

# COMMENT

## DECREASING THE ACCESSIBILITY TO CRIMINAL HISTORY RECORDS TO DIMINISH THE DEVASTATING IMPACTS OF COLLATERAL EFFECTS ON AFRICAN AMERICANS IN MINNESOTA

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“Does the state feel that people are ever rehabilitated?”<sup>1</sup>

### INTRODUCTION

Collateral effects are invisible,<sup>2</sup> civil punishments<sup>3</sup> attached

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\* J.D., University of St. Thomas School of Law, 2008; B.S., Troy University, 2002. I would like to thank Jane Dockery for encouraging me and further convincing me that I have an obligation to use the blessings God has given me to make this world a better place and that law school was the next important step towards doing my part to uplift the African American community. I would like to thank my grandmother, Gussie Moody, for being such a strong woman and ensuring that I broke the negative cycle afflicting our family; six out of seven of my aunts and uncles were, at one time, all addicted to crack-cocaine, as was my mother, who is still addicted to this day, and all three of my uncles and two younger brothers have spent significant time in prison. I would also like to thank K.T. Cole and Kisha Moody for supporting me. Special thanks to Nathaniel Khaliq and the Council on Crime and Justice, Judge Larry J. Cohen for making the fight for equal rights a life passion and an attainable goal and to Professor Rene Browser, “Race and the Law,” for ensuring that I had the tools to write this Comment and for providing the groundwork for my success in the legal profession despite the incredible obstacles that have been placed in his path.

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1. Gregg E. Johnson, Dist. Ct. J., Courtroom Speech, Consideration of Executive Agency Inherent Power Expungement (Oct. 18, 2006) (copy of court transcript on file with Ramsey County Dist. Ct.).

2. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 16 (Marc Mauer & Meda Chesney-Lind eds., 2002). Travis emphasizes that “[n]ot all criminal sanctions are as visible as prisons: We punish people in other, less tangible ways.” *Id.* at 15. He explores a “criminal sanction that is nearly invisible, namely, the punishment that is accomplished through the diminution of the rights

to any crime.<sup>4</sup> Collateral effects arise immediately following an arrest, but affect individuals more harshly upon conviction.<sup>5</sup> Collateral effects impinge on minorities at an astoundingly disproportionate rate; but much more than any other race, African Americans receive the brunt of it.<sup>6</sup> Minnesota's African American community is particularly more susceptible because Minnesota is one of the nation's leaders in the disparity of incarceration rates for African Americans,<sup>7</sup> disproportionate arrest rates for

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and privileges of citizenship and legal residency in the United States. . . . Because these laws operate largely beyond public view, yet have very serious, adverse consequences for the individuals affected, [they are an] invisible punishment." *Id.* at 15-16.

3. *Id.* at 16 ("Through judicial interpretation, legislative fiat, and legal classification, these forms of punishment have been defined as 'civil' rather than criminal in nature, as 'disabilities' rather than punishments, as the 'collateral consequences' of criminal convictions rather than the direct results.").

4. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002) (arguing that "Collateral consequences can operate as a secret sentence"). See also AMERICAN BAR ASSOCIATION, BLACK LETTER ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, BL-1 (August 2003), available at <http://www.abanet.org/leadership/2003/journal/101a.pdf> ("The term 'collateral sanction' means a legal penalty, disability or disadvantage . . . that is imposed on a person automatically upon that person's conviction . . . even if it is not included in the sentence."). The terms collateral effects, collateral consequences, and collateral sanctions are used synonymously throughout this Comment.

5. Tom Johnson, Pres. Council on Crime & Justice, Lecture at the Council on Crime and Justice: Why Arrest Legislation Should Be Approved in Minnesota (Nov. 22, 2006) (copy of transcript on file with author). ("Most people either discuss the consequences of arrest or the consequences of conviction. Although the consequences of conviction are worst than the consequences of arrest, the two should be considered together."). See Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 253 (2002) (asserting that collateral effects offer the most significant consequences of convictions); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 100-01 (1995) (warning that collateral effects may be considerably more important to the defendant than the sentence).

6. See generally Larry Cohen, Dist. Ct. J., Lecture in Chambers: Explanation of the Disproportionate Effects of Collateral Effects on the African American Community (Nov. 21, 2006) (copy of transcript on file with author) ("With the huge disproportionate number of African Americans males age 18 to 35 entering [Minnesota's] prison system, the African American community will continue to be devastated.").

7. HUMAN RIGHTS WATCH, UNITED STATES - PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS, INCARCERATION AND RACE 2 (2000), available at [http://www.hrw.org/reports/2000/usa/Rcedrg00-01.htm#P153\\_25380](http://www.hrw.org/reports/2000/usa/Rcedrg00-01.htm#P153_25380). (comparing racial disparity between U.S. states, the report concludes, "Minnesota has by far the highest disparity — black's in that state are incarcerated at 23 times the rate of whites." Moreover, in Minnesota "a black man is 26.8 times more likely to be in prison than a white man."); Council on Crime and Justice, *African American Males in the Criminal Justice System* 1 (2006) [hereinafter Council on C & J, *African American Males*], available at <http://www.crimeandjustice.org/Pages/Projects/RDI/African%20American%20Males%20in%20the%20Criminal%20Justice%20System.pdf> ("Compared to other states, Minnesota has the greatest black-to-white disparity in imprisonment rates.").

African Americans,<sup>8</sup> and poverty rates for African Americans.<sup>9</sup> Collateral effects have the ability to all but prevent African Americans from obtaining employment, decent housing, and government assistance.<sup>10</sup> After a dismissal following his arrest, or the completion of his sentence in a Minnesota correctional institution, an African American believes that the debilitating effects of the experience are over.<sup>11</sup> However, unbeknownst to the individual, the invisible shackles of collateral effects have already begun to materialize.<sup>12</sup>

In the past, the public could not easily access criminal history records. Remedies curtailing their availability were not compelling.<sup>13</sup> Today, technology has greatly increased the public's accessibility to criminal records.<sup>14</sup> The only protections left to in-

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8. Council on Crime and Justice, *Reducing Racial Disparities While Enhancing Public Safety, Key Findings and Recommendations*, 5 (2006) [hereinafter Council on C & J, *Racial Disparity*], available at <http://www.racialdisparity.org/files/Final%20Report-Reducing%20Disparity%20Enhancing%20Safety.pdf> (“Nationally, the disparity for African Americans and Whites was 4:1; which means that the arrest rate disparity in Minnesota is more than twice the national average.”).

9. The Brookings Institution, *Mind the Gap: Reducing Disparities to Improve Regional Competitiveness in the Twin Cities* 4 (2005), available at [http://www.brookings.edu/~media/Files/rc/reports/2005/10cities\\_sohmer/20051027\\_mindthegap.pdf](http://www.brookings.edu/~media/Files/rc/reports/2005/10cities_sohmer/20051027_mindthegap.pdf) (Though median household income is among the highest in the nation, 14th out of the 100 largest cities, Black household income is among the lowest. “In 2000, Whites had a median household income of \$56,642, while the typical household income for African Americans lagged at \$29,404 and \$38,909 for Mexicans.”); see The Minneapolis Foundation, *Opportunities for All — Closing the Racial Disparities Gap in Minnesota* 2 (2006), available at <http://www.minneapolisfoundation.org/publications/OpportunityforAll.pdf> (1 in 17 of Minnesotans living below the poverty line are White and 1 in 4 are African American.); Legislative Auditor – State of MN, *Welfare Reform: Summary* (2000), available at <http://www.auditor.leg.state.mn.us/PED/2000/0003sum.htm> (“In 1999, 3 percent of Minnesota’s white, non-Hispanic children were on welfare, compared with 40 percent of African Americans.”).

10. CRIMNET, BACKGROUND CHECKS AND EXPUNGEMENTS – RESEARCH REPORT 87 (2006) [hereinafter BACKGROUND CHECKS], <http://www.crimnet.state.mn.us/GovOrg/DataPracticesDeliveryTeam/ResearchReport.pdf> (“Current law presents a tremendous barrier for people. There are not enough options. People aren’t getting a remedy for obtaining housing, jobs, or to get into the military.”).

11. *Id.* (“When arrested, some people are most concerned about going home, keeping the kids, and not going to jail because they would lose their jobs. They’re told it’s ‘dismissed’ if you plea. But it’s guilt, with many consequences. People aren’t informed and don’t understand. Low level cases are decided on fear. Some take the \$50 fine and go home. Entry level health care positions are common way [sic] to get into society. The explanation should say, if you accept a plea, you can’t work at your regular job any more.”).

12. See Chin, *supra* note 5, at 253 (“The real sentence comes like a ton of bricks in the form of a series of statutes denying convicted felons a variety of rights.”).

13. CrimNet, *Expungement Sub-Team: Meeting Minutes Aug. 11, 2006* (2006) [hereinafter *Meeting Minutes*], <http://www.crimnet.state.mn.us/GovOrg/DataPracticesDeliveryTeam/Eminutes081106.pdf> (The current expungement statute is narrow and not very helpful to many because it was implemented before widespread electronic distribution.).

14. See Jon Bonné, *Most Firms Now Use Background Checks, Survey: 8 in 10 Probe Criminal History Amid Security Worries*, MSNBC, Jan. 21, 2004, <http://www.msnbc.msn.com/id/4018280> (“Most companies now conduct criminal background

dividuals with criminal records are mechanisms restricting the public's accessibility to criminal history records. These mechanisms include laws limiting access to criminal history information,<sup>15</sup> laws governing expungements,<sup>16</sup> and laws governing pardons.<sup>17</sup> However, these mechanisms have recently been reduced to a state of either non-effectiveness or obscurity.<sup>18</sup> Faced with continual denials for housing, rejections for employment derived from criminal background checks,<sup>19</sup> and Minnesota laws prohibiting government assistance, rehabilitated African Americans are forced to return to criminal activity to provide for themselves and, as a result, back to Minnesota correctional institutions. This Comment calls for a change in specific laws governing the accessibility to criminal history records in Minnesota, pre-conviction and post-conviction, to reduce the impact of collateral effects — especially the impact of such effects on the African American community.

This Comment explores the collateral effects that directly impact the African American community in Minnesota. First, I will discuss Minnesota's current mechanisms which seek to limit the public's accessibility to criminal history records, including the laws governing the dissemination of criminal history information to the public, Minnesota's current state of expungement law, and Minnesota's pardon law. Second, I will discuss the grossly disproportionate incarceration rate in Minnesota and present further

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checks on potential employees. . . . A sharp increase in this practice . . . reflects both corporate America's heightened security concerns after Sept. 11 and the growing public availability of personal information."); CRIMNET, BACKGROUND CHECKS, *supra* note 10, at 83 (In Hennepin County, MN in 2000, 318 people were granted expungements and in 2005, the number rose to 1,295).

15. MINN. STAT. § 364.04 (2004) (mandating that arrest and/or expunged records not to be used by public employers or for licenses); *see* MINN. STAT. § 364.01 (2006) (declaring that it is the state's policy to encourage rehabilitation and that the legislature understands that the opportunity to work is essential); MINN. STAT. §13.87 (2005) (defining the Minnesota Government Data Practices Act, which governs access to government data in the executive branch and interprets "criminal history data"); MINN. STAT. § 13.04 (2005) (outlining procedures for inspecting and accessing criminal records).

