MINNESOTA DEPARTMENT OF PUBLIC SAFETY

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Office of the Commissioner

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January 3, 2007

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Chief Justice Russell Anderson
Minnesota Supreme Court

The Honorable Linda Higgins, Chair
The Honorable Thomas Neuville
Senate Public Safety Budget Division

The Honorable Michael Paymar, Chair
The Honorable Steve Smith
House Public Safety Finance Committee

The Honorable Leo Foley, Chair
Judiciary Budget Division

Dear Colleagues:

As required by House File 2656, 2006 Legislative session, a collateral consequences committee was established to study collateral consequences of adult convictions and juvenile adjudications. The committee was tasked with identifying the uses of collateral consequences of convictions and adjudications, and recommend any proposed changes to the legislature on the issue of collateral consequences.

This letter is to inform you that the report is complete and it is enclosed for your reference. The Department views this correspondence as satisfying the reporting requirements as provided in House file 2656.

If you need further information, please do not hesitate to contact me, or Deputy Commissioner Mary Ellison at 651 201-7160.

Sincerely,

Michael Camion
Commissioner

cc: Rep. Warren Limmer, Judiciary Budget Division
Chair Mee Moua, Senate Judiciary Committee
Chair Joe Mullery, House Public Safety and Civil Justice
Legislative Reference Library

Collateral Consequences Report Summary

The Collateral Consequences Committee was created through House File 2656 passed during the 2006 regular legislative session. The committee was convened by the Department of Public Safety with Deputy Commissioner Mary Ellison serving as Committee Chair.

The Committee met on September 9, September 22, October 20 and December 8, 2006. While the committee determined that the impact of collateral consequences is significant in scope and impact the committee did not feel that adequate time or resources were provided to make specific, meaningful policy or legislative recommendations.

There are six major areas in which collateral consequences impact a person's life:

- Civil participation
- Employment
- Family
- Financial
- Housing
- Immigration

In Minnesota statutes there are currently 200 collateral sanctions. While it is difficult to determine the exact number of people in Minnesota impacted by collateral consequences, review of data sources indicate that the problem significantly impacts many people within our state. The Minnesota Revisor of Statutes has created a new chapter of law that cross – references the collateral sanctions that exist in Minnesota statutes – Chapter 609B.050. A draft of this new statute is now available online. The National Commissioners of Uniform State Laws is drafting uniform acts and model legislation to encourage consistency in state laws. Both of these resources will be valuable as the legislature considers revisions to Minnesota statutes.

The committee recommends further review of this issue with a committee more broadly representative of the various stakeholders impacted by this issue as well as adequate time and resources to make meaningful recommendations. This report contains specific recommendations regarding the membership of the committee, its scope, the resources needed to complete the work and a proposal regarding leadership for the committee.

COLLATERAL CONSEQUENCES
REPORT TO THE LEGISLATURE

Table of Contents

COLLATERAL CONSEQUENCES REPORT

Introduction

The Collateral Consequences Committee was created through House File 2656 passed during the 2006 regular legislative session.

Sec. 45. **COLLATERAL CONSEQUENCES COMMITTEE.**

Subdivision 1. **Establishment; duties.** A collateral consequences committee is established to study collateral consequences of adult convictions and juvenile adjudications. The committee shall identify the uses of collateral consequences of convictions and adjudications and recommend any proposed changes to the legislature on collateral consequences.

Subd. 2. **Resources.** The Department of Corrections shall provide technical assistance to the committee on request, with the assistance of the commissioner of public safety and the Sentencing Guidelines Commission.

Subd. 3. **Membership.** The committee consists of:
(1) one representative from each of the following groups:
(i) crime victim advocates, appointed by the commissioner of public safety;
(ii) county attorneys, appointed by the Minnesota County Attorneys Association;
(iii) city attorneys, appointed by the League of Minnesota Cities;
(iv) district court judges, appointed by the Judicial Council;
(v) private criminal defense attorneys, appointed by the Minnesota Association of Criminal Defense Lawyers;
(vi) probation officers, appointed by the Minnesota Association of County Probation Officers; and
(vii) the state public defender or a designee; and
(2) the commissioner of public safety, or a designee, who shall chair the group.

