One Step in the Right Direction: Ohio's Framework for Sealing Criminal Records

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As illustrated throughout this symposium, collateral sanctions often present convicted criminal defendants with hidden surprises. These collateral consequences beg a number of questions, not the least of which is how a rehabilitated citizen can shake free of these burdens, or perhaps whether they should be able to do so. The American Bar Association (ABA) has issued a number of standards designed to inform criminal defendants of collateral consequences of a plea or conviction, and to provide a framework for them to seek relief from these sanctions. Yet the ABA leaves relatively vague the methods by which a defendant can seek redress from collateral sanctions; instead it seems to prefer to establish an aspirational norm that some such avenue should be provided.

This article examines in greater detail the ABA's proposal, as well as its accompanying commentary and the critical commentary on expungement. It then turns to an exploration of Ohio law on expungement and considers how Ohio's statutory system works in practice. Next, this paper takes a brief tour of Ohio law on the sealing of civil records in order to consider overlapping themes between the civil and criminal contexts. Finally, this paper returns to the criminal arena and evaluates how well Ohio's expungement statute measures up to the ABA standards.

I. A Modest Proposal

Section 19.5(c) of the ABA's model standard provides that "[t]he legislature should establish a process by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed the law of that jurisdiction."[3] This standard is at the same time sweeping and vague. It is sweeping in the sense that it contemplates "a judicial or administrative process for obtaining relief from *all* collateral sanctions imposed by the law of that jurisdiction."[4] Yet it is vague because it leaves the process by which such relief may be obtained undefined.[5] Prior ABA Standards on the Legal Status of Prisoners had specified expungement as a means to reach this objective, but the standard failed to elaborate on what exactly the effect of "expungement" would be.[6]

As a result, the ABA Standards do not purport to cabin a jurisdiction's discretion on how to implement section 19.5(c) specifically to expungement. Rather, the Standards invite creativity and recognize that rewarding rehabilitation can take many forms.[7] Some states have taken the principles articulated in the Standards to heart, and offer criminal defendants alternate avenues in order to more successfully re-enter society. In New York, for instance, a first offender may obtain a Certificate of Relief from Disabilities from the parole board when he is released from prison, and after a period of law-abiding conduct, may apply for a Certificate of Good Conduct.[8] Georgia's Board of Pardons and Paroles will issue a similar certificate after five years of law-abiding conduct, which restores basic civil rights and relieves many of the licensing

restrictions imposed on convicted persons under state law.[9] Such "administrative restoration schemes" attempt to help offenders to not only regain legal rights, but also to re-establish their credit within their community.[10]

By and large, however, jurisdictions have turned to expungement as an acceptable means of restoring rights, and Ohio is no exception.[11] Although the new Standards seek to divert attention from expungement, a more thorough understanding of expungement is necessary given its relatively widespread recognition.[12]

Most expungement mechanisms allow a criminal defendant the right to petition a court to have his record sealed, but it is certainly not available to all offenders. Generally, it is reserved for non-violent, lower level offenses and for defendants who do not have a prior (or subsequent) criminal record.[13]

However, critics of expungement have attacked the mechanism for a number of reasons.[14] As a threshold matter, "anything short of complete destruction of the records leaves open the possibility of future access to the records."[15] As discussed in greater detail below, this problem surfaces in Ohio's statutory scheme because the records are sealed from most, but not all, people or agencies who would like to inspect them. And subsequent convictions could unravel the expungement. Thus, this "sealed for the most part" approach is rightly subject to criticism.

Expungement also raises legitimate public safety concerns, for employers and law enforcement officials alike.[16] If an employer asks whether an individual has ever been convicted of an offense, and the individual responds negatively (based on statutory permission to do so) despite a prior conviction, such a response could place the employer and its customers at risk in certain lines of work. Law enforcement may also find themselves stymied by an inability to find criminal records on an individual who they believe may have committed another offense.

Further complicating the goals of expungement is the fact that we live in an internet age.[17] Criminal records – sometimes even traffic tickets – are available for anyone with a computer and an internet connection in many jurisdictions.[18] While sealing the judicial records may be accomplished easily enough, the same cannot be said of wiping the conviction or offense from other sources. Again, returning to the example of an individual seeking employment who responds that she has never been convicted, if the employer decides to "google" her and finds out the contrary, then she sits in even a worse place – now she appears to be untruthful as well.

Finally, it is difficult to assess how well expungement serves the goal of re-integrating the offender in society.[19] If we mean to accomplish this feat by putting blinders on and pretending that the conviction did not happen, then it begs the question of whether we are really welcoming this individual back into the community or just perpetuating a myth. Rehabilitation might be better served by acknowledging the conviction but relieving the individual of her collateral sanctions in recognition for the progress she has made since conviction.