16. CRIMNET, BACKGROUND CHECKS, *supra* note 10 (arguing that the *Schultz* case has severely affected the power of the courts to make executive agency expungements). *See* Four C's, Collateral Consequences of Criminal Charges – New York State, <http://www2.law.columbia.edu/fourcs/index.html> (last visited Oct. 21, 2006).

17. MINN. STAT. § 638.02, subd. 1 (2004) ("The board of pardons may grant an absolute or a conditional pardon . . .").

18. *See* Travis, *supra* note 2, at 16 ("Over the same period of time that prisons and criminal justice supervision have increased significantly, the laws and regulations that serve to diminish the rights and privileges of those convicted of crimes have also expanded.").

19. CriMNet, *Meeting Minutes*, *supra* note 13, at 3 ("In the civil system, an employer does not have to presume innocence. What we're talking about is information gathered by law enforcement and the courts, and its downstream use by the private sector."). *See* Bonné, *supra* note 14.

proof as to why African Americans are subjected to disproportionate collateral effects upon release. Third, I will highlight the disparity in the arrest rate of African Americans in Minnesota to stress why mechanisms which decrease accessibility to criminal records must focus on arrest records as well as conviction records. Fourth, I will discuss the disparate impact of collateral effects on African Americans in Minnesota. Finally, this Comment provides recommendations to serve as a guide to the public, community activists, legislators and the judiciary to facilitate change of these laws.

### I. MECHANISMS FOR DEPRESSING CRIMINAL HISTORY ACCESSIBILITY IN MINNESOTA

After an arrest in Minnesota, a person has limited options available to avoid the collateral effects of a criminal conviction. Perhaps the best option, aside from an outright dismissal, is a "continuance for dismissal."<sup>20</sup> The person may ask the prosecutor for a continuance for dismissal which in effect will dismiss all charges against the person, if the person conforms to certain conditions mandated by the prosecutor.<sup>21</sup> If the continuance is denied, the defendant may petition the court for a stay of imposition or stay of execution.<sup>22</sup> A stay of imposition or stay of execution requires that a person make a plea of guilty.<sup>23</sup> However, imposition is stayed (not executed) until the person conforms to the requirements of the order, usually probation, restitution, community service, etc.,<sup>24</sup> after which time a felony may be reduced to a misdemeanor.<sup>25</sup> In some cases, a person may receive a stay of adjudication, in which case a plea of guilty

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20. *State v. C.P.H.*, 707 N.W.2d 699, 702 (Minn. Ct. App. 2006) (explaining that continuance for dismissal differs from a stay of imposition in that it involves neither a guilty plea nor a finding of guilt).

21. MINN. STAT. § 609.132 (2004) ("The decision to offer or agree to a continuance of a criminal prosecution is an exercise of prosecutorial discretion resting solely with the prosecuting attorney.").

22. MINN. STAT. § 609.135 (2004) ("Except when a sentence of life imprisonment is required by law, or when a mandatory minimum sentence is required . . . any court may stay imposition or execution of sentence . . .").

23. See generally Chin & Holmes, *supra* note 4, at 697 ("Because over ninety percent of criminal convictions result from guilty pleas, perhaps the most important service criminal defense lawyers perform is advising their clients whether to plead guilty and on what terms.").

24. MINN. STAT. § 609.135 subd. 1(b) (2004) ("[I]ntermediate sanctions includes but is not limited to incarceration in a local jail or workhouse, home detention, electronic monitoring, intensive probation, sentencing to service, reporting to a day reporting center, chemical dependency or mental health treatment or counseling, restitution, fines, day-fines, community work service, work service in a restorative justice program, work in lieu of or to work off fines and, with the victim's consent, work in lieu of or to work off restitution.") (internal quotes omitted).

25. *Id.*

is given, however, the state will dismiss the matter if he complies with the conditions.<sup>26</sup> The legislature created these tools to provide an avenue whereby people could avoid the devastating consequences<sup>27</sup> of collateral effects.<sup>28</sup> Even so, when these cases have reached the above mentioned dispositions, no tool currently exists in Minnesota to allow for the sealing of the arrest records. Therefore, the arrest data may still be accessed by persons who conduct criminal history checks without the disposition of the arrest being made known to the investigating person or business.<sup>29</sup>

When the person is arrested, a record of his arrest along with any other identifying information is reported to Minnesota's central repository.<sup>30</sup> The central repository is the Bureau of Criminal Apprehension (BCA).<sup>31</sup> The BCA then keeps a record on file for that person.<sup>32</sup> Any member of the community may go to the BCA or any authorized dissemination terminal and receive only conviction data on an individual.<sup>33</sup> However, the public can still access the arrest data with the arrestee's authorized signature.<sup>34</sup>

26. MINN. STAT. § 152.18 (2004) (deferring prosecution for certain first time drug offenders).

27. Chin & Holmes, *supra* note 4, 716 ("In some defendant's cases the consequences of conviction may be so devastating that even the faintest ray of hope offered by a trial is magnified in significance.") (quoting ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 204 (4th ed. 1984)).

28. For example, the purpose and effect of MINN. STAT. § 609.13, subd. 1. is to avoid imposition of most legal disabilities that accompany a felony conviction, including those in administrative licensing proceedings.

29. See, e.g., Johnson, *supra* note 1 (discussing a defendant who petitioned for expungement explaining that an arrest put on her record in 1979 but dismissed by the prosecutor still prevented her from obtaining decent employment and housing).

30. MINN. STAT. § 299C.11 (2004) (requiring police and courts to report arrest and conviction information to the BCA); MINN. STAT. § 299C.10 (mandating that identification data is required to be reported to the BCA including finger and thumb prints, photographs, distinctive physical marks). See MINN. STAT. § 13.87 (defining the Minnesota Government Data Practices Act, which governs access to government data in the executive branch and interprets "criminal history data"); MINN. STAT. § 13.04 (outlining procedures for inspecting and accessing criminal records).

31. Minn. Dept. of Pub. Safety, Bureau of Criminal Apprehension Criminal Justice Information Systems, [http://www.dps.state.mn.us/bca/CJIS/Documents/CCHInformation.html#What%20is%20the%20Computerized%20Criminal%20History%20\(CCH\)%20system](http://www.dps.state.mn.us/bca/CJIS/Documents/CCHInformation.html#What%20is%20the%20Computerized%20Criminal%20History%20(CCH)%20system) (last visited Nov. 23, 2006) ("The Computerized Criminal History (CCH) System is the State central repository for [arrest] data. . . . It is used by the criminal justice community for decisions regarding investigations, arrests, bail/bond, criminal charges, plea bargains, convictions, probation, and placement in correctional facilities. It is also used during mandated background checks on individuals seeking employment or licensing for various positions.").

32. See MINN. STAT. § 13.87 (stating that criminal history data is "public data for 15 years. . . ."); MINN. STAT. § 299.C11.

33. Minn. Dept. of Pub. Safety, *supra* note 31; MINN. STAT. § 13.87, subd. 1.

34. Minn. Dept. of Pub. Safety, *supra* note 31 (noting that authorized agencies receive arrest data and such data may be obtained with the arrestee's authorized signature).

Publicly available arrest data is highly prejudicial and arguably irrelevant as the dispositions of the arrests have not been determined. The potential to “publicly convict” and deny employment and housing to someone for a crime of which they have not yet been adjudicated guilty is extremely high. To combat this, the BCA has determined that arrest data will not be made publicly available.<sup>35</sup> This decision is admirable as most states are moving in the direction of making their arrest data public.<sup>36</sup> Currently, 15 states make their arrest data available to the public through their central repositories.<sup>37</sup> Another 17 states make exceptions which allow the data to be obtained almost as freely through their central repositories.<sup>38</sup> Minnesota makes such an exception.<sup>39</sup> Minnesota’s privately held arrest data law currently allows businesses to receive the arrestee’s information with a notarized signature from the individual who is the subject of the arrest data.<sup>40</sup> Therefore, employers and/or landlords not authorized by the State of Minnesota to receive arrest data circumvent the ostensibly restrictive law by requiring individuals to provide a notarized signature before receiving consideration for the housing and/or job. Minnesota’s legislature should act to change this law to require that no unauthorized agency access arrest data by requiring or even suggesting that the potential employee or tenant provide their signature for authorization of her criminal record. In fact, the law should be amended such that all arrest data is automatically sealed from anyone except criminal justice agencies. This would still allow relevant conviction data to be accessed and used to make a judicious determination of employability.

A second mechanism for decreasing accessibility to criminal history records in Minnesota is expungement.<sup>41</sup> Expungement is

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35. *Id.* (“[P]ublic information does not include . . . arrest history.”). See MINN. STAT. § 364.04 (mandating that arrest and/or expunged records not be used by public employers or for licenses); Minn. Dept. of Pub. Safety, *supra* note 31 (However, arrest data may still be obtained with the arrestee’s authorized signature).

36. See Travis, *supra* note 2, at 16; Bonn , *supra* note 14.

37. Shawn D. Stuckey & Heather E. Chaussee, *Criminal Record Accessibility Survey: A Summary of Arrest and Conviction Information Among the 50 States Maintained by the State’s Central Repository*, <http://www.crimeandjustice.org> (forthcoming 2008) (copy on file with author and Council on Crime and Justice) (15 states make arrest data public, however 17 states have exceptions which make arrest data accessible).

38. *Id.*

39. Minn. Dept. of Pub. Safety, *supra* note 31 (“Private record information may only be accessed by . . . [a]ny individual that has a notarized Informed Consent Form signed by the adult subject of the record.”).

40. *Id.*

41. Jon Geffen & Stefanie Letze, *Chained To The Past: An Overview Of Criminal Expungement Law In Minnesota-State v. Schultz*, 31 WM. MITCHELL L. REV. 1331, 1333 (2005).

the removal of a conviction from a person's criminal record.<sup>42</sup> An expungement only seals a person's criminal record; it does not destroy it.<sup>43</sup> Minnesota has two types of expungements: statutory and inherent power.<sup>44</sup> Statutory expungement exists in two laws.<sup>45</sup> Minnesota Statute § 609A calls for the "sealing" of records for all proceedings which have ended "in favor of" the defendant,<sup>46</sup> juvenile records,<sup>47</sup> and certain drug convictions.<sup>48</sup> Minnesota Statute § 299C.11 covers the second form of statutory expungement (arrest only records).<sup>49</sup> The two are often interrelated<sup>50</sup> and both call for no findings of guilt.<sup>51</sup> If a person is arrested but not charged, she may have her arrest records returned and in some cases other identification<sup>52</sup> data returned simply by requesting them<sup>53</sup> without the need to petition for an expungement.<sup>54</sup> However, she *must* request these records.<sup>55</sup> This request involves money and, more importantly, the knowledge that one may utilize this tool.<sup>56</sup>

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42. *State v. C.P.H.*, 707 N.W.2d 699, 705 (Minn. Ct. App. 2006) ("Expungement means to erase all evidence of the event as if it never occurred . . .") (internal citation and quotes omitted); BLACK'S LAW DICTIONARY (8th ed. 2004) (defining expungement of record).

43. MINN. STAT. § 609A.01 (2006).

44. *State v. Ambaye*, 616 N.W.2d 256, 258 (Minn. 2000) (explaining that court order or statutory authority may provide expungement); MINN. STAT. § 609A.01.

