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## Changing the Rule that Changes Nothing: Protecting Evicted Tenants by Amending Cleveland Housing Court Rule 6.13

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### Recommended Citation

James J. Scherer, *Changing the Rule that Changes Nothing: Protecting Evicted Tenants by Amending Cleveland Housing Court Rule 6.13*, 69 Clev. St. L. Rev. 719 (2021)  
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**CHANGING THE RULE THAT CHANGES  
NOTHING:  
PROTECTING EVICTED TENANTS BY AMENDING  
CLEVELAND HOUSING COURT RULE 6.13**

JAMES J. SCHERER\*

ABSTRACT

Renting is on the rise, with all households seeing an increase in the prevalence of renting a home versus owning one from 2006 to 2016. As rental rates rise, so too do the rates of eviction. The detrimental effects of eviction are numerous and can be self-reinforcing, with a single eviction decreasing one’s chances of securing decent and affordable housing, escaping disadvantaged neighborhoods, and benefiting from affordable housing programs. All this was before the coronavirus pandemic that devastated jobs and savings accounts across the nation.

One of the biggest impacts that eviction has on renters is a public court record. It is the policy of many sophisticated property owners—as well as many HUD-funded properties—to reject applicants with any prior evictions. Housing courts across the country can help mitigate the effects of eviction. Cleveland Municipal Housing Court has tried to do just that. Cleveland Municipal Housing Court Local Rule 6.13 allows for the sealing of eviction records, but arbitrarily limits the protection the court is otherwise capable of providing. This Note argues that the Cleveland Municipal Housing Court—as well as every housing court in Ohio—has the inherent authority to order the expungement of eviction records and should adopt an amended rule that expands the availability and effectiveness of tenant protections.

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\* J.D. expected May 2021, Cleveland State University, Cleveland-Marshall College of Law. I thank Maria A. Smith, Esq. of the Legal Aid Society of Cleveland—one of the greatest advocates a tenant could ever have, and I am deeply grateful for the time, effort, and feedback of Professor Doron M. Kalir and the *Cleveland State Law Review* team. This Note is dedicated to the hundreds of families evicted from their homes every day in Ohio, in hopes that it may affect the change they need and the protection they deserve.

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## I. INTRODUCTION

Overgrown lawns. Boarded up windows. Bank notices taped to doors. In 2011, the foreclosure crisis peaked in Ohio, with 56,000 homes being foreclosed upon in that year alone.<sup>1</sup> The foreclosure crisis was visible and invoked anger and frustration across the country. Those feelings—in turn—led to a massive governmental response.<sup>2</sup>

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<sup>1</sup> CORELOGIC, UNITED STATES RESIDENTIAL FORECLOSURE CRISIS: TEN YEARS LATER (2017), <https://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-10-year.pdf>; see also Molly Schnoke et al., *Federal, Ohio, and Cuyahoga County Timeline of Programs in Response to Housing Foreclosures: 2005-2015*, URBAN PUBL’NS (Nov. 13, 2019), [https://engagedscholarship.csuohio.edu/urban\\_facpub/1343/](https://engagedscholarship.csuohio.edu/urban_facpub/1343/) (finding that foreclosures in Cuyahoga county peaked even earlier, with 13,777 foreclosures in 2007).

<sup>2</sup> The foreclosure crisis resulted in the National Mortgage Settlement (“NMS”), a settlement agreement between 49 states and the five largest mortgage servicers (Bank of America, JPMorgan Chase, Citi, Wells Fargo, and Ally/GMAC). Amounting to a \$26 billion, the NMS is the second largest civil settlement in U.S. history, behind only the Tobacco Masters Settlement Agreement. Joseph A. Smith, Jr., *A Review and Assessment of the National Mortgage Settlement by Its Monitor*, 21 N.C. BANKING INST. 29, 31 (2017); see also Kathryn Hexter & Molly Schnoke, *Responding to Foreclosures in Cuyahoga County: 2013 Evaluation Report*, URBAN PUBL’NS 1 (Aug. 25, 2014), [https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2183&context=urban\\_facpub](https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2183&context=urban_facpub) (“Cuyahoga County became one of the first places in the nation to respond to the rapid

Although foreclosures have returned to pre-crisis levels,<sup>3</sup> another related crisis remains and is on the rise. The crisis of eviction is every bit as widespread—and every bit as destructive—as the foreclosure crisis, but until recently it has been mostly invisible to the public eye.<sup>4</sup>

According to the most recent, pre-pandemic data—in the state of Ohio alone—over 100,000 evictions were filed annually and nearly 58,000 were granted.<sup>5</sup> Over 158 Ohio families were evicted from their homes every day.<sup>6</sup> The situation has since only become worse, with the pandemic placing an additional 1.5 million Ohioans at risk of eviction.<sup>7</sup> Many commentators and researchers have related eviction to social ills such as homelessness, job loss, depression, suicide, and family instability.<sup>8</sup> In addition,

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increase in the number of residential foreclosure filings”); Weinstein et al., *Responding to Foreclosures in Cuyahoga County: An Assessment of Progress*, L. FAC. REPS. & COMMENTS 18 (Nov. 20, 2006), [https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1006&context=lawfac\\_reports](https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1006&context=lawfac_reports) (explaining that Cuyahoga county’s response included the creation of the Cuyahoga County Foreclosure Prevention Program and modifying the judicial process to make foreclosures faster and fairer).

<sup>3</sup> Archana Pradhan, *The Foreclosure Rate Is Now Back to Pre-Crisis Levels*, CORELOGIC INSIGHTS BLOG (July 25, 2018), <https://www.corelogic.com/blog/2018/07/the-foreclosure-rate-is-now-back-to-pre-crisis-levels.aspx>; *U.S. Foreclosure Activity Drops to 12-Year Low in 2017*, ATTOM DATA SOLS. (Jan. 16, 2018) <https://www.attomdata.com/news/foreclosure-trends/2017-year-end-u-s-foreclosure-market-report/>.

<sup>4</sup> See Terry Gross, *First-Ever Evictions Database Shows: ‘We’re in the Middle of a Housing Crisis’*, NPR (Apr. 12, 2018), <https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis> (“Our hope is that we can take this problem that’s been in the dark and bring it into the light.”).

<sup>5</sup> EVICTION LAB, <https://evictionlab.org/map/#/2016?geography=states&bounds=-157.148,12.171,-44.648,59.78&locations=39,-83.047,40.206> (last visited Feb. 3, 2021).

<sup>6</sup> *Id.*

<sup>7</sup> See Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30–40 Million People in America are at Risk*, NAT’L LOW-INCOME HOUS. COAL. (Aug. 7, 2020), [https://nlihc.org/sites/default/files/The\\_Eviction\\_Crisis\\_080720.pdf](https://nlihc.org/sites/default/files/The_Eviction_Crisis_080720.pdf).

<sup>8</sup> See Andrew Waks, Note, *Eviction and Exclusion: An Argument for Extending the Exclusionary Rule to Evictions Stemming from a Tenant’s Alleged Criminal Activity*, 26 GEO. J. POVERTY L. & POL’Y 185, 186 (2018) (“[Eviction] increases material hardship, decreases residential security, and brings about prolonged periods of homelessness; it can result in job loss, split up families, and drive people to depression and, in extreme cases, even to suicide.”); see also Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 118 (2012) [hereinafter Desmond, *Eviction and the Reproduction of Urban Poverty*] (“[M]any evicted tenants look for months without securing a place to stay, their homelessness manifest in nights spent in shelters and on friends’, relatives’, or strangers’ floors or, sometimes, the street.”). See generally Martha R. Burt et al., *Community-Wide Strategies for Preventing Homelessness: Recent Evidence*, 28 J. PRIMARY PREVENTION 213 (2007); Katherine A. Fowler et al., *Increase in Suicides Associated with Home Eviction and Foreclosure During the US Housing Crisis: Findings from 16 National Violent Death Reporting System States, 2005–2010*, 105 AM. J. PUB. HEALTH 311 (2015).

evicted persons are often prevented from finding affordable and safe housing, exacerbating their already difficult situation. In response, a small number of states have taken steps to address the complex and growing problem of mass evictions.<sup>9</sup> The State of Ohio has yet to take any such statewide action and has left the issue for individual municipalities—such as Cleveland—to resolve. States and local governments do not have a monopoly in the field of tenant protection—courts can play an important role in addressing the eviction crisis as well. For example, one of the key issues faced by evicted persons is their publicly available eviction records, over which the courts have control. Landlords can easily find eviction records online and evicted persons are often asked to disclose them when applying for housing, which inevitably leads to adverse results for the evicted person.

Cleveland Municipal Housing Court enacted Local Rule 6.13 (“the Rule”) on December 31, 2018, enabling evicted persons to petition the court to seal their eviction record.<sup>10</sup> Unfortunately, the Rule is far from optimal. Instead of implementing a rule based on the concept of record expungement—a judicial power well established by Ohio Supreme Court precedent—the Housing Court implemented a rule-based on record sealing, which provides far less protection for an evicted person’s court record. Additionally, the Housing Court placed several conditions and limitations on the Rule which prevents most evicted tenants from obtaining even the small amount of protection it does provide. For example, section 6.13(A) of the Rule limits the availability of eviction record sealing to those who have been able to survive for five years without another eviction judgment against them in any jurisdiction, and section 6.13(E) requires those who succeed in sealing their eviction record to disclose it whenever a potential landlord asks—which renders utilization of the Rule essentially an exercise in futility.

In an interview with *The Plain Dealer*, former Cleveland Housing Court Judge Ronald J.H. O’Leary stated that the promulgation of the Rule sought to balance the interests of landlords and tenants.<sup>11</sup> Such “balancing,” however, greatly limits the availability of eviction record sealing for those who need it the most and undermines the protections the Rule could otherwise provide.<sup>12</sup>

All of the above-mentioned issues existed before the coronavirus pandemic. The universal devastation of COVID-19 has only made worse the precarious situation that many renters can find themselves in, with 16.5 million renting households in the United States experiencing a loss of income due to pandemic-related layoffs.<sup>13</sup>

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<sup>9</sup> See *infra* note 46.

<sup>10</sup> Cleveland Municipal Housing Court Local Rule 6.13.

<sup>11</sup> Rachel Dissell, *Cleveland Housing Court Sets New Rules to Make Requests to Seal Evictions Easier*, CLEVELAND.COM (Dec. 30, 2018), <https://www.cleveland.com/metro/2018/12/cleveland-housing-court-sets-new-rules-to-make-requests-to-seal-evictions-easier.html> (“In creating the rule, [the judge] said he sought to balance the ability of landlords to screen potential tenants, which the court encourages, with giving tenants a chance to clear a record that can limit their housing options.”).