Subd. 4. **Report and recommendations.** The committee shall present the legislature with its report and recommendations no later than January 15, 2007. The report must be presented to the chairs of the senate Crime Prevention and Public Safety Committee and the house Public Safety and Finance Committee.

EFFECTIVE DATE. This section is effective July 1, 2006.

The committee was convened by the Department of Public Safety and included the following members:

Robert M.A. Johnson, Anoka County Attorneys Office
Leonardo Castro, Hennepin County Chief Public Defender
Brock Hunter, Attorney at Law
Lollita Ulloa, Hennepin County Attorney's Office Victim Assistance Program
Honorable Charles A. Porter Jr., District Court Judge, Fourth Judicial District
Patricia Alfredson, Rochester Assistant City Attorney
Mary Ellison (Committee Chair), Minnesota Department of Public Safety
Traci L. Green, Minnesota Association of County Probation Officers
Bill Guelker (staff support), Minnesota Department of Corrections
Jacqueline Kraus (staff support), Minnesota Sentencing Guidelines Commission
Danette Buskovick (staff support), Minnesota Department of Public Safety

The committee met on September 9, September 22, October 20 and December 8, 2006.

Background

The effects of collateral consequences for criminal charges are significant both in scope and impact. Since the 1990s many state and federal laws have been enacted that restrict the access offenders have to social and economic opportunities. These consequences can be direct (like the ineligibility to vote while serving a felony sentence or a lifetime ban from welfare benefits for a drug conviction) or indirect (like landlords refusing to rent to someone based on a criminal history check). Since 9/11 many additional restrictions have been placed on employment opportunities for felony offenders. Many offenders were evicted from airport jobs as baggage handlers or shoe shine operators due to federal regulations against airports giving identification badges to felons[1]. In addition to federal collateral consequences, there are various state prohibitions against those with a criminal history. While it is beyond the scope of this report to delineate each state's sanctions, examples of sanctions include prohibitions against getting a realtor's license, working as a barber, and being a foster parent or adopting a child[2]. These statutory sanctions do not reflect the additional impact of criminal history checks made by an increasing number of private landlords and employers. Many people with a criminal arrest or conviction find they are unable to secure housing or are summarily excluded from even entry-level blue collar employment. Often, collateral effects can occur years after the conviction. For example, a woman had a 1981 felony conviction for attempted aggravated robbery. After completing jail, treatment, and living in a halfway house, she obtained her nursing assistant certificate and worked in that field for 24 years. In 2005, she was permanently disqualified from working as a nursing assistant by the Department of Human Services. She was not legally eligible to have the conviction set aside.

While many collateral consequences are associated with a felony conviction, often just having an arrest on your record can have unanticipated ramifications. In essence, collateral consequences can have long-lasting impacts on those who are arrested *or* convicted for any level crime, and on those returning to the community from prison. In one example, a person lost her job when her felony conviction was not properly reduced to a misdemeanor in her criminal history record. If this information had been recorded properly, she would not have lost her job. Fortunately, an attorney caught this mistake and corrected it but not before over a month of unemployment. These effects can spill over to an offender's family and to the communities in which high concentrations of offenders live.

Determining the number of people affected by collateral consequences of crime is difficult. However, a 2003 report[3] provides estimates of people federally barred from certain social benefits. The report stipulated that about 92,000 women are ineligible for welfare benefits because of a felony drug conviction[4]. Federal laws passed in 1996 and 1998 prohibit public housing benefits for anyone who has engaged in "any drug-related activity"; since these laws were enacted, those denied housing because of a criminal background doubled from 9,835 to 19,405. The report also states that about 9,000 students in the 2000-2001 school year were ineligible for student aid because of federal restrictions. These numbers are just a fraction of the consequences faced by those with a criminal background and do not include the obstacles faced by the 600,000 adults released from prison across the United States each year. Nor do these estimates indicate the number of people with a criminal background (conviction or not) who are denied a job, a licensure, or a home based on a criminal history background check.

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[1] *Since 9/11, jobs for ex-cons have shrinked*, by Lance Gay retrieved from: http://www.knoxstudio.com/shns/story.cfm?pk=FELONS-01-28-05&cat=AN

[2] *Ibid.*

[3] *Focus*, June 2003, retrieved from: http://www.sentencingproject.org/pdfs/mauer-focus.pdf

[4] States can opt out of this ban. The *Focus* report indicates that 20 states enforce the ban in full.

