Expungement in Ohio: Assimilation Into Society for the Former Criminal

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(e) Any vague sort of reference to a hospital, clinical, or university study guarantees that a product is reliable, and is probably preferable to other, similar products (ads [1], and [13]).

In closing, it is worth reiterating that since food and drugs have the potential of injuring health, instead of simply causing financial injury, increased vigilance of food and drug advertising is justified. Consumers have a right to be told more than they have been told about the products they ingest.

BARRY S. DONNER

EXPUNGEMENT IN OHIO: ASSIMILATION INTO SOCIETY FOR THE FORMER CRIMINAL

I. INTRODUCTION

T has only been within the last 50 years that there has been official recognition of the debilitating legal and social consequences that result from a citizen’s arrest and conviction. Legally imposed restrictions and the social stigma concomitant with a criminal record effectively operate to penalize ex-convicts even after they have paid their “debt” to society. A person with merely an arrest record suffers damage to reputation, impeachment as a witness, disabilities in acquiring schooling and professional licenses, more intense police scrutiny, and direct economic losses. Consequences of a criminal conviction are more severe.

Most criminal records are available to the general public; which fact gives rise to many of the consequences attendant to conviction of a crime. In recognition of this fact, several state legislatures have enacted laws commonly termed “expungement statutes.” These statutes seek to go beyond mere sentence and imprisonment in dealing with the problem of the criminal offender’s relationship with society:

Expungement and annulment are the product of the recent emphasis in corrections on rehabilitation. Both kinds of statutes are designed to restore forfeited rights and uplift the offender’s status by

3 The use of the word “expungement” to describe these statutes is somewhat of a misnomer. To expunge “means to destroy or obliterate; it implies...a physical annihilation.” Black’s Law Dictionary 693 (rev. 4th ed. 1968). None of the statutes call for actual destruction of records.
Although the statutes manifest various approaches to the concept of expungement (no two read exactly alike), they are all linked by the emphasis upon rehabilitation and the former offender’s assimilation into society.

II. THE EXPUNGEMENT STATUTES IN GENERAL

Approximately 20 states now have expungement laws, the oldest and most extensively interpreted being that of California. The nature of the relief afforded by the different statutes varies from withdrawing a plea of guilty, or setting aside the verdict, to expungement and sealing of records. The former attempts to nullify the fact of conviction, while the latter endeavors to hide all evidence of any proceedings against the successful applicant. The typical expungement statute states in general terms the effects of a grant of expungement, such as release from all penalties and disabilities resulting from the conviction and restoration of all rights and privileges. Most of the more recently enacted statutes specifically provide that the successful petitioner for expungement may, in applications for employment or licensing, state that he has never been convicted of a crime. Almost all the expungement statutes, however, permit the record of conviction of the expunged crime to be pleaded and proved in a subsequent criminal prosecution.

4 Special Project, supra note 2, at 1148-49. Confidentiality of juvenile criminal records is and has been widely recognized; many states provide for expungement of such records by statute. E.g., Ohio Rev. Code Ann. § 2151.358 (Page Supp. 1973). Juvenile expungement statutes, however, are not within the scope of this Comment.


6 E.g., Cal. Penal Code § 1203.4 (West Supp. 1974). Although statutes with such a provision are commonly called “expungement statutes,” they really are not. Gough, supra note 2, at 152. These statutes are of more limited effect than true expungement statutes, like that of Ohio. Id. Most existing court decisions about expungement interpret statutes of this nature and, therefore, are not completely analogous to true expungement statutes.


11 E.g., Kan. Stat. Ann. § 21-4617(b) (Supp. 1973). Statutes with such a provision state that the effect of the relief shall be that all criminal proceedings are deemed not to have occurred. E.g., Nev. Rev. Stat. § 179.285 (1971). See also Mich. Comp. Laws Ann. § 780.622 (1968), which merely provides that the proceedings are deemed not to have occurred, making no mention of applications for employment. Where the petitioner is released from all penalties and disabilities, such as in the California law, there is never such a provision.

The applicability of all statutes is limited either to probationers, 13 convicts who have received pardons, 14 first offenders, 15 or to those who committed a crime before reaching the age of 21. 16 Some laws combine the requirements, and some add parolees to the list of those who are eligible. 17

Some states make expungement the goal of rehabilitation and require that the petitioner for expungement show that he has reformed before he makes his application. He must have exhibited good moral character since his conviction, or he must show that it is in the public interest to grant the relief. 18 Some statutes imply this by providing that the court “may” grant the applicant’s request. 19 Others apparently regard expungement as a method to accomplish or a way to encourage rehabilitation. They require that the relief be granted after satisfactory completion of parole or probation, or upon pardon. 20

III. THE OHIO EXPUNGEMENT STATUTE 21

A. The First Offender

The availability of expungement in Ohio is limited to the first offender, 22 which the law defines as: “... anyone who has once been convicted of an offense in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act, or result from offenses committed at the same time, they shall be counted as one conviction.” 23 Unfortunately, this definition does not eradicate all uncertainty.

