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# CRIMINAL RECORDS AND EMPLOYMENT IN MINNESOTA

1/15/2008

REPORT AND RECOMMENDATIONS OF THE  
2007 COLLATERAL SANCTIONS COMMITTEE

# Criminal Records and Employment in Minnesota

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*This report is the product of the Collateral Sanctions Committee created and fully funded by the Minnesota Legislature in 2007. Although the Legislature utilized staff of the Minnesota Sentencing Guidelines Commission for the project, that agency's Commissioners took no part in the collateral sanctions work. The opinions and recommendations set forth here are those of the Collateral Sanctions Committee. They have not been reviewed or approved by the Guidelines Commission.*

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This information will be made available in an alternative format upon request. The total cost of development and preparation for this report was \$70,318.61 (Reported as required by Minnesota Statute §3.197).

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## INTRODUCTION

In 2007, Minnesota's Legislature focused several public safety initiatives on the important business of reducing recidivism among the vast majority of imprisoned offenders who will return from incarceration to live among us. The Legislature created the Collateral Sanctions Committee responsible for this report and mandated that the group study the impact of criminal records on people's ability to work for a living. See, Appendix A, p. 66. In doing so, the Legislature evidenced its understanding of the fact that ex-offenders who are barred from doing things that functional law-abiding adults do – renting an apartment, driving to work, obtaining a job, qualifying for an occupational license – are far likelier to commit new crimes than they would be if they had the options and responsibilities that most of us take for granted.

Minnesota's criminal law, and the expensive institutions that enact the law, exist to enhance public safety. Insofar as this report makes recommendations concerning employment of people with criminal convictions, those recommendations are centered on the core purpose of protecting the public from crime. The Committee members come from many backgrounds, and they hold diverse views about the role of forgiveness in our lives. This report is not built on a consensus about how much people who have broken the law should pay before they are treated like those who have not. It derives from the conviction held by everyone in the group that Minnesotans will be safer, and Minnesota will be stronger, when everyone who is capable of earning an honest living is allowed and encouraged to do so.

The Committee has chosen to define the term "collateral sanctions" broadly. A "sanction" is a punishment, and a "collateral sanction" is a punishment that results from a crime, but is not imposed by a judge as part of a criminal sentence. Some collateral sanctions are statutory, and the Committee might have confined its work to those. However, the members are cognizant of the broad range of negative consequences on employment that result from contact with the criminal justice system and believe that it is essential to consider the matter as fully as possible.

While the employment of people with significant criminal convictions is a matter of public safety, there is another group of citizens whose contact with the criminal justice system is such that public safety is not the issue. The Committee began by focusing almost exclusively on convicted felons. It soon became clear that there is a larger number of individuals who are no more likely than the next person to commit a crime, but who are barred from employment by

outgrown misdemeanor convictions, minor misdemeanor convictions, vacated and dismissed convictions, petty misdemeanor (noncriminal) violations, dismissed charges, stays of adjudication, one-time delinquency adjudications, and arrests not leading to charges. While criminal justice professionals define most of these as experiences that do not leave a person with a criminal record and think that there is a meaningful difference between having a criminal record and not having one, the society as a whole is not making such distinctions. For these people, who are being treated as though they had serious criminal records, improving collateral sanctions policy and practice is not a matter of public safety; it is a matter of basic fairness.

The Collateral Sanctions Committee's Report does not thoroughly cover all the issues that should be considered, or outline all the actions that should be taken, to ameliorate the negative impact of criminal justice data on employment. Given time constraints and the difficulty of mastering the factors and possibilities involved, the report is our best effort at laying out some important policy, making some specific recommendations for change, and suggesting what remains to be done. We wish to emphasize that sound re-entry policy includes improved access to housing, to behavioral health specialists, and to chemical dependency treatment. The Legislature properly limited the scope of the Committee's work; even the single area of employment could not be examined fully in six months. However, it is important to recognize that the Committee did not discuss housing, mental health, chemical dependency, or any topic other than eliminating irrational barriers to employment that result from criminal data. For instance, while there were two housing experts on the Committee, the issues arising between landlords and prospective tenants were not explored.

All of the ideas and recommendations expressed in this report have been approved by the Committee. Generally, the group worked by consensus; on one or two occasions, a majority vote determined whether a proposal would go forward. The Committee is grateful to the "interested persons" who contributed their substantial knowledge, energy and common sense to this effort.

# SUMMARY OF RECOMMENDATIONS

Full recommendations, and the rationale for each proposal, are set forth in the chapters under which they appear in this summary.

## NOTICE

### COURTS

- Provide a general notice regarding collateral sanctions to defendants (p. 19).

### HIGH SCHOOLS, VOCATIONAL SCHOOLS, COLLEGES AND UNIVERSITIES

- Give notice to those intending to embark on studies leading to employment that they should consider any records of contacts with the police or criminal courts in career-planning (p. 21).
- Educate school administrators and counselors about collateral sanctions, so that they can provide students with sound advice about vocational courses and career planning (p. 22).

### MAKING COLLATERAL SANCTIONS EASY TO IDENTIFY

- A directory of all of the professions and jobs that require licenses and clearances from state agencies must be created. The directory should state requirements for licensure/clearance, the process each agency uses to vet applicants (including how they weigh arrest or conviction records), instructions on how to apply, and an outline of the appeals process (p. 23).

### EDUCATING THE PUBLIC

- Implement a campaign to educate the public about the links between public safety and sound re-entry programs, including those that promote employment (p. 24).

## **REDUCING CONVICTIONS / DIVERSION**

- Re-evaluate the legal mechanisms Minnesota law provides to spare deserving individuals from having criminal convictions and refine and augment them to increase their impact and make them equally available to all qualified defendants (p. 27).
- Establish a mandatory statewide diversion program based on an appropriate actuarial risk assessment tool (p. 27).

## **LICENSING AND BACKGROUND CHECKS**

- Rationalize licensing agencies' use of criminal data, so that it is consistent with the policies set forth in this report (p. 32).
- Create a process by which all state agencies choosing to do background checks of criminal records can readily obtain uniform, accurate reports concerning at least Minnesota criminal history (p. 33).
- Before creating a standard format for criminal history reports, the Legislature should consider carefully exactly what data should be included and whether there should be more than one format. It might be decided that the content of background checks should depend upon the purpose for which they're used, or how much access the subject will have to vulnerable people or property (p. 33).
- Carefully restrict the number of convictions that will trigger absolute bars from particular kinds of employment, or eliminate such bars entirely (p. 33).
- Establish sensible "look-back" periods after which convictions will not be reported. It is not readily apparent why some are longer than others and how we arrived at the periods we have. These time-frames must be carefully considered, because they affect many people in a major way (p. 33).
- Weigh the advantages and disadvantages of streamlining professional licensure by reducing the number of licensing agencies (p. 33).
- Require all licensing agencies to consider specific factors every time they weigh an individual's criminal record. If they deny licensure based on criminal history, they must provide the applicant with their evaluation of the factors (p. 34).
- Review statutory bars to licensure for their adherence to sound collateral sanctions policy and amend them so that they are consonant with sound policy. In addition to considering the elimination of permanent bars and the establishment of reasonable look-back periods, determine whether there is a rational relationship between each

conviction triggering a bar and the profession the ex-offender is not allowed to pursue. If there is not, the bar should be eliminated (p. 35).

- Eliminate arrests not leading to charges from criminal history reports for use outside the criminal justice system (p. 35).
- Determine whether and/or when charges that do not result in conviction should be reported outside the criminal justice system (p. 35).
- Determine how and whether to report vacated sentences, dismissals, petty misdemeanors, and other actions that the courts employ specifically to spare people who do not pose a risk to others from having criminal convictions. Create a statute clearly setting forth how and whether such actions are reported (p. 35).
- Background reports including legal terms, such as “continuance for dismissal,” “vacated,” “dismissed,” and “suspended” will include a standard glossary defining these terms and noting that courts count only convictions as a “criminal record” (p. 35).
- Amend Minnesota Statute §609.135. See proposed statute, pp. 36.

### **MINNESOTA STATUTE §364**

- Make Minnesota Statute §364 and actual practices consistent (p. 40).

### **DATA MINERS**

- Regulate data miners. See proposed statute, pp. 42-43.

### **CERTIFICATES OF RELIEF**

- Create a Certificate of Good Conduct. See proposed statute, pp. 46-49.

### **WORK EXPERIENCE**

- Fund county corrections agencies at a level adequate to allow them to work within their communities to provide work experience to individuals on probation, to support probationers in getting and keeping jobs, and to measure their efforts' impact on recidivism (p. 53).
- Fund DOC vocational training that is designed in collaboration with potential employers, measures impact on recidivism, and provides all inmates with experience working at jobs that are likely to be available in the community (p. 53).



- Fund state or nonprofit vocational programs for ex-offenders only if the large majority of participants gain employment, and the programs have measurable impact on recidivism (p. 53).
- Explore the possibility of linking funding for correctional work programs to projects that would benefit the communities most impacted by crime or would build facilities needed to enhance public safety (p. 53).

## **EMPLOYER INCENTIVES**

### **ROLE OF EMPLOYERS AND UNIONS**

- Involve employers and unions in minimizing unreasonable impact of criminal records on employment (p. 55).

### **EMPLOYER LIABILITY**

- Eliminate employer liability for reasonable hiring of ex-offenders (p. 56).

### **FINANCIAL INCENTIVES**

#### A. Work Opportunity Tax Credit (WOTC)

- Evaluate the effectiveness of Work Opportunity Tax Credits in Minnesota (p. 57).
- Work with employers to maximize utilization of tax credits (p. 57).

#### B. Minnesota Federal Bonding Service

- Determine why Minnesota businesses are not utilizing the Federal Bonding Service (FBS) (p. 59).
- Increase utilization of federal bonds, or stop paying to advertise and administer the FBS (p. 59).

## **DRIVING PRIVILEGES**

- Give judges discretion not to report non-driving traffic violations to the Department of Public Safety (DPS) (p. 61).

- Create a task force to study driver licensing in Minnesota and elsewhere, in order to determine ways in which to decrease the number of residents who are driving illegally in order to get to work (p. 62).
- Revoke Minnesota Statute §171.175 (p. 62).
- Revoke or amend Minnesota Statute §171.171 (p. 62).

## BACKGROUND

While the topic of collateral sanctions, and that of offender reentry in general, has recently gained attention in Minnesota, it has been the topic of discussions across the country for almost a decade. While serving as Attorney General in the late 1990's, Janet Reno focused on offender reentry, committing significant Department of Justice funds toward reentry issues.<sup>1</sup> Her work was continued by Attorney General John Ashcroft, who, in collaboration with several other federal departments, implemented the Serious & Violent Offender Reentry Initiative in 2003. This initiative committed \$100 million to the development of prisoner reentry programs across the country.<sup>2</sup> In his 2004 State of the Union address, President George W. Bush recognized the importance of reentry efforts: "America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life."<sup>3</sup>

Members of Congress have also addressed the need to help ex-offenders remain law-abiding by normalizing their daily lives. In 2007, Representative Danny Davis (D-IL) and Senator Joe Biden (D-DE) introduced the Second Chance Act of 2007, H.R.1593/S.1060; the bill authorizes the appropriation of roughly \$180 million in grants for the development of reentry initiatives aimed at reducing recidivism. The bill passed the House of Representatives on November 13, 2007, and has been referred to the Senate Committee on the Judiciary.<sup>4</sup>

In August of 2003, the American Bar Association House of Delegates approved standards specifically addressing collateral sanctions.<sup>5</sup> They were published in ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons.<sup>6</sup> The ABA concluded that due process requires that defendants receive notice of collateral sanctions prior to entering a guilty plea. They recommended that a judge should have the discretion to provide relief from any collateral sanction at the time of sentencing.<sup>7</sup> These and other ABA recommendations were taken into consideration in the development of this report.

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<sup>1</sup> Reno, J. (2000, Feb. 29).

<sup>2</sup> Office of Justice Programs.

<sup>3</sup> Bush, G.W. (2004, Jan. 20).

<sup>4</sup> Library of Congress. (2007); Congressional Budget Office. (2007, April 17).

<sup>5</sup> American Bar Association. (2004b).

<sup>6</sup> American Bar Association. (2004a).

<sup>7</sup> Ibid. At Standards 19-2.3, 19-2.5 .

The National Conference of Commissioners on Uniform State Laws (NCCUSL) is currently drafting its own proposals for addressing collateral sanctions. Their “Uniform Act on Collateral Consequences of Conviction,” like the ABA standards, emphasizes the importance of raising awareness of collateral sanctions and making it possible for defendants to understand the extra-judicial consequences of conviction before they enter a plea in court.<sup>8</sup> Michele Timmons, Minnesota’s Revisor of Statutes, is a member of the drafting committee; and Judge Jack Davies, a former Minnesota legislator, is an ex officio member.

The increasing attention to issues of offender reentry and collateral sanctions is, in large part, motivated by policymakers’ awareness that the number of Americans involved with the criminal justice system continues to expand. Approximately 2.2 million people are currently incarcerated in prisons and jails throughout the United States, a 100 percent increase over the number incarcerated in 1990.<sup>9</sup> According to the Bureau of Justice Statistics, roughly seven million Americans are under some type of correctional supervision on any given day (i.e: probation, parole, or incarceration), roughly 60 percent more than the approximately 4.4 million under supervision in 1990.<sup>10</sup>

Minnesota has seen a dramatic increase in its offender population, as well. In 1990, there were about 8,800 felony sentences in Minnesota; in 2006, the Minnesota Sentencing Guidelines Commission (MSGC) processed about 16,400 felony sentences and there were nearly 163,000 non-traffic misdemeanor and gross misdemeanor convictions.<sup>11</sup> According to the Minnesota Department of Corrections, roughly 7,700 offenders were released into the community in 2006.<sup>12</sup> It is important to note that, because an offender can be released more than once in a given year, this figure does not necessarily represent 7,700 different individuals; some offenders may be counted more than once.

The same ideas and beliefs that have fueled the expansion of criminal punishment have contributed to the expansion of the negative consequences lawbreakers - and even people who are arrested but never charged with a crime or required to appear in court - experience in their communities. As we have focused our efforts to reduce crime on putting offenders away for the longest time we can afford, we have neglected the more important business of reducing recidivism among the offenders who will continue to live among us. It has become increasingly

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<sup>8</sup> National Conference of Commissioners on Uniform State Laws. (2007).

<sup>9</sup> Bureau of Justice Statistics. (2007).

<sup>10</sup> Ibid.

<sup>11</sup> Minnesota Sentencing Guidelines Commission. (2007); Minnesota State Court Administrator’s Office. (2007).

<sup>12</sup> Minnesota Department of Corrections. (2007).

difficult for people who break the law to put their crimes behind them and to exercise the rights and responsibilities that are essential to normal adult lives. The extra-judicial collateral sanctions imposed by prospective employers, licensing agencies and landlords are often more severe and longer-lasting than criminal punishment. Many of them are disabling to an extent that is grossly disproportionate to whatever behavior or suspected behavior triggers them.

