The Unified Sealed Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century

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THE UNIFIED “SEALED” THEORY: UPDATING OHIO’S RECORD-SEALING STATUTE FOR THE TWENTY-FIRST CENTURY

MICHAEL H. JAGUNIC∗

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I. INTRODUCTION

Brad W. was a typical college student. He studied hard for four years, held a job while attending classes, and still made time to visit his parents. Like most college students, Brad W. used his first stint away from home to make friends, enjoy new experiences, and branch out socially through campus events and parties. While on his way home from one of these parties, Brad W. was cited for disorderly conduct. His offense did not involve violence, resistance, or obstruction of justice. In fact, Brad never even saw the inside of a patrol car, let alone a police station. The citing officer quickly wrote Brad a ticket at the scene, then sent him on his way home. On the advice of counsel, Brad pleaded guilty and paid his fine. His attorney assured

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1 Brad W. is a personal friend of the author. The account of his first-hand experience of the practical difficulties of record sealing is true. Only his name has been altered in the interest of maintaining the privacy of his sealed record.
him that he could avail himself of Ohio’s record sealing statute after a year without any further offenses.

Several years passed before Brad applied to have his record sealed. He had been working for the same employer for some time, and a potential blemish on his background check had not even crossed his mind. When he eventually did apply to have his record sealed, Brad easily showed that he had kept his record clean since the disorderly conduct offense, and that he met each of the statutory requirements for eligibility. And so there was no problem at all: the court ordered his record sealed.

Three years later, Brad had been in the same line of work for quite some time and decided to make a change. While filling out a job application online, he came to a question regarding his criminal background. For his own peace of mind, Brad went to the website of the court that had both sentenced him and sealed his record. There was no trace of his offense in the court’s records. Just to be thorough, he then went to the search engine, Google, and typed in the search terms “criminal background check.” The very first result for his search led to a website offering free criminal history checks. Despite the fact that his conviction had been sealed by the court, this website had a full record of his conviction available free of charge to the entire world. It was then that Brad realized that, no matter what the State of Ohio may say, his record would never truly be sealed.

A criminal record can have many negative effects on an individual’s life. Even records of arrests that did not end in conviction can have long-term devastating effects on an individual’s living situation and social standing. But perhaps the harshest consequence for an ex-offender is the impact of a criminal record on his employment opportunities.

As a society, we recognize that while some offenders’ criminal histories should remain open, ex-offenders like Brad W. should not have to pay a lifetime penalty for a one-time mistake. The mechanism for guarding against this injustice in Ohio is criminal record sealing, colloquially known as expungement. For close to forty

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3 See discussion infra Part II.
5 Journey v. State, 895 P.2d 955, 959 (Alaska 1995). “The pernicious effects of criminal records are well documented. Courts, commentators, and legislatures have recognized that a person with a criminal record is often burdened by social stigma, subjected to additional investigation, prejudiced in future criminal proceedings, and discriminated against by prospective employers.” Id.
8 There are various definitions of expungement, some of which include judicial sealing of records. See id. at 20; David Louis Raybin, Expungement of Arrest Records: Erasing the Past, Tenn. B.J., Mar. 2008, at 22, 22-23. This Note, however, adopts the following distinction: “Expunging refers to an order to remove and destroy records so that no trace of the information remains. Sealing of a record refers to the procedure to segregate certain records from the court activity record information to ensure the confidentiality to the extent specified in the record sealing statute.” Elizabeth V. Tavares, Criminal Records: Sealing, Expungement
years, Ohio has granted rehabilitated offenders the right to apply to have their records sealed. The underlying idea of this system is that, by removing criminal history information from the reach of the public, we can prevent a select group of offenders from being “saddled forever with a criminal record.”

But today, sealing a public record is no longer as easy as simply removing a physical document from a folder or shelf and locking it away. The technological advances of the information age have allowed private industry to usurp control of criminal history information. Data in electronic form has changed the landscape of record sealing. With increasing electronic availability of criminal records, one’s criminal history “is not just much more accessible, it is also much more easily duplicated.” In effect, once criminal records are made public, they may be copied and recopied. Sealing that information from the public’s view becomes something like trying to stop a chain letter or halt a computer virus.

In Ohio, more than seventy-five percent of counties now make criminal records and court dockets available to anyone with Internet access. These records are regularly copied by information brokers into large databases and made available to anyone willing to pay. Even when records are not easily accessible online, information brokers send “runners” to gather information directly from on-site terminals on a daily basis, which they add to their enormous file collections. The information may then be distributed to prospective employers, credit reporting agencies, and even other privately maintained databases. As a result, Ohio’s record sealing statute has become a double-edged sword. If an ex-offender does not take advantage of the statute, he subjects himself to the harsh discrimination that comes with a criminal record. But if he relies on the record-sealing statute only to have

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9 OHIO REV. CODE ANN. §§ 2953.31-.36.


11 Id.


13 Ohio courts overwhelmingly make criminal records available online. See discussion infra at Part III. At the time of this writing, sixty-seven of eighty-eight counties provide Internet access to criminal records regardless of whether the charges involved ultimately led to a conviction. One county that does not currently provide access to criminal records advertises that such records are “Coming Soon!” WILLIAMS COUNTY CLERK OF COURTS, http://www.co.williams.oh.us/Clerk_Courts/default1.htm (last visited Apr. 20, 2011).


16 Employment Rights of Workers with Criminal Records, NATIONAL EMPLOYMENT LAW PROJECT, http://www.nelp.org/site/issues/category/employment_rights_of_workers_with_criminal_records (last visited Apr. 20, 2011). “[A] major survey . . . found that over 60% of
evidence of his sealed record revealed, it then appears as though the ex-offender has lied on his application, which may be even more detrimental to the ex-offender’s employment prospects.17 While there is a chance that employers will not be able to locate sealed records, there is an increasing probability that a credit report or even a basic Internet search will reveal information that an ex-offender did not disclose. The growing difficulty of truly sealing a record has gotten so bad that some lawyers advise their clients that record sealing in our technological world is “a waste of time.”18

Currently, the Fair Credit Reporting Act (FCRA) provides some limited rights to individuals harmed by out-of-date or inaccurate information.19 These rights are often of little use to ex-offenders, though, because they only vest after the sealed data is revealed and the employment opportunity is lost.20 Also, the FCRA provides no protection where the employer conducts its own investigation, leaving ex-offenders with practically no recourse when employers conduct in-house background checks.21 Because of databases like the one that contains the sealed record of Brad W., employers can discover inaccurate or out-of-date criminal record information without disclosing their sources and rescind job offers based on this information.

Undoubtedly, employers have a right to know an applicant’s criminal background for the purpose of making informed decisions to protect the safety of the public, the staff, and company property. This concern, however, should be balanced with the right of certain ex-offenders to have a second chance.

This Note will argue that Ohio’s record sealing statute is still a viable means to achieve this balance, but that it must be supplemented by additional laws in order to remain effective. Part II provides a short history of record sealing and expungement in the United States and explains how Ohio’s record sealing statute effectively deals with some common criticisms of record sealing.22 Part III then briefly examines why sealing and expungement statutes are becoming increasingly ineffective due to the proliferation of electronic criminal records and the rise of the data-mining industry. Part IV critiques some of the proposed solutions to the record-sealing problems posed by modern computer technology. Finally, Part V recommends a combination of state credit reporting legislation, negligent hiring limitation, and restriction of employer access to criminal record information. This combined solution will not

17 See Stuckey, supra note 14, at 348.
20 See De Armond, supra note 12, at 1103.
22 There are actually two provisions in the Ohio Revised Code for sealing criminal records. Ohio Revised Code sections 2953.31-.36 deal with the sealing of records of convictions, and Ohio Revised Code sections 2953.51-.55 deal with the sealing of records after a dismissal or a finding of not guilty. This Note deals with both. Where not specifically differentiated, discussion of Ohio’s “record-sealing statute” applies to both sets of provisions.
only balance the rights of ex-offenders and employers, but will also protect innocent
individuals who might otherwise be harmed by inaccurate credit reporting.

