University of St. Thomas Law Journal

Volume 9
Issue 3 *Spring 2012*

Article 12

2012

Collateral Sanctions as Punitive Sentences and the Minnesota Judiciary's Expungement Authority

Erin Westbrook

Bluebook Citation

Erin Westbrook, Comment, *Collateral Sanctions as Punitive Sentences and the Minnesota Judiciary's Expungement Authority*, 9 U. St. Thomas L.J. 956 (2012).

This Comment is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

COMMENT

COLLATERAL SANCTIONS AS PUNITIVE SENTENCES AND THE MINNESOTA JUDICIARY'S EXPUNGEMENT AUTHORITY

ERIN WESTBROOK*

INTRODUCTION

In 1978, Minnesota became the first state to enact legally binding sentencing guidelines to reduce disparities in sentencing and promote uniformity and proportionality in criminal sentencing.[1] Other states and the federal government followed suit, and sentencing guidelines are now the norm. While imperfect, sentencing guidelines were meant to address the wide disparities and unbridled discretion in criminal sentencing. Today, the criminal justice system faces a new challenge: managing the consequences of criminal conviction beyond those imposed through criminal sentencing. This Comment urges Minnesota to continue to lead the way in criminal punishment reform in light of the excessive and catastrophic effects of these so-called collateral consequences or sanctions[2] flowing from a criminal conviction.

When an individual commits a crime, a judge imposes a criminal sentence based upon the sentencing guidelines, which allow for consideration of a variety of factors, including criminal history and the nature of the offense. The sentencing guidelines provide safeguards to ensure that a sentence is justified and follows traditionally recognized theories and goals of punishment. Yet, once an offender has fulfilled her sentence, she faces reentry into society under the shadow of a criminal record that, among other restrictions, prevents her from securing adequate employment and housing.

---

* Erin Westbrook is a lawyer in the Twin Cities area. Erin graduated from the University of St. Thomas School of Law in 2012, where she was an editor for the University of St. Thomas Law Journal. She received her undergraduate degree in Accountancy and Spanish from the University of Notre Dame. Erin wishes to thank Professor Nekima Levy-Pounds for her comments and insight on this comment.

1. Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 CRIME & JUST. 131, 131–132 (2005).

2. Although scholars have used many different terms when identifying the concept of collateral consequences, this paper will generally use the term "collateral sanctions."

And whereas the offender's judicially imposed sentence is subject to judicial discretion within the limits of sentencing guidelines, the collateral "sentence" is not subject to the same safeguards.

Instead, collateral sanctions are categorically imposed either through state and federal legislation or through individual prejudice. Collateral sanctions imposed through legislation include, for example, disenfranchisement, denial of public benefits, or exclusion from certain government jobs. These are codified restrictions on the ex-offender's membership in society. On the other hand, the collateral sanctions imposed through individual prejudice are murkier and depend on the unpredictable (and potentially unprincipled) whims of private individuals. For example, a private landlord might deny an ex-offender's housing application based solely on the existence of a criminal record. Similarly, an employer might reject an otherwise qualified ex-offender. Although there are undeniably some cases where the exclusion of an ex-offender is appropriate, there are also cases where an ex-offender deserves a second chance—a chance that starts with the ability to obtain adequate housing and employment. When private individuals preclude an ex-offender from receiving that chance, they affect the ex-offender's ability to reintegrate into society.

To minimize the harm of collateral sanctions, courts should take remedial measures such as granting expungements of criminal records with greater regularity, especially in circumstances involving low-level, non-violent offenses. Under Minnesota law, the remedy of expungement "is limited to a court order sealing the records and prohibiting the disclosure of their existence or their opening except under court order or statutory authority."[3] Because the record is sealed, an expungement permits a person to state on a background check that he has no criminal history.[4] Expungements thus help an ex-offender obtain housing and employment because landlords and employers are no longer able to access the ex-offender's records. Because an expungement provides relief from some of the devastating consequences of a criminal conviction, in certain cases judges should have the authority to expunge records, taking into consideration guidelines similar to those used for criminal sentencing. In the past, judges in Minnesota have used their inherent judicial authority to expunge records, but recent case law has severely limited a judge's ability to grant effective relief through expungement.

This Comment advocates for the legislature to take steps to give the judiciary discretionary authority to grant expungements based on the punitive nature of collateral sanctions levied because of a person's criminal record. Criminal records carry a social stigma that is often the root of collateral sanctions related to housing and employment. Expungement ad-

3. MINN. STAT. § 609A.01 (2012).

4. State v. M.B.M., 518 N.W.2d 880, 882 (Minn. Ct. App. 1994).

dresses these sanctions by preventing private citizens from accessing those records. Part I of this paper provides an overview of both direct and collateral sanctions flowing from a criminal conviction as well as the underlying justifications for each. Part II compares the rationale behind the two types of sanctions, noting the highly punitive nature of collateral sanctions that are cloaked in civil statutes and imposed through private individuals and institutions. Part III discusses the state of expungement law in Minnesota and the case law that has limited judicial authority to grant expungement. Finally, Part IV argues that based on the punitive nature of collateral sanctions, Minnesota should reinvigorate judicial discretion so that expungement is a conceivable remedy for reducing the devastating effects of collateral sanctions.

I. Consequences of a Criminal Conviction

A. *Criminal Sanctions*

1. Justifications for Punishment

Criminal law scholars generally agree that punishment for criminal behavior is theoretically justified as either a retributive or utilitarian measure.[5] These justifications are often at odds with each other and focus on different aspects of individual morality and public policy.[6] As a practical matter, state legislatures often articulate the justification (or justifications) for criminal sentencing. The stated purpose impacts many aspects of the administration of criminal law because "[w]hether utilitarian or retributive purposes apply pushes sentences toward one end or the other of the available sentencing range, and toward imprisonment or toward alternatives."[7]

Retributive theory is based on the idea of what an offender *deserves* and "supposes that crime inherently merits punishment."[8] It is often associated with philosopher Immanuel Kant who "provided two guiding standards: his renowned principle of respect for persons and his insistence that only the 'Law of retribution' (*jus talionis*) could determine the morally appropriate kind and degree of punishment."[9] Three principles underlie the theory of retribution:

> (i) Punishment is justified only if it is deserved.
> (ii) It is deserved if and only if the person punished has voluntarily done a wrong (and, specifically, the wrong being punished).