The most salient uncertainty seems to be in regard to multiple indictments and multiple counts of a single indictment. The statute makes it clear that, if the offenses charged in the various counts or indictments

21 The Ohio expungement statute is contained in Ohio rev. code Ann. § 2953.31-36 (Page Temp. Supp. 1973). As originally introduced in the legislature the numbering was § 2969.01-05. This explains the apparently meaningless reference in present § 2953.35 to “Sections 2969.01 to 2969.05.” (There is no Chapter 2969 in the present Code). Through oversight the chapter and section numbers were not changed.
derive from a single act or from contemporaneous acts, there is still only one conviction. However, convictions on multiple counts or indictments of offenses that arise from non-contemporaneous actions are certainly not uncommon, and the statute does not make it clear whether such conviction would bar the offender from obtaining expungement of his records.

The question of the relationship between offenses and convictions, on the one hand, and multiple counts and indictments, on the other, has been examined by the courts chiefly in dealing with recidivist statutes. There are two views on the matter. One is that separate indictments or counts are separate offenses and that one convicted under separate indictments comes within the reach of a habitual criminal statute. However, these cases are narrow in their application, because they interpret specific statutes and do not announce general principles of law.

The majority view is that, "... where there were two or more convictions on as many indictments or on two or more counts in the same indictment, only one of them may be subsequently utilized as a previous conviction within the contemplation of habitual criminal statutes." It appears that the rationale for this view is that the convictions should be sufficiently separated in time to give the offender opportunity to reform. Rehabilitation cannot begin until the offender has realized that he has committed a wrong and he fully understands the gravity of his actions:

It is obviously the experience of the cold steel doors of the penitentiary slamming behind him or the inexorable conditions of probation, restricting his movement and actions that effectively demonstrate the futility of crime. ... Apparently it is only when he has faced the total, stark consequences that he should have learned his lesson.

Since no court has yet interpreted the term "first offender" in the context of an expungement statute, it is not illogical to rely upon and analogize with precedent in the area of recidivist statutes. The terms "habitual criminal" and "first offender" are semantically related. S. Rubin, The Law of Criminal Corrections 465 (2d ed. 1973). Furthermore, recidivist and expungement statutes have their roots in the same concept: rehabilitation. See text accompanying note 2 supra. Whereas expungement, at least in Ohio, is available only to those who reform, recidivist statutes apply to those who do not, or cannot, reform.

People v. Braswell, 103 Cal. App. 399, 407-08, 284 P. 709, 712-13 (1930); People v. Carney, 203 Misc. 512, 103 N.Y.S.2d 75 (Sup. Ct. 1951). E.g., People v. Braswell, 103 Cal. App. 399, 284 P. 709 (1930), was concerned with a recidivist statute that was separated into two parts. One part explicitly stated that prior convictions must be "separately brought and tried," while the other left out the phrase. The court held that the omission must have been intentional and that conviction of charges of different offenses tried concurrently would bring the offender within the reach of the habitual criminal statute. Id. at 407-08, 284 P. at 712-13.


People v. Spellman, 136 Misc. 25, 29, 242 N.Y.S. 68, 71 (1930). See also People v. Snow, 1 N.Y.2d 30, 133 N.E.2d 681, 150 N.Y.S.2d 75 (1956); Cromeans v. State, 160 Tex. Crim. 135, 268 S.W.2d 133 (1954), which went so far as to hold that convictions resulting in suspended sentences are disregarded in applying recidivist statutes.

Ohio case law is in accord with the majority view.\textsuperscript{30}

The same reasoning that is used in dealing with recidivist statutes is also valid as to an expungement statute, which also has its basis in rehabilitation. In all justice, the offender should be given an opportunity to meet the requirement of reformation, that opportunity coming after the proceeding against him. Conviction of charges of separate offenses, tried in the same proceeding, should be counted as only one conviction so that the offender may earn a right to expungement of his records.\textsuperscript{31}

B. The Court's Discretion

Section 2953.32(C) of the Ohio law states that expungement of official records will be ordered, "[i]f the court finds that the applicant is a first offender, that there is no criminal proceeding against him, that his rehabilitation has been attained to the satisfaction of the court, and that expungement of the record of his conviction is consistent with the public interest. . . ."\textsuperscript{32} Thus, the court at \textit{nisi prius} is given a certain amount of discretion in dealing with two of the criteria: the completeness of rehabilitation and the determination that expungement of the individual's records will be in the public interest.\textsuperscript{33} As is the case in other areas of judicial discretionary powers, an appeal should be considered proper because of the potential for abuse in the use of this discretion.\textsuperscript{34}

In \textit{State v. Miller},\textsuperscript{35} the applicant for annulment had pleaded guilty to a charge of burglary, but upon suspension of sentence he was placed on probation. During the probationary period his fiancee became pregnant and his probation was revoked. Miller served one year of the sentence and thereafter married his fiancee, started his own business, bought a home, and led a totally law-abiding life. The lower court denied his application for annulment\textsuperscript{36} on the evidence presented,\textsuperscript{37} even though there had been

\textsuperscript{30}See \textit{Carey v. State}, 70 Ohio St. 121, 70 N.E. 955 (1904). The decision in \textit{Brumbaugh v. State}, 36 Ohio App. 375, 173 N.E. 267 (1930), should be distinguished because there the defendant had pleaded guilty to two separate offenses at two different times. The charges were consolidated only for judgment and journalization.

\textsuperscript{31}This also was the intent of at least one of the sponsors of the Ohio expungement statute in the state legislature. Affidavit of State Senator (now U.S. Congressman) Ronald Mottl, July, 1974, on file Akron Law Review.