II. Ohio Law on Expungement of Criminal Records

A. Ohio law on the expungement or sealing of criminal convictions

Ohio has created a somewhat regimented framework for those seeking expungement. The relief is reserved to first offenders, who may petition the court to have the record of their conviction sealed.[20] A "first offender" is an individual who has been convicted of one offense but who has previously and subsequently not been convicted of the same or another offense.[21] However, as we shall see below, there is flexibility in the "one

offense" requirement. If the conviction is for a felony,[22] the application may be made on the sentencing court three years after the final discharge, and if the conviction is for a misdemeanor,[23] the application may be made on the sentencing court one year after discharge.[24]

Additionally, any person arrested for a misdemeanor offense who has paid a bail or fine pursuant to an agreement with the court and prosecutor may apply for an expungement one year from the date on which the bail forfeiture was entered into the court journal or minutes.[25]

The remedy of expungement or sealing of criminal records rests within a court's equitable jurisdiction, and it is within the inherent powers of a court to order the expungement of a record where it is appropriate.[26] However, in light of the statutory regime, the court's discretion is largely limited – that is to say, while a court retains discretion to determine whether an individual who meets the statutory test should have his record sealed, it generally lacks the ability to afford similar relief to those who fall outside of the statutory boundaries. In fact, the Ohio General Assembly amended the expungement statute in 1984 to limit the trial courts' powers of extra-judicial expungement. In amending the definition of "first offender," the general assembly specifically stated that minor offenses, such as misdemeanor traffic offenses, would not bar statutory expungement, and mandated which more serious traffic offenses would bar the sealing of criminal records.[27] By more clearly defining what constitutes a "first offender," the legislature eliminated the need to find "unusual and exceptional circumstances" that would justify judicial expungement. Therefore, under the current statutory scheme, judicial expungement is not permitted, and a trial court's focus is directed to the individual's interest in having the record sealed.[28]

In considering the application for sealing records, courts are guided by Ohio Revised Code § 2953.32(C). First, the court must determine whether the applicant is eligible to make the request: is the applicant truly a first offender, or was the forfeiture of bail pursuant to an agreement with the prosecutor and the presiding judge? If the applicant has applied as a first offender and has two or three convictions that resulted from the same indictment or the same guilty plea, and result from related criminal acts, then the court must make a determination whether it is in the public interest for the two or three convictions to be counted as one conviction for purposes of the expungement.[29] If it is not in the public interest for the three convictions to be considered as one, then the court must find that the petitioner is not a first offender and is therefore ineligible.[30]

After determining that the petitioner is a first offender or is otherwise eligible for expungement due to bail forfeiture, the court must then determine whether there are any current criminal proceedings pending against the petitioner.[31] If there are any counts pending in a criminal indictment, then the record may not be sealed.[32]

Yet if there are no criminal proceedings pending against the petitioner, the court must assess whether the applicant has been sufficiently rehabilitated.[33] Rehabilitation, however, goes beyond merely leading a law-abiding lifestyle, and whether a petitioner is rehabilitated sufficiently lies within the discretion of the court.[34] Factors such as the deprivation of federal or state rights, employment opportunities or the like as a result of the prior conviction may be considered in determining whether the individual is sufficiently rehabilitated.[35]

If the court feels that the petitioner is sufficiently rehabilitated, then any reasons specified by the prosecutor against the application must be considered. The prosecutor for the original conviction has the option of filing a written objection, but even where a prosecutor fails to file a written objection, the court may hear the prosecutor's oral objections to the expungement or sealing at the hearing.[36]

Finally, the court must engage in a balancing test, weighing the interests of the petitioner in having the conviction record sealed against the government's need to maintain those records as public documents.[37] A

court may consider and make judgment on the underlying facts,[38] and may weigh the petitioner's privacy interests in the balance.[39] Even where the petitioner is technically eligible for his record to be sealed, a court may deny the sealing if it would not be in the public's interest.[40] A variety of factors may be considered, including whether the petitioner has taken responsibility for his crime,[41] the underlying facts of the conviction,[42] and the type of crime committed. The statute places great emphasis on the individual's interest in having the record sealed,[43] and courts are to liberally construe the statute in favor of this interest.[44] Courts have broad authority to order an expungement and sealing of criminal records, and while an appeal may be taken by the state,[45] the decision to object to the sealing of records at the hearing is generally considered a matter of prosecutorial discretion.[46]

Upon a determination that the petitioner has met all requirements of the statute and has passed the final balancing test, then the official records must be sealed, all index references must be deleted, and, in the case of a bail forfeiture, the charges shall be dismissed.[47] The proceedings, including the petition for sealing and expungement, will be considered not to have occurred.[48] If, however, the petitioner is subsequently convicted of another offense, the sealed record may be considered by the court in sentencing or in making other appropriate dispositional decisions.[49] The legal fiction that the conviction did not occur is thus incomplete.