45. MINN. STAT. § 609A.01; MINN. STAT. § 609A.02; MINN. STAT. § 299C.11 (calling for the return of arrest-only records and law enforcement identification data).

46. *Ambaye*, 616 N.W.2d at 257.

47. MINN. STAT. § 609A.02 subd. 2 (stating that expungement may be offered where petitioner was a juvenile prosecuted as an adult).

48. *Id.* at subd. 1 (allowing the sealing of all arrest records for possession of controlled substance).

49. MINN. STAT. § 299C.11 (2006).

50. *State v. Bragg*, 577 N.W.2d 516 (Minn. Ct. App. 1998) (holding that defendant may seek an order for recovery of identification evidence in the same proceedings as a petition for expungement).

51. MINN. STAT. § 609A.02 subd. 3 (providing for the sealing of all records relating to arrest where proceedings were resolved in favor of the petitioner).

52. MINN. STAT. § 299C.11 (defining "identification data" as fingerprints, mug shots, and any other information collected).

53. MINN. STAT. § 299C.11 (defining the Law Enforcement Identification Data Statute as calling for the return of arrest-only records and law enforcement identification data).

54. MINN. STAT. § 299C.11 (requiring that all charges be dismissed before finding probable cause or no charges were filed and no indictment was given and the person not be convicted of any felony or gross misdemeanor within ten years preceding the event).

55. MINN. STAT. § 609A.03 (2007) ("An individual . . . seeking the expungement . . . shall file a petition . . . and pay a filing fee. . . . The filing fee may be waived in [some] cases. . . .").

56. *See id.*; CriMNet, *Meeting Minutes*, *supra* note 13, at 2 ("The issue of poverty. Lots of people are represented by public defenders. These people are not good at paperwork and don't have lawyers representing them. [E]ven now, public defenders have a double case load. . . . Middle class people get lawyers. Hope that people here are thinking about how not to exacerbate the growing gap. Brookings Institu-

The second form of statutory expungement in Minnesota requires that all proceedings have ended “in favor of” the petitioner.<sup>57</sup> Examples would include a decision by the prosecutor not to charge the case<sup>58</sup> or a not guilty verdict.<sup>59</sup> Similarly, this request involves money and knowledge.<sup>60</sup>

Minnesota also allows for two forms of convicted records to be expunged.<sup>61</sup> Minnesota Statute § 609A.02 permits expungement when a person is convicted of certain drug offenses<sup>62</sup> and for a juvenile convicted as an adult.<sup>63</sup> An order for statutory expungement is extended to all agencies that have a record of the incident<sup>64</sup> including the BCA,<sup>65</sup> where a vast majority of the requests are made for criminal history information.<sup>66</sup>

Inherent power expungement, the second form of expungement in Minnesota, when given its full authority, is arguably the most important current judicial remedy in Minnesota for stemming the backlash of collateral effects.<sup>67</sup> Inherent power expungement gives the court the discretion to consider, on a case by case basis, an individual’s need to have his or her record expunged. The court examines whether the petitioner’s constitutional rights have been infringed by the publication of the information.<sup>68</sup> If not, the court determines whether the balancing test (society’s need to know of the person’s criminal history past against the detriment to the rehabilitation efforts of the individ-

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tion report, Kerner Commission report 40 years ago – all of it has come true in Minnesota. So make arrest records disappear automatically, to help lessen the gap between rich and poor. You can’t tell a homeless guy to come back in two years and petition.”).

57. *Ambaye*, 616 N.W.2d at 257.

58. *Id.* at 256.

59. *See, e.g.*, *State v. M.C.*, 304 N.W.2d 362 (Minn. 1981). *See State v. Schultz*, 676 N.W.2d 337, 340 (Minn. Ct. App. 2004) (holding that expungement applies in these cases unless the agency whose records would be affected shows by “clear and convincing evidence” that the interests of the public and public safety outweigh the disadvantages to petitioner of not sealing the record.).

60. MINN. STAT. § 609A.03.

61. MINN. STAT. § 609A.02 subd. 2 (2007) (allowing for juvenile records to be expunged); MINN. STAT. § 609A.02 subd. 1 (allowing for certain drug charges to be expunged).

62. Specifically, possession of controlled substance violations. MINN. STAT. § 609A.02 subd. 1.

63. MINN. STAT. § 609A.02 subd. 2 (allowing expungement where petitioner was a juvenile convicted as an adult).

64. MINN. STAT. § 609A.01 (“The remedy . . . prohibit[s] the disclosure of their existence or their opening except under court order or statutory authority.”).

65. *See id.*

66. Geffen & Letze, *supra* note 42, at 1360-61.

67. *See State v. C.A.*, 304 N.W.2d 353, 357-58 (Minn. 1981) (affirming that district courts have the inherent authority to control their own records and those of their agents, along with the equitable power to prevent unfairness to individuals).

68. *Id.* at 358 (“[P]etitioner’s constitutional rights may be seriously infringed by retention of his records.”) (internal citation omitted). Expungement is almost never granted on this basis because of the compelling interest of the state.

ual) has been fulfilled.<sup>69</sup> In the past, inherent authority sealed the records of not only the judicial branch but any records held by executive agencies like the BCA.<sup>70</sup> Now, recent case law has changed this once viable option.<sup>71</sup>

The Minnesota Appellate Court in *State v. Schultz*<sup>72</sup> determined district courts may not expunge records held at the BCA, thus removing the inherent authority of the courts to grant executive agency expungements.<sup>73</sup> A petitioner may petition the court for an expungement, however, their expungement will only have the force on the court and will only cover court records.<sup>74</sup> So in Minnesota, after a judge's well considered determination of rehabilitation, a court cannot order the BCA to seal the records. Since almost all employment agencies and landlords go through the BCA to obtain criminal history information, the expungements become meaningless.<sup>75</sup> "When it comes to expungements, this eliminates the power of an independent judiciary."<sup>76</sup> No longer may judges make individual determinations of worthiness and rehabilitation; an individual who is successfully rehabilitated will have no remedy to escape the consequences of collateral effects.

A third mechanism available to Minnesotans to decrease the accessibility of criminal history records is a judicial pardon.<sup>77</sup> Some who are opposed to granting executive agency expunge-

69. *Id.* ("[T]he court must decide whether expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public. . .").

70. *State v. P.A.D.*, 436 N.W.2d 808 (Minn. Ct. App. 1989).

71. *See Schultz*, 676 N.W.2d at 342-43 (holding that separation of powers doctrine limits inherent power of court to records held by judiciary).

72. *Id.*; *See generally* CRIMNET, BACKGROUND CHECKS, *supra* note 10 ("The *Schultz* case has become a focal point and center of controversy for the discussion about courts' lack of authority to order executive branch agencies, notably the BCA and other law enforcement agencies, to expunge their records under inherent authority expungement orders of the courts.").

73. *Schultz*, 676 N.W.2d at 342-43 (upholding *State v. T.M.B.*, 590 N.W.2d 809 (Minn. Ct. App. 1999)) (holding that courts' expungement authority does not extend to situations where the records are held by agencies of another branch of government absent evidence of "an injustice resulting from an abuse of discretion in the performance of a governmental function."). *See State v. H.A.*, 716 N.W.2d 360, 363 (Minn. Ct. App. 2006) (upholding *Schultz*); *State v. A.C.H.*, 710 N.W.2d 587, 591 (Minn. Ct. App. 2006) (upholding *Schultz*).

74. *Schultz*, 676 N.W.2d at 342-43.

75. Geffen & Letze, *supra* note 41, at 1360-61; Johnson, *supra* note 1 ("Reality is [an inherent power of court expungement] doesn't make much of a difference because employers and landowners go to the BCA. This is a decision the Supreme Court should look into.").

76. Johnson, *supra* note 1 (The removal of inherent power expungement "eliminates the power of judges. The surprising thing is that the court of appeals is responsible for taking this power away.").

77. MINN. STAT. § 638.02, subd. 1 ("The board of pardons may grant an absolute or a conditional pardon . . ."). *See* CRIMNET, BACKGROUND CHECKS, *supra* note 10, at 66 ("Every state constitution provides for an executive pardon authority. In 42 states and for federal offenders, pardon is the only system-wide mechanism for

ment look to judicial pardons as a possible solution for African Americans with criminal records.<sup>78</sup> The Minnesota Board of Pardons<sup>79</sup> may determine an individual deserving of a pardon.<sup>80</sup> The Board of Pardons purportedly has the power to nullify a conviction.<sup>81</sup> Those who suggest this alternative, argue that a pardoned record allows the recipient the benefit of never having to reveal the conviction ever again except for a few defined circumstances.<sup>82</sup> However, this is very misleading because pardons are rarely given; in fact in the last 22 years, the Board of Pardons have granted no pardons, and very few applications for pardon extraordinary have ever been granted.<sup>83</sup> Additionally, when a pardon or pardon extraordinary is granted, the record of a pardon is never sealed.<sup>84</sup> Therefore, the BCA may still access the record. Landlords and employers will still see the criminal record.<sup>85</sup> Since the person may legally deny the conviction,<sup>86</sup> the landlord or the employer will think the person is being dishonest and deny the individual an opportunity for employment or housing.<sup>87</sup> Additionally, unless the person has received a pardon (and

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relief by which adult felony offenders can mitigate collateral effects of their convictions.”).

78. See generally Geffen & Letze, *supra* note 41, at 1346.

79. CRIMNET, BACKGROUND CHECKS, *supra* note 10, at 66 (“The Governor, Attorney General, and Chief Justice of the Supreme Court constitute the Board of Pardons.”).

80. See MINN. STAT. § 638.02, subd. 1.

81. *Id.*

82. MINN. STAT. § 638.02, subd. 2 (“The pardon extraordinary, when granted, has the effect of setting aside and nullifying the conviction and of purging the person of it, and the person shall never after that be required to disclose the conviction at any time or place other than in a judicial proceeding or as part of the licensing process for peace officers.”).

83. See CRIMNET, BACKGROUND CHECKS, *supra* note 10, at 60, 66 (“In Minnesota, pardons are very rare. . . . [P]ardons are used sparingly in all but a very few U.S. jurisdictions.”); Telephone Interview with Randolph J. Hartnett, Sec.- Minn. Bd. of Pardons, Minn. Dept. of Corrections, Policy and Legal Services, Adminstr. - Interstate Agreement on Detainers (Apr. 16, 2007) (copy on file with author). See generally MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION MN3 (2007), available at [http://www.sentencingproject.org/tmp/File/Collateral%20Consequences/Minnesota\(2\).pdf](http://www.sentencingproject.org/tmp/File/Collateral%20Consequences/Minnesota(2).pdf) (last visited Nov. 24, 2006) (“In 2003, 10 pardons granted out of a total of 17 applicants – six denied, one did not appear for hearing. Three found ineligible.”) (citing MINNESOTA BOARD OF PARDONS, ANNUAL REPORT TO THE LEGISLATURE: 2003 ACTIVITY (2004), available at <http://www.doc.state.mn.us/publications/legislativereports/pdf/2004/BOP%202003%20report.pdf>).

84. State v. Haugen, No. C4-98-1400, 1999 WL 138730, at \*1 (Minn. Ct. App. 1999) (asserting that the statute calls for a copy of the pardon to be sent to the executive agencies but does not call for them to seal the record).