\textsuperscript{33}Most expungement statutes endow the court with some amount of discretion.


\textsuperscript{36}The application for expungement was made under \textit{Kan. Stat. Ann.} § 21-4616 (Supp. 1973), which applies to offenders who commit crimes before reaching the age of 21. Much of the wording of that statute is identical to that of the Kansas adult expungement law, \textit{Kan. Stat. Ann.} § 21-4617 (Supp. 1973), especially those parts that relate to the effect of an expungement order. Furthermore, the reasoning of the
no showing of non-rehabilitation by the state other than the record of his probation revocation. In a well-reasoned opinion, the Supreme Court of Kansas reversed and said:

Judicial discretion must always be exercised within the bounds of reason and justice. Judicial discretion is abused when it is arbitrary, fanciful or unreasonable, where no reasonable man would take the view adopted by the trial court. 38

The court then considered the evidence presented in the lower court:

The facts presented at the annulment hearing clearly demonstrated that the defendant has made every conceivable effort to conform to the norms and demands of our society.... There is no evidence whatsoever in the record to show that the defendant has any propensity toward continuing criminal conduct or that he is a clear or present danger to the public.39

Thus, in spite of the fact that a trial court's handling of a matter ought to be given due respect, decisions which show a clear-cut abuse of discretion need not be a total bar to relief for the reformed criminal seeking expungement.40 The Kansas court went so far as to spell out a rule for judges to follow in the future:

We hold that the filing of a simple request with supporting evidence to show compliance with the statutory requirements should constitute *prima facie* entitlement to the annulment of a conviction. Annulment of a conviction should be granted unless the court finds some strong affirmative cause to deny it. In other words the norm should be the granting of relief.... unless the state shows some good compelling reason not to grant it.41

Although this may conflict with strict interpretations of expungement,42 it is probably closer to the spirit of expungement's attempt to help replace the former offender in society as a contributing member thereof.

Kansas Supreme Court is in general terms and is equally applicable to adult expungement laws.

37 The district court also held the annulment law unconstitutional.


39 Id. at 546, 520 P.2d at 1255.

40 However, there is no reason to believe that the court has any discretion in dealing with the matter of the time at which an application for expungement may be brought. See Anderson v. State, 512 P.2d 1387 (Okla. Crim. App. 1973), for an example of strict, to-the-day compliance with time provisions in criminal proceedings. OHIO REV. CODE ANN. § 2953.32(A) (Page Temp. Supp. 1973) expressly provides for a three-year lapse for a felon and a one-year lapse for a misdemeanant. The court's discretion is implied only in § 2953.32(C).


42 See Meyer v. Superior Court, 247 Cal. App. 2d 133, 55 Cal. Rptr. 350 (1966). See also People v. Ignazio, 137 Cal. App. 2d 881, 290 P.2d 964 (1955) (in the absence of some showing of fulfillment of conditions, there is a presumption that the applicant did not fulfill them).
C. The Handling of the Expunged Records

When the court determines that the requirements have been met to its satisfaction, it orders all "official" records sealed. "Official" records should be distinguished from "public" records. The latter refers to "any record required to be kept by any governmental unit." More specifically, public records would include:

Any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions which serves to document the organization, functions, policies, decisions, procedures, operations or other activities of the office.

The term "official records," on the other hand, has a broader meaning in that the term also includes those papers and documents made in the normal course of the performance of a public official's duty. Undoubtedly, this definition would also include copies of such papers and documents. However, matters of opinion contained in an official report do not come under the definition.

Once it is determined which records are subject to a court order of expungement, the official in charge of them must decide exactly how he is to comply with the law. The Ohio statute merely provides for the sealing of all records pertaining to the case and the deletion of all index references. There is no provision outlining procedure, nor is there even a definition for the term "sealed." Therefore, the individual official has been left to decide the procedure he deems appropriate.

A survey of several large Ohio counties shows that the clerks of court follow a fairly uniform procedure. To delete index references the

51 Questionnaires were sent to the clerks of court of Cuyahoga, Hamilton, Montgomery, Franklin, Summit, Stark, Lucas, Mahoning and Trumbull counties. Cuyahoga, Hamilton and Montgomery counties did not reply. The Mahoning County clerk answered only that one application had been received in the year of the law's
clerk strikes through the name with a black felt-tipped pen. He then places all records and papers, including docket references, in a sealed file or envelope. While a few offices place the old case number on the expunged file, the clerk in one county assigns it a special number and maintains a confidential expunged number index. Where the successful applicant for expungement was one of several defendants in the original case, a special problem arises since only the applicant's name can be removed from the documents while some record of the individual's involvement must be preserved in case he is ever arrested again. In such instances, one clerk reported that he retypes all papers, omitting the name of the applicant, and places these in the regular files and dockets, while the original papers are put in the applicant's expunged file. In every county, expunged files are kept in a safe or other confidential space. If inquiry is made about the individual by persons other than those authorized by the statute, the clerks answer that they have no record.

