuits in distinguishing judicial from executive records. Indeed, the *Abdelfattah* court approvingly cited *Sealed Appellant*, noting the “separation of powers concerns that would arise from the judiciary assuming authority over routine maintenance of executive branch records.” *Id.* at 537 (emphasis added).

The strongest support for ancillary jurisdiction comes from within the Second Circuit. In *United States v. Schnitzer*,<sup>58</sup> the court held that ancillary jurisdiction included at least the limited power to “issue protective orders regarding dissemination of arrest records” held by the executive branch.<sup>59</sup> Despite the opinion’s silence on records of convictions, district courts have interpreted *Schnitzer* to mean that they retain jurisdiction over motions to expunge such records for even equitable reasons.<sup>60</sup> However, these courts have failed to reckon with *Kokkonen*, and *Schnitzer* speaks only to arrest records.

Despite the lack of support among the other circuits for jurisdiction and *Schnitzer*’s questionable reach, Judge Gleeson offered a plausible interpretation of why expungement fits within both purposes for ancillary jurisdiction articulated in *Kokkonen*.<sup>61</sup> To serve the first purpose, the facts of the original proceeding and the new matter must be interdependent.<sup>62</sup> Doe’s conviction and the employment consequences of her record were factually inseparable in weighing the equities of her petition. To determine whether Doe presented a danger such that employers needed to be warned, Judge Gleeson had to delve into the circumstances of her original crime. As he wrote, “facts matter.”<sup>63</sup> For example, in determining that health care employers faced no “heightened risk” from Doe, the court examined how it “was essentially fortuitous” that the conviction had been for health care fraud.<sup>64</sup> In rejecting interdependency, courts have noted that equitable expungement turns on “matters that occurred *after* the criminal proceedings.”<sup>65</sup> It is true that one side of the weighing of the equities — the harm to the petitioner — may involve only these later facts. However, the *other* side — public safety — necessarily requires an investigation into the underlying conviction, such as the one that Judge Gleeson performed.

<sup>58</sup> 567 F.2d 536 (2d Cir. 1977).

<sup>59</sup> *Id.* at 538.

<sup>60</sup> *See, e.g.*, *United States v. Gonzalez*, No. 04-CR-191A, 2010 WL 1491852, at \*1 (W.D.N.Y. Apr. 12, 2010) (finding jurisdiction to expunge conviction for equitable reasons); *United States v. James*, No. 97 CR 715, 2003 WL 21056989, at \*1 (E.D.N.Y. Feb. 13, 2003) (noting an “inherent equitable power to order expungement of criminal records”); *United States v. Doe*, 935 F. Supp. 478, 480 (S.D.N.Y. 1996); *United States v. Bryde*, 914 F. Supp. 38, 39 (N.D.N.Y. 1996) (observing courts “rarely have granted motions to expunge *conviction* records,” thereby implying the existence of such power).

<sup>61</sup> There, the Court found that the breach of a settlement agreement lay outside the jurisdiction of a federal court that had dismissed the case without reserving jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377–79 (1994). Such a dispute constituted a breach of contract claim that had “nothing to do with” the original lawsuit, making it “neither . . . necessary nor even particularly efficient that they be adjudicated together.” *Id.* at 380.

<sup>62</sup> *Id.* at 379–80.

<sup>63</sup> *Doe*, 2015 WL 2452613, at \*6.

<sup>64</sup> *Id.* (“Doe would have participated in any scheme to make ends meet.”).

<sup>65</sup> *United States v. Lucido*, 612 F.3d 871, 875 (6th Cir. 2010).

Though factual interdependency alone would justify jurisdiction, the power to expunge also serves the second purpose of ancillary jurisdiction delineated by *Kokkonen*. A basic goal of the criminal justice system is to punish in a manner that reflects the culpability of the defendant.<sup>66</sup> The relation between a crime and its punishment that leads to factual interdependency thus also supports a sentencing court retaining power over conviction records to improve its efficacy.<sup>67</sup> The original sentence in *Doe* was intended to reflect the offense.<sup>68</sup> The punishment that in fact resulted — a “lifetime of unemployment” — far exceeded that original intention.<sup>69</sup> The ability to modify records of the conviction given this context helps prevent punishment from becoming unmoored from actual culpability. Without the ability to limit the collateral consequences of the sentence through equitable expungement, the power to sentence itself is lessened. Judge Gleeson’s reading of *Kokkonen* recognizes that a court’s ability “to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees,”<sup>70</sup> improves if it can expunge records that have twisted a punishment beyond what culpability requires for retribution.

As several circuits have noted in finding that no ancillary jurisdiction exists to hear requests for equitable expungement, this reading of *Kokkonen* presents serious constitutional concerns related to the separation of powers. The Ninth Circuit observed that expunging lawful arrests and convictions “usurps the powers that the framers of the Constitution allocated to Congress, the Executive, and the states” because “expungement necessarily nullifies a law which Congress has properly enacted and which the Executive has successfully enforced.”<sup>71</sup> A tension therefore exists between these constitutional concerns and the recognition that the collateral consequences of convictions — especially nonviolent felony convictions on otherwise clean criminal records — are increasingly disproportionate to a felon’s original culpability. Judge Gleeson’s reading of *Kokkonen* brings these concerns to the fore and demonstrates the constraints faced by the judiciary in seeking to curtail the worst excesses of overcriminalization.

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<sup>66</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“With respect to retribution . . . the severity of the appropriate punishment necessarily depends on the culpability of the offender.”); MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985).

<sup>67</sup> Judge Gleeson’s focus on culpability also renders moot the distinction drawn by several of the circuits between records of arrests that resulted in acquittals and records of lawful convictions. Because an innocent person is presumably not culpable at all, weighing the consequences of a public arrest record would be similarly justified.

<sup>68</sup> See *Doe*, 2015 WL 2452613, at \*5.

<sup>69</sup> *Id.*

<sup>70</sup> *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994).

<sup>71</sup> *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000).