5. Michele Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 Am. Crim. L. Rev. 1313, 1313 (2000). This is not to say that scholars agree on which theories should exist or should justify punishment, but rather that these theories are recognized as potential justifications for criminal punishment.

6. *See id.* at 1317.

7. *Id.* at 1318.

8. *Id*. at 1315.

9. M. Margaret Falls, *Retribution, Reciprocity, and Respect for Persons*, *in* Punishment 27, 27 (Antony Duff ed., 1993).

> (iii) The severity of punishment deserved is that which is proportionate to the severity of the wrongdoing.[10]

The main distinction from the utilitarian theory is that retribution imposes punishment based on merit or "just deserts" rather than based on perceived social benefits.[11] It considers "punishment as ends rather than means."[12]

In contrast, utilitarian theory justifies punishment as the means to achieve social benefits.[13] The theory is generally further broken down into justifications of deterrence, incapacitation, and rehabilitation.[14] Using punishment as deterrence, society imposes consequences on those who breach the social contract to dissuade others from doing the same.[15] Incapacitation refers to a punishment that includes some term of incarceration so as "to remove the offender from society to protect it from the danger he poses."[16] Finally, rehabilitation "calls for the improvement of the criminal for his own benefit and to reduce the probability that he will offend again."[17]

The Minnesota legislature has adopted a utilitarian theory of punishment in the state's criminal code.[18] The criminal code's stated purpose is "to protect the public safety and welfare by preventing the commission of crime through the deterring effect of the sentences authorized, the rehabilitation of those convicted, and their confinement when the public safety and interest requires . . . ."[19] Although the legislature expressed these utilitarian purposes, the Minnesota Supreme Court has also reinforced retribution as a justification for punishment.[20] Thus, there is a general acceptance and recognition of both theories of punishment, despite the potentially conflicting aspects of each.

2. *Principles of Sentencing*

Distinct from, yet related to the theories of punishment, are principles that effectuate the governing body's elected theories and also safeguard the

---

10. *Id.*
11. Cotton, *supra* note 5, at 1315–16.
12. *Id.* at 1315.
13. *Id.* at 1316.
14. *Id.*
15. *See id.* The term deterrence can also be divided into "specific deterrence," which concentrates on dissuading the offender himself from committing future crimes, and "general deterrence," which focuses on dissuading others. *Id*. In using the term deterrence, this paper will generally refer to "general deterrence."
16. Cotton, *supra* note 5, at 1316.
17. *Id.*
18. *Id.* at 1326.
19. MINN. STAT. § 609.01 subd. 1 (2012).
20. Cotton, *supra* note 5, at 1326 (citing State ex rel. Taylor v. Schoen, 273 N.W.2d 612, 616 (Minn. 1978)). In her article, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, *supra* note 5, at 1326, Michele Cotton claims that "[b]y making retribution a consideration where the statute had omitted it, thereby effectively reducing and counterbalancing the role played by rehabilitation, the [Minnesota Supreme Court] blatantly contravened state law."

offender's rights. For example, in addition to the utilitarian purposes of punishment, Minnesota's criminal code is also meant "to protect the individual against the misuse of the criminal law . . . ."[21] It does so by: (1) "fairly defining the acts and omissions prohibited", (2) "authorizing sentences reasonably related to the conduct and character of the convicted person", and (3) "prescribing fair and reasonable postconviction procedures."[22] These safeguards suggest three overarching principles: predictability, proportionality, and equity. Although these principles protect the individual, they also promote theories of punishment. For example, to impose a criminal sentence for deterrence, the sentence must be predictable—a potential offender cannot be deterred from doing an act when he is not aware it is a crime or by a consequence when he is not aware it will occur. By "fairly defining the acts and omissions prohibited," the legislature advances deterrence by ensuring that society is aware of the acts that constitute a crime and can then avoid engaging in those acts. Likewise, by sentencing in a way that is related to the conduct and character of a person, the legislature requires proportionality and thereby honors the theories of retribution and incapacitation.[23]

The Minnesota Sentencing Guidelines Commission (the "MSGC") has also advanced these theories of punishment by promoting predictability, proportionality, and equity in sentencing. The MSGC has determined that the Minnesota Sentencing Guidelines are intended to "establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history."[24] Here again, the state promotes deterrence because punishment cannot deter future offenses if it is not imposed "rational[ly] and consistent[ly]"; one is not deterred by punishment if one has no clear sense of what that punishment will be. The Minnesota Sentencing Guidelines promote proportionality as an explicit objective. The Minnesota Sentencing Guidelines thus seek to accomplish generally recognized theories of punishment by imposing direct sanctions wherein the severity of the offense primarily determines the severity of the punishment.[25] Collateral sanctions on the other hand, often fail to accomplish these goals and may even serve to counteract theories of punishment.

---

21. MINN. STAT. § 609.01 subd. 1 (2012).

22. *Id.*

23. *See infra* Part II.

24. MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § 1 (2011) [hereinafter MINNESOTA SENTENCING GUIDELINES].

25. *See id.* § 2.B.01 cmt. at 5.

B. Collateral Sanctions

After an offender has served his sentence, he often assumes—mistakenly—that he has paid his debt and is free to undertake any lawful pursuit of his choosing.[26] Not so. Instead, he faces a myriad of obstacles to successful reintegration. Among the most significant barriers are those related to finding employment and housing, receiving public benefits, and participating in civic activities.[27] These barriers are collectively known as collateral sanctions. While collateral sanctions have existed in the statutory scheme for many years, as illustrated below, scholars have recently started criticizing their expanding presence.

1. Defining Collateral Consequences

a. Civil Penalties

Collateral sanctions have been identified, defined, renamed, and redefined by legal scholars, sociologists, and legislatures over the years.[28] Though collateral sanctions or collateral consequences may be the more common terms, some scholars argue that "collateral civil penalties" may be the most appropriate:

> We use the term *collateral civil penalties* to characterize a host of legal restrictions that have come to hinder . . . the life chances for a large number of disadvantaged individuals, their families, and communities in the poorest sections of U.S. cities. The term itself is both awkward and imprecise, as the "civil" and "collateral" nature of the penalties is contested by many, including ourselves. Nevertheless we use the term (1) because it is more accurate than other terms, such as *civil disabilities* or *collateral consequences*, that fail to adequately emphasize the punitive nature of the sanc-

26. *See* Margaret Colgate Love, *The Debt That Can Never Be Paid: A Report Card on the Collateral Consequences of Conviction*, CRIM. JUST., Fall 2006, at 16, 17; Christopher Mele & Teresa A. Miller, *Collateral Civil Penalties as Techniques of Social Policy*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES 9, 12 (Christopher Mele & Teresa A. Miller eds., 2005) [hereinafter Mele & Miller, *Techniques of Social Policy*].