At the same time that Minnesotans, like our fellow Americans, were becoming more committed to severe punishment and isolation of criminals as the best way to increase public safety, we were increasing our capacity to discover details of each other's lives that previously might have remained private. Courts and law-enforcement agencies that keep public records, which historically have been obtainable to those who take the trouble to go to the locations where they are held, have made the data available electronically. Courts post their criminal dockets on the internet as a convenience and maintain telephone and computer services providing access to criminal records. The Department of Corrections website makes it easy to find information about inmates.<sup>13</sup>

Such actions by government agencies are motivated by positive goals, such as improving service to the public and making government activities more transparent and intelligible to the people who pay for them. There are many benefits to all of us in having easy access to government data that touches on important decisions, such as hiring the best employees. There is a growing interest in making accurate public data, especially criminal record data, available. It is difficult, in a democracy built on free speech and free sharing of ideas and knowledge, to argue that it should be harder to access public records that have a real relationship to making sound hiring decisions.

Both nationally and in Minnesota, resources are being devoted to designing methods of providing accurate and fair reports of criminal records to agencies and individuals who have good reason to receive them.<sup>14</sup> While it is essential, at the same time, to design methods of sealing certain records for people who are unjustly burdened by them, locking information up has significant philosophical and practical limitations in this Information Age. Minnesota might create the most rational and equitable laws limiting access to criminal data - indeed, we hope it will - but those laws must not be limited by the notion that we can adequately serve justice by keeping secrets. We must also respect the growing demands of employers and licensing agencies for accurate and complete information about prospective workers and licensees.

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<sup>13</sup> Minnesota Department of Corrections. (2007c).

<sup>14</sup> Office of the Attorney General. (2006); CriMNet Task Force, CriMNet Policy Group: <http://www.crimnet.state.mn.us/>.

Those who do not find that idea persuasive must nevertheless acknowledge the reality that vast quantities of personal information, including information about arrests and convictions, are already "out there" on the internet. Entrepreneurial "data miners" sometimes sell reports of personal data for less than ten dollars, and they are produced for anyone who chooses to pay.<sup>15</sup> It has become so cheap and easy to lay out the details of every person's every contact with the criminal justice system that even employers hiring workers for jobs in which there is little contact with people or valuable property buy background checks and refuse to hire those with any court or arrest records.

In a society that is so concerned with punishing criminals, this glut of data is an essential contributor to a situation in which those who "do the crime" can no longer earn re-entry into society by "doing the time." As was noted in the Introduction, even people who most of us would see as entirely "normal," and who may not have conviction records at all, are being denied employment because they were arrested or appeared in court. Since the data miners who create many of these background reports are unregulated, do not use fingerprints to verify identity, and may not understand the differences among continuances for dismissal, stayed sentences that were never imposed, and convictions, there is no guarantee that a disabling background report is accurate, is up to date, or even that it pertains to the correct person.

The Collateral Sanctions Committee has sought to engage realistically the challenges of making sure that Minnesotans with criminal records, and those unfairly tainted by minor contacts with the criminal justice system, are able to get jobs for which they are fully qualified. The multifaceted and cumulative nature of the difficulties people are currently encountering call for a wide range of responses, some of which will be much easier than others to achieve.

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<sup>15</sup> One example can be found at <http://www.sittercity.com/tour.html?type=2&step=4>. This site allows parents to conduct "background checks" on potential babysitters for \$9.99.

## GENERAL POLICY

The issues and recommendations set out in this report are not complete enough to constitute a full, coherent program adequate to address the impact of criminal records on employment. However, they are all in harmony with broad principles that the Committee recommends be kept in mind as Minnesota moves forward on the task of insuring that contact with the criminal justice system does not unreasonably keep people from getting the work they need to be productive citizens.

### A. CRIMINAL DATA

1. Public safety is enhanced when ex-offenders are able to work and to support themselves and their families. We must, therefore, make it easier for them to gain acceptance in society by insuring that access to criminal record data is limited responsibly, that the data is correct and intelligible to employers, and that employers are encouraged to weigh the data's impact fairly.
2. Public safety is enhanced when employers are readily able to learn of all criminal data that reasonably bears on an individual's suitability for a particular job, especially when the job provides access to vulnerable people.
3. It is desirable to seal criminal records that do not bear on a person's honesty or on the risk that s/he may harm another.
4. Since it is appropriate that many criminal records remain reasonably available to employers, it is desirable to create legal processes by which rehabilitated ex-offenders may receive official determinations that their records should not bar them from employment. Examples include certificates of relief from disability, certificates of good conduct, and pardons. These legal determinations should provide relief from liability for employers who hire those who receive them.
5. While reform in the state's management of its criminal records is essential to rationalizing their impact on employment, it is not adequate. A vast amount of personal data, including criminal data, is being gathered from many sources and sold by entrepreneurial data miners. These businesses should be regulated by the state, and the regulations should include civil penalties for violating the law and civil liability for damages caused by the dissemination of false or erroneous information.

## B. STATUTORY SANCTIONS AND PROFESSIONAL LICENSES

Minnesota law includes many bars from specific jobs or professional licenses that are triggered by criminal convictions. In addition, licensing agencies are often authorized to consider other kinds of contact with the criminal justice system - such as arrests, or charges not resulting in conviction - when deciding whether an individual will be given a license. The following principles should govern these areas. To the extent that a statute, or a licensing agency's practice, does not meet these standards, it should be reformed.

1. In general, statutory bars should be triggered only by convictions. There are reasons why certain state licensing agencies, particularly those which evaluate individuals who seek employment in areas where there is access to vulnerable people or significant risk of theft or fraud, might wish to investigate further the facts underlying an arrest not leading to conviction. In those cases, the arrest should not, in itself, constitute a bar or a reason to deny licensure. Investigations into arrest should have clearly-defined procedural safeguards, including the right of the subjects to notice and an opportunity to provide evidence on their own behalf.
2. There should be a clear relationship between the conviction barring employment and the employment itself. For instance, a conviction for welfare fraud should not bar employment as a nursing assistant in a nursing home where patients do not keep valuable personal property in their rooms.
3. There should be no conviction that triggers an absolute or permanent bar from employment. Licensing agencies should have the discretion to determine whether a person has been rehabilitated, or whether the actual facts of a crime constitute evidence of unsuitability for a particular job. Many agencies have the ability to issue provisional licenses, or to authorize a person to work in a specific job where there is no real risk of harm to anyone. They should be allowed to make such accommodations when they are clearly justified.

In 1998, Tanya\* pled guilty to gross misdemeanor welfare fraud, after neglecting to report her employment for two months while trying to leave an abusive boyfriend. In 2000, she was discharged from probation. From 2001 to 2006, she worked as a Certified Nursing Assistant; in 2006, she was disqualified because of the conviction. Even though she is eligible for a set-aside from DHS, no employer wants to take a chance on her application. She has been unable to obtain a meaningful expungement.

\*All names used in narratives are fictitious. All of the narratives are accurate accounts of the real experiences of particular Minnesotans.



4. Bars to employment should be proportional to the seriousness of the convictions that trigger them. Thus, less serious offenses should bar employment or licensure for a shorter period of time than crimes presenting a greater degree of risk to others.
  
5. "Look-back" periods - that is, the length of time for which convictions bar employment - should be carefully defined, with serious consideration to what is known about recidivism, the ranking of specific crimes in our sentencing guidelines, and other factors bearing on a rational calibration of the look-backs. Because misdemeanors are numerous and cause serious damage to people's employment opportunities, it is particularly important not to create unnecessarily long look-backs for them. Look-backs should not be based on "magic numbers," such as 3, 5 or 7, that come readily to mind. They should not be based solely on some already-established criminal look-back that has nothing to do with employment.

### C. NOTICE AND INFORMATION

1. Minnesota has taken the important first step of gathering all statutory sanctions into one chapter of our statutes, chapter 609B.<sup>16</sup> However, the sanctions are still difficult for an individual concerned about a particular conviction or a particular license to find and understand. We should continue to clarify and catalogue sanctions until they are clear and easily accessible to people charged with crimes, criminal justice professionals, schools, job-seekers, employers, and anyone else interested in them.
  
2. Once information on collateral consequences of conviction is readily available, we should create Rules of Criminal Procedure adequate to inform those charged with crimes about sanctions beyond a criminal sentence that they will suffer if they are convicted. Since criminal justice professionals have not had ready access to information on collateral sanctions, it is understandable that there is presently no legal responsibility to mention them in court. However, once the needed information is available, it becomes unfair for the criminal trial process to ignore penalties that are directly triggered by conviction and are often longer-lasting and more damaging than a criminal sentence.
  
3. The Rules of Criminal Procedure should include one or more samples of general notices regarding collateral sanctions for use in the state's courts. Procedures should be developed to require the provision of such a general notice to all individuals ticketed or charged with misdemeanors and felonies. The notice might be given with a ticket, summons, or complaint; it might be given in court. In any case, the Court should inquire, prior to the entry of a plea, whether the defendant has received the notice. This

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<sup>16</sup> M.S. §609B (2005).

notice is appropriate now and does not require the improved information referenced above.

4. The state must insure that public schools, and private schools regulated by the state, have basic knowledge of collateral sanctions and that students be informed that criminal records may bar them from certain jobs before they enter and/or pay for vocational training.

#### D. PRACTICALITIES

1. Every effort should be made to provide meaningful vocational training and work experience within the corrections system. Any program created for this purpose must be evaluated in terms of its impact on recidivism.
2. The state should work with employers and unions to create more powerful incentives for them to train and hire ex-offenders. The work should include the identification of important barriers, such as liability for hiring people with criminal records and the lack of work experience among ex-offenders, and the creation of initiatives designed to reduce them.

## NOTICE

Although the Legislature is clearly aware of the negative impact of collateral sanctions on people who are trying to leave their criminal behavior behind them, and various state agencies are working on related subjects, such as sealing criminal records and systematizing background checks, there is little understanding among Minnesotans as a whole about the extent to which any contact with the criminal justice system undercuts people's ability to obtain work. It seems that technology has so rapidly made personal data easily available that institutional policy and popular understanding of the related issues have not kept pace. People are not only being barred from employment by arrest, court and conviction records, they are also stunned and blindsided when employers turn them down. Fortunately, it should be relatively simple to make progress in this area, since the needed steps are not controversial. It

Anita\* was charged with misdemeanor domestic assault. She had been in an abusive relationship and, when she left the house, her husband made a false complaint in retaliation. The prosecutor was willing to allow a Continuance for Dismissal with no plea. She accepted this offer, rather than seeking a straight dismissal, because it meant she did not have to return to court and miss more work. The case was eventually dismissed. A few months later, her employer (a nursing home) informed her that they had to terminate her, per DHS rules, even though the charge had been dismissed. Anita, now unemployed, sought assistance from the Council on Crime and Justice's Expungement Clinic, which was able to get a DHS reversal after three months, during which Anita had no income.

\*All names used in narratives are fictitious. All of the narratives are accurate accounts of the real experiences of particular Minnesotans.

is unlikely that there will be much opposition to the proposition that people are entitled to know facts that may help them make better choices, that schools should inform students interested in vocational courses that they may not be employable in the jobs they're aiming for, that judges and lawyers should know that employers do not share their view that only convictions are "criminal records," or that the public should be educated about the cost to individuals and public safety of banning anyone with a criminal record from the opportunities and obligations that are part of being a functional adult.

## COURTS

Most of the Minnesota judges and attorneys who practice criminal law are fully aware of the damage a criminal record can do to a person's employment opportunities. They frequently provide individuals charged with crimes opportunities to avoid having a record, or to lessen the seriousness of the record. Prosecutors continue charges for dismissal: the defendant is not required to admit any

offense and agrees to abide by certain conditions (usually, to pay a fine or do community service and avoid any further arrests while the continuance is in effect); if s/he succeeds, the charge is dismissed with no conviction ever entered; if s/he fails, the defendant is returned to court to face the charge. Judges stay imposition of sentence and place offenders on probation under M.S. §609.135; if the offender succeeds in meeting probationary conditions, often including jail, a misdemeanor will be dismissed and a felony will be reduced to a gross misdemeanor. Some jurisdictions offer pretrial diversion programs and special “problem-solving courts,” such as drug courts.

These and similar dispositions should be equally available to all qualifying individuals. However, not all prosecutors and judges have diversion options or special courts at their disposal. Many prosecutors and judges affirmatively offer continuances and stays to all who qualify; but some do not. In felony cases, where it is rare for anyone to proceed without a lawyer, mitigating dispositions are offered in most appropriate cases. Many people charged with misdemeanors, however, appear without counsel. If they do not know that their options go beyond pleading “guilty” or “not guilty,” they are nearly always ready to admit an offense and agree to a sentence, so they will not have to come back to court. They may incur a criminal record that they could have avoided if they knew better.

When judges and attorneys know that a defendant will lose a job if he is convicted of a particular offense – or any offense - they discuss whether it is appropriate or possible to handle the case in a way that will preserve employment. However, most judges and lawyers are not knowledgeable about the impact of conviction outside criminal courts, and they cannot be expected to consider matters about which they are unaware. “Collateral sanctions” are by definition extra-judicial; they are not imposed in court, and Minnesota law provides that the court has no duty to notify defendants of their existence. If complete information about collateral sanctions were available, it would be possible to design court procedures that would insure that defendants were fully aware of them. As it is, we have the ability to give a generalized warning, but not to answer the questions such a warning will inevitably generate.

## RECOMMENDATION

### **1. Provide a general notice regarding collateral sanctions to defendants.**

It is generally agreed by the task forces that have studied collateral sanctions and made recommendations that defendants should be advised of the collateral impact of convictions

before entering a plea or agreeing to a settlement of their cases, and that courts should inquire of the defendant at sentencing whether s/he has received such advice.<sup>17</sup> As early as 1997, the American Bar Association recommended that “To the extent possible, defense counsel...advise the defendant...as to the collateral consequences that might ensue from entry of the contemplated plea.”<sup>18</sup>

In Minnesota, as in most states, there is no legal requirement that such notice be provided. The Committee recognizes that it is inappropriate to require defense attorneys to give advice on collateral sanctions, or to require judges to ascertain that the advice has been given, as long as information concerning the extrajudicial impact of convictions is not readily available. However, the Committee feels strongly that the general “heads up” that is frequently recommended by collateral sanctions study groups is important and that there is no reason why it should not be provided to defendants. It is true that people might not be so quick to plead guilty if they are aware of collateral sanctions, just as they might be less willing to talk to the police if they are aware of their right to remain silent. Justice is not always efficient.

All Minnesota courts should give a general notice concerning collateral sanctions of conviction and the possibility of avoiding conviction to all defendants. At present, it is so difficult to access information about sanctions that might affect specific individuals that it is unfair to charge courts, lawyers, or corrections officers with any greater responsibility. The Committee is particularly concerned about people who are charged with misdemeanors and often appear without counsel in high-volume court proceedings. They should have equal opportunity to seek dispositions that will spare them from having a criminal record. It is a sad reality that minor offenses are now doing major damage to people’s employment opportunities, even when convictions are five or more years old and involve no violence.