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> Elizabeth Kneebone & Cecile Murray, *Estimating COVID-19’s Near-Term Impact on Renters*, TERNER CTR. FOR HOUS. INNOVATION (Apr. 24, 2020), <https://turnercenter.berkeley.edu/blog/estimating-covid-19-impact-renters>; see also Kim Parker

Children and young adults make up a disproportionate share of this affected population, and 7.1 million of those renters affected were already housing cost-burdened and likely to be especially vulnerable.<sup>14</sup> Further, the pandemic has disproportionately affected Hispanic and Black communities.<sup>15</sup> In Ohio, over 1.5 million renter households—or thirty-eight percent of all renter households in Ohio—have been financially impacted by the coronavirus pandemic.<sup>16</sup> Although a national patchwork<sup>17</sup> of temporary eviction moratoriums and unemployment benefits have kept eviction rates low throughout the pandemic,<sup>18</sup> the unmitigated effect of the virus on renters is likely yet to be seen as these efforts expire.<sup>19</sup>

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et al. *Economic Fallout From COVID-19 Continues To Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/>; CTR. ON BUDGET AND POL'Y, *Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships* (Dec. 16, 2020), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> (according to data collected between February 3–15, 2021, 1 in 5 adult renters were not caught up on rent due to pandemic related losses).

<sup>14</sup> Kneebone & Murray, *supra* note 13 (stating affected population is twenty-seven percent children and sixteen percent young adults, while forty-three percent of likely-impacted renters were already struggling with rental cost burdens before the pandemic).

<sup>15</sup> *Id.* (stating affected population is twenty-eight percent Hispanic and eighteen percent Black).

<sup>16</sup> Steve Neavling, *CDC Orders Sweeping Ban on Evictions Due to Coronavirus as Thousands of Ohio Tenants Face Homelessness*, CLEVELAND SCENE (Sept. 3, 2020, 9:31 AM) <https://www.clevescene.com/scene-and-heard/archives/2020/09/03/cdc-orders-sweeping-ban-on-evictions-due-to-coronavirus-as-thousands-of-ohio-tenants-face-homelessness>.

<sup>17</sup> Some states have taken strong steps to protect tenants during the pandemic. For example, in Kentucky, Governor Andy Beshear ordered a halt to all eviction proceedings for the duration of a declared public health emergency. See Exec. Order No. 2020-257. Many states had—at a minimum—halted utility shutoffs and disconnections. *COVID-19 State Response Tracker*, NAT'L ASS'N OF REGUL. UTIL. COMM'RS, <https://www.naruc.org/compilation-of-covid-19-news-resources/state-response-tracker/> (last updated Aug. 3, 2020). The federal CARES Act temporarily halted eviction for federally subsidized housing. Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, § 4024, 134 Stat. 281. The CDC halted certain residential evictions via a public health order. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19. 85 F.R 55292 (2020).

<sup>18</sup> Kriston Capps, *Across American Cities, Evictions Are Down*, BLOOMBERG CITYLAB (Aug. 18, 2020), <https://www.bloomberg.com/news/articles/2020-08-18/u-s-evictions-are-down-during-the-coronavirus-pandemic> (finding that evictions in Columbus, Cincinnati, and Cleveland in July 2020 are down more than fifty percent compared to the July average of 2012–16).

<sup>19</sup> Katherine Lucas McKay et al., *20 Million Renters Are at Risk of Eviction; Policymakers Must Act Now to Mitigate Widespread Hardship*, ASPEN INST. (June 19, 2020), <https://www.aspeninstitute.org/blog-posts/20-million-renters-are-at-risk-of-eviction/> (estimating that over 700,000 people in Ohio could be at risk of eviction by the end of 2020 as unemployment benefits and eviction moratoriums expire).

This Note argues that the Cleveland Municipal Housing Court—and all housing courts throughout Ohio—should adopt an amended version of the Rule that reconsiders the limitations currently imposed on the protections it could otherwise provide. This could be accomplished by adopting broader conditions under which evicted persons would be allowed to seal eviction records—including automatic sealing of dismissed evictions—and by adopting narrower circumstances in which disclosure would be required following a successful sealing. This Note finds that all Ohio courts possess the authority to expunge civil records—including eviction proceedings—whenever the proper balancing test is met. If these changes are implemented, evicted persons would have greater access to much-needed relief and those with sealed or expunged eviction records would not be required to disclose that record on a housing application, thus gaining a much better chance of being approved for a new home.

Part II of this Note examines the detrimental effects of eviction and the crisis that they pose to individuals, their families, and society—both before and after the coronavirus pandemic. Part III details the various approaches that states and municipalities have taken to protect the housing rights and opportunities of those who have been evicted—including the method implemented by the Cleveland Municipal Housing Court. Part IV analyzes whether the Housing Court’s method can offer stronger protections under the precedents set by the Ohio Supreme Court. Part V explores how the Housing Court could modify the Local Rule to best represent Ohio Supreme Court precedent and best serve both landlords and tenants in Cleveland.

This Note concludes that the Federal Constitution, the Ohio Constitution, and Ohio caselaw provide Ohio courts with the inherent authority to order—in certain circumstances—the expungement of eviction records.<sup>20</sup> The Housing Court has chosen not to utilize this authority and instead has implemented a Rule that provides little actual relief to evicted tenants.<sup>21</sup> The Housing Court could utilize the inherent authority it possesses with relatively minimal change to the Local Rule and with minimal impact on the interests of landlords. Such a change would, however, greatly benefit evicted tenants who deserve a second chance.

## II. EVICTION’S PRESENT EFFECTS AND PAST ATTEMPTS TO REMEDY THEM

### A. *The Effects of Eviction*

Rental households are on the rise.<sup>22</sup> In America today, nearly two-thirds of individuals under the age of thirty-five rent, and nearly half of individuals aged thirty-

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<sup>20</sup> The balancing test of *Pepper Pike v. Doe*, 421 N.E.2d 1303, 1306 (Ohio 1981) allows for judicial expungement of court records when the interests of the accused in their good name and right to be free from unwarranted punishment outweighs the legitimate interest of government in maintaining a public record of the case. *See infra* Section II.B.2.

<sup>21</sup> Instead, the Local Rule places timeline and disclosure restrictions on a tenant’s ability to get their eviction record sealed. *See* Cleveland Housing Court Local Rule 6.13(A) and (E) (limiting eviction record sealing to those able to survive five years without another eviction and requiring them to still disclose their sealed records, respectively).

<sup>22</sup> *Quarterly Residential Vacancies and Homeownership, Second Quarter 2019 Survey*, U.S. CENSUS BUREAU (July 25, 2019),

five to forty-four rent.<sup>23</sup> All households, regardless of age, saw an increase in the prevalence of renting a home versus owning one from 2006 to 2016.<sup>24</sup> The prime argument in favor of renting a home—as opposed to owning one—is flexibility.<sup>25</sup> The inherent downside to renting, however, is cost over time—rent always tends to increase, never to decrease.<sup>26</sup> Most eviction filings in the United States are due to non-payment of rent.<sup>27</sup> In 2017, over twenty-five percent of low-income renters, nearly fifteen percent of middle-income renters, and nearly ten percent of high-income

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<https://www.census.gov/housing/hvs/files/qtr219/Q219press.pdf> (revealing that rental housing has risen over 1.5% since the second quarter of 2019).

<sup>23</sup> More households are headed by renters than at any point since at least 1965. Rental rates of individuals forty-five to sixty-four also increased from two percent to twenty-eight percent. Only the rental rates of individuals sixty-five and older held steady at around twenty percent. Black and Hispanic households continue to be twice as likely to rent their homes, with fifty-eight percent of black households and fifty-four percent of Hispanic households renting compared to twenty-eight percent of whites. Rental rates have increased over all levels of educational attainment. Anthony Cilluffo et al., *More Households Are Renting Than at Any Point in 50 Years*, PEW RSCH. CTR. (July 19, 2017), <https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/>; see also Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MACARTHUR FOUND. (Mar. 2014), [https://www.macfound.org/media/files/HHM\\_Research\\_Brief\\_-\\_Poor\\_Black\\_Women\\_Are\\_Evicted\\_at\\_Alarming\\_Rates.pdf](https://www.macfound.org/media/files/HHM_Research_Brief_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf) (finding low-income black females evicted at a disproportionate rate, making up only 9.6% of the population of Milwaukee, Wisconsin, but composing thirty percent of the evictions there).

<sup>24</sup> See Cilluffo et al., *supra* note 23.

<sup>25</sup> See Christine M. E. Whitehead, *Private Renting in the 1990s*, 11 HOUS. STUD. 7, 9 (1996) (explaining that renting satisfies a need for accommodation in newly forming and mobile households, emphasizing easy access, low transaction costs, and limited commitment to property); see also Shannon Wright, *Rent or Buy? 6 Ways to Consider the Pros and Cons*, NPR (Apr. 15, 2019, 12:01 AM), <https://www.npr.org/2019/04/10/711929383/rent-or-buy-6-ways-to-consider-the-pros-and-cons>.

<sup>26</sup> Wright, *supra* note 25.

<sup>27</sup> See Chris Salviati, *Rental Insecurity: The Threat of Evictions to America's Renters*, APARTMENT LIST (Oct. 20, 2017), [https://www.apartmentlist.com/rentonomics/rental-insecurity-the-threat-of-evictions-to-americas-renters#!/vizhome/Charts\\_80/fig\\_6](https://www.apartmentlist.com/rentonomics/rental-insecurity-the-threat-of-evictions-to-americas-renters#!/vizhome/Charts_80/fig_6) (finding that 77.3% of evictions filed are due to non-payment of rent, 9.5% were due to lease violations, and 13.2% were due to factors outside the renter's control, such as the property being put to a different use by the landlord); see also April Hirsh Urban et al., *The Cleveland Eviction Study: Observations in Eviction Court and the Stories of People Facing Eviction*, CASE W. RESV. UNIV. CTR. ON URB. POVERTY & CMTY. DEV. (Oct. 2019) (“In 70% of the observed hearings tenants were three months delinquent or less, and most of those, 49%, were 2 months delinquent or less. For many cases observed, the eviction was filed after only a single month of delinquent rent, and the second month lapsed awaiting the eviction hearing. The average debt owed to landlords was nearly \$1,200 for our interview participants and roughly \$1,800 for court hearings observed.”). See generally Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545 (2005) (exploring denial of access to housing for past criminal offenses).



renters reported the inability to fully pay their past three months of rent.<sup>28</sup> Between the years 2000 and 2016, on average, 6.73% of renters had an eviction filed against them, and in over a third of those cases (2.83%), the eviction was granted.<sup>29</sup>

Besides the immediate pain that evictions bring to an individual or family forced to leave their home, the effects of eviction are “self-reinforcing.”<sup>30</sup> “[A] single eviction ‘decreases one’s chances of securing decent and affordable housing, of escaping disadvantaged neighborhoods, and of benefiting from affordable housing programs.’”<sup>31</sup> Evictions may also cause long-term issues such as homelessness, poverty, and residential, psychological, and economic instability.<sup>32</sup> Evictions have been associated with an increased risk of suicide<sup>33</sup> and can fundamentally redirect the path of an individual or family’s life.<sup>34</sup> In a recent study of individuals undergoing the eviction process in Cleveland Municipal Housing Court, 34.6% of individuals who were ultimately evicted—and 37.5% of individuals who were not—reported physical and mental health issues caused by the stress of the eviction process that interfered to an “extreme extent” with their normal social activities with family, friends, neighbors, and social groups.<sup>35</sup>

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<sup>28</sup> Sarah Holder, *Where Americans Are Facing the Most Evictions*, CITYLAB (Oct. 30, 2017, 2:25 PM), <https://www.citylab.com/equity/2017/10/where-evictions-hurt-the-most/544238/>.