27. Christopher Mele & Teresa A. Miller, *Introduction*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 26, at 1, 1 [hereinafter Mele & Miller, *Introduction*].

28. *See, e.g.*, MINN. STAT. § 609B.050 subd. 1(2) (2012) ("'[C]ollateral sanction' means a legal penalty, disability, or disadvantage, however denominated, that is imposed on a person automatically when that person is convicted of or found to have committed a crime, even if the sanction is not included in the sentence."); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 255 (2002) ("Collateral consequences can be defined as penalties, disabilities, or disadvantages that occur automatically because of a criminal conviction, other than the sentence itself."); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) [hereinafter Demleitner, *Preventing Internal Exile*] ("[C]ollateral sentencing consequences encompass all civil restrictions that flow from a criminal conviction.").

> tions and (2) because it makes the irony inherent in the term that much more prominent.[29]

Regardless of the term used, it is generally agreed that collateral sanctions are civil ramifications that flow automatically, yet indirectly, from a conviction and severely restrict an ex-offender's ability to fully reenter society after completing a criminal sentence.

An ex-offender may encounter collateral sanctions due to both formal prohibitions created by statute and informal social rejection imposed by private citizens.[30] For example, Minnesota statutes impose around two hundred civil "collateral sanctions"[31] relating to license revocation, prohibitions from employment, restrictions on civil rights, and many others.[32]

In addition to statutory sanctions, ex-offenders may face informal sanctions because of the stigma attached to their criminal records. These sanctions emerge in the form of prejudice, social rejection, and exclusion from employment and housing, among others. In the employment context, surveys have shown that sixty to seventy percent of employers would decline to hire an ex-offender.[33] Moreover, with few exceptions, this reluctance to hire ex-offenders often exists regardless of the underlying offense.[34] Employers do not consider the offense's relevance to the performance of a particular job but rather "view a criminal history as a sign of poor work habits and an indicator of lack of honesty and trustworthiness . . . ."[35] Even in cases where employers have outwardly expressed a willingness to hire ex-offenders, studies have shown that in practice, many of these employers still tend to reject ex-offenders.[36]

Dr. Devah Pager has described a criminal record as a "negative credential," defined as "those official markers that restrict access and opportunity rather than enabling them."[37] As Dr. Pager explains, this is comparable but palpably distinct from a "positive credential." "In parallel (but inverse) fashion to the positive credentials of a college degree or professional membership, the criminal credential conveys generalized information to employ-

---

29. Mele & Miller, *Introduction*, *supra* note 27, at 1, 1.

30. *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 34 (2007).

31. DEP'T OF PUB. SAFETY, COLLATERAL CONSEQUENCES REPORT TO THE LEGISLATURE 6 (2007), *available at* http://archive.leg.state.mn.us/docs/2007/mandated/070025.pdf; *see also* MINN. STAT. §§ 609B.050–.725 (2012) (cross-referencing to Minnesota statutes that impose collateral consequences).

32. *See* MINN. STAT. §§ 609B.050–.725.

33. PAGER, *supra* note 30, at 34.

34. *Id.* at 5.

35. *Id.* at 34 (quoting Lonnie Freeman Husley, Attitudes of Employers with Respect to Hiring Released Prisoners (unpublished dissertation, Texas A&M University, 1990) (on file with University Microfilms International), at 50).

36. PAGER, *supra* note 30, at 34.

37. *Id.* at 32.

ers about the skills and disposition of presenting job applicants."[38] In other words, as much as a Harvard degree tends to propel a resume to the top of the pile, a conviction tends to thrust it to the bottom, or—a more likely scenario—to the trash.

b. Invisibility

In addition to being a civil penalty, collateral sanctions carry the distinct feature of invisibility. They have been described as "invisible punishment,"[39] named because their impact may be unknown and undisclosed to a criminal defendant before or at the time of conviction.[40] Because collateral sanctions technically sit outside the criminal justice system, those involved in the criminal process generally do not consider them throughout sentencing or plea bargaining stages.[41] Moreover, given the complex statutory scheme that often buries collateral sanctions throughout the civil code, many argue that it would be difficult to require counsel to inform a client of every sanction that the client might face in the future.[42]

Another reason collateral sanctions are deemed invisible is that they arise out of civil, rather than criminal, legislation.[43] Whereas legislation related to criminal sentencing is often "high-profile," civil legislation imposing collateral sanctions is often overlooked.[44] Collateral sanctions "tend to be enacted with limited public knowledge and virtually no public debate, thus enhancing their 'invisibility.'"[45]

2. Impact of Collateral Sanctions

These often invisible collateral sanctions have expanded over the last decade—an expansion that many have criticized as unfair and excessive. This expansion carries many injustices, but this Comment will discuss two in particular. First, collateral sanctions effectuate a cycle of poverty and increase the likelihood of recidivism, foisting perpetual punishment on an ex-offender. Second, collateral sanctions disproportionately punish minori-

38. *Id.* at 34.

39. *See generally* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); *see also* Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1215 (2010) [hereinafter Pinard, *Reflections and Perspectives*] (citing Travis, *supra*); Chin, *supra* note 28, at 253 (referring to collateral sanctions as a "ton of bricks" that is "invisible").

40. Pinard, *Reflections and Perspectives*, *supra* note 39, at 1215–16.

41. *Id.* at 1215. *But see* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (holding that although deportation is not a criminal sanction, "counsel must inform her client whether his plea carries a risk of deportation").

42. Chin, *supra* note 28, at 253–54.

43. Mele & Miller, *Techniques of Social Policy*, *supra* note 26, at 9, 12.

44. *Id.* (citing "mandatory minimum sentences, 'three strikes' laws, and federal sentencing guidelines" as highly visible areas of criminal sentencing legislation open to public debate and critique).