Once a criminal conviction is sealed, it may only be unsealed for inspection in limited circumstances. Law enforcement officers or prosecutors may inspect the record in order to determine whether the nature or character of a subsequent charge against the individual, or sentence for a subsequent conviction, would be affected by the prior conviction.[50] The individual's parole or probation officer may refer to the record for assistance in supervising the individual.[51] The individual himself may ask to inspect the record, and the court may formally unseal a record of conviction at the individual's request as well, particularly when the request is made in conjunction with other court proceedings, such as a civil trial.[52]

Other state agencies may inspect an individual's sealed record for limited purposes, or in connection with an individual's job application to state positions.[53] Additionally, law enforcement officials may inspect an individual's record for the limited purpose of performing a criminal background check in connection with an application for a concealed-carry license.[54] Finally, although the record may be sealed to the public and generally inaccessible, Ohio law permits the introduction of evidence of a prior conviction in any criminal proceeding in accordance with the Ohio rules of evidence.[55]

B. Ohio law on the expungement and/or sealing of criminal records where there is no conviction

Similarly, an individual who was charged with a crime but not convicted, or the complaint was dismissed, may apply to the court to have the official records in the case sealed.[56] While Ohio law does not explicitly permit a court to seal an arrest record where a criminal charge was never filed, it has been found to be within the inherent authority of a court to seal an arrest record where appropriate.[57] It should be noted, however, that the lead case in Ohio, *Pepper Pike v. Doe*,[58] has been abrogated by statute on the issue of judicial authority to seal a criminal conviction its analysis has been held applicable to the sealing of records by those who have not suffered a conviction.[59]

The court engages in a similar analysis in determining whether the criminal record should be sealed when there

is no conviction as it would in sealing a conviction record. First, the court must determine whether the petitioner is eligible; eligibility turns on the finding of not guilty or the dismissal of the indictment or complaint.[60] If counts are still pending against the petitioner, he is ineligible for sealing.[61] Likewise, if there are any other criminal proceedings pending, he is ineligible.[62]

Any objections by the prosecutor must also be considered,[63] and the court must engage in a balancing of the petitioner's interest in sealing the record and the public's or government's interest in maintaining those records.[64] As with an application to seal a criminal conviction, emphasis is to be placed on the individual's interest in sealing the record, and the statute is to be construed liberally to effectuate that interest wherever possible.[65]

Official records may be made available to a limited group of individuals for limited purposes. For example, a law enforcement officer defending himself in a civil action arising out of his involvement with the case may access the record for use in that defense, and a prosecuting attorney may use the sealed record to determine a defendant's eligibility to enter a pre-trial diversion program.[66] However, consistent with the legislative purpose of maintaining the individual's interest in sealing the record, the individual who is the subject of the records or any other person named in the application may access the records for any purpose.[67]

The judicial response to sealing criminal records in the absence of conviction has come under attack.[68] One commentator criticizes the practice in Hamilton County of frequently sealing records when an individual is acquitted.[69] The collision of the First Amendment and privacy rights, in that commentator's estimation, should result normally in the public interest prevailing. Those who are acquitted, the argument goes, do not have a right to sealing, particularly when the trial is one of public interest.[70] This argument, however, overlooks the statutory admonition to construe the expungement mechanism liberally in favor of an individual's privacy rights. The General Assembly has conducted the balance between public and private rights in this instance, and has weighed in on the latter. Moreover, our system is an adversarial one. If, in the examples documented by the commentator, the prosecutor's office does not object to the sealing, it places the judge in an awkward position – similar to the one judges in civil matters are placed when both sides agree to a protective or sealing order. When both sides before the judge agree (or at least one does not object) to the relief, it is difficult for the judge to jettison those desires in favor of a more nebulous "public interest." That is not to say, however, that the public interest should never prevail; only that as a practical matter, it seldom will.

III. Ohio Law on Sealing of Civil Records

Record sealing permits a court to enter information or evidence into a civil case file without making that record public.[71] Despite the prevalent nature of sealing orders, the contours of the law surrounding sealing civil records are not well-delineated.[72] However, it is generally recognized that the public has a right to inspect and copy public records and documents, including judicial records, and that the public right and interest in accessing those documents is not conditioned on any proprietary interest in or need for the information.[73]

This public right is not absolute, though; every court ultimately has supervisory power over its own records and files.[74] Judges are also given broad discretion in the handling of cases, so it is not uncommon that, when parties come before the court and request that the court seal part or all of the record as a condition of settlement, the court will grant the request in order to maintain economy and expediency in the disposition of cases.[75] The ability to seal a record is especially important in maintaining the confidentiality of medical records, the identities of sexual assault victims, and proprietary business information.[76]

In civil cases, confidentiality orders come in two basic varieties: protective orders and total sealing orders.

A. Protective Orders

Protective orders control the dissemination of materials that are or will be produced during the discovery period. [77] Such orders are frequently used in settlement negotiations as a bargaining tool, and are used defensively as well to protect confidential or privileged material from being made part of the public record.[78] The procedure for obtaining protective orders is rule-based, and they may be requested pursuant to Ohio Rule of Civil Procedure 26(c)[79] or the federal equivalent,[80] for good cause shown, or to protect any party from annoyance, embarrassment, oppression or undue burden or expense. Deposition transcripts, commercial information, or other documents and testimony may be sealed on order of the court, or by stipulation of the parties with the court's consent.[81]

A court may also issue a protective or sealing order in order to facilitate a settlement, pursuant to Rule 16,[82] which states that "facilitating the settlement of the case" is one of the purposes for pre-trial conferences. Courts, eager to close the case as soon as possible and aware that a secrecy stipulation may be the sine qua non for the settlement's success, will often seal the case record without question.[83] In the absence of interested third parties, a court is at a disadvantage in determining what impact, if any, a protective or sealing order would have on the public interest, making it all the more likely that the court will grant the parties' request.[84]