In general, other agencies follow a similar procedure. The Cuyahoga County Sheriff's Office has devised a complete, well-conceived record sealing method which might be a model for other agencies with similar facilities. The original file jacket is removed from the Master Criminal File and destroyed. All index cards, documents, entries, and all other references to the applicant's arrest and incarceration are placed in a new file jacket marked only with the appropriate sheriff's office number. The jacket's cover tab is then taped shut in such a manner that will deface or tear the file jacket if entry into the jacket is attempted. This sealed file is then placed in the numerically proper location in the Master Criminal Files. An ingenious device is used in the event the individual who has had his records expunged is ever arrested again or if inquiry of any type is made. The existence and that case was still pending. Apparently no procedure will be devised there until the court issues an expungement order.

The questionnaires requested information about the clerks' procedures in sealing their own records, their procedure in distributing an expungement order to other agencies, and the number of applications that had been granted and denied in the first year of the law's existence.


Inspections of the records included in the order may be made only by any law enforcement officer, prosecuting attorney, city solicitor, or their assistants, for the purposes of determining whether the nature and character of the offense with which a person is to be charged would be affected by virtue of such person having previously been convicted of a crime or upon application by the person who is the subject of the records and only to such persons named in his application.

One clerk, however, stated that the inquiring party is referred to the judge who handled the case. This would seem to defeat the whole purpose of the expungement law, because, if the inquiring party is referred to a judge, he knows that the individual, at some time, must have been convicted of a crime.

Questionnaires were also sent to the sheriffs and prosecutors of Hamilton, Franklin, and Cuyahoga counties. Only the sheriffs of Hamilton and Cuyahoga counties replied. A special questionnaire was mailed to, but not returned by, the Ohio Bureau of Criminal Identification and Investigation.
Fingerprint Section of the sheriff's office maintains a fingerprint index that refers to the expunged file's number. Thus, if the successful applicant is charged with another crime, new fingerprints are taken by the arresting agency and will be referred to the sheriff's fingerprint index, which will indicate whether there is an existing file on the person. In this manner all inquiries must be accompanied by a set of original fingerprints.

Those agencies without such a sophisticated apparatus must employ simpler methods. For example, one prosecutor's office simply marks index cards and case files "Expunged" and places them in a special file in the Administrative Assistant's office. One probation department merely places expunged documents in distinctly colored folders in order to distinguish them from other files.

One prevalent criticism of expungement, as a means of hiding the former criminal's conviction from the public view, has been that "criminal records are located in so many different places that it is impractical to fashion an order to expunge them all." This is a valid observation, and its truth will surely hinder the effectiveness of any record-sealing statute.

In Ohio, sheriffs and police are required to take the fingerprints of anyone arrested for a felony and forward them, along with other description, to the Ohio Bureau of Criminal Identification and Investigation (B.C.I.). Courts, also, are required to send B.C.I. a weekly summary of cases involving a felony or misdemeanor which becomes a felony on the second offense. The Superintendent of B.C.I., in turn, must cooperate with bureaus in other states and with the F.B.I. to effect a complete interstate, national, and international system of criminal identification.

Private agencies and employers also keep records on persons in their charge, and any criminal activity would probably be noted.

The record acquiring power of the Federal Bureau of Investigation is more pervasive. Under federal law the Attorney General is required to acquire, collect, classify and preserve criminal identification and other records and to exchange them with state, local and federal officials. The F.B.I. may obtain records not only from law enforcement agencies

56 See Gough, supra note 2, at 175 n.120.
57 Inter-Office Memo, Summit County Probation Department, Jan. 24, 1974.
58 Steele, A Suggested Legislative Device for Dealing with Abuses of Criminal Records, 6 U. MICH. J.L. REF. 32, 34 (1972) [hereinafter cited as Steele].
59 OHIO REV. CODE ANN. § 109.60 (Page Supp. 1973). This applies even to those arrested on suspicion of a felony. If the accused is exonerated, however, the identification data must be returned to him on request.
but also from federal banks and all banks insured under FDIC. In 1970 alone, the F.B.I. processed 29,000 fingerprint cards daily.

The problem of reaching the widely disseminated records is not easily solved. The practice in most counties appears to be that, immediately after an order of expungement is issued, the first duty of circulating the order falls upon the clerk of courts. One county clerk sends copies of the order, as a matter of course and without specific instructions from the attorney or the court, to the county probation department, the city police, the county sheriff, the arresting agency (if not the police or sheriff), the F.B.I., the Ohio B.C.I., and the Ohio Bureau of Statistics. The clerk of the municipal court also receives a copy if the case had been bound over. Another county clerk also informs the county and/or city prosecutor of the order. In those counties where the clerk has a list of agencies which receive expungement orders as a matter of course, the clerks will also send to any other person or agency named in the court's journal entry. In those counties it therefore should be the responsibility of the applicant's attorney to ensure that all appropriate agencies are included in the expungement order. In fact, in two of the counties surveyed, Trumbull and Franklin, the attorney must notify all agencies, the clerk takes no part in the distribution process. The list of agencies set out above would likely suffice in most cases; however, notification to private agencies and anyone else known to have any record of the first offender's former criminal activity would be desirable.

In addition to the clerk and the applicant's attorney, other agencies sometimes endeavor to aid in the dissemination of the expungement order. The Cuyahoga and Hamilton county sheriffs send copies of the order to all agencies or governmental bodies to which they may have formerly supplied information regarding the individual. This is a wise policy, since, in the sophisticated computerized system of record keeping that exists today, it is difficult at best for the attorney to ascertain all those entities that have records on the individual. The procedure of the Ohio Bureau of Criminal Identification and Investigation is not known, but even if it did endeavor to notify all its distributees, much of it would be meaningless effort.