45. *Id.*

ties. Because of these injustices, it is important that those involved with creating and imposing collateral sanctions maintain a dialogue about how the legitimate purposes of collateral sanctions can be appropriately administered while ensuring fairness to the ex-offender.

a. Poverty and Recidivism

Collateral sanctions contribute to increased rates of poverty and recidivism, largely due to the formal and informal restraints on an ex-offender's ability to obtain stable employment and housing.[46] Employment plays a key role in minimizing recidivism, "with the intuition that steady work can reduce the incentives of crime."[47] And this is a logical result; when an ex-offender's criminal record excludes her from gainful employment, she is left with few choices. When the offender is from a poor community with higher rates of poverty and crime, she may be tempted to earn money through illicit means when faced with unemployment. Crime may seem like her only choice.[48]

Not only do barriers to employment and housing make it practically difficult to earn a living while obeying the law, but these barriers can also have a devastating emotional impact. Employment and housing are basic needs that are essential to successful reintegration into society after conviction. But when an ex-offender's criminal record bars her from fulfilling these needs, the barriers relegate her to a second-class citizen—a status which many argue increases the likelihood that she will offend again.[49] Yet as discussed below, collateral sanctions are largely justified as public safety measures. In light of this paradox, collateral sanctions should only be imposed in a way that balances these factors.

b. Disparate Impact

Most scholars agree that collateral consequences disproportionately and unfairly affect communities of color.[50] Although the disparate impact of collateral consequences may be due in part to the disproportionate conviction rates of people of color, some have argued that the civil sanctions themselves are directed towards communities of color. Professor Michael Pinard has argued that the growing disparate impact of collateral sanctions is the result of negligent and/or intentional policy decisions that are influenced by race.

---

46. *See* Love, *supra* note 26, at 17–18.

47. PAGER, *supra* note 30, at 25.

48. *See* Elizabeth Curtin, *Home Sweet Home for Ex-Offenders*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 26, at 111, 112.

49. Demleitner, *Preventing Internal Exile*, *supra* note 28, at 160; R. Paul Davis, *The Mark of Cain: Some Subliminal Effects of Criminal Process*, 44 SASK. L. REV. 219, 219–20 (1980).

50. *See, e.g.*, Pinard, *Reflections and Perspectives*, *supra* note 39, at 1215.

Under Pinard's negligence theory, the disparate impact may merely be an unavoidable corollary of the disproportionate over-representation of people of color in the criminal justice system and the legislature's failure to consider this disparity when imposing new collateral consequences.[51] One example of this is the "War on Drugs" that began in the 1980s. In an effort to fight the "War on Drugs," Congress enacted new laws that would make it more difficult for those convicted of certain drug offenses to take advantage of some federal aid programs.[52] Sentencing laws for drug offenses also became harsher.[53] But when enacting these new laws, Congress "ignored both the racial history of drug criminalization and the predictably disproportionate impact that these consequences would have on people of color."[54] Thus, even though Congress could have foreseen the disparate impact from the expansion of collateral consequences during the "War on Drugs," Congress neglected to consider the impact or enact measures that might alleviate it.

The more sinister view blames the disparate impact of collateral sanctions on an intentional policy decision to ensure that communities of color suffer the effects of collateral sanctions more than others.[55] While felon disenfranchisement is not the focus of this paper, given its "long historical pattern of racial exclusion," it provides a useful illustration of the racial implications of collateral sanctions.[56] Although criminal disenfranchisement laws had existed since colonial times in America, "[a]fter Reconstruction, disenfranchisement laws were retooled specifically to exclude African Americans from voting."[57] For example, some states drafted their disenfranchisement laws to target crimes that the legislatures deemed to be primarily committed by African Americans while excluding those alleged to be primarily committed by whites. Although such overt racism has subsided since the days of Jim Crow, the impact of disenfranchisement laws continues to exclude African Americans from voting at a greater rate than others.[58] In light of this history, collateral sanctions can be viewed as an extension of covertly repressive statutory schemes.

In addition to directly repressive statutes such as felon disenfranchisement laws, collateral consequences also "involve[ ] institutions *unrelated to*

---

51. *See id.* ("[J]ust as mass incarceration has disproportionately impacted individuals and communities of color in urban centers in the United States, mass reentry is now doing the same.")

52. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 513 (2010) [hereinafter Pinard, *Confronting Issues of Race and Dignity*].

53. *Id.* at 514–16 (discussing harsher penalties for drug offenses and studies showing how "sentencing laws—such as the federal sentencing policy which imposes more severe punishment for possession of crack than for powder cocaine—and school zone drug laws have had a disproportionate impact on African Americans.").

54. *Id*. at 514.

55. *Id.* at 512–13.

56. *Id.* at 512.

57. *Id.* at 512–13.

58. Pinard, *Confronting Issues of Race and Dignity*, *supra* note 52, at 512–13.

criminal justice in the management and social control of targeted populations."[59] This invites further discrimination as studies have shown the exacerbated impact that criminal records have on people of color compared to others with a criminal record.[60] This means that not only are there policies and laws in place that permit the government to exclude individuals from certain jobs and public housing, but the government also facilitates private citizens to do the same. "All become complicit in the denial of eligibility of persons (and, by extension, their families if the head of a household) based on criminal records."[61]

3. Historical Justifications for Collateral Sanctions

Despite the harsh impact of collateral sanctions on ex-offenders, society historically justified them because they are loosely in accordance with some of the above-mentioned retributive and utilitarian justifications for criminal punishment. Some have argued that collateral sanctions serve retributive and deterrent purposes;[62] however, there is general agreement that the primary purpose is to incapacitate an ex-offender, preventing him from committing future crimes.[63] Thus, collateral sanctions are considered public safety measures. Although some of the purported justifications for criminal and collateral sanctions are similar, "[t]here is widespread agreement that collateral sentencing consequences do not serve a rehabilitative function and may even actively thwart attempts at rehabilitation by preventing the ex-offender's reintegration into society."[64]

As a retributive measure, collateral sanctions have been deemed appropriately punitive—an offender "deserves" any restraint on his freedom to obtain adequate employment and housing because of his own "breach of the social contract."[65] In the past, because of their retributive nature, collateral sanctions were imposed largely in proportion to the severity of the offense.[66]