<sup>29</sup> *National Estimates: Eviction in America*, EVICTION LAB (May 11, 2018), <https://evictionlab.org/national-estimates/>.

<sup>30</sup> Waks, *supra* note 8.

<sup>31</sup> *Id.*; see also Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 8 at 118.

<sup>32</sup> See Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. ON POVERTY L. & POL’Y 1, 13–14 (2015) (“The fallout from eviction can cause an abundance of collateral damage in the long-term. Even at the outset, the events leading to eviction cause turmoil, such as conflict with the landlord, multiple court appearances, looming uncertainty of the outcome, and the stressful moments during physical removal (possessions piled on the curb, a sheriff present, the possibility of homelessness, etc.)”); Gross, *supra* note 4; Matthew Desmond & Rachel Tolbert Kimbro, *Eviction’s Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 296, 299–300 (2015).

<sup>33</sup> Eviction or foreclosure related suicides accounted for up to two percent of all suicides, and sixteen percent of all financial related suicides captured in one study. Of these, seventy-nine percent of suicides occurred before the actual loss of housing, precipitated by preliminary events such as an eviction notice or a court date. See Fowler et al., *supra* note 8 at 314. Jason N. Houle & Michael T. Light, *The Home Foreclosure Crisis and Rising Suicide Rates, 2005 to 2010*, 104 AM. J. PUB. HEALTH 1073 (2014).

<sup>34</sup> Desmond & Kimbro, *supra* note 32, at 317 (“[E]viction may not simply drop poor mothers and their children into a dark valley, a trying yet relatively short section along life’s journey; it may fundamentally redirect their way, casting them onto a different, and much more difficult, path.”).

<sup>35</sup> Urban et al., *supra* note 27, at 49–50 (reporting the physical and mental effects of eviction on tenants interviewed in Cleveland Housing Court).

B. *The Public Eviction Record*

Eviction proceedings are a matter of public record. Today, it is possible for landlords to purchase a tenant screening report from one of the hundreds of companies that chronicle in granular detail an applicant's personal information—including residential and financial history.<sup>36</sup> This includes any past eviction filings.<sup>37</sup> More and more, both landlords and tenant screening services rarely take the time to determine the actual outcome of an eviction proceeding. Any eviction filing—whether granted or dismissed—is enough to deny an application.<sup>38</sup> In 2006, one tenant screening service manager told the *New York Times* that “[i]t is the policy of 99 percent of our [landlord] customers in New York to flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome is.”<sup>39</sup> Most state legislatures have yet to fully appreciate the debilitating effects that a public court record can have on nearly all aspects of an individual's life.<sup>40</sup> Most record expungement statutes predate the widespread use of the internet and other modern advancements in communication and data-storage technology.<sup>41</sup> They fail to sufficiently protect those with civil court records because civil court records were—before the advent of the internet—not easily or commonly accessed.<sup>42</sup> Despite the damage civil court records can do in an age where finding someone's eviction record and civil violations is as easy as searching their name in a public database, state legislatures have largely failed to update their record expungement and sealing statutes to protect the privacy of vulnerable citizens with civil records.

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<sup>36</sup> See Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 *YALE L. J.* 1344, 1346–47 (2007) (citing estimates that suggest there are at least 650 companies that provide tenant screening reports). Today, thirteen years later, there is reason to believe that this number has only grown, and that those companies have access to much more information due to the technological improvements since 2007 (the same year the iPhone was first introduced). See generally Lauren Kirchner & Matthew Goldstein, *How Automated Background Checks Freeze Out Renters*, *N.Y. TIMES* (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/renters-background-checks.html>.

<sup>37</sup> Kleysteuber, *supra* note 36, at 1347 (“[T]enant-screening reports’ . . . chronicle landlord-tenant disputes and court filings, often regardless of their outcomes.”).

<sup>38</sup> Teri Karush Rogers, *Only the Strongest Survive*, *N.Y. TIMES*, (Nov. 26, 2006), <https://www.nytimes.com/2006/11/26/realestate/26cov.html> (quoting Jake Harrington, founder of On-Site.com).

<sup>39</sup> *Id.*

<sup>40</sup> See Anna Kessler, Comment, *Excavating Expungement Law: A Comprehensive Approach*, 87 *TEMP. L. REV.* 403, 403 (2015).

<sup>41</sup> *Id.*

<sup>42</sup> Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 *WASH. L. REV.* 307, 319 (2004) (“Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”).

### C. Approaches to Protecting Tenants with Eviction History

#### 1. Definitions: The Difference Between Record Sealing and Expungement

For this Note, it is crucial to clearly define the concepts of “record sealing” and “expungement.” The words may change from jurisdiction to jurisdiction, but the concepts remain consistent.<sup>43</sup> In this Note, “record sealing” and “record expungement” will be defined in the following ways. “Record sealing” refers to the inherent power of the courts to control and restrict access to their own internal records—usually for purposes of privacy.<sup>44</sup> “Record expungement,” by contrast, refers not only to the judicial or statutory remedy of restricting access to certain court records, but also to consider those records *to have never existed*.<sup>45</sup> Expungement is characterized in court orders and statutes by phrases such as “the record shall be considered to have never existed,” or “the proceedings shall be considered to have never occurred.”<sup>46</sup>

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<sup>43</sup> The terms “record sealing” and “expungement” are statutorily defined in most states, and the definitions and differences can vary greatly. “Record sealing” is traditionally defined as “officially preventing access to particular records, in the absence of a court order,” usually by the court itself. *Sealing of Records*, BLACK’S LAW DICTIONARY (11th ed. 2019). “Expungement,” comparatively, is traditionally defined as “[t]he removal of a conviction from a person’s criminal record.” *Expungement of Record*, BLACK’S LAW DICTIONARY (11th ed. 2019). Expungement is sometimes also referred to as “expunction” or “erasure.” *Id.* The primary, traditional difference is that records under seal still exist, while expunged records do not, and therefore one can act as though the conviction never existed. *See* 21A AM. JUR. 2D *Criminal Law* § 1192; *Commonwealth v. Boe*, 924 N.E.2d 239, 240 n.2 (Mass. 2010). Ohio’s current statute on criminal record expungement recently changed the applicable term from “expungement” to “record sealing” and places eligible applicants’ records under seal but otherwise retains and does not erase them, further blurring the distinction between the two concepts. *See* OHIO REV. CODE ANN. §§ 2953.31–2953.36 (West 2018).

<sup>44</sup> *See, e.g.*, 20 AM. JUR. 2D *Courts* § 27 (2020) (“Good cause to seal a record has been held to exist when: (1) disclosure will likely cause a clearly defined and serious injury to any person or entity; and (2) the person’s or entity’s interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection.”); 80 OHIO JUR. 3D *Records and Recording* § 39 (2020) (“Any sealing of records should . . . serve the competing interests of protecting the individual’s privacy without unduly burdening the public’s right of access.” (citing *In re Estate of Carpenter*, 804 N.E.2d 1059, 1063 (Ohio Ct. Com. Pl. 2004)); *State ex rel. Cincinnati Enquirer v. Winkler*, 777 N.E.2d 320, 323 (Ohio Ct. App. 2002).

<sup>45</sup> *See, e.g.*, 21A AM. JUR. 2D *Criminal Law* § 1192 (2020) (“‘Expungement’ means to erase all evidence of the event as if it never occurred.”).

<sup>46</sup> OHIO REV. CODE ANN. § 2953.32(C)(2) (West 2019) (“The proceedings in the case that pertain to the conviction or bail forfeiture shall be considered not to have occurred . . . .”); MICH. COMP. LAWS § 780.622(1) (2014) (“Upon the entry of an order under section 1, the applicant, for purposes of the law, shall be considered not to have been previously convicted . . . .”); IND. CODE § 35-38-9-10(e) (2020) (“A person whose record is expunged shall be treated as if the person had never been convicted of the offense.”); KY. REV. STAT. ANN. § 431.076(6) (West 2020) (“After the expungement, the proceedings in the matter shall be deemed never to have occurred.”); MINN. STAT. § 609A.03 subdiv. 6a (2017) (“The person shall not be guilty of perjury or otherwise of giving a false statement if the person fails to acknowledge the arrest, indictment, information, or trial in response to any inquiry made for any purpose.”); *State v.*

For our purposes, the crucial difference is that expungement is intended to erase any negative consequences linked to the expunged record. Expungement is intended to conceal a person's court record by prohibiting inquiry into it in most circumstances and allowing a person with an expunged record to legally attest that the record does not exist. For example, a person with an expunged felony conviction who is asked on a job application whether they have ever had a felony conviction could legally and honestly attest that they do not—as those proceedings were expunged. Conversely, a person with a criminal record that is merely sealed must still disclose the existence of such a record if asked. This difference between expungement and record sealing is crucial in the eviction context, where many tenants who are successful in sealing their eviction records are still required to reveal that record on housing applications—a revelation that is likely to automatically trigger the denial of a housing opportunity.

## 2. Statewide and Municipal Approaches to the Crisis

Some states have adopted different strategies to counter the adverse effects that eviction filings inflict on renters.<sup>47</sup> For example, California has adopted an approach to protect tenants from wrongfully filed evictions or eviction proceedings in which the tenant prevailed on the merits of the eviction claim.<sup>48</sup> The California law keeps the records of all eviction proceedings sealed until the landlord prevails on the merits of the eviction claim.<sup>49</sup> This provides strong protection for a tenant against being saddled with eviction records visible to the public wherein the eviction was frivolously filed, dismissed, or the landlord lost on the merits. As stated above, even eviction filings that were dismissed or where the tenant prevailed on the merits can be enough to cause

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Pinkney, 290 N.E.2d 923, 924 (Ohio Ct. Comm. Pl. 1972) (“[T]he proceedings in said case shall be determined never to have occurred.”).

<sup>47</sup> Nevada's eviction record sealing statute automatically seals the records of dismissed or denied evictions, and evictions where the tenant can show they are not in default. NEV. REV. STAT. § 40.2545(1)–(2) (2019). Sealed eviction records in Nevada are considered to have never occurred. § 40.2545(3). Illinois's simple eviction sealing statute allows for petition of the court to seal an eviction record if the eviction action was “sufficiently without basis in law or fact.” 735 ILL. COMP. STAT. 5/9-121(b) (2018). Minnesota's statute requires eviction records to be expunged under certain circumstances and also at the discretion of the court if the eviction action was sufficiently without basis in law or fact. MINN. STAT. § 484.014(2) (2020). On June 17, 2019 Oregon Senate Bill 873 was signed into law. The new rules will allow tenants to petition for the sealing of their records if the claim was resolved in the tenant's favor, if five years have passed since the eviction was granted, or if the claim ended in a settlement which the petitioner has upheld. S.B. 873, 80th Leg. Assemb., Reg. Sess. (Or. 2019). Proposed legislation in the District of Columbia would automatically seal eviction records resolved in favor of the tenant, or after three years regardless of the outcome, or upon petition and by the discretion of the court. Eviction Record Sealing Authority Amendment Act of 2019, B. 23-338 (D.C. 2019). Expansive proposed legislation in Massachusetts would immediately and automatically seal all eviction records, prohibit credit reporting agencies from reporting them, and prohibit inquiries into the sealed records. S. 824, 191st Gen. Ct. (Mass. 2019).