85. Geffen & Letze, *supra* note 41, at 1360-61.

86. MINN. STAT. §638.02, subd. 2.

87. Geffen & Letze, *supra* note 41, at 1346-47.

not pardon extraordinary), the criminal record may still be used against them in a court to impeach their testimony.<sup>88</sup>

Minnesota's initial efforts in decreasing accessibility to criminal history information were noble. Now, the state must further reform its laws to improve their current effect and address the increasingly disproportionate numbers of African American's entering its prisons.

## II. RACIAL DISPARITIES IN MINNESOTA'S PRISON SYSTEM

Nationally, thirty-two percent of all African American males will spend time in prison.<sup>89</sup> Although African Americans only constitute thirteen percent of the American population,<sup>90</sup> forty-six percent of prison inmates and forty-two percent of jail inmates are African American.<sup>91</sup> Additionally African Americans are thirty-two percent of people arrested<sup>92</sup>

In Minnesota the story is even more appalling.<sup>93</sup> As one community activist noted, "[w]e have plantations in Minnesota in 2006, they're called prisons."<sup>94</sup> "The racial disparity in Minne-

88. MINN. STAT. § 638.02, subd. 2 (establishing that a finding that the individual has been convicted of no other criminal acts and is of good character and reputation by the parole board will have the effect of restoring the civil rights of the individual and will not preclude the conviction from being used for impeachment.)

89. Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Offenders Statistics*, <http://www.ojp.usdoj.gov/bjs/crimoff.htm#findings> (last visited Oct. 6, 2006) ("[A]n estimated 32% of black males will enter State or Federal prison during their lifetime, compared to 17% of Hispanic males and 5.9% of White males."). See Bruce Western et al., *Black Economic Progress in the Era of Mass Imprisonment*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 165, 168 (Marc Mauer & Meda Chesney-Lind eds., 2002) (finding that among high school dropouts, African Americans are four times more likely than Caucasians to be in prison or jail).

90. Bureau of Justice Statistics, *supra* note 89.

91. DENNIS SCHRANTZ & JERRY MCELROY, *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* 3 (Jenni Gainsborough & Marc Mauer eds., 2000), available at [http://www.sentencingproject.org/Admin/Documents/publications/rd\\_reducingrdmanual.pdf](http://www.sentencingproject.org/Admin/Documents/publications/rd_reducingrdmanual.pdf); Bureau of Justice Statistics, U.S. Dep't of Justice, *Census Of State And Federal Correctional Facilities, 2000* 3 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/csf00.pdf>.

92. HUMAN RIGHTS WATCH, *supra* note 7 (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *1998 Sourcebook*, at tbl.4.10 (arrests) & 6.28 (jail inmates)).

93. See Associate Justice Alan Page, *Bias in the Courts?*, <http://www.courts.state.mn.us/district/0/?page=NewsItemDisplay&item=20243> (last visited Oct. 22, 2006) (explaining that "[C]ompared with Caucasians, African Americans are] arrested more often, charged more often, given tougher plea bargains, given higher bails, less fair trials, . . . [are] under-represented in justice system jobs and over-represented in [Minnesota's] prisons.") (emphasis added). See generally Thomas L. Johnson & Cheryl Widder Heilman, *An Embarrassment to All Minnesotans: Racial Disparity in the Criminal Justice System*, 58 BENCH & B. MINN. (May 2001), available at <http://www2.mnbar.org/benchandbar/2001/may-jun01/racial-disparity.htm>.

94. *Call to Justice Forum*, (TPT (Twin Cities Public Television)) (Sat. Nov. 18, 2006) (TV broadcast) (panelist describing Minnesota's prison system).

sota's criminal justice system is one of the worst in the nation."<sup>95</sup> Minnesota and Iowa have the highest percentage of African American incarceration in proportion to their respective populations than any of the other states.<sup>96</sup> But as of 2000, Minnesota had by far the highest disparity of incarceration rates for African Americans in the country.<sup>97</sup> The percentage of African Americans in prison in Minnesota was twelve times greater than their share of the state population.<sup>98</sup> Moreover, one in every twenty-four African American males is in prison while only one in every six hundred and forty-two Caucasian males is incarcerated.<sup>99</sup> In 1999, African Americans represented three and a half percent of Minnesota's population, but thirty-five percent of the adult male prison population.<sup>100</sup> These statistics speak volumes about the numbers of African Americans presently faced with the consequences of collateral effects.

### III. RACIAL DISPARITIES IN MINNESOTA ARREST RATES

Currently, a person's arrest information is not sealed in Minnesota. Therefore, mechanisms which decrease accessibility to criminal records must focus on arrest records as well as conviction records to address the problems created by the disparity in the arrest rate of African Americans in Minnesota. The arrest rate in Minnesota for African Americans to Caucasians is ten to one.<sup>101</sup> This is more than twice the national average.<sup>102</sup> In the year 2000 alone, the state arrested and booked almost half of all African American males between the ages of eighteen and thirty

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95. HUMAN RIGHTS WATCH, *supra* note 7 (finding that Minnesota has the greatest racial disparity in incarceration of any state in the nation: "Minnesota has by far the highest disparity — blacks in that state are incarcerated at 23 times the rate of whites."); See also Council on C & J, *African American Males*, *supra* note 7, at 1 ("Compared to other states, Minnesota has the greatest black-to-white disparity in imprisonment rates.")

96. HUMAN RIGHTS WATCH, *supra* note 7 ("In Minnesota and Iowa, blacks constitute a share of the prison population that is twelve times greater than their share of the state population.")

97. *Id.* (see specifically Figure 3, found at <http://www.hrw.org/reports/2000/usa/Figure3.pdf>).

98. *Id.* (see specifically Figure 2, found at <http://www.hrw.org/reports/2000/usa/Figure2.pdf> and Table 5 at <http://www.hrw.org/reports/2000/usa/Table5.pdf> reporting that in Minnesota, an African American man is 26.8 times more likely to be in prison than a Caucasian man).

99. *Id.* (see specifically Table 6 at <http://www.hrw.org/reports/2000/usa/Table6.pdf>)

100. Council on C & J, *Racial Disparity*, *supra* note 8, at 2.

101. *Id.* at 5-6 (finding that African Americans get arrested at astoundingly disproportionate rates).

102. *Id.* at 5 (asserting that nationally, African Americans are arrested at a 4 to 1 ratio to Caucasians).

residing in Hennepin County.<sup>103</sup> During the 1980s in Minnesota, drug related arrests of African Americans grew by five hundred percent while drug related arrests for Caucasians only increased by twenty-two percent.<sup>104</sup>

Several factors contribute to the racial disparity in Minnesota's arrest rate: poverty, bias, and systematic profiling which originates at the point of first contact with law enforcement.<sup>105</sup> Members of African American communities in Minnesota are disproportionately policed, arrested, prosecuted, and convicted.<sup>106</sup> Police officers are more likely to stop African Americans for traffic stops and search their vehicles which in effect increase opportunities to discover criminal activity.<sup>107</sup> African Americans are thirty-seven percent of traffic stops in Minneapolis, Minnesota even though they are only eighteen percent of the population.<sup>108</sup> Many of these arrests are the result of systemic policies which mandate a high police presence in predominantly African American neighborhoods.<sup>109</sup> Police in Minneapolis, Minnesota, for example, use a system called CODEFOR<sup>110</sup> to place officers in "hot spots."<sup>111</sup> These "hot spots" are purportedly high crime areas.<sup>112</sup> These high crime areas are conspicuously located in low income African American neighborhoods.<sup>113</sup> Officers are

103. Council on Crime and Justice, *Final Draft Resolution Language* (unpublished legislation Aug. 2006) (copy on file with author) ("WHEREAS, In . . . 2000, [44%] of African American males between the ages of [18] and [30] and residing in Hennepin County were arrested and booked in that year alone."). See also *id.* at 1 ("arrest rate in Minneapolis for African American males ages [18] to [30] is [15x] the arrest rate of [White] males the same age.").

104. Kevin Zhao, Presentation, Barred from Voting: The Racially Discriminatory Effect of Criminal Disenfranchisement in the U. S., at slide 12, <http://www1.umn.edu/humanrts/edumat/presentations/Barred%20from%20Voting.ppt#267,11,V> (last visited Nov. 19, 2006).

105. COUNCIL ON CRIME AND JUSTICE, TRAFFIC STOP AUDIT 4 (2006), available at <http://www.racialdisparity.org/files/Traffic%20Stop%20Final%20Report.pdf>.

106. Page, *supra* note 93 ("[Compared with Caucasians, African Americans] are arrested more often, charged more often, given higher bails, tougher plea bargains, less fair trials, . . . [and] are over-represented in [Minnesota's] prisons.").

107. See Council on C & J, *Racial Disparity*, *supra* note 8, at 6 ("Populations of color are disproportionately likely to encounter the justice system as a result of extensive policing of geographic "hot spots" (e.g. CODEFOR) . . .").

108. Council on C & J, *African American Males*, *supra* note 7, at 2.

109. See Council on C & J, *Racial Disparity*, *supra* note 8, at 6 (finding that CODEFOR places a high police presence in African American neighborhoods); CRIMNET, BACKGROUND CHECKS, *supra* note 10, at 83 ("Some jurisdictions use arrest 'sweeps' to maintain order and prevent crime. Even for people who are arrested but never charged or convicted, the record of arrest is public data and shows on some criminal background checks.").

110. Council on C & J, *Racial Disparity*, *supra* note 8, at 7 (finding that CODEFOR is the primary strategy used by the Minneapolis Police Department (MPD) to identify and respond to reported crime, with traffic law enforcement stops being used as the primary crime reduction tactic for a wide range of "hot spots").

111. *Id.*

112. *Id.*

113. See *id.*

then encouraged, if not mandated, to make traffic stops in order to find weapons and other contraband.<sup>114</sup> The searches subject large numbers of African Americans to the wide discretion of police officers.<sup>115</sup> Whatever the justification, legislators must understand that more African Americans will be arrested and thus subjected to collateral effects at disproportionate rates if the arrests that do not end in conviction are not automatically expunged.

#### IV. THE RAMIFICATIONS OF COLLATERAL EFFECTS ON AFRICAN AMERICANS IN MINNESOTA

An arrest and/or conviction results in two types of consequences: direct and collateral. Direct consequences flow directly from to the conviction (e.g., the maximum sentence and/or fine).<sup>116</sup> In contrast, collateral consequences, better known as collateral effects,<sup>117</sup> are “civil and regulatory in nature and are imposed in the interest of public safety.”<sup>118</sup> Collateral effects are not usually directly related to the sentence for a crime<sup>119</sup> and are either imposed by operation of law (statute)<sup>120</sup> or are imposed discretionarily by various entities as a result of legal ramifications (civil actions).<sup>121</sup> There are stigmas associated with collateral effects,<sup>122</sup> but this Comment focuses only on collateral effects that have a legally binding result on African Americans in Minnesota.

114. *See id.*

115. See Dorothy E. Roberts, *The Social And Moral Cost Of Mass Incarceration In African American Communities*, 56 STAN. L. REV. 1271, 1280 (2004) (finding that “[t]he disproportionate incarceration of African Americans results more from systemic factors, such as law enforcement priorities and sentencing legislation, than from biased decision making in individual cases.”).