B. Total Sealing Orders

Although some states have enacted rules governing the sealing of civil records,[85] Ohio has not. However, under Ohio Rule 26(c), "upon motion by any party… and for good cause shown, the court… may make *any order* that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense [emphasis added]."[86] "Any order" may include sealing the entire court record, and Rule 26 gives judges almost complete authority and discretion to determine when it is appropriate to seal a record. [87]

Because sealed records, including the actual order sealing the record, are inaccessible to the public, a detailed analysis of how courts are using that authority and discretion in Ohio is difficult, if not impossible. The general rule outlined by the Supreme Court is that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[88]

In many cases, both parties have agreed to seal the record of a civil case, so opposition to the sealing of an entire record typically comes from the news media, bar associations or other third party interveners.[89] Non-litigants generally extend two intertwined arguments in support of their right to access judicial records: First Amendment constitutional rights, and common law rights.

The First Amendment protects communication about the functioning of government, and empowers the American citizenry to keep a watchful eye on public agencies.[90] This right is part and parcel with the right to engage in speech and commentary about the efficiency and fairness of our court system and government in general.[91] In *Brown & Williamson Tobacco Corporation v. Federal Trade Commission*,[92] the Sixth Circuit recognized that court records may be accessible through a First Amendment right of access.[93] The Sixth Circuit, along with the Third, Fourth, Seventh and Ninth Circuits, reached this conclusion by analogy from the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*,[94] which held that the public has a right to attend criminal trials under the First and Fourteenth Amendments. *Richmond* was limited to criminal trials,

but noted that "historically both civil and criminal trials have been presumptively open."[95]

There is also a common-law presumption that the citizenry has a right to access materials filed with the clerk of court unless they are specifically under seal.[96] Public access enables citizens to keep a watchful eye on the court system, but this common-law right of inspection must bow before the power of the court to insure that its records are not used for improper purposes or to gratify private spite or promote scandal.[97]

Another factor to be considered by a court is the litigants' right to privacy.[98] "By not allowing sealing orders, courts may do a large amount of harm to the privacy rights of citizens who, often through no fault of their own, become embroiled in lawsuits."[99] The Supreme Court recognized the right to privacy in court records,[100] noting that publication of painful and sometimes lurid details contained in pleadings could cause public scandal or be used for improper purposes.[101] Pleadings are addressed to the court and the parties, and may contain allegations that are unproven or unprovable;[102] uncontrolled dissemination of private facts in which the public has no legitimate stake would certainly violate the litigants' right to privacy, and could potentially cause great embarrassment or annoyance.[103]

Courts should also consider the health and safety of the public at large in deciding whether to grant partial or total sealing orders.[104] In product liability cases, it is common for records to be sealed as a condition of settlement.[105] In some cases, third parties have argued that it would be to the public's benefit for those records to be publicly available.[106] In order to address the potentially disastrous results of a continuing toxic tort or product liability issue, the ABA has recommended that courts should grant government agencies access to information revealed in lawsuits that demonstrates that there may be a continuing risk to third persons.[107] This suggestion would require courts to make a judgment call on whether the data filed with the case implicates health concerns, and could potentially result in courts granting overbroad access to otherwise private facts and statistics.[108]

Finally, courts must consider judicial economy. Where a settlement turns on a sealing motion, granting the motion can provide much-needed relief from overcrowded dockets, and may ultimately achieve a higher quality of justice than adjudication by jury.[109] For litigants, "lawsuits are expensive, terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming."[110] Litigants are therefore often unwilling participants in their own cases, and cases may draw on and on, weighing down already-overloaded dockets. Courts are likely to seriously consider the impact of continuing litigation in weighing the private litigants' interest in concluding the case and the public's interest in streamlining the judicial system against the public's need to know.

C. Unsealing civil records

Just as a court may seal a record, it is in the court's inherent power to unseal a record when it is in the interest of justice or public welfare.[111] Courts have upheld the right of the press in limited cases to access sealed records,[112] as well as the right of other third parties that claim a need to access the underlying records. Though the standards in this area are evolving, one recognized means for accessing such information is by the third party moving for leave to intervene in the original suit in order to challenge the propriety of the protective order or sealing order.[113]

Ohio courts have articulated the following test to govern such attempts to unseal records: courts should consider

> the nature of the protective order, the parties' reliance on it, the ability to gain access to the information in other ways, the need to avoid repetitive discovery, the nature of the material for which protection is sought, the need for continued secrecy, and the public interest involved. Also important to consider would be the degree of similarity between the two suits used to justify the claim of repetitious or overlapping discovery, as well as the merits of the second suit when weighed against the privacy interests underlying the challenged protective order.[114]

Based on the nature of this inquiry, it is important for the trial court that seals the records in the first place to explain why it is taking such action, particularly if a third party tries to challenge the order.[115]

D. Overlapping Themes

Two themes regarding sealing emerge in both the criminal and civil context: 1) the right of the public to access court documents, and 2) the litigants' or criminal defendant's right to privacy.

The right of access to court records is couched in a relatively recent development in English law, where a restricted right of public access was granted to those seeking government information for litigation purposes.[116] The Supreme Court formally recognized the right of the public to attend criminal trials in *Richmond* and couched that right in the First and Fourteenth Amendments. That First Amendment right has since been extended into the civil context in some circuits, but is not fully accepted, particularly at the state level.