Some argue that collateral sanctions act as deterrents by dissuading individuals from committing crimes in order to avoid the hardships they might face after completing a criminal sentence.[67] In citing deterrence as a legitimate justification for imposing collateral consequences, "[t]he idea . . . is that deterrence could be a plausible goal even when the nexus between

59. Mele & Miller, *Techniques of Social Policy*, *supra* note 26, at 9, 21.
60. *See* PAGER, *supra* note 30, at 90–92.
61. Mele & Miller, *Techniques of Social Policy*, *supra* note 26, at 9, 21.
62. Demleitner, *Preventing Internal Exile*, *supra* note 28, at 160.
63. *See id.*; Mele & Miller, *Techniques of Social Policy*, *supra* note 26, at 9, 10.
64. Demleitner, *Preventing Internal Exile*, *supra* note 28, at 160.
65. Mele & Miller, *Techniques of Social Policy*, *supra* note 26, at 9–10.
66. *Id.* at 9.
67. Demleitner, *Preventing Internal Exile*, *supra* note 28, at 161.

the criminal act and the collateral penalty is tenuous or nonexistent."[68] For example, in the context of public housing:

> [D]enying public housing to an individual convicted of any misdemeanor (or, in some jurisdictions, even a noncriminal violation) may not be the result of any assumption that the particular individual would pose a danger to his or her neighbors. Rather, the penalty serves to deter individuals living in public housing and prospective public housing tenants from engaging in criminal activity.[69]

As an incapacitative or preventive measure, collateral sanctions have been recognized as an important public safety measure to protect citizens from the "possibility of ex-felons further breaching laws."[70] Similarly, some argue that this prevention is also intended to protect society from the "corrupting influence" of an ex-offender.[71] This theory is largely based on the argument that certain ex-offenders are more likely to reoffend.[72] Because collateral sanctions were initially intended to prevent future crimes by ex-offenders, in the past, the incapacitative sanctions were generally closely tied with the underlying offense.[73] For example, an individual's professional license might be revoked if that individual engaged in criminal activity associated with his profession.[74] Legislatures tend to continue to justify collateral consequences on public safety grounds rather than retributive or deterrent grounds and, in doing so, circumvent consideration of the theoretical justifications that might otherwise be invoked when imposing punishment.[75]

But despite what any legislature claims is the nature of collateral sanctions, these sanctions undeniably serve to punish. That they might also serve public safety interests should not justify the breadth with which they are imposed. And given their punitive nature coupled with their inadequate justifications, the imposition of collateral sanctions merits further consideration by the legislature.

---

68. Pinard, *Confronting Issues of Race and Dignity*, *supra* note 52, at 508.

69. *Id.*

70. Mele & Miller, *Techniques of Social Policy*, *supra* note 26, at 9, 10.

71. Demleitner, *Preventing Internal Exile*, *supra* note 28, at 161.

72. *Id.*

73. Mele & Miller, *Techniques of Social Policy*, *supra* note 26, at 9, 10.

74. *Id. But see* Demleitner, *Preventing Internal Exile*, *supra* note 28, at 156 (explaining that professional boards need not link the underlying offense to the profession in order to justify disqualifying an individual from professional licensure based on the necessity to "foster high professional standards").

75. Nora V. Demleitner, *A Vicious Cycle: Resanctioning Offenders*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 26, at 185, 186 [hereinafter Demleitner, *Vicious Cycle*].

II. Collateral Sanctions as Punitive Sentences

Although collateral sanctions are understood within the framework of civil law, this understanding misses the punitive nature of collateral sanctions. Not only do offenders face the direct, tangible punishment imposed by criminal sentences, but they also face the indirect, invisible punishment of collateral sanctions. While collateral sanctions and criminal sentences are both ostensibly justified on retributive and utilitarian theories of punishment, in imposing collateral sanctions, legislatures utterly fail to accomplish the policies of predictability, proportionality, and equity that are vital to effectuating these theories.

First, from a retributive standpoint, collateral sanctions run contrary to the concept of proportionality, "which is a hallmark of retributive sentencing."[76] Instead, they perpetually punish an ex-offender so he can never repay his "debt" to society; the punishment is excessive, continues beyond the criminal sentence, and results in a punishment that is greater than the offender's "just deserts." Proportionality is at best impracticable and at worst impossible given the breadth of the laws inflicting collateral sanctions along with the stigma attached to any criminal record, regardless of the offense. These consequences result in a punishment not imposed and not considered by the criminal justice system in sentencing.[77] Thus, any collateral sanction is inherently disproportionate, particularly from a retributive standpoint, to the offense because the criminal justice system has already imposed a sentence that the legislature has deemed as adequate and proportionate.[78]

Moreover, grounding collateral sanctions in retributive theory directly conflicts with Kant's conception of retribution as based in respect for the person and individualization—a principle that is unique to the theory of retribution and distinguishes it from utilitarian principles that seek to promote societal benefits. Instead, collateral sanctions corral individuals into groups and deny privileges and rights based on group status, rather than individual conduct and character. By definition, this process of de-individualization results in punishment that lacks proportionality, falling away from the traditional theory of retribution. Yet, despite the fact that they are not entirely consistent with the theory of retribution, collateral sanctions undeniably impose punishment. They simply lack the adequate justification and corresponding necessary safeguards.

Basing collateral sanctions on deterrence also fails. "A basic precept of general deterrence theory is that individuals, to be deterred by a penalty, must be aware of its existence."[79] But collateral sanctions are often invisi-

76. Demleitner, *Preventing Internal Exile*, *supra* note 28, at 160.

77. *Id.*

78. *See id.* ("Many offenders experience collateral consequences as additional and disproportionate punishment that runs counter to the adage that after the sentence is served, the offender has paid his or her debt to society." (internal quotations and citations omitted)).

79. Pinard, *Confronting Issues of Race and Dignity*, *supra* note 52, at 508.

ble, hindering this awareness and precluding the predictability that is a cornerstone of deterrence as a justification for criminal punishment. It is impossible to deter a potential offender through collateral sanctions when the individual has no knowledge of these sanctions or when the sanctions are imposed in a "haphazard way" such that the likelihood of their enforcement is uncertain.[80] The concept of deterrence presupposes knowledge of the consequences of one's actions *before* one acts. Because collateral consequences are largely invisible, they are ineffective means of achieving deterrence.