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64 28 C.F.R. § 0.85(b) (1974).


66 As a California writer and lawyer has suggested, certified copies of the order would probably be most prudent. Booth, *The Expungement Myth*, 38 Los Angeles B. Ass'n Bull. 161, 163 n.15 (1962).

67 For example, it is likely that the local credit bureau would have some notation in their files. It is doubtful, however, that an order to expunge records would be enforceable against a private enterprise. *But see* Atchison, T. and S.F. Ry. Co. v. Lopez .... Kan. ...., 531 P.2d 455 (1975).

68 A state court judgment "... restricting the use of criminal records would not extend beyond the state boundaries." Steele, *supra* note 58, at 37. This is yet another fact that makes expungement a less than totally effective means of hiding a former
The F.B.I., although not required to do so, will remove from its files and return identification data to the contributing agency upon request. The Summit County Clerk of Courts reports that the F.B.I. returns all data when it receives the expungement order, the F.B.I. apparently construing the order as a request for return of records.

In summary, if expungement is to achieve its purpose, all available means should be employed to conceal records. This is undoubtedly a painstaking process and may be rather futile in some cases. More legislative guidance as to procedure and more court supervision of compliance with its dictates would go far in correcting these defects. Perhaps even reciprocity agreements with other states would help eliminate some expungement loopholes.

D. The Practical Effect of Expungement

Of prime concern to the former criminal himself will be the practical benefits that he receives from expungement. Renewed opportunity for employment or professional licensing is likely to be the major, if not sole, reason for turning to the remedy. Ability to serve on a jury or as a member of a public board or qualification to run for office are criminal's records from public view.

California's counterpart to B.C.I. is required by statute, however, to notify all its distributees of a juvenile expungement order. Cal. Penal Code § 11105.5 (West 1970).

Menard v. Saxbe, 498 F.2d 1017, 1022 (D.C. Cir. 1974). As the court noted, 6,000 such requests were honored in 1970.

Supra note 68 and accompanying text.

See Georgetown Law Institute Model Annulment and Sealing Statute, supra note 34, § 4. The Ohio law does not require agencies to inform the court of compliance with the expungement order, but the survey reveals that some agencies do so in the course of normal procedure.

The Ohio legislature did attempt to put force behind the law by making it a fourth degree misdemeanor to knowingly supply unauthorized persons with expunged data. Ohio Rev. Code Ann. § 2953.35 (Page Temp. Supp. 1973). Laws providing a penalty for disclosure of confidential matter are not uncommon, but reported cases of actual imposition of such penalties are virtually non-existent, Daniel Ellsberg being a well-known example.

There may be a civil remedy in damages against the indiscreet public employee who discloses confidential criminal records. The concept of privacy has been the basis for a growing number of equity cases where the courts, without statutory authorization, have ordered expungement of arrest records in the case of arrestees who were discharged before trial or whose constitutional rights were violated in the arrest. E.g., State v. Pinkney, 33 Ohio Misc. 183, 290 N.E.2d 923 (1972); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971); Annot. 46 A.L.R.3d 900 (1972). Dean Prosser gives a most complete analysis of the civil action in tort for invasion of privacy. W. Prosser, Handbook of the Law of Torts 802 (4th ed. 1972). The former criminal, whose expunged records have been illegally disclosed, might well consider an action against the appropriate official on the basis of Prosser's classifications of Intrusion or Public Disclosure of Private Facts. Id. at 807, 809. Valuable rights, such as the right to keep private personal records and documents, have been recognized as appropriate grounds for equitable relief against public officials. Frey v. Dixon, 104 N.J. Eq. 386, 58 A.2d 86 (1948) (dictum). Furthermore, in the light of Scheuer v. Rhodes, 416 U.S. 232 (1974), the fact that defendants in such a civil action for damages are public officials would not necessarily be a bar to the tort suit.
factors which do not have such a broad effect on the ex-convict's life but which may nevertheless be important to him.

Covering the practical effect, the Ohio expungement law is general at one point:

An order of expungement of the record of conviction restores the person subject thereof to all rights and privileges not otherwise restored by termination of sentence or probation or by final release on parole.\(^7\)\(^3\)

At another point it is more specific:

In any application for employment, license or other privilege, any appearance as a witness or any other inquiry . . . a person may be questioned only with respect to convictions not expunged, unless the question bears a direct and substantial relationship to the position for which the person is being considered.\(^7\)\(^3\)

These provisions are also susceptible to differing interpretations. Whether they will be interpreted broadly, so that an ex-convict is truly no longer an ex-convict, or narrowly, with many loopholes and exceptions, will be of utmost significance to those first offenders who opt for expungement.

1. **Employment**

Most private employers show great hesitation in hiring former criminals. Some flatly reject them, and most will not hire them if there are other applicants without criminal records. In addition, even if the ex-convict does find a job, he is usually relegated to menial, unskilled labor.\(^7\)\(^4\) Restrictions on public employment may be even greater.\(^7\)\(^5\)

An inevitable question on any application for employment is whether the applicant has ever been convicted of a crime.\(^7\)\(^6\) Although the Ohio statute does not specifically authorize a negative answer,\(^7\)\(^7\) the applicant whose records have been expunged would probably be safe in replying "No." Although authority in some states is to the effect that employers can use expunged convictions in considering an application\(^7\)\(^8\) and,


\(^{74}\) Special Project, supra note 2, at 1001-02.