Criminal justice professionals must determine how best to provide this notice to every individual charged with breaking the law. Part of that task is to define clearly how juvenile delinquencies impact adult job opportunities and follow through with appropriate modifications to address that impact in juvenile courts.

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<sup>17</sup> National Conference of Commissioners on Uniform State Laws. (2007) Sections, 5, 6, & 7; American Bar Association. (2004).

<sup>18</sup> American Bar Association. (1999). Standard 14-3.2(f).

The Committee has drafted a simple notice that can readily be printed and given to misdemeanor defendants. It includes a place for listing sources of additional information; this will, of course, have to be omitted when no such source is available. Some agencies represented on the Committee have begun posting and distributing the notice. See, Appendix B, p. 68.

## HIGH SCHOOLS, VOCATIONAL SCHOOLS, COLLEGES AND UNIVERSITIES

The Committee has received troubling stories about people who invest time, energy, and money in education aimed at getting them licensed and/or employed in particular jobs, complete their studies successfully, and then learn that they cannot be employed in the fields for which they are prepared. We learned about an 18-year-old woman with a delinquency adjudication for a serious assault at age 16 who was encouraged to complete a nursing assistant course at an alternative high school, earned a certificate in that field, and is unable to get DHS approval to work with vulnerable people - a result that the school did not anticipate, because administrators believed the delinquency would "disappear" when she reached majority. We heard from a man who borrowed money to pay for an expensive course at a for-profit vocational school and was shocked that prospective employers who initially offered him employment withdrew the offers when they learned of his 7-year-old misdemeanor record. We were told of a man who completed the two-year college degree required of Minnesota peace officers and was participating in a skills training course before he was barred because of a domestic assault conviction that made it illegal for him to use or possess a firearm.

While there may be schools that warn students to consider their criminal records when they choose vocational training, the public non-profit institutions contacted informally had given little consideration to the impact of criminal justice system contacts on employment. They were troubled by their failure and will likely do what is necessary to inform themselves and caution students. A state employee charged with monitoring for-profits expressed confidence that counselors were discussing criminal records with prospects; it is, however, hard to believe that such schools are performing better than nonprofits concerning these issues.

Linda was a student at a technical college in Minnesota, working to get her nursing degree. In her last semester of school, Linda discovered that she would not be able to finish her schooling because the program required her to complete an internship, which she could not secure because of a drug offense on her record. Rather than trying to help Linda, her technical college just referred her to DHS with questions.

## RECOMMENDATIONS

- 1. Give notice to those intending to embark on studies leading to**

**employment that they should consider any records of contacts with the police or criminal courts in career-planning.**

It will be necessary to educate school administrators concerning collateral sanctions, to assist them in developing effective protocols for giving the relevant information to faculty and students, and to make certain that they provide the information effectively and consistently. While for-profit schools may be as interested as public schools in making sure their students do not waste time and money, it may be especially important to monitor their performance, given the possible loss in income that might result from giving effective notice.

The affected schools can be reached through the associations of administrators who lead them, and, in the case of for-profits, through the Office of Higher Education that is responsible for monitoring them. The Legislature may choose to enact statutory requirements concerning notice, or the schools might be charged with reporting their efforts in this area to the Department of Education or other appropriate agency, which will be responsible for assuring that notice procedures are adequate.

The Committee approved a sample notice to be used by post-secondary schools prior to a student's final enrollment and maintained in individuals' files. Notice could, of course, be given in many ways, but it is important to make sure that it is clearly understood and that there is proof that schools are providing the information. See Appendix C, p. 69.

- 2. Educate school administrators and counselors about collateral sanctions, so that they can provide students with sound advice about vocational courses and career planning.**

### MAKING COLLATERAL SANCTIONS EASY TO IDENTIFY

When we think about what a given individual would want to know about exactly how past arrests, charges and convictions will impact his life, it becomes apparent that we must collect and catalog collateral sanctions in such a way that people can locate them readily and get a realistic understanding of where they stand and what they might be able to do to improve their situations. At the very least, people have to be aware that criminal records, however minimal, may have serious consequences beyond criminal punishment. But when they are, they will

want to have clear information that is not presently available. The 2005 Legislature's decision to collect statutory sanctions in one chapter is a start, it is no more than that. At present, we can tell people to be aware that they may be barred from employment, but there is nowhere they can turn to get the details they need to make important decisions wisely, or to learn how to mitigate their problems. Until basic information is reasonably available, it is unfair to expect any institution or group of professionals to give individuals advice beyond a general warning.

The Committee is aware of at least one project to create a web-based database that would allow users to enter a Minnesota criminal statute number and receive information about collateral sanctions triggered by a conviction under that statute. It is hoped that some such computerized product will soon become available, after which it will be possible to determine the court rules and procedures necessary to provide defendants with the full notice of collateral sanctions that policy groups deem essential.

## RECOMMENDATION

1. A directory of all of the professions and jobs that require licenses and clearances from state agencies must be created. The directory should state requirements for licensure/clearance, the process each agency uses to vet applicants (including how they weigh arrest or conviction records), instructions on how to apply, and an outline of the appeals process. While some states have a few agencies that issue professional licenses, Minnesota has so many that it is hard to find them all, much less learn how each operates. A first step has been taken with the creation of LicenseMN, a website developed by the Drive to Excellence initiative. According to the website, additional features will be added to the site "over time," including license application and renewal forms, as well as license look-ups.<sup>19</sup>

## EDUCATING THE PUBLIC

Committee members have frequently commented on the need to educate the public about the importance of allowing ex-offenders to put their crimes behind them and about the fact that many of the people being hindered by their records have never been dangerous or are obviously rehabilitated. It is important to encourage citizens to be reasonable when considering the risks criminals present – to recognize that there is no such thing as complete security and that many of those who harm others have no prior criminal record. While ignoring

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<sup>19</sup> Minnesota Drive to Excellence. (2006).



the fact that some criminals should never have access to people or property will place us in danger, making certain that no one around us has a criminal record will not make us safe.

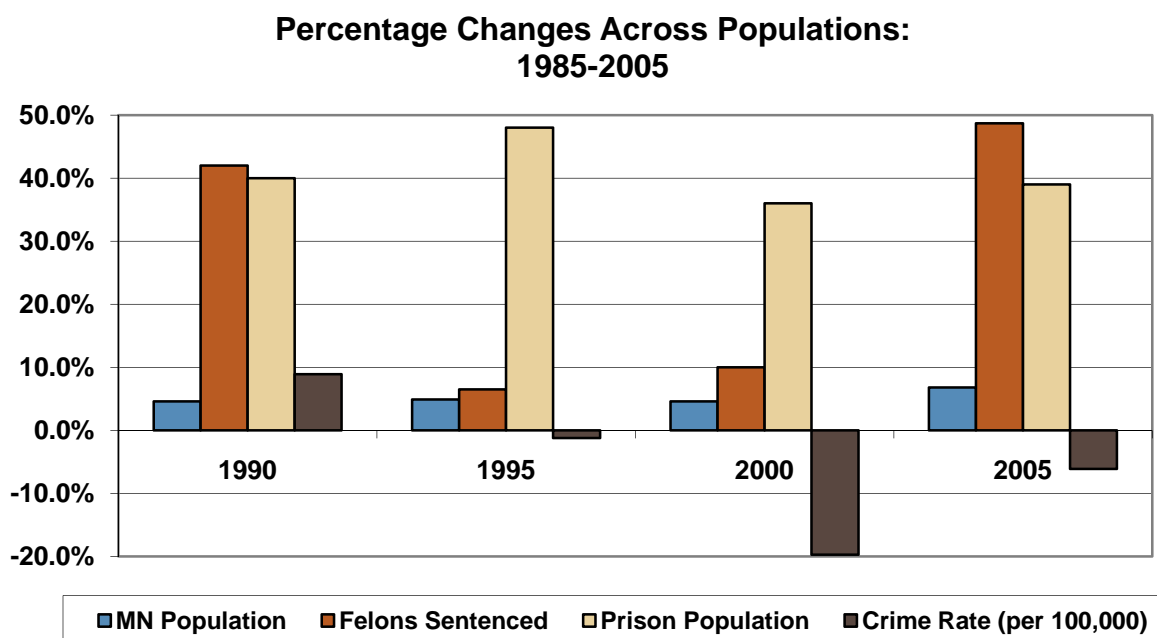
## RECOMMENDATION

- 1. Implement a campaign to educate the public about the link between public safety and sound re-entry programs, including those that promote employment.**

The Committee has not had time to create a proposal for an effective campaign about how appropriate re-entry policy and programs can reduce recidivism and increase public safety, but it would certainly be worthwhile to do so. Citizens should know that they and their friends could easily find themselves faced with unfair barriers resulting from an arrest or a conviction for some minor offense. They should know the real faces and experiences of ex-offenders who are unable to find work or housing even when they do everything the law requires and make every effort to support themselves. In the movies, criminals are either monsters or innocent. In life, they are human beings with significant failures, which can be either sources of learning and self-awareness or irreparably debilitating wounds.

## REDUCING CONVICTIONS / DIVERSION

Between 1985 and 2005, Minnesota's population increased by approximately 23 percent.<sup>20</sup> During that same period of time, the crime rate dropped by about 19 percent.<sup>21</sup> Even with a fairly stable population growth and a declining crime rate, the number of felons sentenced increased dramatically, by 148 percent over those 20 years.<sup>22</sup> Minnesota's prison population saw an even more substantial growth rate during this time: 288 percent.<sup>23</sup> The chart below illustrates the percent changes over time, with the 1990 figures representing the percentage of change from 1985.



Minnesota's criminal justice system has for many years allowed for the fact that many people who break the law deserve an opportunity to avoid being permanently labeled as criminals. Our sentencing guidelines make provisions for downward departures from presumptive sentences. Judges are allowed to place people who have committed crimes on probation without formally imposing a sentence and to reduce the seriousness of their convictions, or

<sup>20</sup> U.S. Bureau of the Census. (1996), (2001).

<sup>21</sup> Minnesota Department of Public Safety. (1991), (1996), (2001), (2006).

<sup>22</sup> Minnesota Sentencing Guidelines Commission. (2007).

<sup>23</sup> Minnesota Department of Corrections. (2006).

eliminate them entirely, if they complete probation successfully.<sup>24</sup> First-time drug offenders may avoid a conviction by complying with probationary conditions.<sup>25</sup> Some jurisdictions have drug courts, or other “problem-solving” courts that may provide alternatives to conviction for successful participants.

In June, 2004, Bob\*, a 52-year-old who had been employed as the maintenance director in a small community for 21 years, became enraged when the mayor of the village terminated his employment. He admittedly swung at the mayor and was charged with fifth-degree assault, a misdemeanor. He was convicted and served one year probation without any trouble. Three years later, the same man was convicted of violating a harassment restraining order, a gross misdemeanor, and was again placed on probation. He completed chemical dependency treatment and an anger management program.

Bob searched for employment and was successful in winning over potential employers to give him a chance, until they obtained his criminal record. He was told by numerous employers that the misdemeanor assault charge prevented them from hiring him and that they were not particularly concerned about his gross misdemeanor conviction. He finally was able to obtain employment as the result of various people in the community vouching for his good character and work ethic.

\*All names used in narratives are fictitious. All of the narratives are accurate accounts of the real experiences of particular Minnesotans.

Some prosecutors are willing to agree to dispositions in which cases are set aside without being resolved; if the defendant meets certain conditions, the case is dismissed (continuance for dismissal). Some prosecutors and judges are willing to give defendants who admit guilt a stay of adjudication, in which the judge delays accepting a plea and entering a finding of guilty for a determined time; if the defendant meets specified conditions, the finding is never entered and there is never a record of conviction.

What many of these procedures have in common is that their availability depends almost entirely on where the defendant is charged and by whom. As is true of every group of human beings, prosecutors have various ideas of right and wrong, and they face various kinds of political pressures. Some set standards for determining whether a defendant will be offered a break of this kind, and they make the dispositions available to all defendants, regardless of their race, gender, class and legal counsel. Some, particularly those from private offices who bid for municipal contracts for prosecutorial services, may feel an obligation to make money for the community they represent and, therefore, require that defendants pay costs that put continuances for dismissal beyond the reach of some people. Some prosecutors who want good conviction

<sup>24</sup> M.S. §609.135 (1963).

<sup>25</sup> M.S. §152.18 (1971).

statistics will not offer continuances for dismissal to defendants who don't ask for them, which unrepresented defendants usually do not know enough to do. Judges may see it as their responsibility to exercise their power so as to make mercy available to all suitable candidates. However, some are comfortable enacting whatever plea bargains are presented to them and routinely order rich and poor to pay identical costs and fines, even though the poor will fail to make the required payment and, therefore, will never get the benefit of the bargain.

The location of the court in which a defendant is charged affects the likelihood of avoiding a criminal record, because judicial districts do not offer equal rehabilitative services. If there is a drug court, or other problem-solving court, in a district, defendants will have opportunities that are not available where such alternatives do not exist. A judge is able to fashion probationary conditions that make a stay of imposition reasonable in districts where there are sufficient rehabilitative programs to enhance the likelihood that the defendant will put his lawbreaking behind him. In a district where appropriate programs do not exist, a stay may seem less desirable.

Although our sentencing guidelines work to make sentencing practices uniform throughout the state, they appropriately provide judges with significant discretion. To the extent that judges have discretion to depart from specific sentences, there will be disparity in the sentencing of similar people for similar crimes.

The Committee certainly does not advocate that judges lose their discretion, but it does want to convey the reality that the kinds of differences among prosecutors, judges and districts that are described here have meant that Minnesotans do not benefit equally from the laws and practices we have created to protect deserving individuals from conviction records.

## RECOMMENDATIONS

1. Re-evaluate the legal mechanisms Minnesota law provides to spare deserving individuals from having criminal convictions, and refine and augment them to increase their impact and make them equally available to all qualified defendants.
2. Design and implement a mandatory statewide diversion program based on an appropriate actuarial risk assessment tool. This initiative would be enacted in every judicial district and affect all eligible defendants equally.

In 1993 and 1994, the Minnesota Legislature mandated that county attorneys establish a pretrial diversion program for adults charged with crimes and a pretrial diversion program for juveniles petitioned on delinquency charges.<sup>26</sup> However, only those counties participating in the Community Corrections Act were required to establish these diversion programs; it was not a statewide mandate. As of July 1, 2006, 32 of Minnesota's 87 counties have elected to operate programming under the Community Corrections Act of 1973.<sup>27</sup> Because only a fraction of Minnesota's counties operate under this Act, diversion programs are not available throughout the state. Minnesotans should have equal access to diversion.

Every felony conviction is a large barrier in the offender's path to full employment. It is evident that many convictions are the direct and fair consequence of behavior that justly requires the offender to surrender both liberty and the opportunities available to the law-abiding. But the remarkable increase in the number of felonies sentenced in Minnesota during a period in which neither the population nor the crime rate increased significantly suggests the possibility that we have expanded the criminal net to the point where the societal cost is outweighing the societal benefit.