The best argument in favor of collateral sanctions is founded in public safety considerations—collateral sanctions serve an incapacitative function to prevent ex-offenders from reoffending by removing them from situations where they might do so. But because legislatures have cast such a wide and indiscriminate net in defining and imposing collateral sanctions, public safety no longer justifies their broad use. Indeed, the purportedly preventive restrictions on an ex-offender's ability to attain housing and employment arguably has a harmful effect on public safety, given the susceptibility to poverty and recidivism when an ex-offender lacks these basic needs. Society can only truly legitimize restrictions on housing and employment when the restrictions are closely tied to the underlying offense. "An obvious example can be found in the employment context, when individuals convicted of child sex offenses are barred from working with children."[81] But instead of imposing only targeted restrictions, legislatures impose broad ones that include all offenders within certain categories. Thus, "[e]ven though they may be designed to prevent further unlawful activity, they restrict much lawful activity."[82] This defies notions of predictability, proportionality, and equity and is an unacceptable infringement on civil liberties.

III. EXPUNGEMENT

One way to reduce the impact of collateral sanctions is to expunge an ex-offender's criminal record. An expungement limits the statutory and social consequences barring the individual from employment and housing. The term "expunge" literally means "to erase or destroy."[83] In Minnesota, however, the statutory remedy of expungement is "limited to a court order sealing the records and prohibiting the disclosure of their existence or their opening except under court order or statutory authority."[84] In any case, expungement is intended to "erase all evidence of the event as if it never

80. *See* Demleitner, *Vicious Cycle*, *supra* note 75, at 185, 198.

81. Pinard, *Confronting Issues of Race and Dignity*, *supra* note 52, at 508.

82. Demleitner, *Vicious Cycle*, *supra* note 75, at 185, 198 (providing as an example the case where conviction of a nonviolent offense may prevent an ex-offender from working in a lawful job that would require him to carry a firearm or from enjoying lawful activities such as hunting).

83. BLACK'S LAW DICTIONARY 662 (9th ed. 2009).

84. MINN. STAT. § 609A.01 (2012).

occurred," and a person who has had a record expunged is permitted to answer that he has no criminal history in response to background checks.[85]

Individuals with criminal records in Minnesota may seek expungement under either statutory authority or inherent judicial authority. Chapter 609A of the Minnesota statutes supplies the statutory grounds for which an offender can seek to have his record expunged, yet the grounds are limited and inapplicable to most cases. A judge's inherent authority, on the other hand, is a remedy that in the past has offered a much broader basis for relief. But recent case law has severely limited the availability of expungement under inherent judicial authority, and it remains to be seen whether the doctrine will provide meaningful relief in the future. Both statutory authority and inherent authority are important avenues for those seeking expungement, and both should be reformed to better protect the interests of those seeking to use them.

A. Statutory Authority – Minnesota Statute 609A

In Minnesota, an individual may petition to have certain records statutorily expunged under only three circumstances: (1) "[u]pon the dismissal and discharge of proceedings against a person" for "[c]ertain controlled substance offenses", (2) when juveniles prosecuted as adults have been discharged by the commissioner of corrections or successfully fulfilled the conditions of their probation, and (3) when "all pending actions or proceedings were resolved in favor of the petitioner."[86] Minnesota interprets the third ground for relief, a resolution "in favor of the petitioner," to apply to: (1) arrest records when the petitioner was never formally charged, (2) a disposition of not guilty, and (3) dismissals in cases prior to a determination of guilt.[87] None of the statutory grounds provides relief for an adult convicted of a crime other than relatively insignificant drug charges.[88] Thus, no matter how old a criminal record may be or how much an individual may have rehabilitated, for many ex-offenders, the Minnesota legislature extends no relief.

In enacting chapter 609A, the legislature intended to "create uniform procedures for hearing and granting criminal expungements."[89] Yet, the legislature also wanted to ensure that criminal records remained publicly available in accordance with the presumption of public data promulgated in

85. State v. M.B.M., 518 N.W.2d 880, 882 (Minn. Ct. App. 1994).

86. MINN. STAT. § 609A.02 subds. 1–3 (2006).

87. 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, 1350 (2005).

88. Subdivision 1 refers to charges "under section 152.18, subdivision 1, for violation of section 152.024, 152.025, or 152.027 for possession of a controlled substance" which allows the court to discharge and dismiss certain first-time drug offenses after a period of probation.

89. Geffen & Letze, *supra* note 87, at 1344 (citing an interview with Minnesota State Senator Don Betzold who helped draft chapter 609A before it was enacted in 1996).

the Minnesota Government Data Practices Act (the "MGDPA").[90] To protect this presumption, the legislature intentionally drafted chapter 609A to include "somewhat cumbersome" procedures for expungement.[91] And even in the cases where statutory expungement is permissible, the legislature made it an "extraordinary remedy."[92] A court should only grant expungement "upon clear and convincing evidence that it would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety of: (1) sealing the record; and (2) burdening the court and public authorities to issue, enforce, and monitor an expungement order."[93]

B. Inherent Judicial Authority

Because of the limited statutory authority, many offenders seek relief from the courts' inherent authority to seal their records. The judiciary has inherent authority to order expungement in two circumstances: (1) when expungement is necessary to protect a petitioner's constitutional rights or (2) when expungement is "necessary to the performance of the judicial function as contemplated in our state constitution."[94] Under the first circumstance, a court may invoke its inherent authority in cases where a government agent has abused his power and used the petitioner's records in a way that violates the petitioner's constitutional rights.[95]

More often, courts are presented with the second situation. Inherent authority under this concept is based on the separation-of-powers doctrine and "governs that which is essential to the existence, dignity, and function of a court because it is a court."[96] Over the past decade, Minnesota appellate courts have corroded this doctrine into one that often fails to provide meaningful relief. Given the lack of clear guidelines, a review of recent significant decisions is helpful in understanding the evolution of the judiciary's inherent authority to order expungement.