II. BACKGROUND—RECORD SEALING THEN AND NOW

A. Origin and Criticisms

The modern practice of criminal record sealing in the United States traces its
roots to the mid-twentieth century. Record sealing and expungement developed
from 1940s era “specialized state sentencing schemes for youthful offenders.”
These laws were adopted on the theory that youthful offenders should be given a
special “incentive to reform” because they could more easily be rehabilitated than
adults. Congress soon followed the lead of the states, enacting the Youth
Corrections Act in 1950. This Act expanded the scope of expungement beyond
youth offenders, allowing federal courts to “set aside” convictions of offenders over
the age of majority but younger than twenty-six. Though the Act broadened the
practice of record sealing slightly, it was not until 1956 that the National Conference
on Parole made the first widely heard call for adult expungement laws in the United
States. Not long thereafter, the National Council on Crime and Delinquency
proposed a Model Act that would grant sentencing courts the authority to “annul”
convictions in order to relieve offenders of the collateral effects of a criminal
conviction.

These first efforts began the movement to reward ex-offenders for rehabilitation
and eventually led to widespread criminal record-sealing and expungement
statutes. At the time of the Model Act’s proposal, only six states had enacted
expungement statutes. Within the next two decades, though, more than half of all
states would enact some form of record-sealing or expungement law. Today, forty-

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24 Id. at 1709.
30 See Nora V. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 Stan. L. & Pol’y Rev. 153, 155 (1999); see also Love, supra note 23, at 1710. “The purpose of judicial expungement or set-aside was to both encourage and reward rehabilitation, by restoring social status as well as legal rights.” Id.
31 Love, supra note 23, at 1710-11.
five states and the District of Columbia have a mechanism in place for criminal record sealing or expungement.\(^{33}\)

Despite their current prevalence, record-sealing and expungement statutes have been and remain subject to two well-founded criticisms. The first criticism is that record sealing and expungement schemes “create serious risks to public safety.”\(^{34}\) Employers rely on criminal background checks in order to make hiring decisions that can potentially affect the safety of their staffs, customers, and property.\(^{35}\) Without these checks, an employer’s ability to protect itself from dangerous ex-offenders is limited. Additionally, criminal record information is regularly used by law enforcement agencies to find (or narrow the field of) suspected perpetrators of crimes.\(^{36}\) Sealing criminal record information could potentially impede law enforcement or prevent police from apprehending a suspect they attempt to identify based on an earlier, sealed offense.\(^{37}\) While offering ex-offenders a second chance through criminal record sealing is a laudable goal, the government cannot ignore its responsibility to protect its citizens.

The second criticism pertains to the deception inherent in record-sealing statutes: what one commentator calls “the moral criticism.”\(^{38}\) Sealing a record only benefits an ex-offender if he may deny the underlying offense.\(^{39}\) It is only by denying the existence of the sealed record—whether it is a record of a conviction or an arrest—that the ex-offender can escape the consequences of the record.\(^{40}\) According to the moral criticism, this necessary deception amounts to a governmentally granted right that allows an ex-offender to lie about his criminal record.\(^{41}\) The dishonesty about past events is not just limited to the ex-offender; courts and public officials, too, must participate in the deception so that the information remains sealed from the community.\(^{42}\) “This deliberate deception of the public violates our longstanding and generally unquestioned preference for truth over falsity.”\(^{43}\) The point is largely philosophical, but well-taken. If a government lies and promotes lies in one arena,

\(^{33}\) Mouzon, supra note 6, at 31.

\(^{34}\) Kristin K. Henson, Comment, Can You Make This Go Away?: Alabama’s Inconsistent Approach to Expunging Criminal Records, 35 CUMB. L. REV. 385, 386 (2005).


\(^{37}\) See Bergeron & Eberwine, supra note 35, at 597.

\(^{38}\) Mayfield, supra note 35, at 1066.

\(^{39}\) Diehm, supra note 36, at 76.

\(^{40}\) See id.

\(^{41}\) See Mayfield, supra note 35, at 1066-67.

\(^{42}\) See id.; Diehm, supra note 36, at 74-75.

why not another? Or perhaps more to the point, how can a citizenry trust its government when it knows that the government engages in deception of its citizens?

Mindful of the two criticisms outlined above, we now turn to Ohio’s record-sealing statute.

B. Ohio’s Record-Sealing Statute

Ohio’s law for sealing records of convictions first took effect in 1974.\textsuperscript{44} The state legislature has amended the statute several times since then in order to refine who is eligible to have a record sealed.\textsuperscript{45} Through this continual fine-tuning, the practice of sealing criminal records in Ohio has struck a commendable balance between the interests of the general public and the interests of the reformed ex-offender.

In Ohio, record sealing is limited to first offenders.\textsuperscript{46} First offenders are individuals who have been convicted of only one offense “and who previously or subsequently [have] not been convicted of the same or a different offense.”\textsuperscript{47} The legislature limited the definition of “different offense” to exclude minor traffic offenses and minor misdemeanors so that reformed individuals with relatively common infractions on their records are not barred from applying for sealing.\textsuperscript{48} After his final discharge, a first offender must wait a statutorily defined period before applying for sealing.\textsuperscript{49}

Ohio law has several safety mechanisms in place so that only a limited number of ex-offenders are eligible for record sealing. An ex-offender is ineligible to have his record sealed if he has criminal proceedings pending against him.\textsuperscript{50} This prevents the ex-offender from abusing the record sealing statute by “hiding” his past conviction in a present criminal action. As well, convictions subject to mandatory imprisonment,\textsuperscript{51} convictions for acts of violence,\textsuperscript{52} convictions for an offense in which the victim was a child,\textsuperscript{53} convictions of a first or second degree felony,\textsuperscript{54} and convictions for driving under the influence\textsuperscript{55} are not sealable. These exceptions

\textsuperscript{44} 1973 Ohio Laws 72 (current version at OHIO REV. CODE ANN. §§ 2953.31-.36).
\textsuperscript{46} OHIO REV. CODE ANN. § 2953.32(A)(1).
\textsuperscript{47} Id. § 2953.31(A).
\textsuperscript{49} OHIO REV. CODE ANN. § 2953.32(A)(1). Specifically, the waiting period is three years for a felony conviction and one year for a misdemeanor conviction. Id.
\textsuperscript{50} Id. § 2953.32(C)(1)(b).
\textsuperscript{51} Id. § 2953.36(A).
\textsuperscript{52} Id. § 2953.36(C). If the offense is less than a first degree misdemeanor, the ex-offender may still apply to have his record sealed. Id.
\textsuperscript{53} Id. § 2953.36(F). If the offense is less than a first degree misdemeanor, the ex-offender may still apply to have his record sealed. Id.
\textsuperscript{54} Id. § 2953.36(G).
\textsuperscript{55} Id. § 2953.36(C).
show that the Ohio legislature has taken great care not to sacrifice public safety for the benefit of ex-offenders.

Even where all of these criteria are met, Ohio law does not grant a first offender the right to have his conviction sealed, but only the right to apply to the sentencing court to have the conviction sealed.\textsuperscript{56} Though courts are to “liberally construe” the statute in favor of the rehabilitated offender,\textsuperscript{57} at all time courts may decide against sealing “if the petitioner’s interest is outweighed by a legitimate government interest.”\textsuperscript{58} To ensure a fair picture of these interests, the local prosecutor may object to an applicant’s request to seal, even when the applicant meets the statutory requirements for eligibility.\textsuperscript{59} The prosecutor then has a chance to explain why under the particular circumstances the record should remain open.\textsuperscript{60} Thus, throughout the record-sealing process, the prosecutor acts as an advocate for the public’s interests.