\(^{75}\) Id. at 1013-18.

\(^{76}\) Even here, however, employers are being restricted. For example, Hawaii Rev. Stat. § 21-378 (Supp. 1973), prohibits employer discrimination on the basis of past criminal records and California has recently enacted a law whereby employers are prohibited from asking questions regarding criminal records on initial employment applications. Cal. Labor Code § 4327 (West Supp. 1975).


therefore, by implication, may require the applicant to reveal prior convictions, the reasoning of these authorities probably is based on the narrow relief afforded by their respective expungement statutes.79 In Ohio, "the proceedings shall be deemed not to have occurred. . . ."80 By answering negatively, the former offender would merely be accepting the position that the law assumes. Furthermore, the enigmatic clause "... a person may be questioned only with respect to convictions not expunged . . ."81 also indicates that a negative answer is appropriate.

The negative answer might in many cases end inquiry into a prospective employee's criminal past, but the diligent employer may still learn of prior convictions in other ways.82 The applicant who has answered in the negative may also be required to account for the period that he was actually imprisoned. Explanations such as "self-employment" or "extended vacation" will serve only to aggravate any suspicions an employer may have.83 Furthermore, it has been said that exceptions, such as those in the Ohio law,84 to the strict confidentiality of records open the door for employer access.

From a public policy and public interest standpoint, it may even be unwise to conceal conviction from all employers.85 Professor Gough has listed some areas where the nature of the job virtually requires exclusion of certain prior offenders: a former embezzler with a bank; a former sex offender as a teacher; any previous offender as a policeman or in a position involving high national security and defense.86 These areas are undoubtedly what the legislature intended to affect with the insertion of the clause "... unless the question bears a direct and substantial relationship to the position for which the person is being considered."87

82 Lack of enforcement of prohibition of access and required waivers of confidentiality giving the employer the authority he needs to gain access to records are two such means. 1970 Wash. U.L.Q. 530, 531-32 n.8 (1970). Also, a question on an employment application, such as, "Have you ever been convicted of a crime that has been expunged?" should not be permitted as a circumvention of the purpose of the statute.
83 American Bar Ass'n, Removing Offender Employment Restrictions 7 (1972).
85 Steele, supra note 58, at 40.
86 Gough, supra note 2, at 182-83.
87 Ohio Rev. Code Ann. § 2953.33(B) (Page Temp. Supp. 1973). This part of the statute presents some serious difficulties. For example, the question arises as to who is to determine whether the conviction bears a substantial relationship to the position sought. Surely it cannot be left to the former criminal himself, who would obviously be prejudiced in his own favor. Resting the decision on the employer seems absurd, because, if the applicant states that he has never been convicted and if the records are truly effectively sealed from the public view, the employer will never learn of the expunged record to make the determination. Perhaps statutory guidance is necessary.
Such arguments under the uncertain delineations of public policy are
difficult to refute. They do ignore the very tenet of Ohio's expungement:
rehabilitation. "To rehabilitate means to restore to one's former rank,
privilege or status, to clear the character of reputation or stain, to retrieve
forfeited trust and confidence." Thus, expungement, being a result of
rehabilitation, places the former criminal in his *status quo ante.* For
expungement to do so, it assumes that the one-time criminal no longer has
the criminal character, and, if this assumption is true, a former embezzler
should be considered as qualified as anyone else to work in a bank.

2. Licensing

Ohio, like other states, regulates the legal ability to pursue certain
occupations by licensing. Statutes dictate the qualifications which one must
have to be granted a license and outline the grounds upon which one may
have his license revoked or suspended. To become a C.P.A. or a licensed
architect, for example, one must be of "good moral character." A physician's license may be suspended for conviction of a felony, and no one
convicted of a felony of moral turpitude may be a real estate broker.
Conviction of a felony is ground for revocation of almost all licenses.

The effect of expungement on the applicability of a first offender's
conviction to the licensing laws is not clear. The exception contained
in Section 2953.33(B), discussed above as to employment; did not
appear in the expungement bill as it was originally introduced in the
legislature. But its addition during the enactment process indicates
there will be at least some situations in which the expunged conviction
will be considered by licensing boards. It remains to be determined
which situations, but until such a determination is made, the former
criminal will not be guaranteed that expungement will open the door
to all licensed professions.

88 *In re Stoller,* 160 Fla. 769, ......, 36 So. 2d 443, 444-45 (1948).
90 Needless to say, though, a judicial determination of rehabilitation would not impress
the parent who is faced with the prospect of having a one-time child molester in the
same classroom with his own children.
96 Undoubtedly public policy will be an important consideration in the interpretation
of the statute and its effect upon licensing. *See* notes 84-86 and accompanying text
supra.
97 California has enacted specific provisions to several of its licensing statutes
regarding the effect of expungement. *E.g.*, *Cal. Bus. & Prof. Code* § 10177 (West
1970) (real estate licenses).
The possibility exists that expungement will have no effect in the area of licensing. It might be argued that the licensing boards can inquire about any conviction, whether expunged or not, because any occupation important enough to be licensed and regulated by the legislature would fall within the exception which allows inquiry concerning expunged convictions which have a direct relationship to the position sought. Arguably any conviction has a direct relationship to an occupation important enough to be regulated by the state.