New York State's Collateral Consequences of Criminal Charges website[5] indicates that there are six major arenas in which collateral consequences impact a person's life:

- Civic participation
- Employment
- Family
- Financial
- Housing
- Immigration

In Minnesota, statutory collateral consequences occur in many of these arenas as well. Under Minnesota law, offenders with a felony conviction are barred from voting while incarcerated[6]. Individuals can be barred from certain professions based on conviction, face registration if convicted of certain offenses and may be barred from adopting a child or may have their parental rights terminated. A review of 59 statutory collateral consequences found that all but two[7] of the consequences could be imposed based on the offense charged, not on sentencing level. This means that the nature of the offense can trigger consequences, regardless of sentence[8].

While it is hard to determine the exact number of Minnesotans impacted, the scope of the problem can be estimated by examining various data sources. We know that:

- In 2005 approximately 7,126 adult men and women with a felony conviction were transitioned from prison back into the community.[9]
- In 2004 a total of 14,751 offenders were given a felony-level sentence for a sex, drug, or theft offense.
- In 2005 there were 15,915 felony-level theft, sex, and drug cases filed with the Minnesota court system.

We also know that these consequences affect the families of the offenders as well. While there is no information on the exact number of women in Minnesota denied MFIP benefits because of a felony conviction, we do know that there were 9,563 women on felony probation in 2005[10] and as of January 1, 2006 there were 554 women in prison[11]. While not all of these women have children and not all of those who do apply for welfare benefits, these numbers do indicate that a significant number of children are likely impacted by collateral consequences.

These numbers are intended to provide an estimate of those affected by collateral consequences and represent only a snapshot in time. If one expands these numbers for the past decade, it is clear that there are likely hundreds of thousands of people who experience employment or housing barriers because of a criminal conviction. These numbers do not include people arrested or convicted of

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[5] Overview of Collateral Consequences of Criminal Charges. Retrieved from: http://www2.law.columbia.edu/fourcs/index.html

[6] The right to vote is restorable.

[7] Imposition of disciplinary proceedings for an attorney and denial of employment as a constable.

[8] *Reigning in Collateral Consequences by Restoring the Effect of Judicial Discretion in Sentencing* by Kelly Lyn Mitchell, staff attorney for the Court Services Division, State Court Administrator's Office, Supreme Court of Minnesota.

[9] Minnesota Department of Corrections, January 2006 Profile Card retrieved from: http://www.doc.state.mn.us/aboutdoc/stats/documents/January2006ProfileCard_final.pdf. Please note that this number could include duplicates because offenders can be released from either prison or a community program more than once in a given year.

[10] Minnesota Department of Corrections, 2005 Probation Report retrieved from: http://www.corr.state.mn.us/publications/documents/2005probationsurvey.pdf

[11] Minnesota Department of Corrections, January 2006 Profile Card retrieved from: http://www.doc.state.mn.us/aboutdoc/stats/documents/January2006ProfileCard_final.pdf.

lower level offenses who experience indirect repercussions because of their criminal history. The numbers do not reflect the particular impact of collateral consequences on the minority community, which is often disproportionately involved with the criminal justice system. It is not possible to determine the number of people who have applied for housing, welfare, employment, or employment licensure and were turned down because of a criminal record. Anecdotal evidence suggests that as criminal history information has become more widely available, barriers for people with a criminal history record, despite crime type, level of offense, or conviction status, have increased. For example, a young man was employed with a temporary service to work in the mail room of a company located in the Twin Cities. He worked in that temporary position for two years and when a permanent position came open and was encouraged by his supervisors to apply. He applied and was offered the job, at which point a background check was initiated. This background check revealed a conviction for a property crime 10 years earlier. Not only did the company withdraw the job offer, the temporary agency that employed him was told that he could no longer fill the temporary job in the mailroom (a job he had successfully held for 24 months). Having no other job, the temporary agency terminated him.