It was legislators who defined more and more behavior as felonious, and only legislators can reduce the number of felonies. The Committee understands that it is far more difficult politically to lessen penalties than to increase them. We believe, however, that both criminal justice professionals and the public at large would accept a truly rational system for diverting low-risk offenders throughout the state from the criminal courts. In the twenty-first century, it has become possible to design actuarially-based risk assessments that, employed conservatively, can predict reliably which defendants can safely be diverted and granted the opportunity to maintain a clean record.

Consider, for example, the experience of the state of Virginia. The Virginia Criminal Sentencing Commission (VCSC) has devised a risk assessment instrument, a tool voluntarily used by the courts, to determine who should be sent to prison and who should receive alternative sanctions. Eleven specific factors are used in the risk assessment worksheet: sex, age, marital status, employment status, presence of accomplice, additional offenses (based on severity), prior arrest/confinement in last 12 months, total prior record, prior drug convictions/adjudications, prior adult incarcerations, and prior juvenile incarcerations.<sup>28</sup> Each

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<sup>26</sup> M.S. §401.065 (1993); M.S. §388.24 (1994).

<sup>27</sup> Minnesota Association of Community Corrections Act Counties. (2007).

<sup>28</sup> Ostrom, B. (2002).

of these factors is given a score based on its relative importance to recidivism.<sup>29</sup> Richard Kern, Executive Director of the VCSC, described Virginia's assessment tool at the 2007 Conference of the National Association of Sentencing Commissions. He explained that, by diverting only individuals well within the range of those assessed as low-risk, Virginia had employed the tool very successfully, experiencing minimal failures.

An independent evaluation by the National Center for State Courts (NCSC) found Virginia's risk assessment instrument to be highly cost effective, estimating an annual savings to the state of around \$3 million.<sup>30</sup>

The Virginia system illustrates the level of confidence with which risk can now be evaluated and the value of using assessment in making sentencing decisions. Of course, Minnesota will have to determine its own goals for diversion and use a risk-assessment tool validated in our own state. It will be desirable to employ more ingenuity than we have thus far in designing non-incarcerative sanctions for the diverted individuals. Correctional resources would have to be shifted from jails and prisons to evidenced-based community programs aimed at lessening the chance of recidivism. It should be remembered that, to the extent new programs are required, the right programs will prove less costly and more effective at promoting public safety than the jails we now rely upon so heavily.<sup>31</sup>

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<sup>29</sup> NCSC found that only gender and factors related to prior record effectively predicted recidivism. Its evaluation recommended that VCSC streamline its assessment tool, leaving out factors that do not appear predictive of recidivism.

<sup>30</sup> Ibid at p. 7.

<sup>31</sup> Aos, S., Miller, M., & Drake, E. (2006); Latessa, E.J., & Lowenkamp, C. (2006).

## LICENSING AND BACKGROUND CHECKS

The Criminal and Juvenile Justice Information Policy Group, Criminal and Juvenile Justice Information Task Force, and CriMNet Program Office have been working on the complexities of sealing criminal records and background checks. A number of reports can be found on the CriMNet Web site: <http://www.crimnet.state.mn.us/GovOrg/BGChecksExpungement.htm>. The Policy Group made recommendations on expungements in May, 2007, and on background checks in June, 2007. The Policy Group asked the CriMNet Program Office to determine how these policy directions can be implemented and to estimate the cost of doing so. After considering this information, the Policy Group will submit recommendations to the 2008 Legislature.

One of the Policy Group's major goals is to bring consistency to background checks.<sup>32</sup> In this case, "consistency" means that checks for similar types of employment or activities should be made using the same databases and, also, that all subjects of background checks be given the same information about the process and about their rights to seek correction of inaccurate data and to receive copies of reports concerning them.

Given CriMNet's resources, the technical issues involved, and the risk of overlap, the Committee did not undertake in-depth study of background checks. However, there are some matters that became clear in thinking about licensing. The Collateral Sanctions Committee is mandated to report to the Legislature by February 1, 2008 on "the background study provisions contained in Minnesota Statutes, chapter 245C, as well as set-aside and variance policies."<sup>33</sup> The Committee is to recommend changes to current provisions that are "consistent with good public policy and public safety."<sup>34</sup> For that reason, DHS practices regarding those records are not discussed here.

The Committee did do some preliminary work in the area of licensing. While some states have centralized the task of evaluating applications for all, or nearly all, vocational licenses and permits, Minnesota has more than 40 agencies performing this function. Obviously, different occupations call for differing tests of competency, some of which are statutory and some of which are defined by practitioners. Different occupations also create differing levels of risk to

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<sup>32</sup> CriMNet. (2007).

<sup>33</sup> Minnesota Session Laws 2007: Ch. 112, Sec. 58 (2007).

<sup>34</sup> Ibid.

people and property, so it seems entirely appropriate that some licenses would be harder than others for people with criminal records to obtain.

It is not, however, obvious or necessarily appropriate that candidates for licensure will encounter strikingly inconsistent standards for evaluation, depending upon which agency they approach and who the evaluator happens to be. The Committee sent a survey concerning evaluation of criminal records to 48 agencies and received 26 responses. Five additional agencies responded by stating that they do not deal with employment-related licenses. The responses confirm what common sense would assume: we will not arrive at a consistent, rational and fair way of using criminal background information by having a large number of evaluators assessing the data as they choose.

The survey (see Appendix D, p. 70) was simply a means for gathering some information to serve as a starting point for thinking about records and licensure, and it was not followed up with interviews. Some important themes were discernable in the responses, however; and they are set out in this discussion.

First of all, the survey reveals that agencies want background checks that are readily available, uniform, consistent and comprehensive. While all but four of the agencies try to obtain criminal background data, a single agency will get varying amounts of information on applicants within varying lengths of time. What they learn often depends on what applicants choose to tell them. Understandably, most agencies prefer to have the most complete and accurate background information when they make their decisions, and they are troubled by inconsistent amounts

In 2000, John\*, a college student, was arrested for possessing a small amount of marijuana. Because the offense was John's first infraction, prosecution was suspended on the condition that John attend counseling, pay a fine, and remain law-abiding. At the end of his probationary term, the charge was amended to an ordinance violation for disorderly conduct, a noncriminal offense in that state.

In the fall of 2007, after having completed his college degree, obtained his license to teach, and practiced as a substitute teacher for a few years, John was offered a full-time teaching job, conditioned on his passing a background check. A couple of hours after he accepted the position, the principal of the school called him and rescinded the offer, based on the results of the background check. One of John's references called the principal to explain that there had never been a criminal conviction. The principal stated that he really liked John, but would not be able to offer him a position. Another applicant was offered the position instead.

\*All names used in narratives are fictitious. All of the narratives are accurate accounts of the real experiences of particular Minnesotans.



and kinds of data.

There is no consistent relationship between risk to consumers and whether background checks are used and the thoroughness of those checks. Three agencies concerning professions in which licensees have intimate contact with clients, are admitted to clients' homes, or hold positions of authority over vulnerable or unsophisticated people do not use any checks. The agency setting the highest bar for applicants with criminal records licenses about 1,000 individuals annually in fields involving little contact with clients.

At least ten agencies failed to articulate the standards they use in evaluating people with criminal records. One agency stated flatly that it has no consistent standards. Some cited vague and subjective measures: "moral turpitude," or "consider on the merits." Five agencies said they would like to have clearer standards; most seem to be satisfied with the present state of affairs.

Ten agencies that consider criminal records regularly license people with records. Two of those bar all people with felony convictions; one of them is bound by a statutory permanent bar against felons and would prefer a reasonable, defined look-back period. Seven agencies never consider arrests not leading to conviction. Ten do consider arrests, but do not consistently learn of their existence.

Most agencies do not track the number of people with records who are licensed, or the number who are denied, although most are able to give some approximate number and opine that few applicants are denied. No agency has a significant number of appeals from its licensure decisions. That fact may explain why five agencies are not sure what the appeal process is. Five report that they have an internal appeal process, and six provide administrative appeals. Many agencies stated that few denials are reversed on appeal. Since the survey did not ask for copies of the notices given to applicants who are denied and there seems to be no tracking of appeals, it is impossible to draw any conclusion as to how accessible and fair they are.

## RECOMMENDATIONS

1. Rationalize licensing agencies' use of criminal data, so that it is consistent with the policies set forth in this report.

2. Create a process by which all state agencies choosing to do background checks of criminal records can readily obtain uniform, accurate reports concerning at least Minnesota criminal history.
3. Before creating a standard format for criminal history reports, the Legislature should consider carefully exactly what data should be included and whether there should be more than one format. In California, for example, background checks to be used for employment purposes cannot contain arrest data, unless the job at issue is one of several occupations statutorily exempted from this limitation.<sup>35</sup> Minnesota might decide that the content of background checks should depend upon the purpose for which they're used, or how much access the subject will have to vulnerable people or property.
4. Carefully restrict the number of convictions that will trigger absolute bars from particular kinds of employment or eliminate such bars entirely. The Committee received compelling accounts of people who are unmistakably rehabilitated, who gained valuable insight from their criminal experience, and who cannot use that understanding constructively, because they are absolutely barred from working with the people for whom they could do the most good. This subject will be expanded upon in the Committee's response to the mandate to review provisions of chapter 245C.<sup>36</sup> The point is that exceptions ought to be made for exceptional people and that those who have obviously turned away from wrong-doing ought to be allowed to put their crimes behind them.
5. Establish sensible "look-back" periods after which convictions will not be reported. Minnesota's "look-backs" are sometimes very long. It is not readily apparent why some are longer than others and how we arrived at the periods we have. These time-frames must be carefully considered, because they affect many people in a major way. According to the Bureau of Justice Statistics, approximately two-thirds of offenders released from prison in 1994 were re-arrested within three years, with roughly 25 percent being re-sentenced on a new crime.<sup>37</sup> If most offenders recidivate within three years, the Legislature should re-evaluate the utility in having "look-back" periods that last far longer.
6. Weigh the advantages and disadvantages of streamlining professional licensure by reducing the number of licensing agencies. Assuming that it is best to have rational and consistently-applied standards for licensure, consistent notice to applicants about what

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<sup>35</sup> California Labor Code §432.7(a).

<sup>36</sup> Minnesota Session Laws 2007; Ch. 112, Sec. 58 (2007).

<sup>37</sup> U.S. Department of Justice, Bureau of Justice Statistics. (2007).

the standards are, and consistent review of denials, those might be more easily and cost-effectively achieved in a coherent structure involving fewer bureaucracies.

7. Require all licensing agencies to consider the following factors every time they weigh an individual's criminal record. If they deny licensure based on criminal history, they must provide the applicant with their evaluation of the factors:
  - 1) The public interest in protecting property and the safety and welfare of individuals.
  - 2) The public interest in reducing recidivism among ex-offenders by not irrationally preventing their licensure and employment.
  - 3) The specific duties and responsibilities necessarily related to the license being sought.
  - 4) The relationship, if any, between the applicant's criminal convictions and those specific duties and responsibilities.
  - 5) The time elapsed since the criminal offenses were committed.
  - 6) The age of the person at the time the offenses were committed.
  - 7) The potential and/or actual harm the offenses posed to human beings.
  - 8) The potential and/or actual loss of wealth or property caused by the offenses.
  - 9) Any evidence produced by the applicant, or produced on his/her behalf, concerning rehabilitation and good conduct. Such evidence includes, but is not limited to, the following:
    - a) Successful completion of the conditions for a continuance for dismissal, a stay of adjudication, or a stay of imposition. These are evidenced by dismissal of criminal charges, vacation and/or dismissal of convictions, reduction of a felony to a gross misdemeanor, or reduction of a gross misdemeanor to a misdemeanor.
    - b) Pardon.
    - c) Sealing or expungement.
    - d) Any document showing completion of probation, parole, or supervised release.

- e) A showing that at least one year has elapsed since release from any local, state, or federal correctional institution without subsequent conviction, that the applicant is complying with all terms and conditions of probation, parole, or supervised release, and that the applicant is not currently charged with any offense.
  - f) Evidence of the actions, circumstances, social conditions and other factors involved in the offenses.
  - g) Letters of reference by persons who know the applicant's criminal history.
8. Review statutory bars to licensure for their adherence to sound collateral sanctions policy and amend them so that they are consonant with sound policy. In addition to considering the elimination of permanent bars and the establishment of reasonable look-back periods, determine whether there is a rational relationship between each conviction triggering a bar and the profession the ex-offender is not allowed to pursue. If there is not, the bar should be eliminated.
9. Eliminate arrests not leading to charges from criminal history reports for use outside the criminal justice system.<sup>38</sup>
10. Determine whether and/or when charges that do not result in conviction should be part of criminal history reports for use outside the criminal justice system.
11. Determine how and whether to report vacated sentences, dismissal, petty misdemeanors, and other actions that the Courts employ specifically to spare people who do not pose a risk to others from having criminal convictions. Create a statute clearly setting forth how and whether such actions are reported.
12. Background reports that include legal terms, such as "continuance for dismissal," "vacated," "dismissed," and "suspended sentence" will include a standard glossary explaining what these words and phrases mean and noting that courts count only convictions as "criminal history" or a "criminal record."

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<sup>38</sup> Because the Committee's purpose was to study the affect of criminal data on employment, there was no discussion of landlord-tenant issues. The Minnesota Multi Housing Association (MHA) had a representative on the Committee; when MHA read the draft report, it requested that its objection to this recommendation be noted. MHA wants landlords to have access to arrest records when performing a background check on tenants.

13. Amend Minnesota Statute §609.135:

Section 1. Minnesota Statutes 2006, Section 609.135, is amended by adding a subdivision to read:

Subd.9. **Relief from collateral sanctions.** A court staying imposition or execution of a sentence may suspend or modify any collateral sanction described in chapter 609B.

At the time of conviction, collateral sanctions will be imposed which may not bear any relationship to the offense of conviction. In certain cases, the collateral sanctions may unduly penalize the offender and significantly decrease the ability of the offender to provide for a family or be a productive member of society.

Sentencing for the offense provides an opportunity to provide relief from an unreasonable collateral sanction. All interested parties are present and the court has all the information available to craft a penalty that takes into account all circumstances of the offense and offender. This provision is a timely and precise instrument for the court, unlike the certificate of relief, allowing the court to make limited common sense adjustments to the overall penalty.

## MINNESOTA STATUTE §364

In 1974, the Minnesota Legislature declared:

...that it is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship. The opportunity to secure employment or to pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession or business is essential to rehabilitation and the resumption of the responsibilities of citizenship.<sup>39</sup>

That policy statement introduced a group of statutory provisions that served two goals: increasing rehabilitation of ex-offenders by putting them to work; and protecting the public by keeping ex-offenders from jobs where, based upon their criminal history, they might be likelier than others to harm people or property. Three decades later, we have experienced the difficulties of setting rehabilitation as a goal for policy.

Rehabilitation is defined differently by different people, and the programs we design to be rehabilitative are strongly culture-bound. Judges must decide what people whose lives, choices and cultural mores are strikingly unlike their own have to do to achieve the desired state of functionality and adherence to social norms. Similar offenders receive very disparate treatment in the criminal justice system, depending on the personalities and values of the professionals who deal with them, where they commit their crimes, and - all too often - how similar they and their families are to the people who sentence them.