<sup>48</sup> CAL. CIV. PROC. CODE § 1161.2 (Deering 2020).

<sup>49</sup> *Id.*

the denial of a housing application.<sup>50</sup> However, even this comparatively robust California law provides little protection for tenants who lose their eviction case for any reason, as a granted eviction will become public record and will remain on a tenant's credit report for the required seven years.<sup>51</sup>

Similarly, Nevada automatically "seals" the records of dismissed eviction filings.<sup>52</sup> Most importantly here—for purposes of this Note—"record sealing" is defined by the Nevada statute as a record being "deemed *never to have occurred*."<sup>53</sup> Thus, Nevada's eviction "sealing" statute is, in fact, an eviction *expungement* statute involving records of dismissed eviction filings. As in California, Nevada's statute does not protect tenants who are ultimately evicted and those records remain public.

Other states such as New Jersey and New Hampshire have statewide laws permitting only "just cause" evictions.<sup>54</sup> Examples of "just cause" include a tenant's failure to pay rent or failure to abide by the terms of the rental agreement.<sup>55</sup> These just cause eviction laws prevent a tenant from being evicted at the whim of their landlord and there is some research to suggest that such laws reduce the rate of eviction filings in cities and states that have adopted them.<sup>56</sup> Still, they do not protect an evicted person's housing rights after the fact and the detrimental effects of a public eviction record remain unaddressed.

Efforts to curb the eviction crisis have occurred at the local level as well. In response to skyrocketing rental costs, on October 8, 2019, California Governor Gavin Newsom signed into law Assembly Bill 1482—or the California Tenant Protection

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<sup>50</sup> Kleysteuber, *supra* note 36, at 1351 ("California passed a law in the early 1980s prohibiting tenant-screening agencies from reporting on eviction actions unless the tenant lost in court."); CAL. CIV. CODE § 1785.13(a)(3) (Deering 2010) ("No consumer credit reporting agency shall make any consumer credit report containing . . . [u]nlawful detainer actions, unless the lessor was the prevailing party.").

<sup>51</sup> Fair Credit Reporting Act, 15 U.S.C. § 1681c(a)(2) ("[N]o consumer reporting agency may make any consumer report containing . . . [c]ivil suits, civil judgments, and records of arrest that from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired . . .").

<sup>52</sup> NEV. REV. STAT. § 40.2545(1) (2019).

<sup>53</sup> NEV. REV. STAT. § 40.2545(3) (2019) (emphasis added).

<sup>54</sup> N.J. STAT. ANN. § 2A:18-61.1 (West 2013) (stating that no tenant shall be removed except upon the grounds of good cause); N.H. REV. STAT. ANN. § 540:2 (1996) (stating a lessor may terminate a tenancy only on the grounds enumerated, or for "other good cause.").

<sup>55</sup> *See, e.g.*, N.J. STAT. ANN. § 2A:18-61.1(a) (West 2013) (listing failure to pay rent as grounds for eviction); N.H. REV. STAT. ANN. § 540:2(II)(c) (1996) (listing tenants' failure to comply with material terms of the lease as grounds for eviction).

<sup>56</sup> Julieta Cuellar, *Effect of "Just Cause" Eviction Ordinances on Eviction in Four California Cities*, PRINCETON U. J. PUB. & INT'L AFF. (May 21, 2019), <https://jpiia.princeton.edu/news/effect-just-cause-eviction-ordinances-eviction-four-california-cities> (finding "a -0.808 percentage point difference between eviction rates before and after the passage of just cause eviction ordinances").

Act of 2019—which caps rental rates in that state for the next decade.<sup>57</sup> After the passage of the Act, a prominent attorney advised Californian landlords to quickly evict tenants paying below-market rents before the law took effect.<sup>58</sup> In response, the City of Los Angeles took an emergency measure that banned no-fault eviction filings to prevent landlords from dumping their tenants.<sup>59</sup>

Another effort has been undertaken by the Clerk of Franklin County Municipal Court in Columbus, Ohio. There, the court has taken the step of removing all eviction records more than three years old from the court’s online database.<sup>60</sup> Older records are still accessible, but one must now physically go to the courthouse to obtain a copy.<sup>61</sup> This move—though admirable—still requires an evicted person to survive three years without another eviction judgment against them to have their eviction removed from the public record.<sup>62</sup>

### 3. The Cleveland Approach: Local Rule 6.13

Another approach to mitigate the detrimental results of eviction records—especially when state and local governments fail to act—has been through local rules and policies promulgated by courts.<sup>63</sup> These local rules often allow courts to seal—but not expunge—eviction records if certain conditions are met. One such example is found in Cleveland. In December 2018, the Cleveland Municipal Housing Court implemented Local Rule 6.13, which allows an individual with an eviction record to

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<sup>57</sup> The new law will, until January 1, 2030, prohibit a landlord from, over the course of any twelve-month period, increasing the gross rental rate for a dwelling or unit more than five percent plus the percentage change in the cost of living. Matthew J. Perro, *Overview of the Tenant Protection Act of 2019 – Assembly Bill 1482*, ANGLIN FLEWELLING & RASMUSSEN LLP, <https://www.afrc.com/featured-2/overview-of-tenant-protection-act-of-2019-assembly-bill-1482-sp7yf-rqxbz> (last visited Oct. 26, 2020).

<sup>58</sup> Jenna Chandler, *City of Los Angeles Bans ‘No Fault’ Evictions*, CURBED L.A. (Oct. 20, 2019), <https://la.curbed.com/2019/10/22/20927009/los-angeles-no-fault-evictions>.

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

<sup>60</sup> Franklin County Municipal Court has not yet adopted an eviction sealing rule, but Court Clerk Lori Tyack, with the approval of a committee tasked with updating eviction practices, has removed eviction records from public access online. Rita Price, *Franklin County Set to Shield Some Online Eviction Records*, COLUMBUS DISPATCH (Jan. 14, 2020), <https://www.dispatch.com/news/20200114/franklin-county-set-to-shield-some-online-eviction-records>; see also Editorial, *Records Tweak to Help People Get Housing Is Worth a Try*, COLUMBUS DISPATCH, <https://www.dispatch.com/opinion/20200123/editorial-records-tweak-to-help-people-get-housing-is-worth-try> (last updated Jan. 23, 2020).

<sup>61</sup> Price, *supra* note 60 (“The older cases won’t be viewable online but will remain on file — and open to the public — in the clerk’s office.”).

<sup>62</sup> *Id.*

<sup>63</sup> The City of Garfield Heights, Ohio has promulgated Local Rule 33.1 – Motion to Seal Eviction Record, which is nearly identical to Cleveland Housing Court’s Local Rule 6.13. Compare Price, *supra* note 60 (reporting on Franklin County Municipal Court’s removal of old eviction records from its online database), with Cleveland Municipal Housing Court Local Rule 6.13.

petition the court to seal that record.<sup>64</sup> In an interview, the then-presiding Housing Court judge stated the purpose of the Rule was to “balance the ability of landlords to screen potential tenants, which the court encourages, with giving tenants a chance to clear a record that can limit their housing options.”<sup>65</sup> Under the Rule, the court may order the record sealed under the following circumstances:

1. The court dismissed or entered judgment for the tenant/movant on the claim for eviction; or
2. The landlord dismissed the claim for eviction before adjudication of that claim; or
3. The landlord stipulates, in writing to the court, to sealing the record, except that sealing of a record solely on the basis of stipulation by the landlord shall be granted only once in any five-year period; or
4. The landlord prevailed on the merits on the claim for eviction, and *all* of the following occurred:
  - a. extenuating circumstances led to the eviction;
  - b. at least five years have passed since judgment was entered for the landlord;
  - c. at least five years have passed since the tenant has had an adverse judgment granting an eviction in any jurisdiction.<sup>66</sup>

Unlike the eviction sealing statutes enacted in Nevada and elsewhere,<sup>67</sup> no provision of the Rule is automatic. The tenant must file a written motion and affidavit before the court will consider sealing their record.<sup>68</sup> Further, unlike the statewide statutory measures, the Rule is limited in geographic scope to the city of Cleveland.<sup>69</sup> Finally, this judicial remedy has neither city nor state legislation behind it, which means the Rule can be changed or repealed more-or-less at the court’s whim at any time. Thus, the question is whether the court has only the power to seal the records of evicted tenants, or whether it has the authority to expunge them as well.

The court’s position regarding this question is clear from the Rule’s text. Section E states—in relevant part—that “[s]ealing the record of an eviction *does not* authorize the tenant or former tenant to make a false statement regarding the filing or granting of the eviction.”<sup>70</sup> In an interview with Cleveland newspaper *The Plain Dealer*, the then-presiding Housing Court judge also added—to eliminate any doubt—that “[i]f

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<sup>64</sup> Cleveland Municipal Housing Court Local Rule 6.13.

<sup>65</sup> Dissell, *supra* note 11.

<sup>66</sup> Cleveland Municipal Housing Court Local Rule 6.13(A).

<sup>67</sup> NEV. REV. STAT. § 40.2545(1) (2019); MINN. STAT. § 484.014(3) (2020).

<sup>68</sup> Cleveland Municipal Housing Court Local Rule 6.13(B).

<sup>69</sup> See 21 C.J.S. *Courts* § 164 (2020).

<sup>70</sup> Cleveland Municipal Housing Court Local Rule 6.13(E) (emphasis added).

on a rental application, a question asks about completed evictions that are sealed, a person would have to answer truthfully.”<sup>71</sup> In other words, even if a past eviction record has been sealed, an evicted tenant must *still* reveal it on a housing application questionnaire. That—as noted earlier—will almost always increase the chances of the housing application being denied.<sup>72</sup>

The Housing Court judge’s opinion was that he had no authority to expunge eviction records, explaining that only the Ohio Legislature has such power.<sup>73</sup> The next Section examines whether that position—that the Housing Court lacks the power to expunge eviction records—is accurate and legally sound.

### III. ANALYZING THE LOCAL RULE’S SCOPE

#### A. *Ohio Caselaw: The Expungement Legal Landscape*

Cleveland Municipal Housing Court’s position has so far been that absent legislative authorization it cannot order expungement of eviction records for Cleveland tenants.<sup>74</sup>

While any legislative action in this realm is welcome, preferable, and can likely offer more robust protection to tenants—indeed, several states have already done so<sup>75</sup>—at least two arguments suggest that there are steps the court can take to protect tenants until the state acts.

First, Ohio courts’ power to expunge court records absent statutory authorization from the state legislature is longstanding and well-established. This judicial power to expunge even predates Ohio’s first expungement laws.<sup>76</sup> The Ohio Supreme Court has held that—in certain circumstances—Ohio courts have the inherent authority to order expungement of criminal records even in the absence of any statutory authority to do so.<sup>77</sup> The Ohio Supreme Court has held that Ohio courts’ inherent authority to order the expungement of records extends also to civil court records.<sup>78</sup>

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<sup>71</sup> Dissell, *supra* note 11.