The right to privacy is also apparent in both contexts, but is particularly vital in the context of sealing criminal records. The balancing test laid out by the Ohio statutes clearly weighs in favor of the rehabilitated convict's right to privacy, and favors sealing the record over maintaining the public's right to access the criminal record except in cases of violent or sexual offenses. Comparatively, in a civil case, the more a court is involved, the less likely it appears that a sealing motion will be granted; protective orders and total sealing orders are most common in settlements, and, as one commentator has noted, voluntarily engaging the process of the judiciary may at least partially waive a litigant's right to privacy on those matters.[117]

IV. Ohio's Statutory Scheme as Compared to the ABA Standards

Ohio's mechanism for expunging criminal records appears to afford the relief envisioned by the ABA Standards: "an order to seal the record of a person's conviction restores the person who is the subject of the order to all rights and privileges not otherwise restored by termination of the sentence or community control or by final release on parole or post-release control."[118] For those able to successfully navigate expungement framework, such relief is certainly welcome. However, the lingering questions that remain are (1) how effective is expungement; and (2) what do we do with those who cannot obtain such relief?

The answer to the first question, as highlighted above, is a resounding "somewhat." To be sure, under Ohio's statute, the offender is relieved of presumably all collateral sanctions if he is fortunate enough to navigate all of the statutory requirements. However, this may be a hollow victory if someone is able to subsequently uncover the conviction – either through research on the internet or adherence to statutory mechanisms for revealing it. In other words, the individual may have to live with a cloud over his head and hope that his secret is never revealed. The criticisms of expungement apply just as aptly to Ohio's system.

However, expungement in Ohio does realize one goal of the ABA Standards: "an order to seal the record of a person's conviction ***restores the person who is the subject of the order to all rights and privileges not otherwise restored by termination of the sentence*** or community control sanction or by final release on parole or post-release control."[119] In other words, expungement lifts the burden of all collateral consequences to a conviction. The beneficiary of such an order can take comfort in knowing that no hidden surprises – and this symposium has documented a number of them – will confront her after an expungement (assuming, of course, that the sealed record stays sealed).

The second question, however, is more problematic. For all of the benefits that expungement can confer, it remains a fairly limited remedy. A person must fall within a narrow category of first time offenders of certain offenses before he can even entertain the notion of seeking expungement. Where does that leave the rest of the population of individuals who have already paid their debt to society? Unfortunately, the answer appears to be, not in a very enviable situation. This symposium has cataloged numerous collateral sanctions, some of which provide mechanisms for relief, but many of which do not. A defendant who has served his time and who has been "rehabilitated," but who cannot benefit from expungement must then navigate a patchwork of remedies in order to rid himself of all collateral sanctions. From any perspective, and certainly from that of the ABA Standards, this is less than ideal. In short, expungement in Ohio fails to offer relief from collateral sanctions from others who do not qualify for having their records sealed. And it may be far easier to justify relief from collateral sanctions than a complete order sealing records, with all of its attendant consequences.

This symposium has identified the range and breadth of collateral sanctions facing individuals convicted of an offense in Ohio. With that framework in mind, it is time for the General Assembly to begin debating how individuals may rid themselves of these sanctions. Expungement certainly represents a step in the right direction, but it is only a step. Complete sealing of a criminal record may be a panacea for some, but many would be content with the ability to carry on their daily life without the concern of collateral sanctions. The policy issues implicated by collateral sanctions are by no means easy ones. Now, however, with a fuller understanding of the problem, a productive debate can take place.

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[3] ABA Standards for Criminal Justice (3d ed.) [hereinafter, "ABA Standards"], § 19.5(c).

[4] Commentary to ABA Standards, § 19.5(c) ("[T]he broad scope of paragraph (c) contemplates a process intended to recognize and reward rehabilitation, and thus to restore a convicted person's status in the community.").

[5] *Id.* ("The specific vehicle by which an offender may obtain such general forgiveness is not specified in this edition of the Standards.").

[6] *See* ABA Criminal Justice Standards on the Legal Status of Prisoners (2d ed. 1981) [hereinafter "LSOP Standards"], § 23-8.2. The ABA Standards are designed to supercede the LSOP Standards.

[7] Commentary to ABA Standards, § 19.5(c) ("For example, in some jurisdictions an offender who has remained law-abiding for a period of time may obtain a 'certificate of good conduct' from an administrative agency. . . In many jurisdictions, general forgiveness remains the exclusive province of the governor. . . The only requirements imposed by these Standards are that any general restoration mechanism should be accessible to all, efficient in operation, and reliable in effect.").

[8] 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, 1720 (2003), discussing N.Y. Correct. Law 700-705 (2003).

[9] *Id.*

[10] *Id.*

[11] *See* Ohio Rev. Code. Ann. § 2953.31 *et seq.* Gubernatorial pardon, the more commonly-known and traditional form of minimizing the collateral sanctions that haunt a criminal offender, is in decline as governors are increasingly reluctant to issue pardons for fear of reprisal in the next election. The discretion vested in the executive pardon scheme also tends to be biased in favor of the wealthy and connected, and is generally inaccessible to the average offender or to those without financial or political means. Love, *Starting Over*, *supra* note ___ at 1720.