Although licensing boards are not permitted to be totally arbitrary in reviewing license applications, they have been accorded broad powers and discretion. In *Papatheodoro v. Department of Liquor Control*, the court held that restoration of rights and privileges upon termination of sentence or discharge from parole does not erase the effect of a licensing statute’s provision that no person convicted of a felony may obtain a liquor license and that, therefore, the licensing board must deny the application on the basis of the conviction. A license is not a property right, and the state may validly deny its issuance. License laws,

... are police regulations designed to promote the general welfare and protect the public morals. They were enacted in the interest of public health and safety and their object is not to punish. It is essential to distinguish the nature of the statute in question from the nature of our criminal statutes which are punitive in their nature. The legislative will of the people of Ohio has been expressed in the Liquor Control Act. Here there is a fair, just and reasonable connection between the statute in question and the common good of society.

California case law, following the same general reasoning as the *Papatheodoro* decision, is uniform as to the effect of expungement on licensing statutes. Expungement is a criminal remedy, while licensing is civil in nature. Objection is raised to judicial determination of rehabilitation, and, for the purposes of licensing, such determination does not have to be recognized. In view of the “high degree of professional skill and fidelity to the public it [licensed occupations] serves,” licensing boards must be allowed their own discretion in deciding whether a former criminal has rehabilitated sufficiently to assume such responsibilities.

The narrowness of the provisions of the California expungement law

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99 118 N.E.2d 713 (Ohio C.P. 1954).
100 Id. at 717.
101 Id. at 715.
102 Id. at 716.
105 Id. at 872, 338 P.2d at 186.
as to its practical effect should not be overlooked in analogizing the California decisions to the Ohio statute. Mere release from penalties and disabilities resulting from the conviction would necessarily be of less effect than restoration of all rights and privileges not otherwise restored by termination of sentence or final release on parole. The latter clause also distinguishes Ohio's expungement statute from the statute under consideration in the Papatheodoro case.

A 1949 Ohio Attorney General Opinion presents more analogous reasoning. There a convicted felon had served in World War II and had thereby come under a postwar Presidential proclamation pardoning all convicts who had served in the armed services during the war. He applied for a liquor license, and the Department of Liquor Control requested the opinion of the Attorney General as to the effect of the pardon on the licensing statute which prohibited former felons from obtaining a liquor license. The Attorney General opined that a Presidential or Governor's pardon totally relieves the person pardoned from licensing disabilities:

It [a pardon], in legal contemplation, obliterates the offense, giving him a new credit and capacity, and rehabilitating him to his former position in society. It is said to make of the convict a new man, and to be, in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon, to this extent, that there is a complete estoppel of record against further punishment pursuant to such a conviction.

This language is virtually identical to that which has been used to describe the general effects of an order of expungement, and the reasoning of the Attorney General as to pardoned convicts vis-à-vis licensing statutes seems equally applicable to the former criminal who has had his conviction expunged.

Thus, there are two forces at odds in the area of licensing and expungement: the police power of the state and its interest in assuring that only the highest caliber of persons practice certain professions, versus the state's interest, as effectuated by the expungement law, of replacing the deserving, reformed criminal to a useful position in society. The two interests are not wholly incompatible if the ex-convict has truly reformed, but the courts and the legislature have traditionally accorded much power and importance to the licensing boards, and usurpation of such power by expungement will most likely not be perfunctorily recognized.

3. Other Areas
The recently enacted Criminal Code provides that a person convicted

106 See note 6 supra.
110 Id. at 513 (quoting 30 O. Jur. § 17 [xxxx]).
111 See notes 4, 87-88 and accompanying text supra.
of a felony loses the right to be an elector, to be a juror, and to hold an office of honor, trust, or profit.\textsuperscript{112} The convicted felon regains his competency to vote upon final discharge and is restored all the rights and privileges forfeited upon a full pardon.\textsuperscript{113} This wording may present a problem for the ex-convict who wishes to hold a public office or serve on a jury and who seeks expungement to remove his disabilities in these areas.\textsuperscript{114} The statute\textsuperscript{115} only states that upon pardon are the privileges restored, and the expungement statute states that privileges returned are those not otherwise restored by termination of sentence, probation, or final release on parole.\textsuperscript{116} The question which therefore arises is whether the privileges restored by expungement include those privileges restored only by pardon in Section 2961.01. Although the new Criminal Code and the expungement statute became effective on the same date, the latter statute was the first passed through the legislature. If chronology is significant, it can be argued that the legislature intended to include in the expungement law the restoration of the privileges restored only upon pardon in Section 2961.01.\textsuperscript{117} However, it can also be argued that there is a conflict between the two statutes, and, since Section 2961.01 is the more specific, it must govern.\textsuperscript{118} In view of the positive remedial purposes of the expungement law, the courts should attempt to construe it liberally\textsuperscript{119} and in such a manner so that both laws are given effect.\textsuperscript{120} Since Section 2961.01 does not say that restoration of the ability to be a juror or hold public office occurs only with a pardon, consistent construction is not impossible.