Collateral consequences are enacted at the societal level and apply to all persons within a defined class (e.g., all persons holding a medical license who have been convicted of a felony) While there are legitimate reasons for imposing collateral consequences to protect public safety, the Minnesota legislature has adopted collateral consequences that have significant, far reaching impact on those coming into contact with the criminal justice system as well as the criminal justice system itself. In the case of State vs. Krotzer, 548 N.W.2d.252 (Minn. 1996) a 19-year-old defendant was charged with third degree criminal sexual conduct resulting from a consensual relationship with his 14-year-old girlfriend. Because a conviction would have required the defendant to register as a sex offender, the court refused to accept the defendant's guilty plea and ordered a stay of adjudication. The decision became a landmark case for the inherent authority of the court to stay adjudication over the prosecutor's objection. More fundamentally, the case represented the court's attempt to provide relief from a collateral consequence where the court deemed the consequence too harsh given the circumstances of the case. This example demonstrates that while collateral consequences are legitimate, it is also legitimate to say that some collateral consequences should be suspended for some individuals in some situations. However, there is no mechanism within the criminal justice system to provide relief to a particular individual from a particular collateral consequence.

Because of this, the task force has deemed this issue worthy of serious review and consideration. Time and thought need to be put into a review of the role of collateral consequences in achieving public safety goals and enabling individuals to return to productive citizenship after involvement in the criminal justice system.

Recommendations

One of the main reasons for creating the Collateral Consequences Committee was to achieve transparency – making the number and impact of collateral consequences more visible. Significant strides have been achieved in that regard. The Minnesota Legislature instructed the Revisor of Statutes to create a new chapter of law that cross-references the 200 collateral sanctions that currently exist in Minnesota law. A draft of Chapter 609B.050 has been completed. The final version of the chapter is available online[12] and the chapter will be available in book form in December of 2006.

In an effort to bring further consistency in state laws regarding collateral consequences the National Conference of Commissioners on Uniform State Laws (NCCUSL) is drafting uniform acts and model legislation to encourage consistency in state laws. Minnesota's Revisor of Statutes, Michele Timmons is a member of NCCUSL and has served on the collateral consequences model legislation drafting committee. The Committee recommends that Minnesota legislators carefully consider the proposed model statute and also consider whether modifications to Minnesota's laws are warranted. Ms. Timmons will be an excellent resource for the legislature to draw upon as they consider possible changes to Minnesota law.

The committee reviewed an article and heard a presentation by Kelly Mitchell, staff attorney for the Court Services Division of the State Court Administrator's Office. Ms. Mitchell's article entitled *Reigning in Collateral Consequences by Restoring the Effect of Judicial Discretion in Sentencing* is attached as appendix A. The committee recommends that the legislature consider the issues raised in this article regarding the legislative intent of Minnesota statute 609.13[13], the resulting drafting of the legislation and the fact that it is not achieving the purpose for which it was intended.

The committee reached the conclusion that collateral consequences can seriously impact the ability of offenders to become law-abiding, productive members of society and that limiting opportunities for reintegration may encourage criminal activity and endanger public safety. The committee has found this issue to be complex, requiring further study and participation of additional parties of interest in this subject. Thus, to adequately make meaningful recommendations to the legislature regarding this issue more time and resources are required. Specifically the committee suggests the following:

1. A clear scope statement. The issue of collateral consequences is complex and far reaching and the committee needs specific direction as to the scope of work the legislature would like to have undertaken. This scope could include any or all of the following, in addition to anything else the legislature deems important:
    a. Review the goals and purposes of direct collateral consequences
        i. Whether the current consequences meet the goals or purposes sought to be achieved in enacting the collateral consequence
        ii. Whether all collateral consequences should be triggered at a common point in the criminal proceeding (e.g., at conviction versus charging)

[12] http://ros.leg.mn/bin/getpub.php?pubtype=STAT_CHAP&year=2006&section=609B

[13] 609.13 Convictions of felony or gross misdemeanor; when deemed misdemeanor or gross misdemeanor.
Subdivision 1. Felony. Notwithstanding a conviction is for a felony:
(1) the conviction is deemed to be for a misdemeanor or a gross misdemeanor if the sentence imposed is within the limits provided by law for a misdemeanor or gross misdemeanor as defined in section 609.02; or
(2) the conviction is deemed to be for a misdemeanor if the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence.