[12] However, it appears that states have been restricting the availability of expungement over the last 15 years. *See*, *e.g.*, Love, *supra* note ___, at 118. At the same time, there are a variety of creative proposals for *increasing* the availability of expungement, such as in the case of victims of identity theft who must file for bankruptcy. *See* Peter C. Alexander, *Identity Theft and Bankruptcy Expungement*, 77 Am. Bankr. L.J. 409 (2003).

[13] Love, *supra* note ___, at 118-19; *see also id.* at 120 (noting that "the variety and complexity of approaches among the states is bewildering").

[14] *See id.* at 121; Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 Hofstra L. Rev. 733, 735 (1981); T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. Mich. J.L. Reform 885, 913-33 (1996).

[15] Funk, *supra* note __, at 887.

[16] *See* Love, *supra* note __, at 121; Funk, *supra* note __, at 924-33.

[17] *See, e.g.*, Love, *supra* note __, at 121 ("[T]he expungement concept ignores the technological realities of the information age. . .").

[18] Much to one of the author's chagrin, he discovered that a transgression for speeding several years ago was available for all to see on the internet on the webpage of his home county.

[19] *See* Love, *supra* note __, at 121.

[20] Ohio Rev. Code Ann. § 2953.32(A)(1) (Anderson 2004). "Except as provided in section 2953.61 of the Revised Code, a first offender may apply to the sentencing court if convicted in this state… for the sealing of the conviction record." *Id.* Ohio Revised Code § 2953.62 applies where the "first offender" was convicted of multiple charges stemming from one indictment or complaint.

[21] Ohio Rev. Code. Ann. § 2953.31(A). The statute also addresses cases where the defendant was convicted of multiple counts under the same indictment or multiple offenses committed at the same time: "When two or more convictions result from or are connected with the same act or result from ffenses committed at the same time, they shall be counted as one conviction. When two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period byt do not result from the same act or from offenses committed at the same time, they shall be counted as one conviction, provided that a court may decide… that it is not in the public interest for the two or three convictions to be counted as one conviction." *Id.* Note that in cases of

multiple criminal acts, the statute vests some discretion in the court to determine whether it is in the public interest to consider the petitioner a "first offender." By giving the court discretion over this determination, the general assembly mandates that the court may consider the public interest in deciding whether the petitioner is even eligible to request an expungement.

[22] Under Ohio Rev. Code § 2953.36, the laws governing the sealing and expungement of criminal convictions do not apply to convictions for felonies of the first or second degree, or convictions carrying mandatory prison terms. Therefore, individuals with first or second degree felony convictions, or individuals who were not eligible for probation, are ineligible to have their records sealed. *State v. Simon*, 87 Ohio St.3d 531 (Ohio 2000); *State v. Moore*, 31 Ohio App.3d 225 (Ohio Ct. App. 1986).

[23] Under Ohio Rev. Code § 2953.36, individuals with a conviction for a first degree violent misdemeanor may not be eligible to have their criminal record sealed.

[24] Ohio Rev. Code Ann. § 2953.32(A)(1).

[25] Ohio Rev. Code Ann. § 2953.32(B).

[26] *Schwab v. Gallas*, 724 F.Supp. 509, 510-11 (N.D. Ohio 1989) (relating, specifically, to the powers of the federal court to grant expungement or to seal a record).

[27] *State v. Hilbert*, 145 Ohio App.3d 824, 826 (Ohio Ct. App. 2001) (noting that prior to the 1984 amendment, "the courts construed the words "any offense" literally to mean any and all offenses including minor traffic offenses. This created unjust results because relatively minor convictions, such as speeding violations, operated to bar the sealing or records." *Id.*). Under the original text of the statute, judicial intervention was justified in ordering expungements not otherwise permitted by a strict reading of the text, "where such unusual and exceptional circumstances [made] it appropriate to exercise jurisdiction over the matter." *Pepper Pike v. Doe*, 66 Ohio St.2d 372, para. 2 of syllabus (Ohio 1981).

[28] *Hilbert*, 145 Ohio App.3d at 827, citing generally *State v. Bissantz*, 40 Ohio St.3d 112 (Ohio 1988) (applying a strict-language reading of the statute to determine that a conviction of bribery in office may be expunged, and stating that the rule requires the court to consider the individual's interest in having the

record sealed.)

[29] *Id.*

[30] *Id.*

[31] Ohio Rev. Code Ann. § 2953.32(C)(1)(b).

[32] *State ex rel. Lewis v. Lawrence Cty.*, 95 Ohio App.3d 565, 568 (Ohio Ct. App. 1994) ("The statute requires that an indictment against the appellant be dismissed, not merely a count in an indictment."). Although this case addressed the dismissal of individual counts in an indictment, because the balancing test is the same for criminal convictions and cases where the case was dismissed or the defendant found not guilty, this holding would apply where current charges are pending against a first offender. *Dayton v. Sheibenberger*, 115 Ohio App.3d 529 (Ohio Ct. App. 1996).

[33] Ohio Rev. Code Ann. §2953.32(C)(1)(c).