If the sentencing court determines that (1) all of the statutory requirements are met, (2) that the public does not have a special interest in keeping the criminal record open, and (3) that the ex-offender has been satisfactorily rehabilitated, the court will then order that the official records relating to the conviction be sealed.\textsuperscript{61} After sealing has been ordered, “[t]he proceedings in the case shall be considered not to have occurred and the conviction . . . shall be sealed.”\textsuperscript{62}

But, under Ohio law, sealed records are not entirely inaccessible. If the ex-offender is subsequently convicted, the sealed record may be used by the court when determining the sentence for the subsequent conviction.\textsuperscript{63} Additionally, the record-sealing statute makes the sealed record available for a number of specific purposes. Law enforcement officers and agencies may inspect a sealed record when the nature of the sealed conviction could affect the charge in a subsequent case,\textsuperscript{64} when an officer involved in the sealed case requires information for his defense in a civil action arising from his involvement in the sealed case,\textsuperscript{65} or when conducting a background investigation on an ex-offender applying for a law enforcement employment position.\textsuperscript{66} A parole or probation officer may also use the sealed record in supervising the ex-offender.\textsuperscript{67} A prosecutor may use the sealed information to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{56} Id.
\item \textsuperscript{57} State ex rel. Gains v. Rossi, 716 N.E.2d 204, 207 (Ohio 1999).
\item \textsuperscript{58} Bergeron & Eberwine, supra note 35, at 600.
\item \textsuperscript{59} OHIO REV. CODE ANN. § 2953.32(B).
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id. § 2953.32(C)(2). These official records include, \textit{inter alia}, information in the case docket, subpoenas, filings, records of testimony and evidence, fingerprints, photographs, and all records and investigative reports possessed by law enforcement. \textit{Id.} § 2953.51(D).
\item \textsuperscript{62} Id. § 2953.32(C)(2).
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id. § 2953.32(D)(1).
\item \textsuperscript{65} Id. § 2953.32(D)(4).
\item \textsuperscript{66} Id. § 2953.32(D)(6).
\item \textsuperscript{67} Id. § 2953.32(D)(2).
\end{itemize}
\end{footnotesize}
determine the ex-offender’s eligibility for pre-trial diversion programs. Finally, the ex-offender himself may access the record.

Another important access exception in the record-sealing statute is that the state Bureau of Criminal Identification and Investigation may use and provide information regarding a sealed record to licensing boards and specific employers who provide care services. This provides the public with an extra level of safety. Ex-offenders who wish to pursue careers in childcare or healthcare can demonstrate their suitability for a position by notifying a potential employer that a conviction has been sealed, but they cannot hide a conviction in fields where the safety and well-being of others are of utmost concern.

Once a record is sealed, the ex-offender’s rights with respect to employers do not change. This is true because, rather than granting an ex-offender the right to deny the existence of a sealed conviction, the record-sealing statute instead prohibits employers from questioning an applicant about the existence of sealed records. Only sealed records that did not end in a conviction allow the applicant to deny that the arrest or action occurred.

In cases that did not end in conviction, the individual may apply for the record to be sealed without many of the limitations placed on the sealing of convictions. There is no waiting period, no limitation based on the degree of the charge, and no consideration of rehabilitation. However, the prosecutor may still object to sealing the record, and the court may refuse to seal the record if doing so would not be in the public’s interest. After sealing, the record is available for inspection in fewer circumstances, but given that the applicant has not been found guilty and must be presumed innocent, these differences from the handling of a record of conviction serve the interests of justice.

The Ohio record-sealing statute holds up well against the two criticisms outlined in Part II.A. First, Ohio law does not expunge or destroy records, it merely seals them. Ohio requires that the government maintain the records for future (albeit limited) use when such use is in the interest of the public. The statute does not require that knowing parties pretend that the conviction never happened. Thus, the mechanism of sealing records rather than expunging them answers both safety

68 Id. § 2953.32(D)(5).
69 Id. § 2953.32(D)(3).
70 Id. § 2953.32(D)(8)-(10).
71 Id. § 109.57(F).
72 Id. § 2953.33(B).
74 OHIO REV. CODE ANN. § 2953.52(A)(1).
75 Id. § 2953.52(B)(1).
76 Id. § 2953.52(B)(2)(d).
77 Id. § 2953.53.
concerns and moral criticism. Second, the Ohio record-sealing statute provides for a number of safeguards so that the benefit to the ex-offender does not come at the expense of public safety. It requires extensive balancing of the rights of the ex-offender and the public through consideration of the particular facts of a conviction. Furthermore, even if a record is sealed, it is available for use where matters of public safety are of particular concern. Third, the Ohio record-sealing statute does not give ex-offenders the right to lie about their convictions. By limiting what employers may ask rather than granting ex-offenders a right of denial, the issue underlying the statute is a question of employment law, not morality. The state operates well within its moral rights by imposing hiring-process limitations on employers.

Ohio’s record-sealing statute strikes a fair balance between the interests of the public and the ex-offender. It protects against both threats to the public’s safety and the moral toll of governmental deception. But it is not flawless. Its major drawback is that it presupposes that state records are the only source of criminal history information.

III. THE PROBLEM—DATA PROLIFERATION IN THE TWENTY-FIRST CENTURY

Unfortunately for those like Brad W., cases of employers relying on inaccurate or out-of-date criminal record information are becoming more common. This is because an estimated eighty percent of large- and medium-sized employers now perform criminal background investigations on potential employees, and these employers are relying increasingly on privately maintained criminal history records. With hundreds of private companies providing information once controlled almost exclusively by the state, criminal records can no longer be effectively sealed.

Over a decade ago, one commentator noted that because of technological advances, “access to criminal records, whether expunged or not, is becoming the norm rather than the exception.” This prediction certainly holds true in Ohio. As noted above, today the courts of more than three quarters of all Ohio counties make their criminal records available online. This electronic data provides the general public with easy access to public records, but it also allows information brokers and


79 See Liptak, supra note 18.


82 Mayfield, supra note 35, at 1061.

83 See supra note 13.
data-mining agencies instant access to thousands of pieces of criminal record information each day. 84

These businesses cull criminal records from online court files across the country. 85 In the minority of jurisdictions that do not make records available electronically, data harvesters employ “runners.” 86 Runners are people who physically retrieve records on-site from police stations and courthouses. 87 They provide the records to information brokers who input the data into their own electronic databases. 88 These private databases “are updated only fitfully,” causing an increasing number of cases in which sealed or expunged records appear in criminal background checks. 89

Most of these private databases are available online. 90 This means that their data is directly accessible to employers, as in the case of Brad W. This online availability also allows background screening firms or other data-mining companies to append their own records with the records gathered by other agencies, effectively “re-mining” the data. 91 Given this system, it is easy to see how quickly the state loses control of information. The same Google search that leads to the out-of-date data about Brad W. also yields hundreds of links to other privately maintained criminal record databases. 92 Even if courts were to require that private databases be updated, enforcing this requirement would difficult. The number of man-hours a court would expend sifting through the hundreds of private databases—some of which “contain more than 100 million criminal records” 93—would be exorbitant.

Compounding matters is the fact that criminal record furnishers actively work to increase the market for their services. 94 Demand for criminal background checks has grown significantly because “[p]rivate information service companies warn employers, landlords, hotels, and other businesses that failure to conduct criminal background checks could result in significant tort liabilities.” 95 The basis for these

84 See Jacobs, supra note 15, at 401 (noting that “private companies specializing in background checks have the expertise and motivation to copy this information to their own databases”).