There is no clear standard for determining whether a person is rehabilitated, and no credible way to measure the effectiveness of a particular program or approach in terms of rehabilitation. Neither offenders nor their victims have any certainty about how long they will be subject to state control. When the paying public is told that, in order to make them better, criminals are being educated, receiving chemical dependency treatment, or being given vocational training, citizens ask questions like, "How is it fair that the guy who robbed me is being trained to be a programmer and my son, who obeys the law, can't afford a vo-tech program?" Rehabilitative programs are seen as soft, value-laden "social work" that is not appropriate in a correctional system.

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<sup>39</sup> M.S. §364.01 (1974).

In 2008, government's goal is reducing recidivism, rather than making offenders healthier. It is clear that, if we increase the chances that the vast majority of offenders who will eventually be living unsupervised in their communities will remain law-abiding, we are protecting public safety. We can clearly see whether an ex-offender commits new crimes. We have learned that some popular and allegedly rehabilitative approaches do not reduce criminal behavior and, in fact, may increase it.<sup>40</sup> We have determined empirically that some approaches are truly effective, that programs are not "one size fits all," that it is essential that new programs be designed in such a way as to capture the data necessary to measure their value, and that it is worth paying for that measurement.

Josh\*, at age 21, was charged with felony assault of a police officer, as the result of the officer locating Josh in a home where the officer thought he did not belong. Josh was acquitted of the charges and the charges were re-filed. On the second filing, the court dismissed the charges.

Josh applied for employment with the railroad and was offered a job contingent upon a records check. Through the record check, the railroad learned of the charges for which Josh had been acquitted, and for which the charges had been dismissed by the court when he was prosecuted a second time for the same incident. The railroad withdrew their offer of employment because of the behavior alleged in the arrest report.

\*All names used in narratives are fictitious. All of the narratives are accurate accounts of the real experiences of particular Minnesotans.

The desired result, whether one thinks in terms of rehabilitation or in terms of recidivism, is virtually identical: a person functioning in such a way that crime is not appealing. But focusing on recidivism clarifies policy in a way that rehabilitation does not, and it improves the chances that we will reach the desired result.

In Minnesota, the over-arching goal of the criminal justice system is to protect public safety, and reducing recidivism is essential to that goal.

While the centrality of rehabilitation in M.S. §364.01 may be anachronistic, its mandates are entirely in keeping with the collateral sanctions policy set out in this report. When the Committee first looked at M.S. §364, it seemed that it would make sense to amend the law so as to make it applicable to private employers, or at least to private employers contracting with the state. It also seemed

desirable to create a stronger, more practical enforcement mechanism than the law now contains. But, as we learned more about how criminal records affect employment, we realized that, today, the law is honored more in the breach than in the observance.

<sup>40</sup> Sherman, L.W., et al. (1998); Wilson, J.A. (2007).

Starting in 1983 and continuing through 2005, the Legislature has increased the number of ex-offenders who are not covered by the law. Some changes have been made to M.S. §364 itself. In addition, new laws that appear to conflict with both the spirit and the letter of the 1974 statute have been enacted. Minnesota Statute §364.03, subd.1, provides that

Notwithstanding any other provision of law to the contrary, no person shall be disqualified...from engaging in any occupation for which a license is required solely or in part because of a prior conviction..., unless the [conviction]...directly relate[s] to the position...or the occupation for which the license is sought.

In 2005, the Legislature amended M.S. §245C, which relates to licensure by the Department of Human Services, to add a number of absolute bars. The amended statute lists convictions which absolutely bar licensure for a specified number of years or, in some cases, forever.<sup>41</sup> DHS is, therefore, precluded from determining whether a listed conviction “relate[s] to the position...for which the license is sought,” as M.S. §364 requires it to do. Although M.S. §364.03, subd.3, provides that an applicant for licensure must be allowed to show “competent evidence of sufficient rehabilitation and present fitness,” the 2005 amendment allows for no such showing. Other statutory bars enacted after 1974 similarly conflict with M.S. §364.

The responses to the Committee's exploratory survey of Minnesota's licensing authorities (see Licensing and Background Checks section), show that some licensing agencies not listed in the exceptions to M.S. §364 and to whom the law's provisions, therefore, apply, are evaluating criminal convictions informally and idiosyncratically, as opposed to using procedures consonant with the statute.<sup>42</sup> Almost none of the responding agencies made any reference to M.S. §364, even though they were asked about the standards they use in deciding whether ex-offenders will be licensed.

The Legal Action Center, a New York justice policy institution, has scored the states according to how well their laws and policies protect public safety by promoting successful reintegration of ex-offenders. The highest-ranked state is New York, with a score of 10; the lowest is Colorado, with a score of 48. Minnesota has a score of 31 and is ranked 24<sup>th</sup>.<sup>43</sup> This evaluation has as one assumption the belief that Minnesota actually follows the law set forth in M.S. §364; if we remove that assumption, the state would likely fall substantially in the rankings. Several studies summarizing the states' responses to collateral sanctions issues make the same assumption. Minnesota is regularly recorded as a jurisdiction that has implemented some important employment procedures, because they are contained in M.S.

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<sup>41</sup> M.S. §245C.15 (2005).

<sup>42</sup> M.S. §364.09 (1974).

<sup>43</sup> Legal Action Center. (2004). p. 21.



§364. Unfortunately, those assessments are more positive than our actual licensing practices warrant.

## RECOMMENDATION

### **1. Make M.S. §364 and actual practices consistent.**

If the Legislature decides to continue working on removing collateral sanctions that irrationally burden job-seekers, it will be important to determine exactly how state agencies and private employers who do state work may use criminal records in hiring and licensing. Then it will be necessary to draft a new statute, or to amend M.S. §364, in order to implement that determination. This process should include surveying and consultation concerning the practices of Minnesota's municipal and county governments, several of which have recently created new hiring procedures intended to make certain that criminal records do not unfairly bar employment.<sup>44</sup> In addition, there should be consideration of whether private employers should meet the same standards as government in weighing criminal records. Any new law in this area should include practical enforcement mechanisms. The existing law provides that "complaints or grievances concerning violations...shall be processed and adjudicated in accordance with... chapter 14 [of] the Administrative Procedure Act."<sup>45</sup> This provision is inadequate, as witness the fact that most of the licensing agencies that responded to the Collateral Sanctions survey had no apparent knowledge of its existence.

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<sup>44</sup> E.g.: St. Paul, November 2007, initiative of Mayor Chris Coleman.

<sup>45</sup> M.S. §364.06 (1974).

## DATA MINERS

The Collateral Sanctions Committee, like the CriMNet Policy Group and CriMNet Task Force, has been engaged in finding ways to improve Minnesota law in ways that will strike a healthy balance between the public's right to access criminal justice data and the right of Minnesotans not to be stigmatized by criminal justice data that unfairly suggests that they present unusual risks to others. The Legislature's manifest interest in creating state laws that enhance public safety by achieving this balance is laudable. However, both the Committee and CriMNet have recognized that sound laws and rational state practices are not adequate to solve the many problems that exist in this area. In a nation whose greatest contribution to the world may be its radical commitment to the free flow of information and ideas, it is neither possible nor desirable to make public data disappear from the marketplace.

Much of the criminal data that inhibits Minnesotans' access to jobs can be bought at very low cost from an ever-expanding number of entrepreneurs known by a variety of labels: consumer reporting agencies, business screening services, data harvesters, data miners. The latter term is frequently used in Minnesota, it is reasonably descriptive, and it has the virtue of brevity. For those reasons, it is the informal label used in this report. Data miners are not currently regulated in Minnesota. While this state is properly engaged in crafting procedures to insure accuracy of state records and reasonable access to them, private businesses do not necessarily concern themselves with such important matters as whether the record they are selling actually belongs to the subject in whom the buyer is interested, whether it is correct, whether it is up to date, and whether the subject is enabled to correct errors by being provided with a copy of the report.

Steve\* and Jeff\*, both 16-year-old students, were playing volleyball in the high school swimming pool. Steve became angry at Jeff and smashed him in the face with the volleyball. Jeff, who was bleeding, punched Steve. Jeff was referred to juvenile court for disorderly conduct. The court stayed adjudication for three months with various conditions. Jeff had no problem completing the program, and no adjudication was entered. Later, he applied for employment and was denied because the potential employer learned of the incident. The fact that the court never adjudicated Jeff delinquent was of no consequence to the employer.

\*All names used in narratives are fictitious. All of the narratives are accurate accounts of the real experiences of particular Minnesotans.

In the Fair Credit Reporting Act (FCRA), Congress has placed important limitations on data miners. A few states – California is notable – have created statutes patterned after the Federal law. California’s statute exemplifies how far-reaching and complicated such laws can be.<sup>46</sup> It is not necessary for Minnesota to enact an FCRA-based complex of statutes in order to regulate data-miners doing business in this state; and, given the many layers of bureaucracy in the California structure, it may not be desirable. It is necessary, of course, that any state law in this area not conflict with Federal law.

## RECOMMENDATION

### 1. Regulate “data miners.”<sup>47</sup>

The Committee recommends the following as an initial draft of a statute regulating data miners:

#### Section 1. BUSINESS SCREENING SERVICES; REMOVABLE AND UNREPORTABLE DATA.

Subdivision 1. Definition. For the purposes of this section, "business screening service" or "BSS" means a person engaged, for profit, in whole or in part in the practice of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating to third parties, background information on individuals that includes records of arrests, citations, criminal proceedings, or convictions involving the individual.

Subd. 2. Notification of background check; report. (a) Before completing a background check, record check, or both, the business screening service shall notify the individual who is the subject of a check that a search is being done. The BSS must give the subject the following information:

(1) the identification and contact information of the person or entity requesting the report;

(2) that the subject has a right to see any public record or information obtained from a commercially available database used to prepare the report;

(3) that the subject has the right to request that the BSS change erroneous information and provide information that will make it possible for the BSS to reinvestigate; and

(4) all other rights available to the subject under this section.

The BSS shall provide a complete copy of the search findings to the subject at the same time the information is provided to the requester.

<sup>46</sup> California Civil Code §1786.10-1786.40.

<sup>47</sup> Because the Committee’s purpose was to study the affect of criminal data on employment, there was no discussion of landlord-tenant issues. The Minnesota Multi Housing Association (MHA) had a representative on the Committee; when MHA read the draft report, it requested that its objection to this recommendation be noted. MHA states that state law already regulates the rental screening process and provides many of the rights set forth in the proposed legislation; MHA is also concerned that the procedures set forth in the statute drafted by the Committee will slow down tenant screening to a degree that is harmful to the interests of both landlords and tenants.

(b) A BSS report must include a glossary defining the criminal court terms used in the report, such as continued for dismissal, dismissal, stay of imposition, stay of adjudication, misdemeanor, petty misdemeanor, adjudication of delinquency, conviction, acquittal, and probable cause not found. A BSS report using public record information must identify the source from which the information was obtained, including the particular court or agency.

(c) A BSS must use the same look-backs as government agencies in reporting; for instance, if the law provides that misdemeanors cannot be disclosed or used by a state agency after three years from discharge, the BSS may not disclose them after three years.

(d) A BSS must verify any data obtained from public records within 30 days prior to distributing a report. The BSS has a continuing duty to update its information and to avoid using outdated information. The BSS may be liable under subdivision 4 if information in a report is different from the public record within 30 days prior to reporting. No adverse information that is a matter of public record and is included in a report may be repeated in a subsequent report by the same BSS unless it has been verified in the process of preparing the subsequent report.

Subd. 3. **Correction and deletion of records.** (a) If the completeness or accuracy of a record involving an arrest, citation, criminal proceeding, or conviction maintained by a business screening service is disputed by the individual who is the subject of the record, the screening service shall, without charge, investigate the disputed record. The agency shall notify any and all sources from which incomplete or inaccurate data was obtained of the reasons for the reinvestigation and of the result. This notice shall be in writing, and a copy shall be sent to the subject.

(b) In conducting a reinvestigation, the BSS shall review and consider all relevant information submitted by the subject of the record with respect to the disputed record. If, after reinvestigation, the disputed record is found to be inaccurate or incomplete, the BSS shall modify the record. If, after reinvestigation, the disputed record is found to be sealed or pardoned, the business screening agency shall promptly delete the record. The BSS shall, at the request of the subject, furnish a corrected report to any person who has, within two years prior to the correction or deletion, received a copy of a report on the subject from the BSS.

(c) A BSS may determine that no modification will be made to a disputed record search if the individual who is the subject of the record fails to provide sufficient information to investigate the disputed record. Upon making a determination that the record will not be modified, the BSS shall notify the subject in writing, giving reasons for the decision and describing the information required to investigate the disputed record.

(d) The BSS shall notify the subject of the record of the modification or deletion of the disputed report, or termination of the reinvestigation, within 30 days of the date the agency receives written notice of the dispute from the individual who is the subject of the record. The BSS must send a corrected report within three days of the completion of the reinvestigation to both the subject and requester.

(e) The BSS shall retain a copy of any report it creates for at least two years.

Subd. 4. **Remedy.** A business screening service that violates this section is liable to the individual who is the subject of the record for a penalty of \$10,000 or actual damages caused by the violation, whichever is greater, plus costs and disbursements and reasonable attorney fees.

## CERTIFICATES OF RELIEF

Charlie\* moved into an apartment with his girlfriend after graduating from high school, having experienced major conflicts with his parents because he was abusing alcohol. By the time he was 20, he had two misdemeanor convictions: issuing a worthless check, and an assault resulting from a bar fight. In each case, he went to court without a lawyer and was given a non-jail sentence when he pleaded guilty. At age 21, Charlie became a father. He has been his son's custodial parent, has maintained employment, and has had no further brushes with the law.

This year, when his son was about to enter kindergarten, Charlie decided it was time to increase his earning capacity. He obtained a loan for a financial data analysis program at a for-profit school. When he graduated, he applied for three jobs in his chosen field, and was given three offers of employment. In each case, the offer was withdrawn because of his six-year-old misdemeanor record. The last employer kept the offer open while Charlie sought an expungement from the sentencing court; the judge was unable to seal the BCA's record of the assault, and Charlie lost a job which would have paid \$30,000 a year more than he is now earning. He was never told by anyone that his record might have such an effect. He is burdened by the school loan and completely demoralized.

\*All names used in narratives are fictitious. All of the narratives are accurate accounts of the real experiences of particular Minnesotans.

The CriMNet Policy Group is forwarding recommendations concerning the sealing of criminal records to the 2008 Legislature. It is very important that Minnesota establish clear policy, standards and procedures for sealing and for all other aspects of the state's management and dissemination of criminal data. However, as is noted in the Data Miners section of this report, even the most rational and fair state practices will not relieve ex-offenders from the negative consequences of data summaries prepared and sold by private businesses. The Collateral Sanctions Committee has discussed procedures for "trumping the data miners," by creating a system that would allow ex-offenders to ask for official review of their convictions and, when appropriate, to receive a clear determination that those convictions may not bar them from applying for particular licenses or cause their job applications to be summarily dismissed.