[34] *Schwab v. Gallas*, 724 F.Supp. 509 (N.D. Ohio 1989).

[35] *Id.* at 511.

[36] *State v. Hamilton*, 1994 Ohio App. LEXIS 6069 (Ohio Ct. App. 1994).

[37] Ohio Rev. Code Ann. § 2953(C)(1)(e).

[38] *State v. Launer*, 107 Ohio App.3d 42 (Ohio Ct. App. 1995).

[39] *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (Ohio 1981).

[40] *State v. Mastin*, 83 Ohio App.3d 814 (Ohio Ct. App. 1992) (Petitioner-teacher had been convicted of a sex offense against a student).

[41] *Launer*, 107 Ohio App.3d at 43.

[42] *Mastin*, 83 Ohio App.3d at 815-16.

[43] *State v. Bissantz*, 40 Ohio St.3d 112, 114 (Ohio 1988).

[44] *State v. Hilbert*, 145 Ohio App.3d 824, 827 (Ohio Ct. App. 2001).

[45] *Id.*

[46] *State v. Keene*, 33 Ohio App.3d 116 (Ohio Ct. App. 1986). *See also Mastin*, 83 Ohio App.3d at 816 ("[A]n application for sealing or expungement cannot be denied on the basis of the interest of society.").

[47] Ohio Rev. Code Ann. § 2953.32(C)(2).

[48] *Id.*

[49] *Id.*

[50] Ohio Rev. Code Ann. § 2953.32(D)(1).

[51] Ohio Rev. Code Ann. § 2953.32(D)(2).

[52] *Akron v. Frasier*, 142 Ohio App.3d 718 (Ohio Ct. App. 2001).

[53] Ohio Rev. Code Ann. § 2953.32(D). Various enforcement officers and state administrative officials may inspect an individual's record in connection with an application for employment with Head Start, a state-run elder-care program, or an application for a peace officer program.

[54] Ohio Rev. Code Ann. § 2953.32(D)(10).

[55] Ohio Rev. Code Ann. § 2953.32(E).

[56] Ohio Rev. Code Ann. § 2953.52(A)(1). Also, any person against whom a "no bill" is entered by a grand jury may apply to have the record sealed. Ohio Rev. Code Ann. § 2953.52(A)(2).

[57] *Bound v. Biscotti*, 76 Ohio Misc.2d 6, 8 (Mun. Ct. 1995), citing *State v. Stadler*, 14 Ohio App.3d 10 (Ohio Ct. App. 1983); *State v. Weber*, 19 Ohio App.3d 214, 216 (Ohio Ct. App. 1984). However, the *Bound* court notes that "the exercise of the court's authority is limited to those situations not addressed by the statutory scheme for expungement. As such, the court's inherent authority is not available to situations in conflict with statutory provisions for expungement." *Id.* at 10.

[58] 66 Ohio St.2d 374 (Ohio 1981) (superceded by amendment to the expungement statute in 1984, as noted *supra*).

[59] *Ohio v. Netter*, 64 Ohio App. 3d 322 (Ohio Ct. App. 1989).

[60] Ohio Rev. Code Ann. § 2953.52(B)(2)(a).

[61] *Ex rel Lewis*, 95 Ohio App.3d at 568.

[62] Ohio Rev. Code Ann. § 2953.52(B)(2)(b).

[63] Ohio Rev. Code Ann. § 2953.52(B)(2)(c).

[64] Ohio Rev. Code Ann. § 2953.52(B)(2)(d).

[65] *See Hilbert*, 145 Ohio App.3d at 827.

[66] Ohio Rev. Code Ann. § 2953.53(D)(2), (3), (4).

[67] Ohio Rev. Code Ann. § 2953.53(D)(1).

[68] *See* John P. Sellers, III, *Sealed with an Acquittal: When not Guilty Means Never Having to Say You Were Tried*, 32 Cap. U.L. Rev. 1 (2003).

[69] *See id.*

[70] *Id.* at 42 ("Expungement on demand under section 2953.52 substantially interferes with the pbulic's qualified right of access to judicial records and places sweeping authority in the hands of the trial court to seal not only trial records, but all 'official records' pertaining to the case.").

[71] Ross E. Cheit, *Public Courts, Private Records: Accessibility and Confidentiality in the Rhode Island Court System*, *available at* http://www.brown.edu/departments/taubman_center/foi/html/sealed1.html.

[72] *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (addressing the general contours of the common-law right of access to judicial records, particularly as that right applies to the media).

[73] *Id.*

[74] *Id.* at 598 (citing cases where the "common-law right of inspection has bowed before the power of a court.").

[75] Sharon L. Sobczak, *To Seal or Not to Seal? In Search of Standards*, 60 Def. C. J. 406, 406-07 (1993) (noting that public access could impair the settlement process because, rather than expose themselves to the misleading or illegitimate implications settlement creates, parties who believe in their innocence and want to avoid those negative implications may instead choose to litigate).

[76] Cheit, *Public Courts, Private Records*, *supra* note 48. (noting that medical records, trade secrets, and information involving minors are the most common types of information sealed by the courts in Rhode Island).