86 Jacobs, supra note 15, at 410.

87 See id.

88 See id.

89 Liptak, supra note 18. See also Raybin, supra note 8, at 27.

90 Geffen & Letze, supra note 85, at 1343.


93 Liptak, supra note 18.

94 Jacobs, supra note 15, at 388.

warnings is well-founded. Under the tort theory of negligent hiring, an employer may be liable “when he employs a person with known propensities, or propensities which could have been discovered by reasonable investigation, in an employment position which, because of the circumstances of employment, it should have been foreseeable that the hired individual posed an unreasonable threat of injury to others.”96 Negligent hiring is a viable cause of action in Ohio courts.97 Due to the increasing access to, and decreasing costs of, obtaining criminal background checks, some scholars predict that background checks may soon be required to avoid negligent hiring liability.98 Of course, it is to be expected that a business will make efforts to drive up the demand for its products and services, particularly in situations like this where employers are legitimately at risk of loss and liability.99 The problem is that increased demand and the consequent rise in the number of background checks relying on privately maintained databases also increases the number of employers using inaccurate information, including information about sealed records.

Record sealing statutes have never been foolproof. There has always been the chance that in a small-town setting an employer would remember the actual conviction or at least the report of the conviction. But the information age has dramatically increased the likelihood that an ex-offender’s sealed record will be exposed to the world. As one scholar put it, because of today’s technology “[t]here is no fresh start. There is no escape from the past—not as far as personal data is concerned.”100 America, though, is a society that values second chances. To maintain that ideal, we must forge ahead and find a way to ensure that the rehabilitated ex-offender is not forever hindered by the electronic specter of a one-time mistake.

IV. ANALYSIS OF PROPOSED SOLUTIONS

Advances in information technology and criminal record proliferation have made record sealing difficult, perhaps even impracticable.101 But due to increasing numbers of criminal offenders,102 the number of people applying to have their

98 See, e.g., Dickerson, supra note 21, at 472.
101 See Raybin, supra note 8, at 27; Dickerson, supra note 21, at 463; Bergeron & Eberwine, supra note 35, at 597; Liptak, supra note 18; Horn, supra note 10.
102 See Ohio Office of Criminal Justice Servs., Probation and Parole in the United States 2007, at 2 (2008), http://www.publicsafety.ohio.gov/links/ocjs_Probation_and_Parole_2007.pdf. “In 2007, the total Federal, State, and local adult correctional population (incarcerated or in the community) grew 2.0%.” Id. In Ohio, the rate of ex-offenders on probation increased 4.2%, id., and the rate of imprisonment rose 3.2%. Ohio Office of
Because of this increased reliance on Ohio’s record-sealing statute, the State must either take steps to make it more effective or design an alternative to accomplish the statute’s goal of giving deserving ex-offenders a second chance. Mindful of the problems presented by electronic criminal records proliferation, legal commentators have proposed a number of methods to accomplish this goal. These proposed methods can be divided into two categories: those that could replace record sealing and those that would repair record sealing.

A. Proposed Replacements for Record Sealing

1. Nondiscrimination Laws

Scholars have proposed mitigating the effects of widespread criminal record availability by prohibiting employment discrimination based on criminal records. Nondiscrimination laws typically state that an employer cannot use a criminal record to deny employment or negatively discriminate against an individual based on the fact that an applicant has a criminal record. The protection from discrimination is afforded to ex-offenders generally, with exceptions only where there is a “direct” or “rational” relationship between the particular conviction and the position for which the ex-offender has applied. One commentator goes so far as to suggest that “Title VII could be amended to include criminal history as a protected status.” Notably, four states have already enacted laws that control how conviction records can be used during the hiring process by both public and private employers. Several other states have enacted similar laws that only affect public employers.

The policy embodied by nondiscrimination laws stands in stark contrast to the policy embodied by Ohio’s record-sealing statute. Nondiscrimination laws presuppose that an employer should not have the right to discriminate based on a criminal record, except in special circumstances. In contrast, Ohio’s record-sealing scheme presupposes that employers should be able to discriminate based on criminal records, except in special circumstances where an ex-offender has met the criteria for sealing. So at the outset, there is a policy difference to consider.

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103 See Raybin, supra note 8, at 22. “[T]he insistence for expungements has grown to the point where in Davidson County there is now a full-time expungement clerk in the courthouse.” Id.

104 Jacobs, supra note 15, at 412; Watstein, supra note 80, at 604-08.

105 See, e.g., N.Y. CORRECT. LAW § 752 (McKinney 2010); HAW. REV. STAT. § 378-2 (2010); WIS. STAT. § 111.321 (2010).

106 See N.Y. CORRECT. LAW § 752; HAW. REV. STAT. § 378-2.5.


108 Love, supra note 7, at 23. Those states are Hawaii, New York, Pennsylvania, and Wisconsin. Id.

109 Id.
In defense of Ohio’s method, the key issue is the fact that “[a] criminal record is not an ascribed characteristic over which the individual has no control.”\textsuperscript{110} It is unreasonable to discriminate on the basis of sex or race—characteristics that one cannot control. But it is not unreasonable for an employer to discriminate against an individual based upon how he acts, or has acted in the past.\textsuperscript{111} This type of discrimination based on a criminal history is often viewed as appropriate, even “desirable.”\textsuperscript{112} In fact, in some instances Ohio law requires discrimination based on a criminal history.\textsuperscript{113} Even the Equal Employment Opportunity Commission allows employers to consider both conviction records and arrest records when determining whether to hire an applicant.\textsuperscript{114} Though our society values second chances, we recognize that in some instances it is in the public interest to make decisions based on a person’s past. Arguably, we want banks, daycare centers, and chemical plants to discriminate based on criminal records in the interest of safety.\textsuperscript{115} This is why the Ohio record-sealing statute prohibits many ex-offenders from sealing their records.\textsuperscript{116} Given the need to balance the rights of the public with the rights of ex-offenders, a blanket prohibition of discrimination on the basis of a criminal record is undesirable because it tips the scales heavily in favor of ex-offenders.

Even if one agrees with the policy underlying nondiscrimination laws, there is still the “very difficult” matter of enforcement.\textsuperscript{117} These laws do not prevent employers from obtaining criminal record information.\textsuperscript{118} Because employers still have access to criminal records, they may rely on these records and concoct explanations for discrimination, or simply offer no explanation for denial of an application.\textsuperscript{119} Even operating within statutory schemes, “an employer could plausibly argue that any criminal record demonstrates untrustworthiness and [that] low police clearance rates plus plea bargaining means that an ex-convict’s conviction of record probably does not fully reveal his actual criminal conduct.”\textsuperscript{120}

While nondiscrimination laws “look good on paper,”\textsuperscript{121} they present two problems. On a policy level, they grant relief to too wide a field of ex-offenders, tipping the balance dangerously against the public interest. On a practical level,

\textbf{REFERENCES}

\textsuperscript{110} Jacobs, \textit{supra} note 15, at 413.

\textsuperscript{111} \textit{Id}.

\textsuperscript{112} \textit{Id}. at 390.

\textsuperscript{113} \textit{See, e.g.}, \textbf{OHIO REV. CODE ANN.} \textsection 109.77(E)(3).


\textsuperscript{115} Jacobs, \textit{supra} note 15, at 412.

\textsuperscript{116} \textit{See discussion supra} Part II.B.

\textsuperscript{117} Jacobs & Crepet, \textit{supra} note 95, at 212.

\textsuperscript{118} \textit{See, e.g.}, \textbf{N.Y. CORRECT. LAW} \textsection 752; \textbf{HAW. REV. STAT.} \textsection 378-2; \textbf{WIS. STAT.} \textsection 111.321.