<sup>72</sup> See Kleysteuber, *supra* note 36, at 1346–47.

<sup>73</sup> See Dissell, *supra* note 11.

<sup>74</sup> *Id.*

<sup>75</sup> See sources cited *supra* note 46.

<sup>76</sup> *State v. Pinkney*, 290 N.E.2d 923, 924 (Ohio Ct. Com. Pl. 1972) (expunging on the court’s own authority the criminal record of a defendant two years before the passage of Ohio’s first criminal expungement statute).

<sup>77</sup> *Pepper Pike v. Doe*, 421 N.E.2d 1303, 1306 (Ohio 1981) (holding that courts may employ a balancing test when considering whether judicial expungement is an appropriate remedy absent statutory authorization).

<sup>78</sup> *Schussheim v. Schussheim*, 998 N.E.2d 446, 455 (Ohio 2013) (holding that the court’s authority to seal and expunge a record does not turn on whether the case is civil or criminal, but on whether the *Pepper Pike* balancing test is met).



Second, if it is to make any difference at all, the Rule itself must be designed to allow expungement and not merely sealing of eviction records. Each of these arguments will be addressed in turn.

*B. Ohio Courts' Power to Expunge Absent Statutory Authorization to Do So*

1. Ohio Courts' Inherent Power to Order Expungement Predates Ohio Expungement Law

If the Housing Court is correct in assuming that any power to expunge court records may only be derived from the state legislature, then there should not exist any judicial expungement orders—civil or criminal—before the passage of Ohio's first criminal expungement law. This is not the case.

Ohio's first criminal record expungement statute went into effect in 1974.<sup>79</sup> Two years earlier, the Cuyahoga County Court of Common Pleas ordered the expungement of a criminal record based on its inherent authority in *State v. Pinkney*.<sup>80</sup> In *Pinkney*, the court ordered Alan G. Pinkney's criminal record sealed and expunged, stating, "the proceedings in said case shall be determined never to have occurred."<sup>81</sup>

Even after the Ohio criminal record expungement statute went into effect in 1974, *Pinkney* was followed as the rule by that same court four years later in *State v. Allen*.<sup>82</sup> In *Allen*, the court again ordered the expungement of a criminal record by its authority under the precedent set by *Pinkney*.<sup>83</sup>

In 2005, the Ohio Seventh District Court of Appeals defined the limits of this judicial power to order expungement in the face of state legislation. In *City of Youngstown v. Garcia*,<sup>84</sup> the court held that where the Ohio legislature has statutorily defined eligibility requirements for expungement, the Ohio Constitution's separation of powers forbids the courts from contradicting or circumventing those requirements.<sup>85</sup> Because the Ohio legislature has never passed eviction expungement legislation or defined eligibility for it, *Garcia* does not represent a hurdle to Ohio courts enacting rules to create such a remedy.

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<sup>79</sup> 1973 Ohio Laws 72 (current version at OHIO REV. CODE ANN. §§ 2953.31–2953.36 (LexisNexis 2021)); see also Michael H. Jagunic, Note, *The Unified "Sealed" Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century*, 59 CLEV. ST. L. REV. 161, 167 (2011).

<sup>80</sup> *Pinkney*, 290 N.E.2d at 924.

<sup>81</sup> *Id.*

<sup>82</sup> *State v. Allen*, 394 N.E.2d 1025, 1026 (Ohio Ct. Com. Pl. 1978).

<sup>83</sup> *Id.* at 1027.

<sup>84</sup> *City of Youngstown v. Garcia*, No. 05 MA 47, 2005 Ohio App. LEXIS 6379, at \*8 (Ohio Ct. App. Dec. 22, 2005).

<sup>85</sup> *Id.* at \*8–9.

## 2. Even After Legislation, Ohio Courts May Still Order Expungement Where the Legislature is Silent

When the expungement statute in question does not address the particular set of circumstances before the court, the question again arises whether the court may order such a remedy. In *Pepper Pike v. Doe*,<sup>86</sup> the Ohio Supreme Court answered that question in the affirmative. *Pepper Pike* recognized that as a judicial remedy, absent statutory authorization, a court may order “expungement and sealing of all records in [the] case.”<sup>87</sup> But such a remedy, the court explained, may be granted only “in unusual and exceptional circumstances”<sup>88</sup> where the “interest of the accused in his good name and right to be free from unwarranted punishment [outweighs] the legitimate need of government to maintain records.”<sup>89</sup>

In addressing the “inherent lack of precision” in the term “expungement,” the Ohio Supreme Court has held that such a judicial remedy should parallel the Ohio expungement statute, citing section 2953.32(C) of the Ohio Revised Code.<sup>90</sup> That statute, in turn, states: “The proceedings in the case . . . shall be considered not to have occurred . . .”<sup>91</sup> Thus, the court was clear in authorizing a judicial remedy to expunge a petitioner’s record—absent statutory authorization—to the *same extent* as would be possible under Ohio’s criminal expungement statute. That is, judicially expunged court records may be considered to have never existed.

The *Pepper Pike* court found a basis for this judicial authority in the individual right to privacy derived from the Federal Constitution, citing the United States Supreme Court’s holdings in *Roe v. Wade*, *Wisconsin v. Constantineau*, and *Griswold v. Connecticut*.<sup>92</sup> However, there is a second basis for the court’s holding in *Pepper Pike*—though not addressed in that opinion—but rather, in the Ohio constitution. In *Griswold v. Connecticut*, Justice Douglas, writing for the majority, found the individual right to privacy to emanate from the Bill of Rights’ “penumbra.”<sup>93</sup> Specifically, Justice Douglas cited the Third Amendment’s prohibition on the

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<sup>86</sup> *Pepper Pike v. Doe*, 421 N.E.2d 1303, 1306 (Ohio 1981).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* Today, a very similar balancing test was adopted by the Housing Court’s Local Rule: “The Court may order the Clerk to seal an eviction record when the interests of justice in sealing the record outweigh the interests of the government and the public in maintaining a public record of the case. . . .” Cleveland Municipal Housing Court Local Rule 6.13(A).

<sup>90</sup> *Pepper Pike*, 421 N.E.2d at 1306.

<sup>91</sup> OHIO REV. CODE ANN. § 2953.32(C)(2) (West 2019).

<sup>92</sup> *Pepper Pike*, 421 N.E.2d at 1306; cf. Pierre H. Bergeron & Kimberly A. Eberwine, *One Step in the Right Direction: Ohio’s Framework for Sealing Criminal Records*, 36 U. TOLEDO L. REV. 595, 605 (2005) (speculating that OHIO R. CIV. P. 26(c) may also provide sufficient basis for a judicial expungement power).

<sup>93</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (“We have had many controversies over these penumbral rights of ‘privacy and repose.’ These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.”) (citations omitted).

quartering of soldiers in private homes without consent, the Fourth Amendment's right of the people to be secure in their persons, the Fifth Amendment's right against forced self-incrimination, and the Ninth Amendment's reservation to the people all rights not enumerated in the Constitution.<sup>94</sup>

The Ohio Constitution contains the same building blocks as the Federal Constitution to arrive at the same conclusion as the *Griswold* Court. Article I, Section 13 of the Ohio Constitution is nearly identical to the Third Amendment;<sup>95</sup> Article I, Section 14 is nearly identical to the Fourth Amendment;<sup>96</sup> Article I, Section 10 bears the same prohibition against forced self-incrimination as the Fifth Amendment;<sup>97</sup> and Article I, Section 20 contains the same reservation of power to the people as the Ninth Amendment.<sup>98</sup> Indeed, beginning in 1896—nearly 70 years before *Griswold*—the Ohio Supreme Court held that the Ohio Constitution contains an individual right to privacy.<sup>99</sup>

In addition, Article I, Section 1 of the Ohio Constitution—indeed, the very first words of that document—defines in extraordinarily broad terms every Ohioan's inalienable right to enjoy and defend “life and liberty” and to seek and obtain “happiness and safety.”<sup>100</sup> This language resembles both the Due Process Clause in the Fifth and Fourteenth Amendments of the United States Constitution, as well as the broader language of the Declaration of Independence declaring the “pursuit of happiness” to be an inalienable human right.<sup>101</sup> The language of the Ohio Constitution

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<sup>94</sup> *Id.* at 484.

<sup>95</sup> Compare OHIO CONST. art. I, § 13, with U.S. CONST. amend. III.

<sup>96</sup> Compare OHIO CONST. art. I, § 14, with U.S. CONST. amend. IV.

<sup>97</sup> Compare OHIO CONST. art. I, § 10 (“No person shall be compelled, in any criminal case, to be a witness against himself . . .”), with U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself.”).

<sup>98</sup> Compare OHIO CONST. art. I, § 20 (“This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.”), with U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

<sup>99</sup> *Palmer v. Tingle*, 45 N.E. 313, 314 (Ohio 1896) (“The word ‘liberty,’ as used in the first section of the [Ohio] Bill of Rights does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.”); *State v. Williams*, 728 N.E.2d 342, 355 (Ohio 2000) (“We have stated that the right to privacy under Section 1, Article I runs parallel to those rights of privacy guaranteed by the Fourteenth Amendment to the United States Constitution.”).

<sup>100</sup> OHIO CONST. art. I, § 1, (“All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.”).

<sup>101</sup> U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed

is broader still than either of those two revered documents—proclaiming not only every Ohioan’s right to pursue happiness, but also to *obtain* it; and not just happiness, but safety for one’s person as well.<sup>102</sup> These first and foremost rights of the citizens of Ohio certainly cannot be fulfilled—or even pretended to be real—in a system where one can have something as fundamental as a roof over their head denied to them due to a single court docket entry from years ago.<sup>103</sup>

Although the circumstances in *Pepper Pike* were later addressed by the Ohio legislature in an amendment to the criminal expungement statute,<sup>104</sup> *Pepper Pike* is still considered good law today. In fact, the *Pepper Pike* rule has been expanded upon, followed, and applied by many Ohio courts.<sup>105</sup>

### 3. The Power of Ohio Courts to Judicially Expunge Civil Records

Seven years after announcing the *Pepper Pike* rule, the Ohio Supreme Court expanded it to include civil records in *Schussheim v. Schussheim*.<sup>106</sup> In that case, the court below—the Court of Appeals of Ohio, Twelfth Appellate District, Warren County—had refused to apply the *Pepper Pike* rule to a civil case, stating: “We . . .

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by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

<sup>102</sup> OHIO CONST. art. I, § 1.

<sup>103</sup> See Kleysteuber, *supra* note 36, at 1347.

<sup>104</sup> OHIO REV. CODE ANN. § 2953.32(A)(1)(b) (West 2018).

