

By Margaret Colgate Love

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Expungement of Criminal Records: “The Big Lie”

The *Salt Lake Tribune* recently [reported](#) that people convicted of crimes many years ago who thought their convictions had been expunged by the Utah courts are finding that their record continues to show up in routine background checks. The problem appears to be that private background-checking companies are not notified when the court expunges a conviction, and so do not purge their databases.

One young mother who volunteered to be a parent helper for her son’s youth football team was mortified when a background check turned up a conviction for check forgery that had been expunged years before.

One might well ask why the football team felt it necessary to do a background check on this volunteer mom. The answer lies partly in post-9/11 paranoia, and partly in the seductive ease with which a record can be checked.

What used to require a trip to the courthouse can now be accomplished by pushing a few buttons on the computer and paying \$15. There are now hundreds of background checking companies that harvest data and make it available for a modest fee, and many state records systems are now on line. Most systems allow checking by name and date of birth, which produces many false positives.

One might also ask what rules govern the hundreds of background-checking companies that now control the destiny of the [65 million Americans](#) who have a criminal record.

The answer: very few. Those that exist are both unclear and hard to enforce.

Expungement has always been controversial—even in its heyday 40 years ago, when it was realistic to promise deserving individuals a clean slate and a new beginning. In a 1970 article in *Criminology & Police Science* [378,389] from which the title of this post is borrowed, two veteran probation officers— Bernard Kogon and Donald L. Loughery Jr—remarked that expungement “helps society to evade its obligation to change its views toward former offenders.”

The drafters of the Model Penal Code thought it hard to square a willingness to rewrite history with a legal system founded on the search for truth. Journalists claimed they were constitutionally entitled to know the worst about everyone.

Nowadays, the objections to expungement are far more practical. In addition to broader public posting and private dissemination of criminal history information, the ever-expanding list of individuals and entities given special access to expunged criminal records has further diminished the value of relief mechanisms that depend on concealment. I recently wrote in an article in the *Howard Law Journal* that expungement schemes produce “understandable anxiety in the community about a remedy many see as premised on a lie.”

It is certainly misleading to tell people whose convictions have been expunged or sealed that they may deny that they have ever been convicted, as do many 1970s-era laws that are still on the books.

If having a criminal record is not disqualifying, being caught in a lie about it probably is.

In the past two decades, the collateral consequences of conviction have multiplied, while the mechanisms for avoiding or mitigating them have become increasingly dysfunctional.

The ugly label of “convicted felon” should not be a life sentence. If we expect people once convicted of a crime to become law-abiding and productive members of the community, we should give them the tools they need to do it.

There remains a romantic fascination with expungement, but experience teaches that this is a remedy of another era.

Pardon, too, has become largely anachronistic because most politicians are either too busy or too timid to perform this once-central aspect of their job.

The challenge for modern-day reformers is to develop a new approach to restoring rights and removing the stigma of conviction that will at the same time command respect and be accessible to ordinary individuals seeking to put their past behind them.

My bet is that it will be based on acknowledging and forgiving the crime, rather than attempting to conceal and deny it.

Margaret Love, who practices law in Washington DC, represents applicants for executive clemency and for a decade in the 1990s was U.S. Pardon Attorney. She welcomes comments from readers.