\textsuperscript{119} \textit{See} Jacobs & Crepet, \textit{supra} note 95, at 212; Zetter, \textit{supra} note 78.

\textsuperscript{120} Jacobs, \textit{supra} note 15, at 413.

\textsuperscript{121} Love, \textit{supra} note 7, at 22-23.
because these statutes do not prevent access to criminal records, they cannot protect deserving ex-offenders from unjust scrutiny and discrimination. Even if there were a policy shift in Ohio towards allowing a majority of ex-offenders to escape consideration of their criminal records, implementing nondiscrimination laws cannot solve the problems posed by the widespread, uncontainable proliferation of electronic criminal records.

2. “Ban the Box”

“Ban the box” initiatives have been adopted in Minnesota and proposed in California. These initiatives prohibit an employer from inquiring about an applicant’s criminal record during the interview process. The employer may conduct a criminal background check only after making a conditional job offer. The employer may withdraw the job offer after a background check returns a criminal history, but the employer must justify withdrawal of the offer by showing that withdrawal is related to a “business necessity.”

“Ban the box” laws delay employers’ access to applicants’ criminal records in the hope that, during the interview process, an employer will “see the individual for his or [her] other qualifications and thus be more likely to overlook a past conviction.” This approach focuses on the cause of the problem, i.e., employers’ generalized prejudice against ex-offenders. By allowing applicants to display their abilities and character during the interview process, “ban the box” laws commendably grant ex-offenders the opportunity to prove their character and suitability, despite their criminal records. But this process requires employers to invest time and money into assessing and interviewing applicants whose criminal backgrounds remain a mystery. In cases where an applicant’s criminal record turns out to be unacceptable, “ban the box” laws force employers to waste resources that would not have been expended if the employer could have made a preliminary decision to deny an ex-offender’s application.

Regardless of whether this system fairly balances the interests of ex-offenders and employers, it does not provide an adequate alternative to record sealing. If “ban the box” were to replace record sealing, the deserving ex-offender would remain

125 Rebecca Oyama, Note, Do not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act, 15 MICH. J. RACE & L. 181, 219-20 (2009). This is not always the case, however. The Minnesota statute allows employers to consider criminal records once “the applicant has been selected for an interview.” MINN. STAT. § 364.021 (2009).
126 Oyama, supra note 125, at 220.
127 Id.
128 Id.
unable to escape the effects of his conviction record. The interview process would always culminate in the revelation of an unsealed criminal conviction. This system, like any system that allows employers to view criminal records, will necessarily involve more risk of discrimination than an effective record-sealing system, which prevents employer access to criminal records. Even if "ban the box" were to supplement, rather than replace, record sealing, it would still be ineffective. "Ban the box" laws do nothing to prevent employers from accessing private databases during the interview process. These laws also do not protect ex-offenders from the possibility of inaccurate or out-of-date record disclosures in the allowable, post-offer background check.

Further, the latest data suggests that "ban the box" initiatives "will have large negative impacts on the employment of those whom we should also be concerned about in the labor market, namely minorit[ies]." There is evidence that, when barred from accessing applicants’ criminal records, employers are more likely to "infer criminality" through broad stereotypes. In other words, when unable to discriminate against applicants based on criminal history, employers are more likely to discriminate against broad classes of people. So beyond the inherent problems of "ban the box" laws, these schemes also may cause discrimination against deserving applicants. This unfairly tips the balance against the rights of the public.

3. Deferred Adjudication

Under Ohio law, the prosecutor of a jurisdiction “may establish pre-trial diversion programs for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again.” Ohio law limits eligibility for these pre-trial diversion programs to offenders who meet a set of statutorily defined circumstances that exclude, inter alia, offenders accused of drug-related offenses, violent offenses, and repeat offenders. If an offender is eligible for pre-trial diversion, he may be admitted to a program at the discretion of the prosecutor. While an offender is enrolled in a pre-trial diversion program,

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129 See Jacobs, supra note 15, at 409 (noting that under the FCRA “convictions can be reported forever”).
130 See Chantal Kazay, Legal Rights Group Takes Illinois State Police to Court . . . The Charge: Criminal Contempt of Court for Failure to Seal Court Ordered Criminal Records, 14 PUB. INT. L. REP. 20, 23 (2008) (noting that a “visible” criminal history creates a barrier for an ex-offender). Unlike “ban the box,” which leaves records “visible,” effective record sealing makes a criminal history invisible, thereby removing the “barrier.”
131 Stoll, supra note 124, at 383-84.
132 Id. at 384.
133 OHIO REV. CODE ANN. § 2935.36(A).
134 Id. § 2935(A)(3)-(4).
135 Id. § 2935(A)(2). In special defined circumstances, offenders accused of violent offenses may still be eligible for pre-trial diversion. Id. § 2935(A)(2)(a)-(e).
136 Id. § 2935(A)(1).
137 Id. § 2935(C). Prosecutorial control of pre-trial diversion eligibility is common in most deferred adjudication schemes. See Love, supra note 7, at 20.
adjudication of the offender’s case is suspended. If the offender successfully completes the pre-trial diversion program, the charges against him will be dismissed.  

Statutory schemes like this are called deferred adjudication schemes. The purpose behind such schemes is to allow an offender to “avoid the stigma of a conviction” so that he “can truthfully say that he . . . has no record of conviction.” While these schemes have a noble goal, they—like nondiscrimination laws—present both a policy problem and a practical problem.  

First, deferred adjudication programs are “preemptive front-end schemes.” These programs grant preliminary relief to an offender before the offender has proven his rehabilitation through law-abiding participation in society. Presumably, proponents of deferred adjudication would say that completion of the pre-trial diversion program serves as the proof of rehabilitation. The tension, then, is whether it is a better policy to grant offenders preemptive, conditional relief or grant them relief only after they have independently proven their rehabilitation. To the credit of deferred adjudication schemes, there is some evidence that “carefully targeted” rehabilitation programs can reduce offender recidivism. Thus, as long as a prosecutor’s decisions to admit offenders are statistically “targeted,” pre-trial diversion may have desirable effects. If this is the case, the practice may be an acceptable alternative to record sealing, but only for some offenders. To err on the side of public safety, deferred adjudication should be the exception, not the rule.  

Although from a policy standpoint deferred adjudication may be a worthwhile replacement or supplement to record sealing, it does not escape the problems caused by electronic record proliferation. Deferred adjudication does not mean that no criminal information will be made public; criminal records of the offender’s arrest and charge will still be gathered and entered into privately maintained databases. Because deferred adjudication schemes do nothing to prevent subsequent access to this information, an individual’s records may still fall into the hands of employers. Even these criminal records “that did not result in a conviction can derail a job opportunity.”  

4. Certificates of Rehabilitation and Removal of the Conviction Stigma  

Some states, including New York and Georgia, allow ex-offenders to apply for a “Certificate of Rehabilitation” or a “Certificate of Good Conduct.” As commonly

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138 OHIO REV. CODE ANN. § 2935(D).
139 See Jacobs, supra note 15, at 406.
140 See Love, supra note 7, at 20.
141 Id.
143 Love, supra note 7, at 17.
used, these certificates are typically granted to restore legal rights to ex-offenders. But they could just as easily be used to relieve employers from negligent hiring liability. There would be some merit to a system granting employers a presumption against negligent hiring based on the existence of a criminal record where the ex-offender had achieved “certified” rehabilitation. With this freedom from liability, employers may be more likely to hire an individual with a criminal record.