iii. Whether requiring that defendants be provided notice of collateral consequences prior to the plea and sentencing stages of criminal proceedings would impact the efficiency of the courts, re-entry, or recidivism
iv. Whether the ability of judges to suspend collateral consequences in individual cases would impact the efficiency of the courts, re-entry or recidivism.

b. Examine methods for relief from direct collateral consequences
   i. Time limitations
   ii. Non-imposition/suspension of consequences (judicial discretion)
   iii. Expungements
   iv. Certificates of rehabilitation
c. Review administrative consequences, with special attention to driver's license reinstatement fees
d. Review indirect collateral consequences
   i. Immigration impacts
   ii. Impact on data harvesters (related to expungements)
   iii. Employment
   iv. Housing
e. A pilot study on the effect of notification[14] and relief with respect to a limited number of consequences
   i. Examine effect on efficiency of court system
   ii. Examine effect on offenders rehabilitation and recidivism

2. The committee membership should be more broadly representative of those impacted by collateral consequences. Membership of the committee should be expanded to include representation from:
   a. The housing and employment industries.
   b. Law enforcement.
   c. Community crime prevention organizations.
   d. People of color.
   e. Sentencing Guidelines Commission.
   f. Ex-offender groups.
   g. Attorney General representation.
   h. Those agencies representing re-entry services.
   i. Members of the legislature.

3. Resources adequate to cover the scope of work to be undertaken. This should include costs of staffing the committee, for research services and to cover the costs of public hearings and to reimburse committee members for mileage and related expenditures.

4. Leadership of the committee. Given that adequate resources are provide the committee recommends that the Sentencing Guidelines Committee establish and staff the committee.

[14] Notification in this instance refers to the obligations of counsel to notify offenders of the collateral consequences associated with their charges.

APPENDIX A

REIGNING IN COLLATERAL CONSEQUENCES BY RESTORING THE EFFECT OF JUDICIAL DISCRETION IN SENTENCING

BY KELLY MITCHELL

Reigning in Collateral Consequences
by Restoring the Effect of Judicial Discretion in Sentencing
by Kelly Lyn Mitchell[1]

I. Introduction

The State of Minnesota has long been a leader in criminal sentencing policy. In 1980, Minnesota was the first state to implement a "system of sentencing guidelines to structure the criminal penalties that courts impose on convicted felony offenders."[2] And in 2003, Minnesota again led the way by instituting a program of staggered sentencing for driving under the influence offenses that is aimed not only at punishing the offender but at ensuring that the offender gets treatment for his or her alcohol problem.[3] Minnesota has relied more heavily on probation than prison to respond to crime problems.[4] And in the 1960's a legislative advisory committee attempted to affect the very outcome of sentencing by changing the nature of a person's conviction in specific cases.

As part of that larger project to revise the Minnesota criminal code,[5] in 1962, the advisory committee proposed a new law that would allow for more lenient conviction levels at the discretion of the court. The provision, which was eventually codified as Minnesota Statutes, section 609.13 [hereinafter section 609.13], read as follows:

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[1] Kelly Lyn Mitchell is a staff attorney for the Court Services Division, State Court Administrator's Office, Supreme Court of Minnesota.

[2] Dale G. Parent, Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines 1 (Butterworth Legal Pub. 1988).

[3] 2003 Minn. Laws 1st Spec. Sess. Art. 9, §§ 7-9.

[4] Office of the Legislative Auditor, State of Minnesota, Funding for Probation Services, Report # 96-01 at ix (Jan. 1996).

[5] The Minnesota Criminal Code revision was an extensive project undertaken from 1955 to 1962 with the fourfold objective of: 1) removing duplications, inconsistencies, invalid provisions and obsolete materials; 2) stating the elements of the crime in clear, simple, and understandable terms; 3) conforming the law to accepted modern standards and concepts within the field of each crime considered; and 4) confining the criminal code to those matters of substantive criminal law. See Minnesota Criminal Code at 5, 9-10 (Advisory Committee on Revision of the Criminal Law, Proposed Draft 1962).