1. State v. Schultz

The Minnesota Court of Appeals in *State v. Schultz*[97] distinguished between judicial and non-judicial records when it affirmed expungement of judicial records.[98] "[T]he more difficult of the issues" was whether the district court had the authority to order expungement of non-judicial records

90. *Id.*
91. *Id.*
92. MINN. STAT. § 609A.03 subd. 5 (2012).
93. *Id.* Although, the standard seems high, it has been noted that there appears to be no appellate court opinions that have denied expungement under the statute. *See* Geffen & Letze, *supra* note 87, at 1353.
94. State v. S.L.H., 755 N.W.2d 271, 275 (Minn. 2008).
95. State v. T.M.B., 590 N.W.2d 809, 813 (Minn. Ct. App. 1999).
96. *S.L.H.*, 755 N.W.2d at 275.
97. 676 N.W.2d 337 (Minn. Ct. App. 2004).
98. *Id.* at 342.

held by the executive branch.[99] Noting that existing precedent was somewhat inconsistent, the *Schultz* court proceeded to examine prior case law and determined that inherent judicial authority was limited to "unique judicial functions, corresponding court records, and agents of the court."[100] Relying on "the important separation-of-powers issues implicated in expungement questions," the court of appeals concluded that the district court exceeded its authority by ordering other branches of government to seal non-judicial records.[101] Despite this limitation, courts could still order the expungement of significant judicially created records but could not require other branches to seal their records.

2. State v. V.A.J.

Although *Schultz* restricted the judiciary's inherent authority to order other branches to seal records, its scope was limited, and the availability of expungement under inherent judicial authority remained unclear. In *State v. V.A.J.*, the Minnesota Court of Appeals seized the opportunity to clarify and reassert the judiciary's inherent authority under certain circumstances. The court conceded that the district court lacked authority to order expungement of non-judicial records, i.e. records "created and maintained by the executive branch," such as a petitioner's arrest record and investigative file.[102] It held, however, that the judicial branch retained the authority to order the executive to seal those records that were created by the judiciary and disseminated to executive branch agencies, including the Bureau of Criminal Apprehension ("BCA"),[103] for custodial purposes. Those records included documents detailing the offense, the court of conviction, the date of conviction, and sentencing information.[104] Thus, when a district court invoked its inherent authority to order expungement, that order included public records created in the judicial branch and held by the BCA.[105]

Concurring in the result of *V.A.J.*, Judge Shumaker wrote separately and in three brief paragraphs made two crucial, yet seemingly disregarded, points. First, he noted that to order "the remedy of record expungement but then to limit the reach of that expungement so that the record remains accessible to the public is to effectively deny that remedy."[106] Next, Judge Shumaker pointed out the additional shadow cast over a petitioner who informs an employer that he does not have a criminal record (as he is permit-

99. *Id.*
100. *Id.* at 343 (internal quotations and citations omitted).
101. *Id.* at 344.
102. State v. V.A.J., 744 N.W.2d 674, 677–78 (Minn. Ct. App. 2008).
103. *Id.* at 678. Petitioners are often most concerned with the BCA expunging records because records held at the BCA are a common source for employment and housing background checks. *Id.* at 675.
104. *Id.* at 678.
105. *Id.*
106. *Id.* (Shumaker, J., concurring).

ted to do upon a court's expungement order) only to have that employer discover otherwise after checking the BCA database. Not only does the criminal record potentially affect the petitioner's qualifications for employment, but also now "the person's credibility is impugned or destroyed."[107] Judge Shumaker's concurrence grasped the essence of the inherent authority to grant expungements, yet his reasoning has not been acknowledged, much less followed, as Minnesota case law has continued towards limiting this inherent authority.

3. State v. S.L.H.

The Minnesota Supreme Court redefined and limited this inherent authority shortly after *V.A.J.* was decided in 2008.[108] In *State v. S.L.H.*, the court effectively extinguished a petitioner's right to seek expungement under inherent judicial authority absent a constitutional violation.[109] In doing so, the court departed from *Schultz* and *V.A.J.* and declined to distinguish between judicial and non-judicial records. Instead, the court focused on whether the separation-of-powers doctrine precluded the judiciary from ordering the executive branch to seal any records, regardless of where the records were created.

In 2006, S.L.H. sought expungement of criminal records related to a 1992 conviction for fifth-degree possession of a controlled substance.[110] She was twenty years old at the time of the conviction, received a stay of imposition, and successfully completed probation, after which her offense was deemed a misdemeanor. As a single mother of four children, S.L.H. requested expungement so she could work as a teacher or a medical assistant to better support her family.[111] After finding that the benefit to S.L.H. of expungement outweighed the disadvantages to the public, the district court granted her expungement based on its inherent judicial authority but declined to extend the order to executive agencies.[112] S.L.H. appealed, and the Minnesota Supreme Court granted her petition for review.[113]

The court cobbled together a two-part test to determine whether or not the judiciary could exercise inherent authority to expunge criminal records held outside the judicial branch. A court must first identify the judicial function at issue and then determine whether "appropriate circumstances"

107. *Id.* at 677–78.

108. State v. M.L.A., 785 N.W.2d 763, 767 (Minn. Ct. App. 2010) (noting that the conflicting holdings of *V.A.J.* and *S.L.H.* cannot be reconciled and because the supreme court decided *S.L.H.* after the court of appeals decided *V.A.J.*, "*S.L.H.* supersedes *V.A.J.*").

109. State v. S.L.H., 755 N.W.2d 271, 275 (Minn. 2008).

110. *Id.* at 273.

111. *Id.*

112. *Id.* at 274.

113. *Id.*

are present so that expungement is necessary to accomplish a core judicial function.[114]

In applying the test, the court examined two precedential cases. First, in *State v. C.A.*, the petitioner requested expungement of records related to his "arrest, trial and conviction" after his conviction of "consensual sodomy" was set aside.[115] In identifying the judicial function at issue, the *S.L.H.* court explained:

> In *C.A.*, the judicial function at issue was reduc[ing] or eliminat[ing] unfairness to individuals that could arise if court records, records related to the court process, or records used by agents in that process were used in a way that undermined the benefit to the petitioner of having his conviction set aside.[116]

Because the conviction was no longer valid, expungement "could be viewed as being closely tied to the core judicial function of granting full relief (and thus eliminat[ing] unfairness) to the petitioner."[117] The *S.L.H.* court did not go on to identify the "appropriate circumstances" to exercise inherent authority, but explained that the "unfairness concern at issue in *C.A.*—criminal records negatively impacting the petitioner even after his conviction had been set aside—is not implicated in the same way because S.L.H. continues to stand convicted."[118]