The state of New York authorized its Parole Board to grant "Certificates of Good Conduct" in the 1940's, and the concept was further developed during Governor Nelson Rockefeller's administration in the 1960's, when a "Certificate of Relief from Disabilities" was created. While many of the groups now considering collateral sanctions policy recommend such processes as an adjunct to laws providing for reform in government's handling of its own data, there are only six states that offer any such remedies. Although New York's law is the most comprehensive of these, a May 2006 report of the New York State

Bar Association states that the Parole Board grants about 500 certificates per year and that the state courts grant about 2,500. Neither the number of applications nor the number of grants is as large as one might expect in a jurisdiction as populous as New York.<sup>48</sup> The Bar speculates that offenders are not applying, because they are not being informed of their right to do so.

Illinois has recently created a certification system, but only those with two or fewer non-violent felonies may apply; and the certificates are aimed at facilitating licensing for specified occupations, rather than removing employment barriers generally. Connecticut has an administrative pardons process that is “independent of the governor and issues about 200 full pardons each year.”<sup>49</sup> Recent legislation extends the kinds of relief the pardons authority may grant to include “provisional pardons” lifting barriers to employment. It seems likely that, as in New York, the certificates will not be numerous enough to achieve the degree of change that is needed in this area. According to a paper by Margaret Love and April Frazier, “certificates offered by California, Nevada, and New Jersey...appear to have little operational usefulness.”<sup>50</sup> The Committee has approved a draft of a statute designed to reduce significantly the existing irrational barriers to employment that result from criminal convictions. If enacted, the proposed Certificate of Good Conduct would be especially important to the large number of people who are being denied jobs for which they are clearly qualified and are being told that, if they can eliminate their old and/or minor convictions, they will be hired.

Minnesota will be on the leading edge of reform if the proposal becomes law. As noted above, the general approbation such laws have gained from legislators and policy experts has not translated into meaningful results. Only a few states have enacted laws for this purpose, the laws have not always been adequately publicized, and the procedures petitioners must employ are often unnecessarily complicated.

## RECOMMENDATION

### **1. Create a Certificate of Good Conduct.**

The Collateral Sanctions Committee recommends that Minnesota create a process by which people adjudicated delinquent, convicted of misdemeanors, or convicted of felonies can apply to the courts in which they were adjudicated or convicted for certificates designed to have significant positive effect on their employment opportunities. The Committee offers a proposal

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<sup>48</sup> New York Bar Association. (2006). pp.99-106.

<sup>49</sup> Love, M., & Frazier, A. (2006).

<sup>50</sup> Ibid at p.2.

for legislation, recognizing that it will be necessary to insure that there is sufficient funding to make the program feasible for the State Court and the entities responsible for managing the data involved in the program. The proposed statute incorporates features from several sources, including proposals for model/uniform codes:

**Section 1. [364.20] CERTIFICATE OF GOOD CONDUCT.**

**Subdivision 1. Petition; filing fee.** A person who has been convicted or adjudicated delinquent for a crime may petition a court for a certificate of good conduct as provided in this section. A petition may seek a certificate for a single crime or multiple crimes. When filing the petition, the person shall pay a filing fee in the amount required under section 357.021, subdivision 2, clause (1). A court may waive the filing fee in cases of indigency.

**Subd. 2. Contents of petition.** (a) A petition for a certificate of good conduct must be signed under oath by the petitioner and state the following:

(1) the petitioner's full name and all other legal names or aliases by which the petitioner has been known at any time;

(2) the petitioner's date of birth;

(3) all of the petitioner's addresses from the date of the offense in connection with which a certificate is sought, to the date of the petition;

(4) why the certificate is sought and why it should be granted;

(5) the details of each offense for which the certificate is sought, including the date and jurisdiction of the offense, either the names of any victims or that there were no identifiable victims, whether there is a current order for protection, restraining order, or other no contact order prohibiting the petitioner from contacting the victims or whether there has ever been a prior order for protection or restraining order prohibiting the petitioner from contacting the victims, the court file number, and the date of conviction;

(6) what steps the petitioner has taken since the time of the offense toward personal rehabilitation, including treatment, work, or other personal history that demonstrates rehabilitation;

(7) the petitioner's criminal conviction record indicating all convictions for misdemeanors, gross misdemeanors, or felonies in this state, and for all comparable convictions in any other state, federal court, or foreign country, whether the convictions occurred before or after the conviction for which the certificate is sought;

(8) the petitioner's criminal charges record indicating all prior and pending criminal charges against the petitioner in this state or another jurisdiction, including all criminal charges that have been continued for dismissal or stayed for adjudication, or have been the subject of pretrial diversion, and all stays of imposition; and

(9) all prior requests by the petitioner, whether for the present offense or for any other offenses, in this state, in any other state, or in federal court, for pardon, return of arrest records, expungement or sealing of a criminal record, or certificate of good conduct or similar certificate, whether granted or not.

(b) If there is a current order for protection, restraining order, or other no contact order prohibiting the petitioner from certain conduct or there has ever been such an order, the petitioner shall attach a copy of the order to the petition.

**Subd. 3. Service of petition and proposed order.** (a) The petitioner shall serve by mail the petition for a certificate of good conduct and a proposed certificate order on the prosecutorial office that had jurisdiction over the offense for which the certificate is sought.

(b) The prosecutorial office that had jurisdiction over the offense for which the certificate is sought shall serve by mail the petition for the certificate and the proposed certificate order on any victims of the offense for which the certificate is sought who have requested notice pursuant to section 611A.06. Service under this paragraph does not constitute a violation of an existing order for protection, restraining order, or other no contact order.

(c) The prosecutorial office's notice to victims of the offense under this subdivision must specifically inform the victims of the victims' right to be present and to submit an oral or written statement at the hearing described in subdivision 4.

**Subd. 4. Hearing.** A hearing on the petition must be held no sooner than 60 days after service of the petition. Parties to the action may call witnesses to establish or refute the petitioner's eligibility for the certificate. A victim of the offense for which a certificate is sought has a right to submit an oral or written statement to the court at the time of the hearing describing any conduct of the offender that has occurred after the offender's sentencing that is relevant to the issue of whether the offender has been rehabilitated, including the effect of this conduct upon the victim. The judge shall consider the victim's statement when making a decision.

**Subd. 5. Eligibility.** A person is eligible for a certificate of good conduct under this section if the following conditions are met:

(1) the person has been successfully discharged from the sentence imposed for the offense for which the certificate is sought and is not under correctional supervision for any other offense;

(2) the person is not currently required to register as a predatory offender under section 243.166;

(3) the person is not currently charged with any offense and has been law abiding for the following period immediately preceding the filing of the petition (i) for a person convicted of a felony against the person, five years; (ii) for all other felonies, three years; (iii) for misdemeanors against the person, two years; (iv) for all other misdemeanors, one year; (v) for delinquencies against the person, five years; (vi) for all other delinquencies, two years.

(4) the person demonstrates rehabilitation, which may be shown, among other ways, by evidence of the person's good character, employment, volunteer activities, or participation in vocational, educational, treatment, or rehabilitation programs;

(5) the issuance of the certificate is consistent with the public interest; and

(6) any other factor deemed relevant by the court, including, but not limited to, the severity of the conduct that constituted the offense for which the certificate is sought.

**Subd. 6. Issuance of certificate.** A judge shall issue a certificate of good conduct to a petitioner if the petitioner establishes by clear and convincing evidence that the petitioner meets the eligibility requirements specified in subdivision 5, clauses (1) to (5), and any other factor required by the court under subdivision 5, clause (6).

**Subd. 7. Effect of certificate.** (a) A certificate of good conduct issued under this section creates a presumption of rehabilitation in favor of the person to whom it was issued and relieves the person of any state-imposed collateral sanction, as defined in section 609B.050,



relating to eligibility for housing, employment, or professional licensing arising from a crime for which the certificate was issued.

(b) A certificate of good conduct has no effect on collateral sanctions not related to housing, employment, or licensing.

(c) Consistent with paragraph (a) and other applicable law, a housing or licensing authority or employer may, but is not required to, take into account a conviction that is the subject of a certificate of good conduct when making a housing, licensing, or hiring decision.

(d) A housing or licensing authority or employer is not civilly or criminally liable for relying on a certificate of good conduct when offering housing, employment, or licensing to a person. This paragraph does not relieve a person from any other legal duty in making a housing, employment, or licensing decision not related to the conduct that is the subject of the certificate of good conduct.

(e) Evidence relating to a conviction for which a certificate of good conduct has been issued is inadmissible in a civil action against a housing or licensing authority or employer for negligence or other fault in renting, leasing, licensing, or hiring if the authority or employer relied on the certificate when making the underlying decision.

(f) The existence of a certificate of good conduct is admissible as evidence of reasonable care by a person who relied on it when making a housing, licensing, or hiring decision related to the subject of the certificate.

Subd. 8. **Revocation.** A certificate of good conduct is revoked by operation of law if the subject of the certificate is subsequently convicted or adjudicated delinquent for a new crime.

Subd. 9. **Limited effect.** A certificate of good conduct has only the effect given in this section. A certificate does not act as a pardon or expungement. The certificate does not relieve the person to whom it was issued of any collateral sanctions or legal disabilities related to predatory offender registration; eligibility to possess firearms; or driver's license sanctions.

Subd. 10. **Crime for misuse.** Unless a greater penalty is specified elsewhere in statute, a person who knowingly uses or attempts to use a revoked certificate of good conduct or who fraudulently alters or forges a certificate of good conduct is guilty of a misdemeanor.

Subd. 11. **State Court to collect data.** The State Court shall collect data adequate for assessing the impact of certificates of good conduct on recidivism. The data shall include, but not be limited to, the following:

(1) Name and birth date of every applicant for a certificate, whether the application was granted, and the statute numbers of the convictions each applicant listed on his/her application, as required by subd. 2(5) above;

(2) Number of certificates sought in each of the categories set forth in subd. 5(3) above;  
and

(3) Number of certificates granted concerning each of the categories set forth in subd. 5(3) above.

Subd. 12. **Reporting of data.** The State Court shall prepare data reports concerning certificates of good conduct from time to time, as requested by the Legislature.

Sec. 2. Minnesota Statutes 2006, section 611A.06, subdivision 1a, is amended to read:

Subd. 1a. **Notice of expungement or certificate of good conduct required.** The prosecuting authority with jurisdiction over an offense for which expungement or a certificate of good conduct under section 364.20 is being sought shall make a good faith effort to notify a victim that the expungement or a certificate is being sought if: (1) the victim has mailed to the prosecuting authority with jurisdiction over an offense for which expungement or a certificate is being sought a written request for this notice, or (2) the victim has indicated on a request for notice of ~~expungement~~ release submitted under subdivision 1 a desire to be notified in the event the offender seeks an expungement or a certificate for the offense.

A copy of any written request for a notice of expungement or a certificate request received by the commissioner of corrections or other custodial authority shall be forwarded to the prosecutorial authority with jurisdiction over the offense to which the notice relates. The prosecutorial authority complies with this section upon mailing a copy of an expungement or a certificate petition relating to the notice to the address which the victim has most recently provided in writing.

## WORK EXPERIENCE

Some Committee members have substantial experience supervising and/or assisting people with criminal convictions as they attempt to build lives free from crime. They were instrumental in maintaining the group's awareness of the practical difficulties of achieving employment for people who had little or no work experience prior to their convictions and now are burdened with a criminal history. While some ex-offenders may derive real benefit from the work-readiness training presently available to Minnesota's unemployed, many of them must have training that is specifically focused on the deficits common in forensic populations. In addition to lowering the legal and social barriers faced by ex-offenders, it is necessary for the correctional system to create opportunities for people to acquire valuable skills, and to provide them with real work experience.

The work experience referenced here should not be confused with the unskilled chores that are part of the "productive day" programs often used in correctional facilities to provide inmates with a sense of purpose and to minimize negative behaviors. The cleaning, maintenance, food service and laundry work that may be a valuable part of a productive day in jail or prison are not usually adequate to enhance employment opportunities in the outside world. When such work is given added value by being part of a program linked to the known needs of specific employers in the community and including skills and attitude training that raise workers above the lowest level of day labor, it may become real work experience of the kind contemplated in this discussion. That is, experience that makes offenders more valuable workers than they would have been left to their own devices, especially because it is designed and implemented in consultation with prospective employers.

Ideally, work experience is provided while offenders are still incarcerated or under the active supervision of corrections agents. It is evident that employers want people who display the attitudes and habits that are part of reliable attendance, interacting appropriately with co-workers, and doing consistently good work. Corrections agents understand offenders and can employ a range of sanctions that may be uniquely effective in encouraging this essential socialization among individuals who often have reason to doubt their own potential.

Offenders who are placed on probation must not be overlooked when we think about making people with criminal records more valuable to prospective employers. They are often more capable of living and working in the community than those who are imprisoned, and there are

many more of them. Some county jails have been able to provide real work experience to longer-term inmates, but most probationers do not have such opportunities. Even the wealthiest county correctional agencies do not have the funding to build the work programs they would like to have in their jails, and many probationers are not incarcerated for long enough to participate in jail programs. The short-termers serving DOC sentences in local facilities are often subject to the same deficits.

County corrections agencies must be funded at a level adequate to create work programs linked to the employers in their vicinity and to make it possible for agents to adequately support their clients in obtaining and keeping jobs. Such support would include acting as an "interpreter" between the client and employer, by helping the client explain his past conduct and how he has put it behind him, assuring the employer that the client is not using drugs or abusing alcohol, providing a "go-to" person when either party has a concern about the work relationship, and so on. The Committee heard from probation officers who expected to have meaningful engagement with clients and are discouraged by the fact that they are able to do little more than conduct brief check-ins and report failures to the courts. The Minnesota Corrections Association's 2008 Legislative Position Paper reports that corrections agents have caseloads three times greater than in 1980.

The Committee heard from two programs that show real evidence that they are successfully providing skills training and work experience making offenders employable in the community: Hennepin County's STS Homes Program and Minnesota Correctional Facility-St. Cloud's masonry program. Both programs are based on win-win relationships with trade unions. The programs were designed with the unions and have on-going union involvement; the Hennepin program relies on union supervisors for its work crews. The prison inmates who participate become high-quality prospective apprentices.

At present, many unions are unable to recruit the number of apprentices they need to replace retiring members. They are troubled by the lack of commitment and competence of those they do recruit, because it threatens the maintenance of high standards that is the core of the unions' missions. Many unions wish to recruit minority apprentices, and both programs include a high percentage of people of color. Those who participate as trainees usually find employment on the outside; there is no doubt that the supervision that comes with incarceration contributes greatly to their success. A significant number of those trained in the Hennepin construction program go to work for non-union contractors, a reality which the union expects and understands.