116. *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998) (“[T]hose which flow definitely, immediately, and automatically from the guilty plea, namely, the maximum sentence to be imposed and the amount of any fine.”).

117. AMERICAN BAR ASSOCIATION, *supra* note 4, at BL-1 (using the terms collateral effects, collateral consequences, and collateral sanctions are used synonymously).

118. *Kaiser v. State*, 641 N.W.2d 900, 905 (Minn. 2002); *see Four C's*, *supra* note 16 (asserting that the collateral consequences of criminal charges, known as the “Four C’s”, are formal legal restrictions imposed by the state as a result of a suspected violation of a law).

119. *See, e.g., State v. Byrge*, 614 N.W.2d 477, 494 (Wis. 2000) (“Collateral [effects] are indirect and do not flow from the conviction.”); Travis, *supra* note 2, at 16 (“[Collateral effects] are invisible . . . [b]ecause these punishments typically take effect outside of the traditional sentencing framework . . .”).

120. Travis, *supra* note 2, at 16.

121. AMERICAN BAR ASSOCIATION, *supra* note 4, at BL-1 (distinguishing between a collateral sanction, which is imposed “automatically upon [a] person’s conviction,” and a discretionary disqualification, which is a “penalty, disability or disadvantage . . . that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense . . .”).

122. *See generally* Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491, 1493 (2003).

A logical correlation may be made between the disproportionate number of African Americans in Minnesota's criminal justice system and the disproportionate number of African Americans subjected to collateral effects in Minnesota. Collateral effects in Minnesota affect African Americans in disparate rates civically, socially, and, most importantly, economically.

a. *Civic Ramifications*

Civic collateral effects materialize in four ways to marginalize the participation of African Americans in the political and judicial arena: voting,<sup>123</sup> serving public office,<sup>124</sup> jury duty,<sup>125</sup> and serving as a witness.<sup>126</sup> In Minnesota, a person does not have the right to vote once they have been convicted of a felony until they have had their civil rights restored.<sup>127</sup> Almost eighteen percent of Minnesota's African American males are barred from voting as a result of collateral effects<sup>128</sup> and thirteen percent of Minnesota's total African American population is precluded,<sup>129</sup> although the state as a whole only deprives about one percent of adults of the vote.<sup>130</sup>

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123. MINN. CONST. art. VII, § 1 (asserting that a person who has been convicted of a felony is ineligible to vote until civil rights restored). See HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* (2008), available at <http://www.hrw.org/reports98/vote/usvot98o.htm#FELONY> [hereinafter H.R.W., *LOSING THE VOTE*] (reporting that voting is denied in 46 states to convicted adults in prison, in 32 states to felons on parole, in 29 to those on probation, and in 14 one is barred for life). See generally U.N. Econ. & Soc. Council, Comm. on Human Rights, Written statement submitted by Human Rights Watch: Racism, Racial Discrimination, Xenophobia And All Forms Of Discrimination, U.N. Doc. E/CN.4/1999/NGO/60 (Jan. 29, 1999), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/f247c38438f0ddcdc12569910037e669/2c64d6c0930a86df80256739004f1f61?OpenDocument> (Jan. 22, 1999) ("Given that . . . offenders suffer the . . . loss of liberty, it is difficult to discern a State's interest in inflicting even more punishment by depriving offenders of . . . suffrage.").

124. MINN. CONST. art. VII, § 6.

125. MINN. GEN. R. PRAC. R. 808 (2004).

126. MINN. STAT. § 595.07 (2004).

127. MINN. CONST. art. VII, § 1 (asserting that a person who has been convicted of a felony is ineligible to vote until civil rights restored); MINN. STAT. § 609.165, subd. 1 (A person convicted of a crime is restored to civil rights by being discharged.); see generally MINN. STAT. § 609.165, subd. 2 ("Discharge" is accomplished . . . by order of the court . . . or upon expiration of sentence.); MINN. STAT. § 609.165, subd. 3; MINN. STAT. § 609.42 (There is one exception; the statute does not restore the right to seek public office to a person, who as a public officer, is convicted of bribery.).

128. H.R.W., *LOSING THE VOTE*, *supra* note 123.

129. CHRISTOPHER UGGEN, *FELON DISENFRANCHISEMENT IN MINNESOTA 1* (2006), [http://www.soc.umn.edu/%7Euggen/MNReport\\_2006.pdf](http://www.soc.umn.edu/%7Euggen/MNReport_2006.pdf) (the 13% of African Americans precluded from voting stands in stark contrast to the fact that only 1% of the non-African American voting-age population is precluded from voting).

130. *Id.*

Felony disenfranchisement laws have resulted in the loss of the right to vote in thirteen percent of the United States' African American adult male population<sup>131</sup> and, specifically, in seven states at least twenty-five percent of the adult male African American population<sup>132</sup> is affected.<sup>133</sup> Florida and Alabama lead at thirty-one percent.<sup>134</sup> In some states, forty percent of African American men are likely to be *permanently* disenfranchised.<sup>135</sup>

Collateral effects, which materialize into political disenfranchisement laws, are in direct violation of the United Nations Treaty to which the United States is a party.<sup>136</sup> When comparing "other Western democracies' criminal disenfranchisement laws, the United States stands alone."<sup>137</sup> In fact, the "United States may have the world's most restrictive criminal disenfranchisement laws."<sup>138</sup>

The crime triggering the disenfranchisement does not have to be serious or even remotely connected to the right to vote.<sup>139</sup> Most other democracies at least require that political disenfranchisement only be invoked when the punishment would mirror the crime.<sup>140</sup> Minnesota should study this blueprint closely.<sup>141</sup> Voter disenfranchisement serves no purpose as deterrence<sup>142</sup> and has resulted in large contribution to the political disenfranchisement of African American Minnesotans much like the Jim Crow

131. See H.R.W., *LOSING THE VOTE*, *supra*, note 123.

132. *Id.*

133. *Id.*

134. *Id.* ("In Alabama and Florida, 31 percent of all black men are permanently disenfranchised.")

135. H.R.W., *LOSING THE VOTE*, *supra* note 123 ("Given current rates of incarceration, three in ten of the next generation of black men will be disenfranchised at some point in their lifetime. In states with the most restrictive voting laws, 40 percent of African American men are likely to be *permanently* disenfranchised.") (emphasis in original).

136. Zhao, *supra* note 104, at slide 17 (stating that U.S. ratification of the U.N. Charter following the interpretation of commonly accepted interpretation of "human rights" in the Universal Declaration of Human Rights which reads in Article 21 that "the will of the people shall be the basis of the authority of government" and that the equal, universal suffrage shall be granted to all.)

137. *Id.* at slide 19.

138. U.N. Econ. & Soc. Council, *supra* note 123.

139. *Id.* ("In the United States an 18-year-old first-time offender convicted of writing a bad [check] who receives a non-prison sentence can lose the right to vote for life.")

140. Zhao, *supra* note 104, at slide 19 ("Most democracies only bar criminals who have undermined the 'democratic order' (ie [sic] electoral crimes, treason, buying/selling votes) from voting; and virtually no other democratic country denies the vote to criminals who have already served their sentence.")

141. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (arguing that the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government).

142. Chin, *supra* note 5, at 274.

laws of the South served to disenfranchise southern African Americans for almost three quarters of the 1900s.<sup>143</sup>

Second, collateral effects deny political candidate representation to the entire Minnesotan African American community.<sup>144</sup> A convicted felon in Minnesota may not run for office until the state has restored his civil rights.<sup>145</sup> African Americans in Minnesota may potentially lose candidates who may represent their interests. Aristotle believed that civic participation was one of the most important functions of human life.<sup>146</sup> He said, “[t]hrough it is not necessary to give everyone equal access to public office, it is never wise to exclude entirely any group from power.”<sup>147</sup>

Third, collateral effects affect the ability of African Americans in Minnesota to serve on juries.<sup>148</sup> Minnesota prevents rehabilitated African Americans from serving on juries until the state has restored their civil rights.<sup>149</sup> However, even after their civil rights have been restored, collateral effects continue to present barriers.<sup>150</sup> Some courts create jury pools through the use of voter registration and/or driver’s license lists. Felons in Minnesota cannot vote<sup>151</sup> and some cannot receive driver’s licenses,<sup>152</sup> therefore they are precluded from joining the very lists that create jury pools.

Finally, an African American’s ability to serve as a witness may be barred.<sup>153</sup> A witness may be impeached by showing he

143. Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 539 (1993) (“finding that “between 1890 and 1910, many Southern states tailored their criminal disenfranchisement laws, along with other voting qualifications, to increase the effect of these laws on black citizens.”). See also Chin, *supra* note 5.

144. MINN. CONST. art. VII, § 6 (requiring one to be able to vote to run for office); 5 U.S.C. § 7313 (2000) (inability to hold federal office for 5 years); MINN. STAT. § 609.42 subd. 2 (banned from public office for life if convicted of bribery).

145. *Id.*

146. Sparknotes, *Aristotle: Politics*, <http://www.sparknotes.com/philosophy/aristotle/section10.rhtml> (last visited Oct. 22, 2006).

147. *Id.*

148. MINN. CRIM. R. PROC. 26.02, subds. 5(1)-(2) (convicted of a felony, may not serve as a juror unless civil rights have been restored); MINN. GEN. R. PRAC., R. 808 (stating that a person is eligible for jury service if they have had their civil rights restored if they have been convicted of a felony); 28 U.S.C. § 1865(b)(5) (2000) (cannot serve if convicted of sentence for which more than 1 year of imprisonment is imposed).

149. *Id.*

150. *Cf.* Page, *supra* note 93 (“To improve the response rate to court summons for jury service, Minnesota became one of only a few states in the country to reimburse jurors for day-care costs.”).

151. CRIM. R. PROC. 26.02, subds. 5(1)-(2) (felons in Minnesota cannot vote until they have their civil rights restored).

152. MINN. STAT. § 152.0271 (denial of driver’s licenses for 6 months for individuals convicted of drug offenses).

153. MINN. STAT. § 595.07 (2004).

was convicted of a crime.<sup>154</sup> This obstacle may continue even after the individual's civil rights have been restored.<sup>155</sup> An African American who could potentially serve as an exculpatory witness for a fellow African American could be dissuaded or even precluded based on his criminal record. This contributes in diminishing the chances African Americans have of receiving equitable treatment in a Minnesota courtroom.<sup>156</sup>

b. *Economic Ramifications*

Collateral effects operate to hinder the economic progress of African Americans in Minnesota through the denial of jobs, the denial of decent housing, licensing, welfare, and educational loans. The first and arguably most significant economic collateral effect is employment. Over eighty percent of large employers use criminal history checks in the hiring process.<sup>157</sup> Over sixty percent of employers indicate that they probably would not or definitely would not hire an ex-offender.<sup>158</sup> Six states go so far as to bar public employment for life when one has a felony.<sup>159</sup>

There are significant interests on both sides in making criminal history information available to employers.<sup>160</sup> On the one hand, employers are faced with three legitimate concerns. First,

154. *Id.*

155. MINN. STAT. § 609.165, subd. 1; *State v. Stern*, 297 N.W. 321 (Minn. 1941) (restoration of civil rights); *State v. Zecher*, 128 N.W.2d 83 (Minn. 1964) (restoration of civil rights after pardon).