The likely ineffectiveness of this scheme as an alternative to record sealing, though, stems from deeply ingrained attitudes in our culture. As Professor Jacobs states, “The most ambitious strategy for neutralizing the consequences of a criminal record would involve persuading politicians, employers, landlords, voluntary organizations, and the general public that a criminal conviction (much more, an arrest) is not probative of the individual’s character nor predictive of his future conduct.” Unfortunately, as Professor Jacobs immediately notes, there are “many reasons” to be skeptical that such a strategy could ever be successful. Employers tend to view ex-offenders as a class of people that are unreliable, untrustworthy, or dangerous, regardless of whether these descriptions apply to the individual. Even where an ex-offender’s criminal record has been sealed by the state, if any portion of that record is “visible” to an employer, employer prejudices diminish an ex-offender’s chance of employment. There is no reason to think that a certificate of rehabilitation will change these prejudices. Even if the certificates could protect employers from negligent hiring liability, they could not prevent what employers perceive to be the other significant risks of hiring ex-offenders: potential property loss, poor work, or ex-offenders generally causing problems. To state the issue bluntly, “[i]f there are [two] competitors for the same job, with [only] one of the competitors having no police record, and both are equally qualified, who do you think will get the job?”

To grant deserving ex-offenders a meaningful measure of relief, the law must put them on a level playing field with non-offenders. Certificates of rehabilitation alone cannot accomplish this goal. And while reversing public attitudes about criminal records would best assist ex-offenders in obtaining employment, thus far scholars have proposed no practicable means of accomplishing this Sisyphean task.

B. Proposals for Repairing Record Sealing

While many have proposed alternatives to record sealing and expungement, others have recognized the value in criminal record-sealing legislation. To that end, some scholars have proposed methods that could be employed to repair record-sealing statutes so that they may remain a viable form of relief despite the

\[145\] See Bergeron & Eberwine, supra note 35, at 596.

\[146\] Jacobs, supra note 15, at 415.

\[147\] Id. at 415.

\[148\] Id. at 390.

\[149\] Kazay, supra note 130, at 23.

\[150\] As one commentator argues, the persuasive value of certificates of rehabilitation needs to be enhanced if they are to be effective. See Kashcheyeva, supra note 144, at 1079.

\[151\] David L. Naumann, Meaningful Reform of Expungement Law or a Midsummer Night’s Dream?, 51 J. Mo. B. 31, 32 (1994).
proliferation of electronic records. Outlined below are the significant proposals to "fix" the practice of criminal record sealing.

1. Limiting Records Access

The first method is to limit the availability of criminal records.152 The practice of record sealing is, of course, already a limitation on the availability of criminal records. The ease of access and duplication of information, though, calls for further limits on public availability. The difficulty is that, unless a court can exercise complete control over its records, it cannot ever hope to seal them.153 As one judge who prohibits bulk access to his court’s records asks, "How . . . do I expunge anything if I sell tapes and disks all over the country?"154 The question is a valid one, and its implications are far-reaching. Given today’s rapid proliferation of information, one would have to remove criminal trials and records from the public view altogether if one were going to effectively limit access to criminal records.155 This is the only way to preclude the proliferation of records in the digital world. But such Orwellian control of information is not an option.156

Statutory and constitutional provisions prevent Ohio legislators from restricting public access to criminal record information to such an extent that it would not be available to data harvesters.157 Currently, the Ohio Revised Code makes criminal records public information, available to both individuals and bulk purchasers under Ohio’s "sunshine laws."158 These sunshine laws—aimed at promoting openness in government—demonstrate the broad Ohio policy recognizing that the public has an interest in accessing public records, including criminal records.159 Of course, this policy could be reversed, and the legislature could repeal these laws or attempt to except criminal records from public access. But, even if Ohio law did not specifically make criminal records publicly available, several Supreme Court cases indicate that there is a constitutional public right to attend and record court proceedings, and to publish criminal history records.

In 1976, the United States Supreme Court held in Paul v. Davis160 that there is no constitutional right of privacy that protects citizens from disclosure of criminal record information by the state.161 In that case, Davis had pleaded not guilty to a

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152 Geffen & Letze, supra note 85, at 1333.


154 Liptak, supra note 18.

155 See Mayfield, supra note 35, at 1069.

156 Id.

157 See Jacobs, supra note 15, at 415.

158 See generally OHIO REV. CODE ANN. § 149.43.


161 Id. at 713.
shoplifting charge, and the charge had been “filed away with leave [to reinstate].” 162 Soon after this had occurred, Paul—a local law enforcement officer—had circulated a flier identifying “active shoplifters,” which included Davis’s picture. 163 Davis claimed that his constitutional privacy right had been violated, 164 but the Court held that the state could publicize records of official acts (in this case an arrest). 165 This decision means that states are free to make criminal records available without violating the constitutional rights of the accused or convicted offender.

Several years later, the Court held in Richmond Newspapers, Inc. v. Virginia 166 that there is a “guaranteed right of the public under the First and Fourteenth Amendments” to attend criminal trials. 167 The Court based this decision on the idea that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.” 168 This decision gave constitutional support to the common-law rule that “[a] trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity.” 169 Within two years the Court decided the case of Press-Enterprise Co. v. Superior Court of California, 170 which extended the First Amendment right of access to preliminary hearings in criminal cases. 171

Under these cases, criminal trials and the records relating to those trials will necessarily be public information. Not only is there no privacy right against publicizing criminal record information, there is a First Amendment right of access to criminal trials and criminal records. Because the events of a criminal trial can be “report[ed] with impunity,” 172 the state cannot prevent criminal record information from reaching the public. This means that offenders cannot force states to withhold criminal record information based on a constitutional privacy argument, and states may not deny access to public criminal trials or records without unconstitutionally violating the First and Fourteenth Amendments.

States may still constitutionally control how criminal history information is made public. 173 For example, a state may limit availability of criminal history information

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162 Id. at 695-96.
163 Id. at 694-95.
164 Jacobs, supra note 15, at 409.
165 Paul, 424 U.S. at 713.
167 Id. at 580. Only where there is “an overriding interest articulated in the findings” may a criminal trial be closed to the public. Id. at 581.
168 Id. at 573.
171 Id. at 13-14.
172 Craig, 331 U.S. at 374.
by prohibiting bulk access to court records. Limitations like this generally have two effects. First, large data harvesters financially capable of circumnavigating these access prohibitions (through the use of runners) benefit from the limited availability of criminal record information, which “astronomically increases the value of [the] information.” Second, smaller data harvesters unable to invest the resources to obtain less accessible information are far more likely to use out-of-date—and potentially sealed—records. This means that limitations on how criminal record history is made publicly available may not only benefit some large data mining companies, but may actually promote the proliferation of inaccurate and out-of-date information by smaller providers. To avoid this problem, Ohio should not attempt to control how criminal history information is made available to the public, but instead regulate how the same information is made available to employers.

2. Supplementing or Enhancing the Fair Credit Reporting Act

The other possible method to repair Ohio’s record-sealing statute is to enact legislation supplementing or enhancing an ex-offender’s rights under the FCRA. Private data harvesters and information brokers are regulated by the FCRA, which applies to criminal background checks for the purposes of “employment, promotion, reassignment or retention.” Specifically, the FCRA oversees consumer reporting agencies: any person or business that “regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.” Here, the “consumers” are ex-offenders with sealed records who are applying for employment.

Typically, courts or police stations act as the “furnisher” of criminal records to a consumer reporting agency. However, it is not unusual for background screening firms to rely on privately compiled databases as the furnisher of records. In either case, the “furnisher” may provide credit reporting agencies with any information it has on any individual, unless it has “specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.” Because this provision essentially allows furnishers of information to operate without verifying their records, the number of consumer credit reports with errors has been found to be as


175 Stuckey, supra note 14, at 344.

176 Cf. Raybin, supra note 8, at 27.

177 Geffen & Letze, supra note 85, at 1343.


179 See id. § 1681a(f).

180 See De Armond, supra note 12, at 1101.

181 Mayer, supra note 91.

high as seventy-nine percent.\textsuperscript{183} Using this same system for criminal background checks, “[t]here’s no reason to believe that criminal records are any more accurate.”\textsuperscript{184} This inaccuracy of information is not only attributable to private databases acting as furnishers. Even where criminal history information is furnished by courts, there is a danger of inaccuracy. One audit of the Hamilton County, Ohio public court records found “about 2,500” sealed cases still available from the court itself.\textsuperscript{185} If a court cannot guarantee the proper sealing of records under its immediate physical control, what are the chances that a sealing order will have any effect on private databases?