<sup>105</sup> See, e.g., *City of Mayfield Heights v. M.T.S.*, 19 N.E.3d 600, 603 (Ohio Ct. App. 2014) (“The court’s authority to seal conviction records is derived from the defendant’s constitutional right to privacy.”); *Capital One Bank USA, N.A. v. Essex*, No. 25827, 2014 WL 4792583, at \*2 (Ohio Ct. App. Apr. 11, 2014) (“[C]ourts have inherent authority to expunge and seal criminal records in ‘unusual and exceptional circumstances,’ based on the constitutional right to privacy.”); *State v. Raber*, 9th Dist. Wayne No. 13CA0020, 2014-Ohio-249, at \*9 (“[T]rial courts have the inherent authority to expunge records apart from the statutes when justified by ‘unusual and exceptional circumstances’ founded on constitutional guarantees of the right to privacy.” (alteration in original)); *State v. Vanzandt*, 990 N.E.2d 692, 695 (Ohio Ct. App. 2013) (“The power to seal a record of acquittal does not flow solely from R.C. 2953.52. Prior to the statute’s enactment, the Ohio Supreme Court recognized a judicial power to order the expungement and sealing of records. . . .”), *rev’d*, 142 Ohio St. 3d 223; *State v. Boykin*, No. 25845, 2012 WL 1072305, at \*5 (Ohio Ct. App. Mar. 30, 2012) (“A trial court may exercise its authority to order judicial expungement but, as the Ohio Supreme Court concluded in *Pepper Pike*, this authority should not be exercised as a matter of course, but ‘where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter[.]’”); *State v. Brown*, No. 07AP-255, 2007 WL 2773848, at \*1 (Ohio Ct. App. Sept. 25, 2007) (“The court uses a balancing test to determine whether the government’s interest in maintaining the records at issue is outweighed by the applicant’s privacy interest.”; *In re Application to Seal Record of No Bill*, 722 N.E.2d 602, 605 (Ohio Ct. App. 1999) (“We believe that courts have discretion to seal such records under the judicial expungement doctrine enunciated in [*Pepper Pike*].”); *State v. Grove*, 505 N.E.2d 297, 298 (Ohio Ct. App. 1986) (“While *Pepper Pike* was decided before the enactment of R.C. 2953.52 (permitting the expungement of arrest records), we find it to be applicable to the case *sub judice*.”).

<sup>106</sup> *Schussheim v. Schussheim*, 998 N.E.2d 446, 447 (Ohio 2013).

decline to apply the doctrine of judicial expungement as established in *Pepper Pike*, a decision solely involving a criminal case, to the case at bar, a civil case . . . .”<sup>107</sup>

On appeal, the Ohio Supreme Court reversed:

The inherent authority of a court to expunge and seal a record does not turn on whether a proceeding is criminal or civil. Rather, the determination is whether ‘unusual and exceptional circumstances’ exist and whether the interests of the applicant outweigh the legitimate interest of the government to maintain the record.<sup>108</sup>

Justice French’s dissent in *Schussheim* well demonstrates the tension in expanding the *Pepper Pike* rule: “The majority conflates a court’s inherent power over its own records with ‘expungement,’ a statutory remedy affecting records held by other branches of government and carrying a license to conceal information from the public.”<sup>109</sup> Despite Justice French’s dissent, the rule still stands. Although the civil record at issue in *Schussheim* was a civil protection order improperly sought by the plaintiff, if the Ohio Supreme Court bridged the gap between the criminal record of an assault charge at issue in *Pepper Pike* and the civil protection order in *Schussheim*, it stands to reason that the much smaller divide between a civil protection order and a civil eviction proceeding can be bridged by the same reasoning.

Accordingly, Ohio caselaw today prescribes a two-part test that the courts must conduct when expunging court records absent statutory guidance. First, the court must determine whether unusual and exceptional circumstances are present.<sup>110</sup> Second, the court must employ a balancing test where the interests of the petitioner in his or her good name and right to be free from unwarranted punishment are weighed against the legitimate need of the government to maintain its records.<sup>111</sup> When these steps have been satisfied in favor of the petitioner, courts have the inherent authority to order expungement of civil court records—including eviction records—even absent statutory authorization to do so.

### C. *A Proper Construction of the Local Rule Requires Expungement—Not Sealing*

The second argument in favor of expungement over sealing by the Rule is based on statutory construction. If the current version of the Rule is to survive unchanged—as it has for several years now—it would greatly undermine an evicted person’s ability to find affordable and safe housing in the future. While the stated purpose of the Rule

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<sup>107</sup> *Schussheim v. Schussheim*, No. CA2011-07-078, 2012 WL 2087406, at \*4 (Ohio Ct. App. June 11, 2012).

<sup>108</sup> *Schussheim*, N.E.2d at 449.

<sup>109</sup> *Id.* at 456–57.

<sup>110</sup> *Pepper Pike v. Doe*, 421 N.E.2d 1303, 1306 (Ohio 1981) (“[T]rial courts in unusual and exceptional circumstances expunge criminal records out of a concern for the preservation of the privacy interest.”).

<sup>111</sup> *Id.* (“When exercising these powers, the trial court should use a balancing test, which weighs the interest of the accused in his good name and right to be free from unwarranted punishment against the legitimate need of government to maintain records.”).

is to *balance* the interests of landlords and tenants,<sup>112</sup> this “balance” has left landlords in the same position as before while potentially adding insult to injury to Cleveland’s most vulnerable tenants. It is well established by now that low-income individuals are the most likely to suffer an eviction.<sup>113</sup> Yet, the United States Department of Housing and Urban Development—which funds many low-income housing programs throughout the nation—allows low-income housing providers to inquire about past eviction filings,<sup>114</sup> and allows subsidized housing providers to deny applicants with past evictions.<sup>115</sup> Additionally, many local municipalities, such as Lakewood, Ohio, recommend landlords check potential tenants for past eviction filings.<sup>116</sup> Thus, should the current version of the Rule survive, it would only offer minimal protection to evicted tenants—preventing them from sealing their record for five years, and then still requiring them to reveal their eviction records when asked. Further, it may in fact be detrimental to evicted tenants by forcing them to apply only to housing options that do not ask about past evictions, potentially taking subsidized housing off the table.

When Cleveland Municipal Housing Court first sealed an eviction record in 2018, before the implementation of the Rule, it did so based on the reasoning of *Pepper Pike* and *Schussheim*.<sup>117</sup> That partially unsealed opinion, as well as the Ohio Supreme Court

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<sup>112</sup> See Dissell, *supra* note 11 (citing the explanation given by the Presiding Judge).

<sup>113</sup> See generally Holder, *supra* note 28; see also Urban et al., *supra* note 27, at 4 (stating the key finding that most tenant in eviction court in Cleveland are low-income).

<sup>114</sup> U.S. DEP’T OF HOUS. & URB. DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS 4-58 fig.4-7 (Nov. 2013), <https://www.hud.gov/sites/documents/43503C4HSGH.PDF> [<https://perma.cc/E6LU-RTJ4>] (listing “[w]as the tenant evicted?” as an “objective/acceptable question” for a landlord to ask when screening applicants).

<sup>115</sup> 24 C.F.R. § 982.552(c)(ii) (2019) (allowing a public housing authority to deny or terminate assistance to tenants who have been evicted from federally assisted housing within the past five years); cf. 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, 183 (2009) (explaining that individuals with a criminal record are even worse off, as they are generally ineligible from the beginning under HUD guidelines for public housing).

<sup>116</sup> City of Lakewood, Ohio, *Best Rental Practices – A Manual for Lakewood Landlords* 10 (July 2011), <http://www.onelakewood.com/wp-content/uploads/2016/02/BestRentalPractices.pdf> (“Consider checking for criminal convictions and evictions. Outcomes of court proceedings are generally public record and as such can be obtained through the local court system.”).

<sup>117</sup> *Real Estate v. Doe*, a partially unsealed case decided in August 2018, involved the family of an elderly mother and father, their daughter, and minor disabled grandchildren, all of whom experienced severe medical issues, had limited English proficiency, and were impoverished. They lived in subsidized housing when the eviction was filed against them. The eviction case was settled, but the Defendants had subsequently been denied market-rate housing elsewhere by a sophisticated landlord, ostensibly due to the existence of the dismissed eviction on their record. The court granted the sealing of the Defendants’ record, stating:

Defendants herein . . . are the type of tenants the government had likely intended to assist when establishing subsidized housing programs—they have presented ‘unusual and exceptional circumstances’ as discussed in *Schussheim* . . . they are

precedent on which it was based, informed the promulgation of what is now Local Rule 6.13. While parts of the Rule are based—to a large extent—on the spirit of the *Pepper Pike* test, the many limitations the Rule places on an evicted person’s ability to seal their eviction records are not.<sup>118</sup> Those limitations—it should be noted—never appear in the Ohio Supreme Court cases on which the Rule is based.

For example, the *Pepper Pike* court never required disclosure of the records sealed by the petitioner as is currently required by Rule 6.13(E). In fact, this requirement is completely contrary to the court’s holding that Ohio courts have inherent authority to order “expungement and sealing” of records.<sup>119</sup>

Further limitations, like the arbitrary five-year judgment-free term required by 6.13(A)(4)(b) and (c) may, in fact, lead to five long years of being unable to secure public—or other affordable—housing, and likely more evictions, with each eviction resetting the five-year clock.<sup>120</sup>

#### IV. CHANGES TO PROVIDE REAL TENANT PROTECTIONS

To revise and implement a new Rule that contains real protections for tenants, two questions must be answered. First, how would such a change be accomplished? Second, what would compel the court to make such a change?

##### A. *Process of Changing the Local Rule*

The Ohio Rules of Superintendence permit local courts to promulgate local rules to facilitate the expeditious disposition of cases,<sup>121</sup> except that any local rule may not be inconsistent with rules promulgated by the Ohio Supreme Court.<sup>122</sup> Appropriate

elderly, have multiple physical disabilities, are of limited English proficiency, have minor disabled children, and are poor. Defendants have established that the mere existence of the public record of this case filed in eviction *caused* [a landlord] to deny [Defendants’] application . . . [T]he facts as presented in this case are such that a perverse result was reached when [the landlord] reviewed the docket: instead of the landlord obtaining information about how the case was dismissed . . . the landlord only gleaned that an eviction was filed against [Defendant] . . . [T]he Defendants’ interest in restoring their good name, and right to be free from unwarranted punishment (inasmuch as being denied housing) outweighs the legitimate need of government to maintain a public record of the case.

Real Estate v. Doe, CVG 08-20-2018 (a redacted copy of this case is held on file with the Cleveland Municipal Housing Court for academic purposes).

<sup>118</sup> Cleveland Municipal Housing Court Local Rule 6.13(A) incorporates phraseology very similar to the test enunciated in *Pepper Pike*. See *supra* text accompanying note 65. However, even if a tenant can meet the test, if they cannot meet the timeline constraints contained in 6.13(A), they are denied relief.

<sup>119</sup> *Pepper Pike v. Doe*, 421 N.E.2d 1303, 1306 (Ohio 1981).

<sup>120</sup> See Cleveland Municipal Housing Court Local Rule 6.13(A)(4) (requiring a tenant with a granted eviction on their record to be judgment free for a minimum of five years before being eligible to have their record sealed).

<sup>121</sup> Ohio Superintendence R. 5(A)(1).