156. Page, *supra* note 93 (stating that “54% of the adult felony filings in 2002 involved white defendants, while about 19% involved African Americans. Contrast those numbers with the . . . 36% of our prison population [that] is African American. The disparity is more than a little troubling. . . . [T]hese numbers . . . seem to indicate that the courts play a larger role in creating the disparity than many of us would like to think.”).

157. *Bonné*, *supra* note 14 (“A report from the Society for Human Resource Management shows that 80 percent of companies said they run a criminal check on applicants before hiring, up nearly 30 percent from 1996 — making the practice as common as checking references or prior work histories. . . . Large firms were the most likely to run criminal checks, but nearly 70 percent of small companies also said they checked on a potential hire’s criminal history.”); Megan C. Kurlychek et al., *Scarlet Letters And Recidivism: Does An Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 3, 483-504 (2006).

158. Steven Raphael, *Should Criminal History Records Be Universally Available?*, 5 CRIMINOLOGY & PUB. POL’Y 515, 522 (2006).

159. PATRICIA ALLARD, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 17 (2002), <http://www.sentencingproject.org/pdfs/9088.pdf> (last visited Oct. 21, 2006) (listing the six states that enforce a welfare ban: Alabama, Delaware, Iowa, Mississippi, Rhode Island, and South Carolina).

160. DEREK HINTON ET AL., CRIMINAL RECORDS BOOK: THE COMPLETE GUIDE TO THE LEGAL USE OF CRIMINAL RECORDS 79 (2002) (Negligent hiring is a legal doctrine which imposes a duty upon employers to perform a reasonable background check); U.S. DEPT. OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 1 (2006), [http://www.usdoj.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.usdoj.gov/olp/ag_bgchecks_report.pdf) (last visited Oct. 5, 2006) (Employers and organizations subject to liability under negligent hiring doctrines if fail to exercise due diligence in determining

some employers are legally obligated to ask for criminal history information.<sup>161</sup> Second, other employers are motivated by civil liability.<sup>162</sup> Third, in addition to the liability involved in the first two instances, employers have a legitimate personal interest in assessing the risks to their assets and reputations posed by placing persons with criminal histories in certain positions.<sup>163</sup> On the other hand, criminal background checks can all but eliminate the chances of gaining and maintaining employment for African Americans with criminal records.

Most people think low level jobs which have lower educational requirements like service-industry employers are always an avenue to which convicted persons may turn for employment. These employers, however, have the greatest reluctance to hire such workers.<sup>164</sup> Employers whose workers interact directly with customers are reluctant to hire workers with criminal histories.<sup>165</sup> This heavily impacts entry level fast food jobs like McDonald's or department stores like Wal-Mart. Often an employer will make an offer, only to rescind it after completing a background check.<sup>166</sup>

In contrast, African Americans without criminal histories benefit from these higher restrictions. African Americans without criminal histories have a better chance of being hired and receive higher wages in states with laws providing for easier access to criminal history information.<sup>167</sup> Specifically, African Americans have the best chances at receiving jobs at firms that have the strongest self-stated aversion to hiring ex-offenders.<sup>168</sup> Although individual African Americans without criminal histories may benefit from these higher restrictions, the negative results of collateral effects on the African American community show a much more pressing need for a reduction in the accessibility of this information.

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whether the individual would create an unreasonable risk to other employees or the public.).

161. HINTON ET AL., *supra* note 160, at 79.

162. U.S. DEPT. OF JUSTICE, *supra* note 160, at 1.

163. *Id.* (Employers want to assess the risks to their assets and reputations posed by placing persons with criminal histories in certain positions.).

164. Raphael, *supra* note 158, at 515.

165. *Id.*

166. As one rehabilitated African American father stated: "You [sic] not asking for some specific discipline, I'm coming in here, this is a warehouse, you want someone to lower boxes and work on the dock, I think I can do that. And then we'll do the background check and comes back, 'thanks for your interest' and all that. I got a whole folder for 'thanks for your interest' - But I don't got a job." Council on C & J, *Racial Disparity*, *supra* note 8, at 7.

167. Raphael, *supra* note 158, at 515.

168. *Id.*

The military will no longer be an option for individuals with a felon.<sup>169</sup> Traditionally, one way for African Americans in Minnesota to advance out of government housing and economic destitution has been to join the armed services. Collateral effects preclude this option for many rehabilitated African Americans.<sup>170</sup> Furthermore, gun control laws unduly prohibit employment.<sup>171</sup> Denying a felon the right to obtain a gun makes sense when the individual is prone to violence. However, collateral effects laws ban a felon from working at a factory in which firearms are produced. Gun control laws should be narrowly tailored to affect only those that commit relevant crimes.

Collateral effects greatly impact Minnesotan African Americans wishing to obtain licensed positions.<sup>172</sup> Licensing laws severely prohibit the granting of specific licenses to individuals in Minnesota with criminal records.<sup>173</sup> Therefore, individuals who learn trades in prison like barbering,<sup>174</sup> which is one of the most popular for African Americans,<sup>175</sup> are denied the opportunity to obtain a license to barber once they leave prison and become rehabilitated.<sup>176</sup> A prison training program is ineffectual if the individual cannot obtain a license to practice the trade once released.<sup>177</sup>

Most of the licensing laws are left entirely to the state's discretion. California, for example, prohibits parolees from working

169. 10 U.S.C. § 504 (2000) ("No person who . . . has been convicted of a felony, may be enlisted in any armed forces . . ." except "in meritorious cases.").

170. *Id.*

171. See MINN. STAT. § 624.713 subd. 1 (2006) (prohibiting persons who have been convicted of crimes of violence from possessing firearms); 18 U.S.C. § 922(g)(1) (2000); MINN. STAT. § 609.165, subd. 1(a) (a person may petition for restoration of gun rights and the court may grant if they find good cause); see generally MINNESOTA PLANNING & ARMED WITH DATA: CREATING A MULTISTATE PERSPECTIVE 4 (1998), <http://www.gda.state.mn.us/pdf/multstat.pdf> (last visited Nov. 22, 2006) (finding that in Minnesota Caucasians were responsible for 86% of gun-related deaths, however, African Americans were 31% of gun related arrests).

172. MINN. STAT. § 340A.402 (5) (Licenses are given to persons of "good moral character and repute.").

173. *Id.*; see Nora V. Demleitner, *Stopping a Vicious Cycle: Release, Restrictions, Re-Offending*, 12 FED. SENTENCING REP. 243 (2000).

174. Dareh Gregorian & Pia Akerman, *Ex-Con Barber in Hair Tangle*, N.Y. POST, Feb. 21, 2003, at 3 (Detailing the story of Marc LaCloche who served a term in the Clinton Correctional Facility in New York after being convicted of first-degree robbery. He spent 1200 hours in prison learning a barber's trade so that upon release he would have a means of building a new life. Shortly before he was due to be paroled, he applied for a license as a barber's apprentice, but the state refused his application because of his criminal record.).

175. *Id.*

176. See generally Demleitner, *supra* note 173.

177. Cf. Md. Code Ann. Bus. Occ. & Prof. §5-314(a) (1) (vii) (2) (2004) (The State Board of Cosmetologists may deny a license to one convicted of a related misdemeanor.).

in real estate, nursing or physical therapy.<sup>178</sup> Minnesota prohibits individuals with felonies from working as food handlers,<sup>179</sup> licensed and unlicensed medical providers,<sup>180</sup> and bus drivers.<sup>181</sup> Minnesota should alter its licensing laws to allow rehabilitated individuals to receive licenses for trades they have learned in prison.

If each employer used the background checks judiciously and chose to deny employment to only those individuals whose criminal pasts presented a substantial conflict to their potential job duties, the system would work.<sup>182</sup> However, employers use the background checks to blanket the population and eliminate a number of potentially good African American candidates. In Minnesota, a law prohibits unapproved employers from requesting arrest information on job applicants from the BCA.<sup>183</sup> Nevertheless, employers simply require that the applicant sign a release.<sup>184</sup> Employers use this information to make an unfair determination of unworthiness.

When background checks prohibit employment, individuals are left with no income. Prisoners leave incarceration with no savings and few employment prospects.<sup>185</sup> One year after release, as many as sixty percent of former inmates are unemployed.<sup>186</sup>

178. Nora V. Demleitner, *Collateral Damage: No Re-entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1033 (2002).

179. MINN. STAT. § 28A (2004); MINN. STAT. 32.61 (2004); MINN. STAT. § 32.645 (2004).

180. MINN. STAT. § 147.091, subd. 1 (2004); MINN. STAT. § 147.111, subd. 6; MINN. STAT. § 147B.07 (denying medical licenses and physicians subject to disciplinary action (including acupuncturists)); MINN. STAT. § 146A.08 subd. 1 (2004); MINN. STAT. § 146A.03, subd. 6 (unlicensed complimentary and alternative health care practitioners subject to disciplinary action).

181. MINN. STAT. 171.3215 subd. 2 (2004); MINN. STAT. 631.40 subd. a (2004).

182. See MINN. STAT. § 364.01 (declaring that it is the state's policy to encourage rehabilitation and that the legislature understands that the opportunity to work is essential); MINN. STAT. § 364 subd. 1 (“[N]o person shall be disqualified from public employment . . . solely or in part because of a prior conviction of a crime . . . unless the crime . . . directly relate[s] to the [job].”); *But see In re Shelton*, 408 N.W.2d 594 (Minn. App. 1987) (embezzlement directly related to fitness to teach).

183. Minn. Dept. of Pub. Safety, *supra* note 31 (noting that one may obtain private data on another individual with their signature).

184. *Id.* (asserting that signing the informed consent release allows the employer to request arrest information).

185. Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, 65 FED. PROBATION 3, 3 (2001) (explaining that a “majority of inmates leave prison with no savings, no immediate entitlement to unemployment benefits, and few employment prospects”). See also Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 529 (2000) (finding that unemployed individuals are significantly more likely to commit offenses); Council on C & J, *Racial Disparities*, *supra* note 8, at 11 (finding that meaningful employment prevents recidivism).

186. Petersilia, *supra* note 185, at 5; The Sentencing Project, *Facts About Prisons And Prisoners* (2006), <http://www.sentencingproject.org/pdfs/1035.pdf> (last visited

This statistic is a direct result of collateral effects. The income disparity has an even more negative impact on the African American community.<sup>187</sup>

Minnesota has one of the highest median household incomes in the nation, but one of the lowest household incomes for African Americans.<sup>188</sup> One in four of its citizens living below the poverty line are African American<sup>189</sup> and from 1980 to 2004, African Americans were the only racial group to experience an increase in poverty.<sup>190</sup> The Twin Cities (Minneapolis and St. Paul) possess the highest rate of people of color in poverty.<sup>191</sup> Poverty forces African Americans to rely on welfare; however, welfare is another program derailed by collateral effects.

Minnesota denies African Americans welfare assistance for certain crimes.<sup>192</sup> African Americans are subjected to these penalties at much higher rates than other races.<sup>193</sup> States have the choice of opting out of the ban on welfare aid<sup>194</sup> if the effects are too detrimental to a portion of the community. Minnesota has

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Oct. 22, 2006) (64% of jail inmates in 1996 had monthly incomes of under \$1,000.00 in the month before their arrest.). See generally Bureau of Justice Statistics, U.S. Dep't of Justice, *Profile of Jail Inmates* (2002), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf> (last visited Oct. 22, 2006) (41% of jail inmates in 2002 had monthly incomes of under \$1,000.00 in the month before their arrest.).