The Committee heard from Bob Hunter, Division Manager of Hennepin County's STS Homes program. Preparation for the STS Homes program began in 1999. By early 2000, six offenders had been selected to participate in the first house-building crew. Today, there are seven offenders selected for each of the seven crews (3 crews out of Lino Lakes, 1 out of Red Wing, 1 out of Stillwater, 1 out of Shakopee, and 1 advanced crew out of the workhouse in Plymouth). After a two-day training on safety and expectations, crews begin on-site training. Each crew works on a home for approximately seven months, with periodic performance reviews. There are rarely disciplinary issues, and only one offender has ever absconded from the job sites (in September 2007). Hennepin County tracks graduates of the program and, over eight years, boasts a recidivism rate of less than five percent.

The STS Homes program assists graduates with job placement upon release from prison, and most are able to obtain good jobs. The unions typically give graduates about 2,000 hours of credit toward journeyman status, which requires 7,000 hours. Currently, the program is working on a contract with tax services. Under this contract, STS Homes program would have offenders rehab foreclosed homes, which would then be used to house DHS clients who no longer need to be in an assisted living setting.

Ms. Patty Popp and Mr. Jason Kilanowski spoke to the Committee about the masonry program at MCF-St. Cloud. Ms. Popp is the Institution Education Supervisor at MCF-St. Cloud, and Mr. Kilanowski is responsible for supervising the masonry program. According to their presentation, approximately 22 offenders are selected to participate in the program at a time; they receive 47 credits of masonry instruction. Most of the training is hands-on; all book work is completed on offenders' own time. After completing the training program, most offenders are awarded approximately 4,000 hours of on-the-job experience, which counts toward journeyman licensure (6,000 hours required). Upon release from prison, the unions assist program graduates with job placement. The average starting wage for graduates is \$19/hr. Within 12-24 months after release, many graduates complete their hour requirement to reach journeyman status, which comes with a pay increase to approximately \$30/hr.

Mr. Kilanowski pointed out that the average age of bricklayers in Minnesota is currently 56 years old. With an aging population and low numbers of individuals seeking apprenticeships, the unions have an incentive to work with the prisons in this program. It provides them with trained, qualified employees who can fill the spots left vacant by retiring bricklayers. Unfortunately, the Department of Corrections does not gather the data necessary to measure the impact of its vocational programs on recidivism.

## RECOMMENDATIONS

1. Fund county corrections agencies at a level adequate to allow them to work within their communities to provide work experience to individuals on probation, to support probationers in getting and keeping jobs, and to measure their efforts' impact on recidivism. The Committee recognizes that the likeliest and best source for this funding is not new money, but the reallocation of the state's correctional resources based on evidence of the financial and public safety return achieved by reducing recidivism.
2. Fund DOC vocational training that is designed in collaboration with potential employers, measures impact on recidivism, and provides all inmates with experience working at jobs that are likely to be available in the community. It should be noted that it is the position of the Department that no additional funding is needed for vocational training, since all inmates are presently employed. It may be that all that is necessary is to create a means to collect the data essential for evaluation, so as to ensure that DOC programs are reducing recidivism.
3. Fund state or nonprofit vocational programs for ex-offenders only if the large majority of participants gain employment, and the programs have measurable impact on recidivism.
4. Explore the possibility of linking funding for correctional work programs to projects that would benefit the communities most impacted by crime or would build facilities needed to enhance public safety.

Some high-crime neighborhoods have been particularly hard-hit by foreclosures and have a significant number of boarded-up houses that could be repaired, or torn down and rebuilt, so as to provide affordable housing. The Minnesota Corrections Association reports that there are fewer half-way house beds in Minnesota than there were in 1980, while the prison population has gone from roughly 2,000 to 9,010 in 2006.<sup>51</sup> According to testimony recently provided to a legislative working group on re-entry, 70 percent of sex offenders have no housing when they are released from prison.

Projects of this kind will not be provided by the market sector and, without some out-of-the-box thinking, the State cannot provide them, either. It is extremely difficult for those with criminal records to get and keep jobs when they are living on the street or in temporary shelters. The laws requiring predatory offenders to register are not effective

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<sup>51</sup> Data presented by Minnesota Corrections Association at their Fall Training Institute on October 18, 2007.

when such individuals have no stable address. It seems that the linkage proposed here would enhance public safety in several ways.

# EMPLOYER INCENTIVES

## ROLE OF EMPLOYERS AND UNIONS

The Committee recognizes that a major weakness of the collateral sanctions work so far is that it has not involved either employers or unions. Neither is represented on the Committee at present. If the Legislature decides to continue developing collateral sanctions policy and to enact changes in law and in state practices, so as to increase employment of Minnesotans with criminal records, both must be included in the work. If the Committee continues with its present members, it will be able to reach out to businesses and unions as “interested parties,” to survey them, to ask them for information and testimony, and so forth. It would probably be better, though, to expand the Committee to include representatives of these key stakeholders.

## RECOMMENDATION

- 1. Involve employers and unions in minimizing unreasonable impact of criminal records on employment.**

## EMPLOYER LIABILITY

The Committee has recognized and discussed some of the concerns that employers have when they encounter qualified prospective employees with criminal records. Throughout this report, there are references to the reality that many employers will not hire even people whom the criminal justice system does not categorize as having criminal records, if they have the slightest contact with the system. No doubt, employers share the widespread suspicion of ex-offenders; but, unlike most citizens, they are faced with real risks and responsibilities in making decisions about them.

Katlyn\* was adjudicated delinquent at age 16, after participating in an assault in which another teen was beaten with a baseball bat and suffered serious injuries to her face and skull. Katlyn entered a good alternative high school, where she was an outstanding student. While in school, she earned a nursing assistant certificate. Both she and the school principal were shocked when she was unable to get work caring for vulnerable people. The principal believed that the delinquency would “go away” when Katlyn reached 18; and she had been told by the juvenile court that a delinquency would not be treated like an adult felony. Katlyn is still unemployed, having been refused unskilled jobs in fast food restaurants and retail because of her delinquency record.

\*All names used in narratives are fictitious. All of the narratives are accurate accounts of the real experiences of particular Minnesotans.



Employers are vitally engaged with the questions raised by criminal data in the 21<sup>st</sup> century. They are interested in knowing as much as possible about the people they hire, because they want security for themselves, their employees, and their customers. But in many instances, particularly when evaluating people with misdemeanor records or less, they recognize that security is not a real problem. What is always a real problem is that, in the unlikely event the person who had a brush with the law hurts someone or is a thief, the employer will be sued. Employers are sued for not knowing the criminal history of these problematical employees, and they are also sued for knowing it. In several ways, this report recognizes the need to strike some reasonable balance between holding employers responsible for truly negligent hiring and relieving them of what may be crippling liability for the bad behavior of individuals who have some contact with the criminal system and whom it was reasonable to hire.

### RECOMMENDATION

- 1. Eliminate employer liability for reasonable hiring of ex-offenders. See, Certificate of Good Conduct, subd.7 (d), (e), (f), p. 46.**

### FINANCIAL INCENTIVES

It has long been recognized that government should invest in programs that would increase employers' willingness to hire people who are consuming substantial public resources and have higher-than-average rates of unemployment. The United States Department of Labor's Work Opportunity Tax Credit program and the Federal Bonding Service are two such programs, and each includes people with criminal records among the populations employers are given incentives to hire.

#### A. Work Opportunity Tax Credit (WOTC)

WOTC was part of the federal Small Business Tax Protection Act of 1996 and an important adjunct to the welfare reform effort undertaken by the 1996 Congress. In Minnesota, the program is funded by a U.S. Department of Labor grant and administered by our Department of Employment and Economic Development (DEED). Congress has continually reauthorized WOTC, but the reauthorizations have usually lagged, coming many months after the program had expired. This poor timing made it difficult for DEED to market the tax credit, since advertising had to be accompanied by the caveat that the state could not know for certain how long it would be available. In May of 2007, WOTC was reauthorized for an unprecedented 44 months, which will allow the state to advertise the credit with some confidence.<sup>52</sup>

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<sup>52</sup> Small Business and Work Opportunity Tax Act of 2007, P.L. 110-28 (2007).

Under the WOTC, employers qualify for tax credit by hiring individuals from a number of categories, one of which is ex-felons. An employer who hires an ex-felon within one year of that person's conviction or release from a correctional facility may apply for a certification that allows the employer to claim a tax credit. People who are on work-release status are qualified members of the target group. The amount of the credit is calculated according to whether the employee works from 120 to 400 hours, or more than 400 hours, in the first year of employment; the maximum allowable credit is \$2,400. It is not available after the first year of employment. The job on which the credit is based may be full-time, part-time, temporary, or seasonal. The credit is not available if the ex-felon has worked for the employer in the past. There is no limit to the number of new hires the employer may claim for WOTC.

DEED's WOTC unit issued certifications for 1,467 ex-felons hired for calendar years 2000 through 2006.<sup>53</sup> The ex-felon category accounted for 3 percent of the certifications the unit issued during those years. There were about 420 employers who hired ex-felons. Thirty-one of these employers were temporary staffing agencies, and they hired approximately 43 percent of all of the ex-felons who qualified employers for tax credits under the WOTC.

The Committee has not gathered WOTC data from other states; and, without that data, it is impossible to tell how Minnesota compares to others in the number of people with criminal records hired under WOTC and the quality of their jobs. Since it affects fewer than 250 offenders per year, the program seems to be ripe for expansion. It does not seem unreasonable, given the fact that the program is now certainly available until at least August 2011, to hope that more employers seeking permanent workers will recognize the financial opportunity it offers and that the number of ex-felons hired will increase. Certainly, re-entry programs and non-profits that encounter substantial numbers of ex-offenders should be working closely with DEED. Minnesota's political leaders, particularly those representing us in Congress, should be aware of the timing issue that has hampered implementation of WOTC and should do what they can to make sure that the program continues to be reauthorized in a way that maximizes its utility.

## RECOMMENDATIONS

- 1. Evaluate effectiveness of WOTC in Minnesota.**
- 2. Work with employers to maximize utilization of tax credits.**

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<sup>53</sup> All statistical data on WOTC and Federal Bonding provided by DEED in handouts to the 2007 Legislature's Re-entry Working Group and the agency's website (<http://www.deed.state.mn.us/>).

## **B. Minnesota Federal Bonding Service**

Like WOTC, the Minnesota Federal Bonding Service (MFBS) is a program created by Congress and administered by DEED. The bonding provided under the MFBS is no-cost insurance that protects employers against employee theft of money or property. Individual bonds are available to employers for new or current workers who are denied coverage by commercial carriers because of criminal record (including arrest), history of chemical dependency, poor credit history, dishonorable discharge, and/or lack of employment history. The bonded worker may have a full-time or part-time job, and his wages must have federal taxes automatically deducted from each paycheck. Self-employment is not covered. There is no deductible on the coverage, and most bonds are issued in the amount of \$5,000. The bonds are good for six months, after which a standard commercial policy is available from Travelers Property Casualty.

According to the DEED employee who administers the program in Minnesota, 5 bonds were issued in 2006 and 10 were issued in 2007. DEED does not know how many of them covered ex-felons, and it does not track the types of jobs in which they were employed. Clearly, the program has had no meaningful impact on increasing employment of Minnesotans with criminal records.

Under the heading “How Successful is the Program?” DEED’s website says “more than 40,000 bonds have been issued” and cites a Texas A&M University study indicating that Texas achieved substantial reduction in recidivism and substantial savings in prison costs by using the federal bonds “along with other services.” However, the study was done in 1992 as an evaluation of an ambitious Texas re-entry initiative undertaken in 1985; because bonds were just one component of many, the study does not shed much light on the impact of the bonds in particular.<sup>54</sup> It is not clear where the 40,000 bonds referenced in the website were issued and over what period of time.

Because the creators of the Federal Bonding Service saw it as a useful means to lessen unemployment of people in the categories set forth above, and because it does seem probable that the program could, indeed, have that effect, there should be some exploration of how it has fared nationally. Whether or not some jurisdictions have employed the bonds profitably, Minnesota employers should be involved in discussion of whether the program might be made more effective here and how that might be done.

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<sup>54</sup> Finn, P. (1998).

## RECOMMENDATIONS

- 1. Determine why Minnesota businesses are not utilizing the Federal Bonding Service.**
- 2. Increase utilization of Federal Bonding Service, or stop paying to advertise and administer the Service.**

## DRIVING PRIVILEGES

Minnesotans rely heavily on personal vehicles to get them to work. Driving privileges are so essential to people's ability to earn a living that, when their driver's licenses are suspended or revoked, they frequently risk criminal penalties in order to keep their employment. It used to be common for courts to impose stayed jail sentences for a first driving after suspension conviction, and to jail an offender if the crime was repeated. There are now so many of these cases that offenders are in many instances allowed to handle the ticket by paying a fine and not appearing in court at all.

Some suspensions, many revocations, and all cancellations are appropriately linked to highway safety or to crimes involving driver licensing or insurance. All too often, however, the loss of driving privileges is a sanction for some bad behavior unrelated to driving. There is no doubt that the possibility of losing one's license is a powerful incentive to stop whatever misconduct triggers the loss. The fact that most citizens would rather spend a few days in jail, do community service, or pay a fine than lose the right to drive legally is, of course, the reason such sanctions are imposed. They are cheaper than court-ordered punishments, as well.

Given the link between driving and employment, however, the Legislature should re-consider taking the right to drive away from people who are neither imperiling others, nor violating statutes that directly relate to licensing and insurance. It may be desirable not to punish licensing and insurance violators with loss of driving privileges in every case. Good collateral sanctions policy would favor abolition of all laws that punish non-vehicular misconduct by suspending driver's licenses. The Legislature began this process in 2005, by mandating that driving privileges not be linked to school attendance.<sup>55</sup> The Committee has specifically discussed some of these laws.

The Committee devoted a significant amount of its time, both in subcommittees and in meetings of the whole group, discussing the consensus view that something should be done to reduce the number of Minnesotans who are driving illegally in order to get to work. It was never suggested that citizens should retain driving privileges in cases where licenses are lost based on convictions for bad driving. Rather, committee discussion focused on situations in which privileges are suspended or revoked because of behavior other than unsafe driving, and on the barriers to reinstatement once privileges are lost. In the end, the Committee decided

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<sup>55</sup> M.S. §171.176 (2005).

not to include in this report any material that is not directly related to collateral sanctions for convictions of specific misdemeanors and petty misdemeanors.

It was agreed that the Legislature should create a task force to study, and make recommendations concerning, Minnesota driver licensing. The task force should investigate the effectiveness of laws designed to encourage drivers to obtain auto insurance, to pay child support, and to drive only according to the privileges DPS grants them, as well as all other relevant issues. Specific attention should be paid to how reinstatement fees, mandatory court costs, and other required cash payments affect the maintenance of driving privileges, particularly in the case of low-income Minnesotans. In addition the group should look for better practices in other states.