<sup>122</sup> *Id.*

notice and an opportunity to comment on the proposed rule must be given whenever a court creates or changes a local rule.<sup>123</sup> Any changes to a court's local rules, once adopted, must be filed with the Ohio Supreme Court before February 1st of each year.<sup>124</sup>

These are the procedures that would need to be followed in amending Rule 6.13 to adopt real tenant protections. During any new notice and comment period, it can be anticipated that the objections to a new, tenant-focused version of the Rule would be the same as were voiced over the promulgation of the original Rule. One landlord stated their opposition this way: "It's difficult enough weeding our good tenants from bad tenants. If you expunge these records, my hands will be further tied, and unwanted tenants will find their way back in."<sup>125</sup> This objection does not take into account that the Rule does the weeding *for* landlords.<sup>126</sup> "Unwanted" tenants—presumably those that were evicted for just cause, such as criminal activity or failure to abide by the terms of a rental agreement—are not eligible to have their evictions sealed under the Rule as it currently is, or even under the broader *Pepper Pike* test.<sup>127</sup> This is because just-cause evictions are not "unusual and exceptional circumstances" as the *Pepper Pike* test requires.

The Rules of Superintendence also permit a court to enact rules immediately—without prior notice or opportunity to comment—in instances where the court determines that there is an immediate need for the rule.<sup>128</sup> Once enacted, notice and comment must be promptly afforded thereafter.<sup>129</sup> If the immediate need for an amendment of Rule 6.13 was not apparent previously, it is hard to envision a more apparent need than that caused by the coronavirus pandemic and its effects on renters.

#### B. *Envisioning a New Rule 6.13*

What would this stronger rule look like? The current rule is a start and represents some of what is possible under the court's authority, but with a few modifications, it could simultaneously be brought more in line with Ohio precedent and offer tangible protection to tenants in the Cleveland area. To accomplish this, this new Rule should be modeled after the following:

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<sup>123</sup> Ohio Superintendence R. 5(A)(2).

<sup>124</sup> Ohio Superintendence R. 5(C)(1).

<sup>125</sup> This quote was reported in Dissell, *supra* note 11.

<sup>126</sup> Cleveland Municipal Housing Court Local Rule 6.13(A) dictates the requirements and eligibility to have an eviction record sealed.

<sup>127</sup> Concerning just cause evictions related to nonpayment of rent, if an evicted tenant can successfully petition the court to expunge their eviction record by linking past failure to pay rent to extraordinary circumstances that existed at the time but do not exist now, a standard credit check and financial disclosures by the prospective tenant should supply all the information a property owner needs to make an informed decision on whether to accept or reject an application.

<sup>128</sup> Ohio Superintendence R. 5(A)(2).

<sup>129</sup> *Id.*



### 6.13 – Motion to Expunge and Seal Eviction Record

A. The Court shall order the Clerk to expunge and seal an eviction record in the following circumstances:

1. The court dismissed or entered judgment for the tenant/movant on the claim for eviction;
2. The landlord dismissed the claim for eviction before adjudication of that claim.

B. The Court may order the Clerk to expunge and seal an eviction record when the interest of justice in expunging and sealing the record outweighs the interests of the government and the public in maintaining a public record of the case, including, for example, in the following circumstances:

1. The landlord stipulates, in writing to the Court, to expunging and sealing the record; or
2. The landlord prevailed on the merits on the claim for eviction, but extenuating circumstances led to the eviction such that a permanent eviction record would represent an unjust and unwarranted punishment against the tenant.

C. Application to have an eviction record expunged and sealed under section 6.13(A)(1) and (2) must be made by motion. The following conditions apply:

1. The party seeking to have the record expunged and sealed must file a written motion, even if the landlord agrees to the expungement and sealing in a settlement agreement or agreed judgment entry. The motion must be accompanied by an affidavit attesting to all relevant facts.
2. The moving party must serve that motion upon the opposing party in the case at that party's last known address and endorse proof of service of the motion.
3. The opposing party may file a response within the time specified by the Housing Division Local Rule 3.052.<sup>130</sup>
4. Either party may request an oral hearing on the motion.
5. The Court, in its discretion, may order service of the motion or the notice of hearing upon the opposing party by certified mail.

D. The Court may consider all relevant factors when examining a Motion to Expunge and Seal Eviction Record, which may include, but are not limited to the following:

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<sup>130</sup> Cleveland Municipal Housing Court Rule 3.052(A) permits a party opposing a written motion to file with the clerk of court, and serve on the opposing party/counsel, an opposition memorandum within seven days from the date the motion to which the opposition is directed, was served, unless otherwise ordered by the Court. Failure to serve and file an opposition memorandum or brief may be construed by the Court as an admission that the moving party's motion should be granted.

1. The disposition of the eviction claim;
2. Whether the expungement and sealing of the record is agreed to or disputed by the opposing party;
3. If the landlord received judgment on the eviction, the grounds upon which the judgment was granted;
4. Whether the movant has satisfied any money judgment issued in favor of the opposing party in the eviction case; and
5. Any other information relevant to the determination of whether justice requires the expungement and sealing of the record.

E. If the Court grants a Motion to Expunge and Seal Eviction Record, the Clerk shall forthwith cause the Tenant's name to be redacted from all public records it maintains, including the electronic case index system, to the same extent that it would for a criminal sealing<sup>131</sup> of records (formerly known as expungement).

The changes represented in this new model Rule include a new Section A providing for automatic expungement of eviction records in which the claim of eviction was dismissed by the landlord or the court, or where the court entered a judgment in favor of the tenant. This change is fully justified under the two-part *Pepper Pike* test. First, a permanent record of an eviction filing that was dismissed or where the tenant prevailed—as discussed extensively above<sup>132</sup>—will inevitably result in an immediate and unjustified loss of future housing options for the tenant. Such an extreme punishment for a court action in which the tenant prevailed is not only repugnant to our scheme of justice, but punishing the innocent is certainly an unusual and extraordinary outcome. Second, when expunging the record of a dismissed eviction or an eviction claim in which the tenant prevailed, the interest of the tenant in their good name to be free from unwarranted punishment is extremely high. The very nature of the claim's outcome—dismissal or judgment entered for the tenant—indicates that the tenant was not convicted of any wrongdoing. By contrast, the government's interest in maintaining public records—although legitimate—is not so strong as to require a permanent record of claims that will inevitably cause great damage to the tenant. This is especially so where such records do not even chronicle any wrongdoing. When balancing such circumstances, the tenant's interest will always prevail.

Further, such an automatic expungement provision is not unprecedented. As discussed above, several states have implemented this same remedy for tenants statutorily.<sup>133</sup> Although such a remedy was accomplished in those states by the state legislatures, here, courts have the power to act by virtue of the *Pepper Pike* test until Ohio legislates tenant protections. Even then, unless the Ohio legislature occupies the

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<sup>131</sup> To the extent of the Ohio expungement statute.

<sup>132</sup> See *supra* Sections II.A and II.B.

<sup>133</sup> See *supra* Section II.C.2.

entire field of tenant protection statutorily, Ohio courts may still not be foreclosed from enacting their own tenant protections.<sup>134</sup>

Section B of the new model Rule removes the arbitrary timeline requirement of the original Rule—which limited both the availability of the rule generally, as well as limited the number of possible sealings by landlord consent. The *Pepper Pike* line of cases does not impose a time requirement and the implementation of one may represent a nearly insurmountable hurdle for evicted persons in need of relief. In this new model Rule, the court would be free to decide whether a tenant deserves relief based on all relevant information available, unbound by arbitrary timeline constraints. This would allow the court to “weed out” undeserving tenants—as landlords desire—without unduly preventing those who need and deserve relief from obtaining it. Further, as both the new model and current Rules require, the process of expunging an eviction is not one-sided—the opposing party to the original eviction claim always can object to the expungement of the record or give a response as to why it should not be expunged. These two elements—the court’s judgment and an adversarial process—strike a *real* balance between the interests of landlords and tenants.

One of the biggest improvements in the new model Rule is the removal of the disclosure requirement found in Section E of the current Rule. Because the court has the power under the *Pepper Pike* test to seal and *expunge* an eviction record, this would allow tenants with expunged records to legally and honestly attest on housing applications that such a record never existed. This key benefit would open up new housing opportunities to tenants with expunged eviction records and protect their housing options in the future.

### C. *How and Why the Court Should Amend Rule 6.13*

There are two reasons why the court would amend Rule 6.13—if it is compelled to do so or if it chooses to do so. What would compel the court to do so? Local rules can be changed as a result of an external challenge in one of two ways—inconsistent rules and unconstitutional rules. Local court rules inconsistent with the rules promulgated by the Ohio Supreme Court, or local rules in conflict with either the Ohio or Federal Constitution, may be struck down by higher courts if challenged.<sup>135</sup> Here, the Ohio Supreme Court has promulgated no rule that appears to conflict with Rule 6.13, and Rule 6.13 was promulgated by the Housing Court according to the proper procedures. Thus, the Rule is unlikely to be successfully challenged as inconsistent with current Ohio Supreme Court rules.

As discussed above, the Federal and Ohio Constitutions contain a right to privacy.<sup>136</sup> Here, although permanent eviction records arguably affect a violation of an individual’s privacy rights, the eviction process and open court records have their

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<sup>134</sup> *City of Youngstown v. Garcia* stands for the proposition that Ohio courts are only prohibited from granting the judicial remedy of expungement only when the State has statutorily defined who is eligible and what remedies are available. *See supra* note 84.

<sup>135</sup> *Vance v. Roedersheimer*, No. 12370, 1991 WL 108732, at \*3 (Ohio Ct. App. June 19, 1991) (holding local rule at issue to be in conflict with the Ohio Civil Rules of Procedure and therefore invalid).

<sup>136</sup> *See supra* Section III.B.2.

own long-standing precedent and basis in law and the constitution.<sup>137</sup> Further, local rules are rarely struck down as unconstitutional on either federal or state grounds.<sup>138</sup> Combining the strong American traditions of acquiring, possessing, and protecting property,<sup>139</sup> the tradition of maintaining open court records,<sup>140</sup> and the rarity of overturning local rules as unconstitutional,<sup>141</sup> a successful constitutional challenge to Rule 6.13 also seems unlikely. Indeed, there is an easier way to achieve a balance between the housing rights of tenants and the property rights of landlords than to demand the Housing Court upend more than two centuries of common law and tradition.

The best possibility of change for Rule 6.13 is for the court to choose to amend it. Why would it choose to do this? Some change has already come to the Housing Court in the past few years. In November 2019, the people of Cleveland voted in a new judge to the Cleveland Municipal Housing Court by a substantial margin.<sup>142</sup> The new judge is a former fair-housing administrator whose platform included several proposed changes to the Housing Court that would make it more accessible to low-income and working tenants, such as a night docket and satellite courts.<sup>143</sup> The need for housing courts across the country to take real action to protect tenants is higher than ever thanks to an unprecedented global pandemic. Amending Rule 6.13 is one way that the new court can provide powerful protection to evicted persons.

Currently, Rule 6.13 conforms technically to the Rules of Superintendence, the rules promulgated by the Ohio Supreme Court, and perhaps the Rule is even consistent

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<sup>137</sup> See *Gvozdanic v. Woodford Corp.*, 742 N.E.2d 1145, 1157 (Ohio Ct. App. 2000) (holding that eviction is a remedy based on the law of contracts); 35A AM. JUR. 2D *Forcible Entry and Detainer* § 2 (2020) (finding the origin of eviction remedies is rooted in a recognition of the right, at common law, to protect one's property); OHIO CONST. art. 1, § 1 provides for a property owner's right to possess and protect their property.