187. See generally Ward Harkavy, *The Numbers Beyond the Bling*, VILLAGE VOICE, Dec. 28, 2004, <http://www.villagevoice.com/news/0501,harkavy,59767,2.html> (last visited Oct. 22, 2006) (nationally, the average African American family has only 18% of the wealth of the average Caucasian family and more than 25% of all African Americans are officially poor).

188. The Brookings Institution, *supra* note 9.

189. The Minneapolis Poverty line, *supra* note 9 (finding that 1 in 17 of Minnesotans living below the poverty line are White and 1 in 4 are African American.); see generally Legislative Auditor – State of MN, *supra* note 9.

190. Council on Crime and Justice, *Racial Disparity Initiative: The Relationship between Racial Disparity & MN's Changing Demographics*, at tbl.6 (2006) [hereinafter Council on C & J, *Relationship*], [http://www.racialdisparity.org/demographics\\_mn\\_changing.php](http://www.racialdisparity.org/demographics_mn_changing.php) (last visited Oct. 16, 2006) (finding that African Americans increased in poverty while all other racial groups experienced a decrease in overall poverty rates).

191. INSTITUTE ON RACE & POVERTY, EXAMINING THE RELATIONSHIP BETWEEN HOUSING, EDUCATION, AND PERSISTENT SEGREGATION 2 (1997), <http://www.umn.edu/irp/publications/McKnightfinal.pdf> (finding that the Twin Cities has the highest rate of people of color in poverty of the 25 largest cities in the nation and concentrated poverty is more than twice the national average).

192. MINN. STAT. § 256J.26, subd. 1 (2004) (denying Minnesota Family Investment Plan benefits to persons who have been convicted of controlled substance crimes including lifetime bans); 21 U.S.C. § 862a (a) (b) (d) (2) (2000) (anyone convicted of a felony for possession, use, or distribution of drugs is not eligible to receive food stamps or Temporary Assistance to Needy Families).

193. See HUMAN RIGHTS WATCH, *supra* note 7.

194. See Allard, *supra* note 159 (currently only eight states and the District of Columbia have opted out of the ban, while twenty states have modified the ban and twenty-two states have adopted the ban in its entirety).

chosen not to do so.<sup>195</sup> After reviewing the negative impact these laws have on African American families, that option should be considered with paramount importance.

A drug offense will bar a family from receiving educational assistance. An African American convicted of drug possession is barred from receiving federal loans and a third offense bars him from receiving a federal grant, loan, or work assistance indefinitely.<sup>196</sup> Many proponents of the loan ban say it is a justifiable consequence to committing a drug crime and serves as an adequate deterrent.<sup>197</sup> However, many African Americans who commit drug crimes are not deterred by an educational loan ban and these laws contravene the rehabilitation programs set forth in Minnesota prisons.<sup>198</sup> Prisoners as a class are substantially undereducated;<sup>199</sup> almost one-half of prisoners lack a high school education<sup>200</sup> and one in five prisoners are illiterate.<sup>201</sup> Prisoner rehabilitation depends on the financial capability to provide them an education once they leave prison.

The collateral effects present in obtaining federal loans exist in housing.<sup>202</sup> Decent housing prevents recidivism.<sup>203</sup> Where one lives often influences many aspects of one's life.<sup>204</sup> When African

195. See, e.g., MINN. STAT. § 256J.26, subd. 1 (2004) (denying Minnesota Family Investment Plan benefits to persons who have been convicted of controlled substance crimes).

196. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (Student Loans Act: people convicted of possession or sale of drugs are temporarily or permanently ineligible for federal college loans, grants or work assistance); 20 U.S.C. § 1091(r) (2000) (first-time offense of drug possession bars one for one year and a third offense bars indefinitely).

197. See Chin, *supra* note 5, at 270 (noting that as long as the demand remains high and prosecution seems to "depend . . . on race and class," deterrence will fail).

198. The Associated Press, *43,000 Students with Drug Convictions Face Denial of Aid*, N.Y. TIMES, Dec. 29, 2001, at A11 (Rep. Mark Souder (R-IN), the author of the student loan ban, says he intended for the ban to apply only to students already receiving federal aid at the time of their conviction).

199. Eric Blumenson & Eva S. Nilson, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 72 (2002).

200. *Id.*

201. *Id.*

202. 24 C.F.R. § 5.903 (2000) (permitting public housing agencies to access criminal records); 42 U.S.C. § 1437d (q) (2000) (any criminal activity by any member of the tenant's household or guest results in eviction.); Minneapolis Pub. Hous. Auth. v. Lor, 591 N.W.2d 700, 702 (Minn. 1999) (finding criminal activity committed off premises grounds for eviction); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300; 42 U.S.C. § 1437d (l) (6) (2000).

203. See generally Heidi Lee Cain, Comment, *Housing our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 148-149 (2003) (stating that private, unsubsidized housing enables social integration for individuals with criminal records).

204. Rene Bowser, Prof. of Law, Lecture at the University of St. Thomas School of Law: Segregation and Housing Discrimination in the African American Community (Nov. 13, 2006) (copy of transcript on file with author).

Americans leave prison in Minnesota, most of them are financially strained and look to public housing to prevent reentering the criminal environment. A large source for public housing in Minnesota is Section Eight. Section Eight is a government housing assistance program. Minnesota's Section Eight law requires a background check, including arrest records, to be performed on any tenant.<sup>205</sup> The state renders anyone with a drug conviction ineligible for public housing.<sup>206</sup> Additionally, if one is living in public housing and she or anyone on her lease, receives a drug related conviction on or off the premises,<sup>207</sup> she will be evicted.<sup>208</sup> This means if one's son or daughter is convicted of possessing a marijuana cigarette on or off the premises,<sup>209</sup> the entire family may be evicted.<sup>210</sup> Similarly, private landlords perform background checks which many times unfairly disqualify an individual.<sup>211</sup>

When African Americans are released from prison, most do not have the money to buy a house, most cannot pass a criminal history check to rent a decent apartment, and most cannot stay with any of their family members who receive public assistance.<sup>212</sup> Their options become extremely limited.<sup>213</sup> As a result, homeless shelters have seen a steep rise in the numbers of African American ex-offenders.<sup>214</sup>

### c. *Social Ramifications*

Finally, collateral effects present difficult social barriers to African Americans. For example, an African American may lose

205. 24 C.F.R. § 5.903 (section gives Public Housing Authorities ability to obtain and use conviction records for admission and lease violations).

206. 42 U.S.C. § 1437d (q) ("Any criminal activity . . . on or off such premises . . ."); *Minneapolis Pub. Hous. Auth.*, 591 N.W.2d at 702.

207. *Id.*

208. *Id.*

209. *Id.* (stating that such acts "engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. This includes family members residing in the home.")

210. *Id.*

211. See generally Cain, *supra* note 203, at 149-50.

212. 42 U.S.C. § 1437d (q) (covered criminal activity engaged in by a tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy).

213. JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 35 (2001), [http://www.urban.org/UploadedPDF/from\\_prison\\_to\\_home.pdf](http://www.urban.org/UploadedPDF/from_prison_to_home.pdf).

214. See WILDER FOUNDATION, OVERVIEW OF HOMELESSNESS IN MINNESOTA 2006 - KEY FACTS FROM THE STATEWIDE SURVEY 2 -3 (2007), available at [http://www.wilder.org/fileadmin/user\\_upload/research/Homelessoverview2006\\_3-07.pdf](http://www.wilder.org/fileadmin/user_upload/research/Homelessoverview2006_3-07.pdf) (percentage of ex-offenders who are homeless in Minnesota is steadily increasing and while African Americans are 3% of Minnesota's population, they are 38% of the homeless population).

his or her driving privileges.<sup>215</sup> An African American may not be able to obtain automobile or life insurance.<sup>216</sup> Their insurance rates will increase. African Americans may lose their parenting rights.<sup>217</sup> The African American will not be allowed to travel to other places for pleasure or to seek work.<sup>218</sup> He or she may have to register for life as a sex offender.<sup>219</sup> Or if they are one of the few African American lawyers in Minnesota, he or she may lose their right to ever practice law again in Minnesota.<sup>220</sup> Social collateral effects must be administered in a narrowly tailored fashion to provide an adequate solution for both the rehabilitated individual and society.

Minnesota must recognize that collateral effects do operate to severely restrict rehabilitation in the African American community. A decrease in the access to criminal history information, sustains effective remedies.<sup>221</sup>

## V. RECOMMENDATIONS

This Comment serves as a call to the Minnesota Legislature, the Minnesota Supreme Court, and all Minnesota stakeholders, including those who view the accessibility to other's criminal history records as an unequivocal right and those who fight vehemently to protect the rights of the accused, to work together to acknowledge and understand the negative impact of collateral effects on African Americans. The recommendations below serve as a roadmap to facilitate this discussion and provide adequate tools to consequently alter the backlash of collateral effects to be more consistent with the original purpose and intent of the laws.

### a. Consider Arrest Expungement Legislation

I recommend the arrest records accessibility legislation produced by the Council on Crime and Justice (Council) be accepted by the Minnesota Legislature.<sup>222</sup> The Council proposed an auto-

215. MINN. STAT. § 152.0271 (individuals convicted of drug offenses can be denied a driver's licenses for 6 months); 23 U.S.C. § 159 (2000).

216. See AMERICAN BAR ASSOCIATION, *supra* note 4, at BL-1 (stating, "Unbeknownst to this offender, and perhaps to any other actor in the sentencing process, as a result of his conviction . . . he may be unable to obtain life or automobile insurance.").

217. MINN. STAT. § 260C.301, subd. 1 (2004); MINN. STAT. §260.012(b)(3) (2004).

218. See 22 U.S.C. §§ 2714(a)(1), (b)(1) (2000).

219. 42 U.S.C. §§ 14072(i)(3), (i)(4) (2004); 18 U.S.C. §§ 3563(a)(8), 3583(d), 4209(a) (2004) (lifetime registration for sex offenders).

220. See MINN. R. PROF. RESPONSIBILITY 17 (2004) (an attorney convicted of a felony will be subject to disciplinary proceedings including revocation of license).

221. See Geffen & Letze, *supra* note 41, at 1338.

222. The Council on Crime and Justice, *2007 Proposed 609B Legislation*, (unpublished legislation, Nov. 2006) (copy on file with author) [hereinafter Council on C & J, *Proposed Legislation*].

matic sealing of arrest data so that no non-criminal justice agencies may access a person's data and use it against them before a determination of guilt is made by a court.<sup>223</sup> The provisions of the arrest legislation call for all arrests that do not result in prosecution to be automatically sealed within 180 days after the arrest of the individual.<sup>224</sup> This will preclude "public conviction" of a person and unfair determinations to be made by the public before the individual's case has been adjudicated. Additionally, the Council asks that arrest records with dispositions in favor of the defendant be *automatically* sealed and the records strictly controlled and kept within the criminal justice agencies only.<sup>225</sup>

Currently, alternative legislation is being proposed by a Minnesota Task Force (CrimNet Expungement Delivery Teams).<sup>226</sup> The task force is proposing the automatic sealing of arrest information one year after arrest for only non-person crimes.<sup>227</sup> If accepted, the task force's recommendation will achieve the over-arching goal of decreasing the availability of long term prejudicial arrest information, however, the task force's recommendation ignores the short-term prejudicial effect of arrest information. African Americans are arrested exceedingly more often in Minnesota and therefore left vulnerable to the negative effects of the task force's recommendation. The Council's recommended legislation will ensure that proper criminal justice agencies have the necessary, relevant information while providing a justifiable protection to arrested individuals.