The Ohio Constitution provides that no person convicted of embezzlement of public funds shall hold any state office.\textsuperscript{121} There is authority to the effect that statutory expungement will not override such a constitutional provision.\textsuperscript{122}

Expungement would probably eliminate the necessity of registration for the former sex offender.\textsuperscript{123} A first offender who has had his record

\textsuperscript{117} There is also the argument of the close analogy between the practical effects of a pardon and that of expungement. \textit{See} notes 111-12 and accompanying text \textit{supra}.
\textsuperscript{121} \textit{Ohio Const. art. II § 5}.
\textsuperscript{123} \textit{See} Abbott v. City of Los Angeles, 53 Calif. 2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960).
sealed might be allowed to carry firearms, and apparently he could not be impeached as a witness.

It is open to question whether federal courts, in cases arising under federal law, will recognize state expungement. The United States Court of Appeals for the Ninth Circuit has consistently held that, for the purposes of immigration and naturalization, Congress did not intend to accept state expungement. Federal courts will most probably decide each case on an individual basis, using judicial discretion and interpretation of congressional intent.

IV. CONCLUSION

Expungement as a method of restoring the rehabilitated criminal to his former status has been severely criticized: "Record concealment is unworkable; it fails to lift other penalties attendant to the record; it sanctions deceit; its half secrecy leads to speculative exaggerations; it frustrates constructive research; and it is not equally available to all." The statement may be true even with a strong, unequivocal law, but its truth has greater inevitability with a weak, loophole-ridden statute. The Ohio expungement statute is not unequivocal. Without authoritative guidance, procedures for sealing have differed and vary from the careful to the haphazard. Unless there is strict enforcement of the statutory dictates, employers will still be able to learn of conviction records, and unless there is a judicial turnabout or a more straightforward statute in regard to licensing, expungement in Ohio will be of little help to the first offender who applies for a professional license. It is evident that more astute legislation is needed. At the very least, liberal court interpretation, like the Miller decision, is an absolute necessity if Ohio expungement is to approach the achievement of its purpose.

124 Ohio law now allows a former felon to petition the court to relieve him of the disability provided, inter alia, he has been law-abiding since his discharge. OHIO REV. CODE ANN. § 2923.14 (Page Spec. Supp. 1973).
125 OHIO REV. CODE ANN. § 2953.33(B) (Page Temp. Supp. 1973). However, the wording of § 2953.32(E) does not make it clear whether that provision applies only to criminal proceedings in which the former criminal is himself a defendant or to all criminal proceedings. If the latter, then he could be impeached at any criminal trial.
126 Brownrigg v. Immigration and Naturalization Serv., 356 F.2d 877 (9th Cir. 1966); Garcia-Gonzales v. Immigration and Naturalization Serv., 344 F.2d 804 (9th Cir. 1965), cert. denied, 382 U.S. 840 (1967).
APPENDIX
A Lawyer's Expungement Procedural Outline

I. Facts to be ascertained from the client.

A. The crime of which he was convicted.
   Section 2953.36 provides that expungement will not apply where the crime
   was one for which probation was unavailable or where the conviction is
   under Chapters 4507, 4511, or 4549 of the Revised Code. This includes
   crimes under those chapters as they are enumerated under the new Criminal
   Code. Some crimes that were listed under those chapters in the old
   Criminal Code have been inserted into Title 29 and therefore are not
   excluded from expungement.

B. The year of his conviction and when parole, sentence, or probation terminated.
   Section 2953.32(A) provides that three years must have passed since his final
   discharge in the case of a felony, and one year in the case of a misdemeanor.

C. Whether there is any criminal proceeding presently against him.
   Section 2953.32(C) provides that there must be no proceedings against him
   at the time of the application.

D. Whether he has been convicted of any crimes since the first conviction.
   Expungement is limited to first offenders.

E. The name and location of the sentencing court.
   Section 2953.32(A) provides that the application shall be made to such court
   if the conviction was in Ohio. If it was an out-of-state conviction, the
   application may be made to any court of common pleas.

F. General facts about his personal life that would be persuasive to the court
   of his rehabilitation.
   Such facts might include the following:
   1. Employment record;
   2. Marital status and number of children;
   3. Whether he is a home owner;
   4. Community activities;
   5. Interests and hobbies; and
   6. Record on probation.

II. Filing with the court.

A. The form of the application.
   Since the form differs from county to county, the attorney should ascertain
   the procedure in the particular county in which he is filing. The application
   should allege fulfillment of the conditions as enumerated in Section 2953.32(C).

B. A $50 filing fee is required, except for the indigent applicant.

C. The attorney should obtain a hearing date at the time of filing.
   The court will notify the prosecutor of the hearing and may also have the
   probation department make inquiries and a written report as to the merit
   of the application.

III. When the order is granted.

A. The attorney must file a judgment entry for court approval to the effect that
   expungement has been granted.

B. Depending on the practice of the county in which the granting court sits, the
   attorney may have to list agencies to whom the order is to be sent. Some
   counties require that separate Instructions to the Clerk be filed. The text
   contains a discussion of agencies that should receive a copy in all cases;
   whether other agencies should be sent a copy depends on the facts of the
   client's history.

C. Agencies that receive the order are not required to report compliance with
   it. However, the conscientious attorney might take it upon himself, after a
   period of time, to inquire of the agencies as to whether they have sealed
   their records.

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