Under the FCRA, an ex-offender has two remedies when a credit-reporting agency reports inaccurate or out-of-date information. First, the FCRA creates a cause of action against a credit reporting agency that “willfully or negligently violate[s] the statute.”\textsuperscript{186} The requirements of this type of action pose several problems for ex-offenders. The threshold issue in a suit for violation of the FCRA is whether the credit reporting agency has reported accurate information.\textsuperscript{187} If the information is accurate, the credit reporting agency is not liable to the consumer.\textsuperscript{188} This presents a particular difficulty in cases involving sealed records. If a credit reporting agency reports information about a sealed record but notes in its report that the record has been sealed, then the credit reporting agency likely will not be liable because it has reported accurate information.\textsuperscript{189} Even if the sealed record information is deemed inaccurate, the ex-offender still has the burden to prove that the credit reporting agency did not follow reasonable procedures to assure the accuracy of its report.\textsuperscript{190} This can be difficult, particularly when the credit reporting agency merely reproduces records made public by the state. Finally, when an employer conducts an in-house background check, an ex-offender has no cause of action under the FCRA.\textsuperscript{191}

Apart from these obstacles that ex-offenders face, there is also a concern about this remedy’s efficiency. The reasonableness of a credit reporting agency’s procedures will typically be a jury question.\textsuperscript{192} Litigation of these cases will


\textsuperscript{184} Zetter, \textit{supra} note 78.

\textsuperscript{185} Horn, \textit{supra} note 10.


\textsuperscript{187} \textit{Id.} at 330 (citing Houston v. TRW Info. Servs., Inc., 707 F. Supp. 689, 691 (S.D.N.Y. 1989)).

\textsuperscript{188} \textit{Id.}


\textsuperscript{191} See Dickerson, \textit{supra} note 21, at 461.

therefore require full-length trials in the "overwhelming majority of cases." \textsuperscript{193} Relying primarily on expensive, full-length proceedings to redress wrongs caused by inaccurate data reporting costs all parties to the litigation significant time and money. This system also taxes the judicial system, which must expend its resources to hear these cases. Regulations that prevent the harm from inaccurate record reporting in the first place would more efficiently address the problem. By relying on preventative—rather than responsive—laws, the state would eliminate significant costs to ex-offenders, credit reporting agencies, and courts.

The second remedy available to ex-offenders under the FCRA is the ability to dispute the accuracy of a credit reporting agency’s records. When a furnisher provides inaccurate or out-of-date information to a consumer reporting agency, and that agency subsequently discloses the information about a sealed record to an employer, the ex-offender has a right to dispute the false information.\textsuperscript{194} The consumer reporting agency then has thirty days in which to determine whether the information is inaccurate or out-of-date.\textsuperscript{195} If it is, the agency must then update the information.\textsuperscript{196} Or, if the agency cannot verify the information it has reported, it must delete the unverified item from its files.\textsuperscript{197} In either of these circumstances, the consumer reporting agency must also “promptly notify the furnisher” about the inaccurate information.\textsuperscript{198}

The problem with this process is that an ex-offender can dispute out-of-date information about a sealed record only \textit{after} it has been supplied to the prospective employer.\textsuperscript{199} At that point, the harm has already been done. The employer has already obtained information about the ex-offender’s sealed criminal record. And although the ex-offender may petition to correct the information in one database, he has no way of correcting the information in other databases that may be used in his next background check. Further, the FCRA does not apply where employers do not rely on third parties but instead conduct their own background checks.\textsuperscript{200} In those cases, the ex-offender has neither any way of knowing where the employer is looking for criminal record information, nor any recourse if the employer uses out-of-date information. With the ready availability of databases like the one in the case of Brad W., an ex-offender can be rejected without any notice of the information that is used was a basis for denying his application.\textsuperscript{201}

\textsuperscript{193} Id.
\textsuperscript{194} 15 U.S.C. § 1681i(a).
\textsuperscript{195} Id.
\textsuperscript{196} See id. § 1681i(a)(5).
\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} See De Armond, supra note 12, at 1100.
\textsuperscript{200} Dickerson, supra note 21, at 461; Employment Background Checks in California: New Focus on Accuracy § 3 (Oct. 2010), PRIVACY RIGHTS CLEARINGHOUSE, http://www.privacyrights.org/fs/fs16a-calibck.htm (last visited Apr. 20, 2011).
\textsuperscript{201} The FCRA requires an employer who has obtained a consumer report, and who intends to take adverse action based on that consumer report, to provide a copy of the report to the consumer. 15 U.S.C. § 1681b(b)(3). Because the FCRA does not apply to employers
Because the FCRA is a federal law, Ohio cannot repair its record-sealing statute by amending the Act. But while the FCRA expressly preempts state law in some specific areas,\textsuperscript{202} it explicitly says that state credit reporting laws are binding on credit reporting agencies where not inconsistent with the FCRA.\textsuperscript{203} Thus, Ohio remains free to follow the example of several other states and enact its own credit reporting laws to supplement and enhance the protections of the FCRA.\textsuperscript{204} For example, Ohio could fashion a provision based on California’s Consumer Credit Reporting Agencies Act\textsuperscript{205} and Investigative Consumer Reporting Act,\textsuperscript{206} which together extend the application of the credit reporting laws to employers’ in-house criminal background investigations\textsuperscript{207} and limit reporting of conviction information to seven years except where otherwise required by law.\textsuperscript{208} Or, Ohio could adopt a provision similar to that of New York, which prohibits credit reporting agencies from reporting information “relative to an arrest or a criminal charge unless there has been a criminal conviction for such offense, or unless such charges are still pending.”\textsuperscript{209} Under this law, a sealed record would be deemed to have never existed and, thus, could not be reported.

Improving credit reporting laws must be a large part of record-sealing reform. But the models currently used in other states do not adequately prevent the disclosure of inaccurate and out-of-date information. For instance, one ex-offender had a job offer withdrawn because of a credit reporting agency’s improper reporting of a disorderly conduct conviction, despite the protections afforded by New York law.\textsuperscript{210} Incidents like this will continue to harm ex-offenders because of the fundamental flaw in credit reporting laws: they “impose[] meaningful accuracy requirements only after a false and negative item has been reported.”\textsuperscript{211} While state credit reporting laws like those in New York and California grant rights that may be helpful to ex-offenders, they do little to protect ex-offenders from the proliferation of inaccurate or out-of-date information. Timing is critical. For a solution to make record sealing effective, it must shield an ex-offender from false information \textit{before} it reaches employers.

performing their own background checks, the ex-offender loses even this small benefit of notification when employers conduct in-house criminal investigations.


\textsuperscript{203} 15 U.S.C. § 1681t(a).


\textsuperscript{205} \textit{CAL. CIV. CODE} §§ 1785.1-.36 (2010).

\textsuperscript{206} \textit{See id.} §§ 1786.1-.60.

\textsuperscript{207} PRIVACY RIGHTS CLEARINGHOUSE, supra note 200, § 4.