## RECOMMENDATIONS

### **1. Judges should have discretion not to report non-driving traffic violations to the Department of Public Safety (DPS).**

There are many situations in which people are ticketed for license or insurance violations involving no bad driving or accident. These can be punished sufficiently by court-ordered community service, fines, or jail. The currently mandated reporting and subsequent further loss of driving privileges are sometimes unfair or amount to unnecessary “piling on.” The 2006 Legislature addressed one such situation in 2006, when it provided that DPS cannot re-suspend the license of a driver convicted of driving after suspension when the license was suspended “solely because of the individual’s failure to appear in court or failure to pay a fine.”<sup>56</sup>

Because the situations are so various, it is hard to define precise statutory boundaries for judicial discretion in this area. There is no reason why elected judges who exercise great power in complex and high-risk cases should not be trusted with full discretion in these simple, low-risk cases affecting large numbers of their fellow citizens. Some examples:

- Driver A has had his license suspended as a result of pleading guilty to stealing gasoline. He was not told in court that his license would be suspended, and he did not get notice from DPS, because he did not update his address when he moved to a new apartment. A police officer picked up the suspension when he was running random license plates on his squad car’s computer. By the time A gets to court, the thirty-day suspension has run, he has given DPS his new address, and he has a letter informing him

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<sup>56</sup> M.S. §171.18, subd.1(b) (2006).

that his privileges have been reinstated. When he admits driving after suspension and pays a fine, the violation is reported and his license is suspended again, which he only realizes after he gets a notice of suspension from DPS.

- Driver B, who has a clear traffic record and is short of cash, fails to pay his auto insurance bill and the insurance lapses. When he is stopped for a broken tail light, he gets a ticket for driving without insurance. He repairs the light, pays to have his insurance reinstated and brings proof to court that his truck is insured for the next six months. He pleads guilty to driving without insurance and is ordered to do a substantial amount of community service, since he would have trouble paying the fine. The violation must be reported to DPS, so his license is revoked and he cannot drive the properly insured truck until he has passed the license test, paid for a new license, and paid a reinstatement fee.

**2. Create a task force to study driver licensing in Minnesota and elsewhere, in order to determine ways in which to decrease the number of residents who are driving illegally in order to get to work.**

**3. Revoke Minnesota Statute §171.175.**

One who is convicted or adjudicated delinquent for stealing gasoline currently has his driving privileges suspended for 30 days. Even at today's prices, gasoline is not more precious than auto parts, batteries or tires, and vehicle-related items are not more precious than any other property that might be lost to a thief. Gasoline sellers have learned how to protect themselves from "drive-aways" by requiring prepayment or credit card transactions. There is no reason that stealing gasoline should not be punished like any other theft.

a.) Revoked statute:

**~~171.175 SUSPENSION; THEFT OF GASOLINE OFFENSE.~~**

~~—Subdivision 1. **Theft of gasoline.** The commissioner of public safety shall suspend for 30 days the license of any person convicted or juvenile adjudicated delinquent for theft of gasoline under section [609.52, subdivision 2](#), clause (1).~~

~~—Subd. 2. **Definition.** For the purposes of this section, "gasoline" has the meaning given it in section [296A.01, subdivision 23](#).~~

**4. Revoke or amend Minnesota Statute §171.171.**

There are many cases in which people too young to obtain alcohol or tobacco legally use false identification to obtain, or attempt to obtain, these substances. This statute mandates a 90-day suspension of driving privileges for those who commit such offenses, or help others to do so. Using a driver's license in these transactions can fairly be seen as an abuse of that license; to the extent that M. S. §171.171 punishes such abuse, it can be argued that the sanction is related to a part of the driving-privilege structure.

However, the rest of the law is completely unrelated to driving or to driver's licenses. Suspension is mandatory if a "Minnesota identification card, or any type of false identification" is used to purchase, or attempt to purchase, alcohol or tobacco. Alcohol is all too frequently a cause of dangerous driving, and it is surely appropriate to sanction under-age drivers with loss of driving privileges if they link alcohol with driving.<sup>57</sup> However, M.S. §171.171's sanctions are triggered without any nexus to a motor vehicle. And loss of a driver's license for using false identification to illegally obtain tobacco has no relationship at all to driving.

a.) Amended statute:

**171.171 SUSPENSION; ILLEGAL PURCHASE OF ALCOHOL OR TOBACCO.**

The commissioner shall suspend for a period of 90 days the license of a person who:

(1) is under the age of 21 years and is convicted of purchasing or attempting to purchase an alcoholic beverage in violation of section [340A.503](#) if the person used a driver's license, ~~Minnesota identification card, or any type of false identification~~ to purchase or attempt to purchase the alcoholic beverage; or

(2) is convicted under section [171.22, subdivision 1](#), clause (2), or 340A.503, subdivision

2, clause (3), of lending or knowingly permitting a person under the age of 21 years to use ~~the person's~~ a driver's license, ~~Minnesota identification card, or other type of identification~~ to purchase or attempt to purchase an alcoholic beverage;

(3) is under the age of 18 years and is found by a court to have committed a petty misdemeanor under section [609.685, subdivision 3](#), if the person used a driver's license, ~~Minnesota identification card, or any type of false identification~~ to purchase or attempt to purchase the tobacco product; or

(4) is convicted under section [171.22, subdivision 1](#), clause (2), of lending or knowingly permitting a person under the age of 18 years to use the person's driver's license, ~~Minnesota identification card, or other type of identification~~ to purchase or attempt to purchase a tobacco product.

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<sup>57</sup> M.S. §171.173 (1993).



b.) Revoked statute:

**~~171.171 SUSPENSION; ILLEGAL PURCHASE OF ALCOHOL OR TOBACCO.~~**

~~The commissioner shall suspend for a period of 90 days the license of a person who:~~  
~~(1) is under the age of 21 years and is convicted of purchasing or attempting to purchase an alcoholic beverage in violation of section [340A.503](#) if the person used a license, Minnesota identification card, or any type of false identification to purchase or attempt to purchase the alcoholic beverage;~~

~~(2) is convicted under section [171.22, subdivision 1](#), clause (2), or 340A.503, subdivision~~

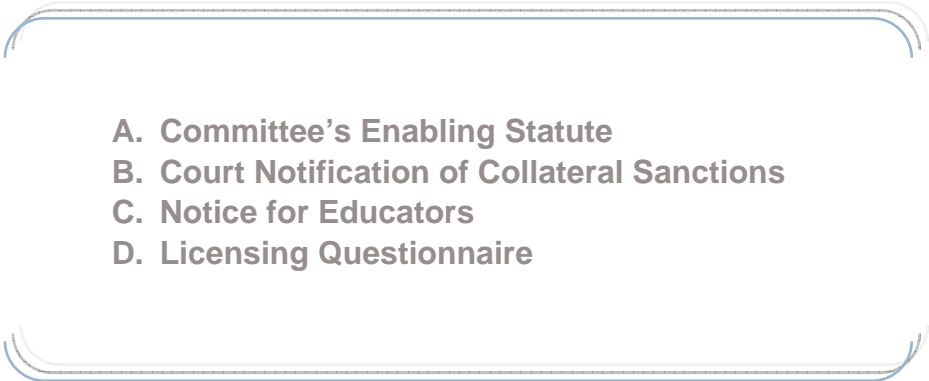
~~2, clause (3), of lending or knowingly permitting a person under the age of 21 years to use the person's license, Minnesota identification card, or other type of identification to purchase or attempt to purchase an alcoholic beverage;~~

~~(3) is under the age of 18 years and is found by a court to have committed a petty misdemeanor under section [609.685, subdivision 3](#), if the person used a license, Minnesota identification card, or any type of false identification to purchase or attempt to purchase the tobacco product; or~~

~~(4) is convicted under section [171.22, subdivision 1](#), clause (2), of lending or knowingly permitting a person under the age of 18 years to use the person's license, Minnesota identification card, or other type of identification to purchase or attempt to purchase a tobacco product.~~



## APPENDICES

- 
- A. Committee’s Enabling Statute**
  - B. Court Notification of Collateral Sanctions**
  - C. Notice for Educators**
  - D. Licensing Questionnaire**

[Minnesota Session Laws 2007: Ch. 54, Art. 7](#)**Sec. 23. COLLATERAL SANCTIONS COMMITTEE.**

Subdivision 1. **Establishment; duties.** The Collateral Sanctions Committee shall study issues related to collateral sanctions. Specifically, the committee shall study how collateral sanctions are addressed in other states and determine best practices on this. In addition, the committee shall study issues relating to how criminal convictions and adjudications affect an individual's employment and professional licensing opportunities in Minnesota. The committee shall consider the policy implications of providing a process to allow individuals currently prohibited from certain types of employment or professional licensing because of a criminal record to seek a waiver. The committee shall make recommendations on changes in law and policy it deems appropriate in this area. By January 15, 2008, the committee shall report its findings and recommendations to the chairs and ranking minority members of the committees having jurisdiction over criminal justice policy in the senate and house of representatives.

Subd. 2. **Resources.** The Sentencing Guidelines Commission shall provide technical and research assistance to the committee, with the assistance of the commissioner of public safety and the commissioner of corrections.

Subd. 3. **Membership.** The committee consists of the following:

- (1) the executive director of the Sentencing Guidelines Commission, who shall serve as the committee's chair and convening authority;
- (2) the commissioner of public safety, or designee;
- (3) the commissioner of corrections, or designee;
- (4) the attorney general, or designee;
- (5) the state public defender, or designee;
- (6) a crime victim's advocate, appointed by the commissioner of public safety;
- (7) a county attorney, appointed by the Minnesota County Attorneys Association;
- (8) a city attorney, appointed by the League of Minnesota Cities;
- (9) a district court judge, appointed by the Judicial Council;
- (10) a private criminal defense attorney, appointed by the Minnesota Association of Criminal Defense Lawyers;
- (11) a probation officer, appointed by the Minnesota Association of County Probation Officers;
- (12) two peace officers, one appointed by the Minnesota Sheriffs' Association and the other appointed by the Minnesota Chiefs of Police Association;
- (13) two members with knowledge of housing issues, one of whom is a landlord and the other a tenant, appointed by the commissioner of public safety;
- (14) a member from the employment industry, appointed by the commissioner of public safety;
- (15) a member from a community crime prevention organization, appointed by the commissioner of public safety;
- (16) a member from a community of color, appointed by the commissioner of public safety;
- (17) a member who is an ex-criminal offender, appointed by the commissioner of public safety; and

(18) a member from an agency that provides re-entry services to offenders being released from incarceration, appointed by the commissioner of public safety.

Subd. 4. **Expenses; expiration.** The provisions of Minnesota Statutes, section 15.059, apply to the committee. The committee expires on January 15, 2008.

Subd. 5. **Definition.** As used in this section, "collateral sanctions" has the meaning given in Minnesota Statutes, section 609B.050, subdivision 1.

**EFFECTIVE DATE.** This section is effective the day following final enactment.

**WARNING:  
Criminal Convictions Have Serious  
Side Effects**

If at all possible, you should talk to a lawyer about your case before you decide whether to plead guilty or not guilty. The court may appoint an attorney if you cannot afford one.

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Whether you plead guilty or have a trial, being found guilty of breaking the law carries a penalty beyond the sentence you are given in court.

A criminal conviction may keep you from renting an apartment or getting a job, because internet background checks are now easy and cheap. Landlords and employers often use background checks to screen out people with criminal records of any kind.

A convicted person may not be able to get a professional license (such as licenses for nursing assistants, child care workers, plumbers, or school bus drivers). There are especially strong bars preventing those with convictions from working or volunteering with vulnerable people.

Convictions and arrests can impact your immigration status. If you are not a U.S. citizen, you may be deported, even with a green card or permanent resident alien status.

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Other bad impacts of conviction may include losing your driver's license, being unable to hunt with a gun or have a gun, and losing your right to vote. There are additional negative side effects that are not listed here.

The prosecutor who is handling the case against you may be willing to settle it in a way that keeps you from having a conviction on your record or gives you a chance to get it off your record by doing what the judge tells you to do. For example, the prosecutor may agree to a Continuance for Dismissal (see Minnesota Statute 609.132) or a Stay of Imposition (see Minnesota Statute 609.135). "Statute" means "law." You can look up the laws in a library or online, or use the court's self-help center, if available.

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You do not have to decide today how to handle your case. You can get a date to come back to court after you've had a chance to think about your choices.

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For further information, contact:

NOTICE REGARDING POSSIBLE IMPACT OF CRIMINAL RECORDS

A criminal conviction – even for a minor offense – may prevent you from being employed in the career of your choice. Because of the ability of “data miners” to do inexpensive background checks and the fact that many public records are now available on the internet, many employers require prospective employees to submit to background checks and refuse to hire them if they have any criminal record. In some cases, arrests and charges that did not lead to conviction prevent people from being hired.

Most vocations that require a license from some state licensing authority subject you to a background check; people with certain specified convictions or charges may be barred from licensure. Most jobs dealing with vulnerable people (children, elderly, sick, disabled), or working in institutions in which such people are housed or serviced, are off-limits to individuals who cannot pass a Department of Human Services background check.

If you have been charged or convicted of any offense, other than routine traffic tickets that cannot result in incarceration in a jail or prison (petty misdemeanor violations for which the maximum possible sentence is a fine of \$300), you should investigate the impact that the charge or conviction may have on your chances of employment in the field you intend to study. It may not make sense for you to spend the time and money required to learn skills that will not result in a job.

I understand the information concerning criminal records that is printed above, because I have read it or have had it read and/or translated for me.

Signature of prospective student: \_\_\_\_\_

Date: \_\_\_\_\_

I hereby certify that the individual who signed above was not prevented from understanding the information about criminal records because of an inability to read this document resulting from illiteracy, lack of English skills, or any obvious physical disability.

Signature of educational/vocational institution representative:

\_\_\_\_\_

Date: \_\_\_\_\_

Licensing Agency: \_\_\_\_\_

- 1.) How many applicants for licensure does your agency review yearly?
  
- 2.) How do you learn that a person requesting licensure has a criminal record?
  
- 3.) To the best of your knowledge, how many applicants with criminal records have received a license through your agency in the last five years?
  
- 4.) How many such individuals have applied for licensure and been denied?
  
- 5.) When you consider an application from a person with a criminal record, what factors do you think about?
  
  
- 6.) Do you weigh some factors more heavily than others?
  
- 7.) If so, which factors are most important to you?
  
  
- 8.) What factors make it likelier that you will grant a license to an applicant with a criminal record?
  
  
- 9.) Do you ever receive information about arrests that did not result in conviction?
  
  
- 10.) If so, do you weigh the arrests in considering an application?

- 11.) How many people in your agency process applications for licenses, in the sense that they determine or recommend whether a license will issue?
- 12.) Do those people use a uniform set of standards in determining licensure?
- 13.) If so, please attach a copy of the standards they use.
- 14.) Do you ever refuse to process a license application further, because the applicant committed a particular, specific type of offense?
- 15.) If so, what offense(s) bars the application?
- 16.) Does the notice to an applicant that a license has been denied include the specific reasons for the denial?
- 17.) How can an applicant appeal a denial of licensure?
- 18.) How often is a denial reversed?
- 19.) What, if any, improvements you would like to see in the licensure process regarding individuals with a criminal record?
- 20.) Would it be helpful to your agency if the standard for licensing individuals with criminal records were more uniform across agencies?



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