The *S.L.H.* court then examined *Barlow v. Commissioner of Public Safety*, in which the petitioner's driver's license was revoked after he was arrested on suspicion of driving under the influence.[119] Because the petitioner pled guilty to a careless driving charge, his license revocation was judicially rescinded.[120] Thereafter, the petitioner requested that the court order the Commissioner of Public Safety to remove any records relating to his license revocation and subsequent reinstatement.[121] The district court did so, but the Minnesota Supreme Court reversed, explaining that the petitioner's only complaint was that the records would increase his car insurance rates.[122] And because the petitioner pled guilty to careless driving, the matter was of record, and "the facts of *Barlow* did not raise the fairness concern that was implicated in *C.A.* where the petitioner's conviction had been set aside."[123]

Upon analyzing these precedents in *S.L.H.*, the Minnesota Supreme Court concluded that the "facts of this case are actually closer to those of

114. *Id.* at 277.
115. 304 N.W.2d 353, 355 (Minn. 1981).
116. *S.L.H.*, 755 N.W.2d at 277.
117. *Id.*
118. *Id.*
119. 365 N.W.2d 232, 233 (Minn. 1985).
120. *Id.*
121. *Id.*
122. *Id.* at 234.
123. *S.L.H.*, 755 N.W.2d at 277.

Barlow."[124] The court stated that *S.L.H.* did "not seem to implicate a core judicial function or to present the 'appropriate circumstances'" as discussed in *C.A.* to exercise inherent judicial authority.[125] It further compared the case to *C.A.* and reasoned:

> Unlike the petitioner in *C.A.*, S.L.H. does not argue that she is entitled to expungement because her conviction was set aside. S.L.H. instead seeks expungement on the ground that it is necessary for her to achieve her employment goals. But helping individuals achieve employment goals is not essential to the existence, dignity, and function of a court because it is a court.[126]

Accordingly, the court affirmed the district court's order declining to seal S.L.H.'s records held outside the judicial branch and effectively precluded a subsequent finding of the "appropriate circumstances" that would invoke the court's inherent expungement authority.

IV. Rethinking Judicial Expungement Authority

In revoking the judiciary's prior inherent authority to expunge records, the *S.L.H.* court gave insufficient consideration to the core judicial functions at issue. The court ultimately failed to recognize that despite the different circumstances of C.A. and S.L.H., granting full relief and reducing unfairness are both judicial functions that are applicable to S.L.H. The Minnesota Supreme Court explicitly recognized "the core judicial function of granting full relief" but then limited that function to cases where a petitioner's conviction has been set aside.[127] As Judge Shumaker explained in his *V.A.J.* concurrence, "to offer to eligible persons the remedy of record expungement but then to limit the reach of that expungement so that the record remains accessible to the public is to effectively deny that remedy."[128] Thus, a court ordering executive branches to expunge judicial records after properly determining that such an order is appropriate is a judicial function and is concomitant with granting full relief.

Moreover, although Minnesota has thus far declined to recognize collateral consequences for sentencing purposes, given their punitive nature, both the courts and legislature should begin to do so. Collateral sanctions are undoubtedly punitive because they treat ex-offenders as second-class citizens and eliminate employment and housing opportunities. While some collateral sanctions are justifiable, they cannot be justified in the indiscriminate manner that they are currently imposed. Because they result in a perpetual "sentence" to punish an individual, this process should be considered as part of a judicial function. But because collateral sanctions are imposed

124. *Id.*
125. *Id.*
126. *Id.* at 277–78.
127. *Id*. at 277.
128. State v. V.A.J., 744 N.W.2d 674, 678 (Minn. Ct. App. 2008) (Shumaker, J., concurring).

not only by the government but also by private individuals and institutions, their imposition is not as straightforward as traditional sentencing under the criminal justice system. The power to expunge records and order other agencies to do the same is one way to remedy this conundrum and control the imposition of sentences extending beyond those sanctioned by the court. By allowing judges some discretion in their ability to expunge records, judges can consider how best to accomplish the goals of punishment: predictability, proportionality, and equity.

Because the judicial function of imposing sentences must be exercised within the limits prescribed by the legislature,[129] judges should utilize guidelines analogous to the Minnesota Sentencing Guidelines in determining when expungement is appropriate. This would allow a judge to focus on the individual to ensure that she is only subject to collateral sanctions that are predictable, proportional, and equitable. Factors to consider might include the nature of the offense, the ex-offender's current situation and background, efforts at rehabilitation, and the hardships encountered from having a public criminal record. This would more closely align collateral sanctions with criminal sanctions and more accurately acknowledge the inherently punitive nature of both. It would force courts and legislatures to recognize the punitive nature of both. Moreover, by using expungement guidelines, courts would be able to counteract allegations of unbridled judicial discretion—real or perceived. The guidelines would act to constrain courts such that judges would only depart from the guidelines in extraordinary circumstances. Just as in the Minnesota Sentencing Guidelines, a judge could depart from expungement guidelines only if "there exist identifiable, substantial, and compelling circumstances to support" a departure.[130] Likewise, judicial discretion to go beyond the guidelines would be "constrained by case law and appellate review" and would require the judge to "disclose in writing or on the record the particular substantial and compelling circumstances" justifying the departure.[131]

The expungement guidelines could also enumerate types of crimes for which a court would require a much higher demonstration of rehabilitation to grant an expungement. For example, just as the Minnesota Sentencing Guidelines treat sex crimes differently from other crimes, so too would expungement guidelines. And that is just the point of using guidelines rather than imposing automatic sanctions on every person who has committed any crime. By creating a higher burden for certain offenders to obtain an expungement, the guidelines could better reflect the predictability, proportionality, and equity required of any properly constructed punishment.

---

129. State v. Olson, 325 N.W.2d 13, 18 (Minn. 1981) ("[T]he imposition of the sentence within the limits prescribed by the legislature is purely a judicial function.").

130. MINNESOTA SENTENCING GUIDELINES, *supra* note 24, § II(D).

131. *Id.* at 28–29.

Conclusion

The collateral sanctions of criminal conviction have the potential to affect an ex-offender forever. If our morals as a society promote forgiveness, second chances, and equity, then there must be wider recognition of the inherent unfairness in such perpetual punishment. Minnesota should expand its expungement law in a way that recognizes the judicial functions in enforcing basic principles of criminal punishment in the context of collateral sanctions and that allows the judiciary to offer complete relief.