[77] *Id.*

[78] David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619, 2649 (1995) (suggesting that the widespread practice of confidential settlements "carves out an unacceptable area of exceptions to democratic publicity." *Id.*)

[79] OHIO. R. Civ. P. 26(c) states, in pertinent part, "[u]pon motion by any party… and for good cause shown, the court… may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including… (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

[80] FED. R. Civ. P. 26(c) states, in pertinent part, "[u]pon motion by any party… and for good cause shown, the court… may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including… (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

[81] Fed. R. Civ. P. 26(c)(6)-(8); Ohio R. Civ. P. 26(c)(6)-(8).

[82] Fed. R. Civ. P. 16(a)(5); Ohio R. Civ. P. 16(a)(5). Under both the Federal and Ohio Rules of Civil Procedure, the control and scheduling of discovery, including any motions or orders to seal discovery, are subjects to be considered at pre-trial conferences. Fed. R. Civ. P. 16(c)(6); Ohio R. Civ. P. 16(c)(6).

[83] Luban, *Settlements*, *supra* note __ at 2649.

[84] Sobczak, *To Seal or Not to Seal*, *supra* note __ at 406.

[85] Massachusetts, for instance, has the "Uniform Rules of Impoundment," which establish judicial guidelines for sealing records in civil cases. Mass. Unif. Impoundment Proc. R. 1, *et seq*. Florida and Texas have also enacted rules governing the procedure for sealing civil documents. Texas Civ. R. 76(a); Fla. Stat. Ann. § 69.081.

[86] Ohio R. Civ. P. 26(c).

[87] Cheit, *Public Courts, Private Records*, *supra* note __.

[88] *Nixon*, 435 U.S. at 599.

[89] Sobczak, *To Seal or Not to Seal*, *supra* note __ at 408.

[90] *Nixon*, 435 U.S. at 597-98, citing *State ex rel. Colscott v. King*, 154 Ind. 621, 621-27 (Ind. 1900).

[91] Sobczak, *To Seal or Not to Seal*, *supra* note __ at 408.

[92] 710 F.2d 1165 (6th Cir. 1983).

[93] Principles of the right to access judicial proceedings apply equally to "the determination of whether to permit access to information contained in court documents because court records often provide… [the] bases or explanations for a court's decision." *Id.* at 1177.

[94] 448 U.S. 555 (1980).

[95] *Id.* at 580.

[96] *See, e.g.*, *Brown & Williamson*, 710 F.2d at 1179-80; *Publicker Industries Inc. v. Cohen*, 733 F.2d 1059, 1066-71 (3d Cir. 1984); *Zenith Radio Corp. v. Matushita Elec. Industrial Co.*, 529 F.Supp. 866,

897 (E.D. Pa. 1981).

[97] *Nixon*, 435 U.S. at 598.

[98] Sobczak, *To Seal or Not to Seal*, *supra* note 52 at 411.

[99] *Id.*

[100] *Nixon*, 435 U.S. at 598, citing *In re Caswell*, 18 R.I. 835, 836 (R.I. 1893).

[101] *Id.*

[102] Sobczak, *To Seal or Not to Seal*, *supra* note 52 at 411.

[103] *See e.g.*, Maria Newman, *Illinois Republican Decides to Quit Senate Race*, N.Y. Times, *available at* http://www.nytimes.com/2004/06/25/politics/campaign/25CND-RYAN.html?ex=1089432000&en=fe7901bf723b9aae&ei=5070&hp (June 25, 2004) (reporting that Jack Ryan has dropped out of the Illinois senate race because of allegations made by his ex-wife, Jeri Ryan, in papers filed in connection with their 1999 divorce).

[104] Sobczak, *To Seal or Not to Seal*, *supra* note __, at 412-13.

[105] *Id.*

[106] Anne-Therese Bechamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 Notre Dame L. Rev. 117, 117-18 (1990) (discussing the impact that a sealed settlement in a toxic tort case had on local residents and health agencies, and the widespread implications of sealing cases in general).

[107] American Bar Association, Report of the Action Commission to Improve the Tort Liability System 32, Recommendation 10 (1987).

[108] Sobczak, *To Seal or Not to Seal*, *supra* note ___ at 413.

[109] Luban, *Settlements*, *supra* note __ at 2619.

[110] *Id.* at 2621.

[111] Brian T. Fitzgerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J. Law & Pol'y 381, 404, n. 119 (1990).

[112] *See e.g.*, *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983).

[113] *See, e.g., Adams v. Metallica, Inc.*, 143 Ohio App. 3d 482 (Ohio Ct. App. 2001); *Doe v. American Cancer Soc'y Ohio Div.*, 143 Ohio App. 3d 495 (Ohio Ct. App. 2001).

[114] *Adams*, 143 Ohio App. 3d at 492-93.

[115] *See Doe*, 143 Ohio App. 3d at 497 (remanding to allow court to make necessary findings).

[116] R. Bryan Morrison, Case Note, *To Seal or Not to Seal? That is Still the Question: Arkansas Best Corp. v. General Electric Capital Corp.*, 49 Ark. L. Rev. 325, 328 (1996).

[117] Beschamps, *Sealed*, *supra* note 83 at 124-29.

[118] Ohio Rev. Code § 2953.33.

[119] Ohio Rev. Code § 2953.33(A) (emphasis added).