#### b. *Present Expungement Test Cases to Challenge Schultz*

Public interest groups and social justice advocates should find worthy candidates to challenge the *Schultz*<sup>228</sup> decision. This is a preferred resolution to deferring to the legislature because of the likelihood of petitioner adverse controls the legislature is likely to implement. If the legislature amends the expungement statute, they are likely to limit the petitions to only certain crimes, limit the effect of the expungement, and increase controls to make the process more burdensome (e.g., more stringent time

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223. *Id.*

224. *Id.* Proposed legislation, § 2, subd.1, would give arrests that do not result in prosecution automatic sealing of record of arrest 180 days after arrest.

225. *Id.* Proposed legislation, § 3, subd. 1 & 3, would provide automatic sealing of records of (1) charges that were dismissed, (2) acquittals, (3) continuance for dismissal, (4) diversion, (5) dismiss and discharge under § 152.18. However, sealed data may still be transmitted between criminal justice agencies.

226. CrimNet, *Connecting Minnesota's Criminal Justice Information*, <http://www.crimnet.state.mn.us/GovOrg/BGChecksExpungement.htm> (last visited Nov. 26, 2006).

227. Council on C & J, *Proposed Legislation*, *supra* note 222.

228. *Schultz*, 676 N.W.2d 337 (Minn. Ct. App. 2004).

restrictions controlling when the petitioner may apply). However, if *Schultz*<sup>229</sup> is overturned, inherent power expungement will return to its former state. This will once again give judges the ability to make an individual case by case determination of an individual's rehabilitation. Consequently, this will return the availability of conviction expungement to the courts.

Organizations wishing to bring a proper expungement test case should do the following: First, find the right client — facts do matter.<sup>230</sup> The client should have a low-level non-violent conviction (e.g., misdemeanor theft, writing a bad check, etc.). The key is to make the facts less of an issue so the court will focus on the legal issues, such as the separation of powers issue on which *Schultz*<sup>231</sup> was decided. However, the facts need to be detailed enough to show that the conviction record has had a negative impact on the individual's life. For example, evidence of a job denial(s) based on the public availability of the record, most notably the BCA record. Also, the client will need to show rehabilitation. The key to this is compliance with probation. A proper time to wait is five years (based on courtroom observations) since being discharged from probation without any other contact with the criminal justice system. Additionally, a necessary showing of changing one's life (e.g., school, treatment, family life, religion, etc.) must be made.<sup>232</sup>

Second, get the right order.<sup>233</sup> There are two options. The judge could agree with one's position and sign one's proposed order — sealing all records. Then the state could appeal. This is unlikely to happen if the attorney does a good job setting the record. The second option, which is the optimal one, is to get an order granting the sealing of court records only. With this order, the factual determination (“the balancing test”)<sup>234</sup> has already been decided in favor of the client.<sup>235</sup> However the legal issue of what records should be sealed remains.<sup>236</sup>

Third, one must adequately explain the legal issue.<sup>237</sup> *Schultz* was decided based on the separation of powers doctrine.<sup>238</sup> One must demonstrate that record keeping is a ministerial func-

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229. *Id.*

230. E-mail from John McCullough, Equal Justice Works Fellow, Council on Crime and Justice, to author (Nov. 28, 2006) (on file with author).

231. *Schultz*, 676 N.W.2d 337.

232. E-mail, *supra* note 230.

233. *Id.*

234. *State v. C.A.*, 304 N.W.2d at 358 (holding that “the court must decide whether expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public . . .”).

235. E-mail, *supra* note 230.

236. *Id.*

237. *Id.*

238. *Id.*

tion of government which does not invoke the separation of powers.<sup>239</sup> Many judges are discontented with the power *Schultz* has taken from them.<sup>240</sup> The Minnesota Supreme Court knows that a grave problem faces Minnesota.<sup>241</sup> The perfect case could very well give them a reason to return the power to judges.

c. *Mandated Informed Consent of All Collateral Effects Before Sentencing*

I recommend the "Collateral Consequences Committee,"<sup>242</sup> which has been introduced through a bill to the Minnesota Legislature per recommendations of the American Bar Association,<sup>243</sup> be formed to undertake an exploration of every collateral effect applicable to every arrest, charge, and guilty plea.<sup>244</sup> As a result, all prosecutors should be required to advise any defendants of each and every collateral effect associated with any plea which might be offered.<sup>245</sup> Prosecutors and defense attorneys are both presently overburdened, however, this is a feasible solution because Minnesota prosecutors presently utilize a similar method for conducting plea agreements.<sup>246</sup> The standard form of the de-

239. *Id.*

240. See Johnson, *supra* note 1 (The removal of inherent power expungement "eliminates the power of judges. The surprising thing is that the court of appeals is responsible for taking this power away.").

241. See Alan Page, Minn. Sup. Ct. J., Keynote Commencement Address: Current Existence of Racism in Our Society at St. Olaf College (May 30, 2004), <http://www.stolaf.edu/news/speeches/page.html> (last visited Nov. 28, 2006) (stating, "An area of particular concern to me is our criminal justice system, which at times seems more interested in putting people of color in jail than in helping them succeed. . . . There is something fundamentally wrong when our judicial system . . . persistently denies equal justice to our communities of color.").

242. CRIMNET, BACKGROUND CHECKS, *supra* note 10, at 58-59 ("In Minnesota, the Legislature has directed the Revisor of Statutes to create a new chapter in statutes that collects the cross-references to Minnesota laws imposing collateral sanctions. The problem being addressed is that the entire range of collateral sanctions in statutes for persons with a criminal conviction history was not clear to policy makers, to the courts, or to defense counsel who advise defendants on the consequences of a plea of guilty to various charges. Additionally, bills introduced in the Legislature during the 2006 session (SF3078/HF3345, Sec. 16; SF 2919, Sec. 82; and SF 2738, Art. 1) seek to create a Collateral Consequences Committee to study the state's collateral sanctions.").

243. AMERICAN BAR ASSOCIATION, *supra* note 4, at BL-1 ("Standard 19-2.1 Codification of collateral sanctions. The legislature should collect . . . all collateral sanctions in a single chapter . . . of the jurisdiction's criminal code. The chapter . . . should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense . . .").

244. See CRIMNET, BACKGROUND CHECKS, *supra* note 10, at 58.

245. See generally AMERICAN BAR ASSOCIATION, *supra* note 4, at BL-3 (Standard 19-2.3(a) states, "The rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense . . .").

246. Chin & Holmes, *supra* note 4 at 719 ("Attention should be paid to the collateral effects of a conviction under the prosecutor's theories. The impact of collateral consequences due to a criminal conviction can . . . be used to persuade the

fendant's waiver of rights must be read and signed by each defendant. The prosecutor is charged with the burden of administering the plea agreement and ensuring the defendant acknowledges his rights before acceptance. If the defendant is not represented, the prosecutor is responsible for reading the rights to the defendant. Therefore, the burden is properly allocated to the state.

The results of the study commissioned by the "Collateral Consequences Committee" should assign the applicable collateral effects to each plea and display them in a simplified, understandable format for the defendant. Each collateral effect will then be placed on the plea form and the prosecutor will be charged with explaining the effects to the defendant. The explanation need not be long and cumbersome and take no longer than what it currently takes to read a plea agreement. This will facilitate an atmosphere whereby the defendant will become aware of the total consequences of her plea, and not simply the immediate effects. Additionally, the defendant will seek to become more aware of the avenues by which she may address her issue in the future. Finally, motivation and deterrence are achieved. A defendant will understand that if she has a clean record after she is returned to her normal environment, she may seek an expungement. Furthermore, full knowledge of the collateral effects associated with each crime will cause a defendant to consider more than simply the immediate or direct effects.

The impact of collateral effects "may persuade the prosecutor to prosecute for a lesser charge or to decline a case altogether."<sup>247</sup> If the state is placed with the burden of informing the individuals of the potential overarching effect to the defendants and the African American community, more sensitivity will be introduced to the process of law enforcement and the judiciary and, ultimately, an effect will be seen on the disparate numbers negatively affecting the African American community.

## CONCLUSION

Collateral effects provide civic, economic, and, social barriers to the African American community in Minnesota.<sup>248</sup> The collateral effects associated with crimes ostensibly serve to strike a balance between protecting the non-criminal society and providing deterrence to current and potential criminals. In Minne-

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prosecutor to prosecute for a lesser charge or to decline a case altogether . . .") (quoting Judson W. Starr & Valerie K. Mann, *Environmental Crimes: Parallel Proceedings and Beyond*, in ENVIRONMENTAL LITIGATION 1051, 1054 (ALI-ABA Course of Study, No. C921, 1994), available at Westlaw C921 ALI-ABA 1051).

247. *Id.*

248. See Cohen, *supra* note 6.

sota, the balance is no longer there.<sup>249</sup> Minnesota is one of the nation's leaders in disparity of incarceration rates for African Americans, arrest rates for African Americans and poverty rates for African Americans. The high numbers represented in the disparity in incarceration directly relate to the negative collateral impacts on African Americans. The effect on the African American community in Minnesota is glaring. Minnesota has one of the highest median incomes in the country, yet one of the highest rates of poverty for African Americans. This is a direct result of collateral effects that work to eliminate job, housing, educational, and civic opportunities for Minnesota's African American community.

To counter the debilitating results of collateral effects, a state must have mechanisms which decrease the accessibility to criminal history information. Until recently, Minnesota possessed some of these tools. The increase of accessibility to criminal history records through the advent of technology, and the decrease of protection of those same records through recent laws and court decisions, a record of conviction and non-conviction is extremely accessible, and is used by employers and landlords when making hiring and housing decisions. Considering the racial and economic disparities that exist in Minnesota's criminal justice system and the racial and economic inequalities that exist now, and have existed forever in society, it does not serve a compelling purpose to keep these records accessible. It has the effect of negatively and disproportionately affecting a population of people that has fewer (and sometimes zero) opportunities to develop their communities.

A court is charged with determining guilt, not an employer or landlord. The arrest records of an individual should be sealed automatically to prevent unfair subjection to collateral effects. If the person is convicted, then allow public access to the record. Conviction records should be used as the proper determinant of a person's fitness for the job. The inherent power of judges should be restored to allow a judge to make a well-considered determination of rehabilitation.

Finally, the all encompassing results list of the "Collateral Consequences Committee" should be attached to each plea agreement given by the prosecutor. The prosecutor should be placed with the burden of thoroughly considering the collateral effects he may impose on the individual when charging the case. With the advances in technology and the decrease in protection for criminal history records, these changes should be imple-

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249. See generally *Schultz*, 676 N.W.2d at 342-43 (holding that the inherent power of the court is limited to records of the judiciary only).

mented to change the access to criminal history information, pre-conviction and post-conviction. This is a necessary step if Minnesota wants to curtail its shocking incarceration and arrest disparity and end the cycle of economic despair among its African American community.