\textsuperscript{208} \textit{Id.}


\textsuperscript{210} \textit{See Liptak, supra note 18.}

\textsuperscript{211} De Armond, supra note 12, at 1100.
V. THE PROPOSAL

Ohio’s record-sealing statute can still help to remove the stigma of a criminal record. But because of modern technology, the statute can no longer fully remove that stigma on its own. Ohio should supplement its record-sealing statute with legislation designed to prevent employer access to information about sealed offenses. By doing so, Ohio could avert injury to ex-offenders while simultaneously protecting employers and reducing costs for the legal system.

Ohio should take three specific steps to make its record-sealing statute an effective—and more efficient—relief for deserving ex-offenders. The first step Ohio should take is to enact credit reporting legislation that allows a consumer to dispute inaccurate and out-of-date information before it is provided to a prospective employer. Ideally, an applicant would submit a criminal record disclosure form to an employer, revealing any criminal record information that has not been sealed. If, after reviewing this disclosure form, the employer wishes to move forward in the hiring process with the applicant, the employer would submit the disclosure form to a credit reporting agency. The credit reporting agency would then compare the disclosure form to its own records. The most important aspect of this plan would require that, if there is an inconsistency between the agency’s records and the disclosure form, the agency must notify the applicant of the inconsistency and allow a reasonable time period for the applicant to offer evidence that the agency’s record is incorrect before the agency reports an inconsistency to the employer. If the applicant is able to verify that the agency’s records are inaccurate or out-of-date, the agency would then update its records and never disclose any false or out-of-date information to a prospective employer. If the applicant cannot establish that the information is inaccurate, the credit reporting agency would then be allowed to disclose to the employer any discrepancies between the applicant’s disclosure form and the agency’s file.

This system would not unduly shift any of the costs or responsibilities of criminal background checks. Employers would still pay for the checks. Though applicants would have to be prepared to quickly provide records of a sealing order where there is a dispute, this is essentially the same procedure for disputed accuracy that is in place today. With the proposed plan, however, an applicant could dispute false or out-of-date information before it reaches an employer, and thus avoid the harm caused by the disclosure of false information. Employers would also remain protected from individuals attempting to illicitly hide their criminal records. Because the employer would receive a report of any discrepancies between the applicant’s disclosure form and the credit reporting agency’s files, applicants would not be able to conceal accurate criminal history information. Further, the legislature could define the “reasonable time period” in which an applicant may dispute the accuracy of the credit reporting agency’s information so as not to impede the hiring processes of employers.

Because the burden would be on an applicant to prove that the credit reporting agency’s information is inaccurate, there would be no conflict between FCRA and the Ohio credit reporting law. One of the preemptive provisions of the FCRA is that credit reporting agencies have thirty days in which to investigate information disputes. A state law requiring a credit reporting agency to complete an

213 Id. § 1681t(b)(1)(B).
investigation sooner would be preempted by the FCRA. But a state law requiring a credit reporting agency to temporarily withhold a report, thereby granting an ex-offender a reasonable time in which to produce positive proof of the report’s inaccuracy, would not conflict with any preemptive provision of the FCRA.

This system would also benefit innocent victims of inaccurate criminal record information. Non-offenders would go through the same disclosure and verification process as ex-offenders. As a result, they would also have the chance to dispute inaccurate information attributed to them before that information could cause any harm to their employment prospects.

The second step Ohio should take is to prohibit employers from conducting in-house criminal background investigations. If the employer wishes to access criminal record information—an option well within its rights—then the employer should have to do so through a credit reporting agency. This will ensure that applicants are afforded the protections offered by the information disputing method laid out above. If the state merely made credit reporting laws apply to an employer’s in-house investigation (as is the case in California), an employer would still be able to obtain out-of-date or inaccurate information. Because the information has already been disclosed to the employer through its in-house investigation, a dispute over whether a record has been sealed or not is meaningless. The employer is already aware of the harmful information. The state can control this problem by requiring employers to use credit reporting agencies, which—in conjunction with the first step of this proposal—would help ex-offenders keep harmful, inaccurate information out of employers’ hands.

A necessary aspect of this step would include creating a civil cause of action for applicants against employers who access criminal records directly. Admittedly, applicants would be at a disadvantage in proving in-house acquisition of criminal record information. However, both the lack of an approved credit report for the applicant and a showing of an employer’s practice of refusing to hire applicants with criminal records would be readily obtainable evidence that the employer relied on illicit acquisition of criminal record information. Moreover, where liability for using inaccurate information falls on the employer rather than the credit reporting agency or furnisher, the employer presumably would be less likely to acquire potentially inaccurate information on its own.

The final step Ohio should take is to create a statutory presumption against negligent hiring where an employer has performed a background investigation using a credit reporting agency. Florida has already enacted a similar law creating a

214 Id.


216 PRIVACY RIGHTS CLEARINGHOUSE, supra note 200, § 3.

217 This cause of action would supplement the cause of action available against credit reporting agencies discussed above at Part IV.B.2. Admittedly, this step introduces an additional cause of action, potentially creating what this Note has termed “inefficient” litigation. The thrust of the proposal, however, is preventing access to sealed information, rather than relying on civil litigation as the operative relief. Under this proposal, the majority of problems with inaccurate or out-of-date information will be resolved by the pre-report dispute process instead of costly, inefficient civil claims.
presumption against negligent hiring.\textsuperscript{218} This step would help allay potential protests that paying for criminal background investigations is more costly than in-house checks.\textsuperscript{219} Even if background checks through credit reporting agencies cost more than in-house investigations, using a credit reporting agency could protect employers from large future losses from negligent hiring claims. This step would also help enforce the prohibition of in-house criminal background investigations. Any employer that does not wish to deprive itself of the presumption against negligent hiring would rely on credit reporting agencies for criminal background checks. This financial incentive, coupled with the prohibition of in-house investigations laid out in step two, would ensure that all employers who obtain criminal background checks would do so using credit reporting agencies.

The sum of these measures would allow an ex-offender to prevent his sealed record from being used against him in employment decisions. These steps would also prevent employers from using unreliable electronic resources that often contain inaccurate information. Finally, the rights of the ex-offender would not infringe on the rights of employers to screen an applicant’s criminal background. Through the use of the initial disclosure form the employer could still decide against hiring individuals with criminal records. In conjunction with Ohio’s record-sealing statute, this system would protect the ex-offender from the negative effects of a sealed criminal record, and it would also protect the employer from the potential dangers associated with hiring an unreformed or dangerous individual.

VI. CONCLUSION

Ohio’s record-sealing scheme strikes an excellent balance between the rights of the public and the rights of the ex-offender. But due to the advances of modern technology, record sealing alone can no longer remove the stigma of a criminal history. Under the current system, this means that those like Brad W. face a lifetime penalty for a one-time mistake.

A review of the proposed methods to correct this injustice has shown that there can only be effective record sealing when the ex-offender may review and dispute criminal history data before it reaches a prospective employer. Because there are so many databases that deal in this information, the only effective means of verification would be to allow ex-offenders to have direct contact with an employer’s chosen credit reporting agency before the agency provides inaccurate criminal history information to the employer. Requiring this preliminary access would not only benefit ex-offenders, but the countless others harmed by the reporting of inaccurate criminal history data.

Technology cannot be stopped. Attempting to limit criminal record proliferation as a means to provide ex-offenders a second chance simply will not work. Instead, the solution lies in allowing ex-offenders to check and dispute inaccurate criminal history information before it can cause them irreparable harm.

\textsuperscript{218} Fla. Stat. § 768.096 (2009). The Florida statute includes provisions that the employer must also, \textit{inter alia}, check the applicant’s references, interview the applicant, and use a specific state agency for the background check. \textit{Id}.

\textsuperscript{219} Though one can foresee this protest, it is unclear whether or not the complaint is legitimate. “[B]ackground screening companies claim they can cut costs, considering how much time and resources it takes an HR department to do thorough checks.” Mayer, \textit{supra} note 91.