<sup>138</sup> One of the only instances of a court of appeals striking down a lower court's local rule on any constitutional grounds occurred 37 years ago in *Hemmelgarn v. Berning*, 460 N.E.2d 677, 679 (Ohio Ct. App. 1983) (holding that the local court rule effectively denied the appellant his right to a jury trial as accorded by the Ohio constitution).

<sup>139</sup> Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 LOY. L.A. INT'L & COMP. L. REV. 201, 203 (2007) (tracing the constitutional right to property back to 1789).

<sup>140</sup> *State ex rel. Cincinnati Enquirer v. Winkler*, 805 N.E.2d 1094, 1096 (Ohio 2004) (“[The Ohio Supreme Court has] consistently construed the Public Records Act to provide the broadest access to government records. . . . Therefore, in keeping with policy, it is apparent that court records fall within the broad definition of a ‘public record’ . . .”).

<sup>141</sup> See *supra* note 138 and accompanying text.

<sup>142</sup> Cliff Pinckard, *W. Mona Scott Defeats Incumbent Ronald J. H. O’Leary for Cleveland Housing Court Judge*, CLEVELAND.COM (Nov. 5, 2019), <https://www.cleveland.com/election-results/2019/11/w-mona-scott-holds-lead-over-incumbent-ronald-j-h-oleary-for-cleveland-housing-court-judge.html> (reporting that W. Moná Scott defeated incumbent Ronald J.H. O’Leary by a margin of more than eleven percent).

<sup>143</sup> *Id.* (“Scott has said she hopes to create satellite courts or add a night docket to Cleveland Housing Court, to make it easier for people to attend court sessions.”).

with the Federal and Ohio Constitutions. However, the precedents discussed above show that the Rule can go further. The court has two choices: retain the current Rule—which does little to nothing to aid evicted tenants—or use the power available to it to adopt a new model Rule that would offer tenants real protection.

#### V. CONCLUSION

At this point, it is fair to ask—if this argument is available to tenants and it has worked in the past,<sup>144</sup> why has no one yet proposed this change? Why do tenants not use this knowledge to their benefit? The answer is sadly simple. Those most likely to be evicted are low-income and are housing cost-burdened.<sup>145</sup> Evictions are summary judicial proceedings performed without the benefit of discovery and are focused on returning possession of the property to the landlord as quickly as possible.<sup>146</sup> The average eviction hearing in Cleveland Housing Court lasts three minutes and twenty-one seconds.<sup>147</sup> When an eviction judgment is rendered against a tenant, the result is one of the harshest imaginable—the loss of a home and a roof overhead. Evicted tenants are almost always unrepresented<sup>148</sup> and are unlikely to be interested in a protracted, rights-based appeal of their eviction when their immediate goal is to find shelter and a new home.

Tenants may take advantage of non-profit organizations such as legal aid organizations to defend them. However, legal aid organizations are federally

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<sup>144</sup> See *supra* note 117.

<sup>145</sup> Urban et al., *supra* note 27, at 4 (stating the key finding that [m]ost tenants in eviction court are low-income . . . and are highly housing-cost burdened).

<sup>146</sup> Hardy v. Hardy, No. 89905, 2008 WL 1822384, at \*2 (Ohio Ct. App. 2008) (“The purpose of the [eviction] statute ‘is to provide immediate possession of real property’ . . . . The drafters of the statute ‘were careful to avoid encrusting this special remedy with time consuming procedure tending to destroy its efficacy’. . . . Because of the summary nature of [eviction], ‘[e]xtensive discovery is contrary to the very purpose of the [eviction] statute.’”); Larson v. Umoh, 514 N.E.2d 145, 147 (Ohio Ct. App. 1986) (“[T]he statutory purpose of [eviction is] . . . ‘to provide a summary, extraordinary, and speedy method for the recovery of possession of real estate.’”).

<sup>147</sup> Urban et al., *supra* note 27, at 5 (“The average case lasted three minutes and 21 seconds. Fifty-nine percent of first hearings resulted in a judgment for the plaintiff, the consequence of which is most often the family moving. Fourteen percent were dismissed and 11% were sent to mediation.”).

<sup>148</sup> See Heidi Schultheis & Caitlin Rooney, *A Right to Counsel Is a Right to a Fighting Chance - The Importance of Legal Representation in Eviction Proceedings*, CTR. FOR AM. PROGRESS 1 (Oct. 2, 2019), [https://cdn.americanprogress.org/content/uploads/2019/10/01114529/Right-To-Counsel.pdf?\\_ga=2.255238410.364231249.1612286259-450851728.1612286259](https://cdn.americanprogress.org/content/uploads/2019/10/01114529/Right-To-Counsel.pdf?_ga=2.255238410.364231249.1612286259-450851728.1612286259) [<https://perma.cc/CG4E-XG22>] (finding that only ten percent of tenants going through the eviction process have representation); see also Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, 22 FAST FOCUS 5 (Mar. 2015), <https://www.irp.wisc.edu/wp/wp-content/uploads/2018/01/FF22-2015.pdf> [<https://perma.cc/FFX7-MUTN>]; Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 40 (2010).

prohibited from engaging in the promotion or pursuance of substantive change—legislative or otherwise—and frequently do not have the financial resources to pursue appeals.<sup>149</sup> Larger civil rights organizations such as the American Civil Liberties Union are aware of the problem of mass eviction, but their aim seems to be set on promoting legislative change at the state level.<sup>150</sup> The result is that the average evicted tenant is financially struggling, almost always unrepresented, or is represented by a party prohibited or disinterested in pursuing the type of arguments discussed in this Note.

The Local Rule and the *Pepper Pike* line of cases stand for the proposition that individuals who have served their initial punishment for deeds the result of “extraordinary circumstances” do not deserve to be continually punished for those same deeds. Doing so is contrary to public policy and repugnant to our scheme of justice. As in *Pinkney*, an individual acquitted of a crime he did not commit does not deserve to wear the scarlet letter of a public criminal record. As in *Pepper Pike*, an individual harassed by misuse of the criminal justice system does not deserve to be judged by those proceedings into the future. As in *Schussheim*, a voluntarily dismissed civil protection order should not be memorialized on an individual’s public court record for all time.

Local Rule 6.13 is not intended to enable the person who damages a rental property to find a new party house. It was not created to enable insolvent tenants to defraud landlords by “finding their way back in.” These are the circumstances that eviction laws were designed to prevent and punish,<sup>151</sup> and landlords will not be forced to open their doors to such tenants under the new model Rule. Instead, the Rule should be there to protect and assist tenants who have suffered an eviction due to extraordinary circumstances beyond their control—a situation that is becoming more and more prevalent.<sup>152</sup> The Rule should exist for the families who have to choose to stock the fridge instead of paying the rent this month;<sup>153</sup> for the woman evicted and rendered

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<sup>149</sup> 42 U.S.C. § 2996e(c)(2) (stating that a legal services corporation shall not “undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative bodies”).

<sup>150</sup> Sophie Beiers et al., *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, ACLU (Jan. 10, 2020), <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color/> (reporting that the ACLU of Massachusetts and the ACLU Women’s Rights Project provided testimony to the Massachusetts state legislature concerning a proposed eviction record sealing statute).

<sup>151</sup> OHIO REV. CODE ANN. § 1923.02(A)(6)(a)(i) (West 2018) (stating that a landlord may bring an eviction action against a tenant engaged in illegal drug related activity); OHIO REV. CODE ANN. § 1923.02(A)(8) (West 2018) (stating that a landlord may bring an eviction action against a tenant who fails to perform their statutory duty to keep the premises in good condition); OHIO REV. CODE ANN. § 5321.03(A)(1) (West 2007) (stating that a landlord may bring an eviction action against a tenant who is in default in the payment of rent).

<sup>152</sup> Cleveland Municipal Housing Court Local Rule 6.13(A)(4)(a) specifically limits the rule to tenants evicted for “extenuating” circumstances.

<sup>153</sup> See George Spencer & Alicia Victoria Lozano, *Many New Jersey and Pennsylvania Families Must Choose Between Rent, Food*, NBC PHILA. (May 20, 2018),

homeless because she was short on rent due to a bank error;<sup>154</sup> for the disabled and elderly couple unable to tend to their affairs;<sup>155</sup> and for the more than fifty-percent of all renters who have lost their jobs at some point during the coronavirus pandemic.<sup>156</sup> These are the tenants who are—and should be—eligible to take advantage of the protections of a new model Rule.

Eviction is a serious problem not just in Cleveland but across the nation. As rental rates rise, so too will the rates of eviction. What additional impact the coronavirus pandemic will have on eviction still looms in the near future. Rental housing is by nature impermanent and transient.<sup>157</sup> A neighbor moving in or out can be common in rental housing and neighbors may take no notice. Evictions can occur under our noses without drawing attention, but that pattern cannot—in a just society—be sustained forever.

Cleveland Municipal Housing Court has a chance to join the small but growing number of state and local governments taking action to defend the housing rights of tenants and setting the standards for others. Cleveland can make Local Rule 6.13 a model for courts across the nation by adopting the modifications suggested in this Note, but becoming such a model should always be secondary—and *must* be secondary—to protecting the housing rights of individuals and families who deserve a second chance. It is for those living without the hope that the Local Rule could provide that this Note is dedicated, and it is for their sakes that the Housing Court should amend Local Rule 6.13.

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<https://www.nbcphiladelphia.com/news/local/many-new-jersey-and-pennsylvania-families-must-choose-between-rent-food/2095436/>; Yepoka Yeebo, *Soaring Costs Force Some Renters to Choose Between Shelter and Food*, HUFFINGTON POST (June 26, 2011), [https://www.huffpost.com/entry/rent-vs-buy\\_n\\_852779](https://www.huffpost.com/entry/rent-vs-buy_n_852779); Clare O'Connor, *'I Have to Choose Between Food and Rent': Meet the McDonald's Workers Fighting for Fair Wages*, FORBES (July 20, 2013), <https://www.forbes.com/sites/clareoconnor/2013/07/22/i-have-to-choose-between-food-and-rent-meet-the-mcdonalds-workers-fighting-for-fair-wages/#36eade2b6639>.

<sup>154</sup> Defendant's Motion for a New Trial at 1, 3, *Gocan v. Bearden*, 2019 CVG 007530 (Clev. Mun. Ct. July 2, 2019) (tenant with health issues evicted due to bank error that resulted in a rent payment that was \$200 short to landlord).

<sup>155</sup> See *supra* note 117.

<sup>156</sup> Mackenzie Born, *Paying Rent During the Coronavirus: What Every Renter Should Know*, AVAIL, <https://www.avail.co/education/articles/paying-rent-during-the-coronavirus-what-every-renter-should-know> (last updated Feb. 8, 2021).

<sup>157</sup> David Barker, *Length of Residence Discounts, Turnover, and Demand Elasticity. Should Long-Term Tenants Pay Less Than New Tenants?*, 12 J. HOUS. ECON. 1, 5 (2003) (“[O]nly 11% of tenants under the age of 40 remain for four or more years.”).