Convictions of Felony; When Deemed Misdemeanor or Gross Misdemeanor

Notwithstanding a conviction is for a felony:

(1) The conviction is deemed to be for a misdemeanor or a gross misdemeanor if the sentence imposed is within the limits provided by law for a misdemeanor or gross misdemeanor as defined in section 609.02;

(2) The conviction is deemed to be for a misdemeanor if the imposition of the sentence is stayed, the defendant is placed on probation and he is thereafter discharged without sentence.[6]

The text of this provision, which remains in effect today, prompted the author to question why such a provision was enacted and whether the policy considerations that supported it in 1963 are still valid.

Some indication of the drafters' intent can be gleaned from the following comment of the advisory committee, which accompanied the proposed law:

> There is no similar provision in the present law. It adopts the California law which has worked successfully.
>
> It is believed desirable not to impose the consequences of a felony if the judge decides that the punishment to be imposed will be no more than that provided for misdemeanors or gross misdemeanors.
>
> **Clause 2:** This covers the cases where suspension of imposition of sentences is ordered, the defendant is placed on probation, and he is thereafter discharged without sentence.[7]

It appears the intent of the drafters was twofold: to ensure judicial discretion in sentencing, and to provide for leniency for offenders whose situations warrant it. But while the statute may achieve the first purpose, as this article will show, it fails to fully achieve the second.

The second part of this article will examine the possible policy considerations that led to the proposition of section 609.13. The third part will examine the text of section 609.13, and explain how its construction with other Minnesota law negates its intended effect. And the

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[6] Id. at 51. Since its enactment, section 609.13 has been amended three times: once to allow a gross misdemeanor conviction to be deemed a misdemeanor under the same circumstances, 1971 Minn. Laws ch. 937, § 21; once to change the reference in clause 2 from "sentence to "prison sentence," 1986 Minn. Laws ch. 435, § 6; and once to clarify that a misdemeanor conviction will always be viewed as a misdemeanor for purposes of determining the penalty for a future offense, even if the person is successfully discharged from probation without sentence, 1993 Minn. Laws ch. 326, art. 2, § 10.

[7] Minnesota Criminal Code at 51 (Advisory Committee on Revision of the Criminal Law, Proposed Draft 1962).

fourth part of this article will explore ways in which the intended effect might be realized. Though section 609.13 allows the court to impose a lesser sentence for both felony and gross misdemeanor convictions, this article will focus primarily on the reduction of felony sentences.

II. The Need for Section 609.13

Once a person is convicted of a crime, he or she will be subject to consequences that flow from the conviction. Criminal policy includes several theories upon which the potential consequences might be based, including retribution, deterrence, incapacitation, and just deserts.[8] Today, sentencing practice in Minnesota is based on the latter theory of just deserts in which the consequences are based upon the seriousness of the offense and the criminal history of the offender.[9] But when section 609.13 was proposed, Minnesota's sentencing practice was dominated by indeterminate sentencing, which was based on the twin theories of rehabilitation and incapacitation.[10]

> Under indeterminate sentencing, legislatures defined criminal conduct and established high maximum sentences. Judges had broad discretion to decide which convicted offenders should and should not be imprisoned. For those not sent to prison, judicial discretion established the conditions of probation. For prisoners, parole boards had wide discretion to grant early release if they believed the offender was not likely to commit future crimes. Offenders entering prison under the indeterminate sentence did not know with certainty when they would be released.[11]

The indeterminate sentencing system had objectors on both sides. Conservatives complained that the system resulted in serious offenders being released too soon whereas liberals complained that sentencing without standards resulted in disparity among similar offenders.[12] Thus, in an

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[8] Paul H. Robinson, Fundamentals of Criminal Law 32-39 (2d ed. 1995).
[9] See Minn. Sentencing Guidelines II (stating the Sentencing Guidelines Grid represents the two dimensions most important in sentencing and release decisions: offense severity and criminal history).
[10] See Dale G. Parent, Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines 15 (Butterworth Legal Pub. 1988).
[11] Id.
[12] Id. at 16.

environment in which there existed the potential for great disparity in sentencing, section 609.13 at least would ensure that specific sentencing practices resulted in lesser convictions.

Additionally, the era in which section 609.13 was proposed was one in which the trend was toward lessening the restrictions on persons with convictions.[13] Prior to the mid-1950s, ex-offenders were effectively exiled from American society through civil sanctions such as "the automatic dissolution of marriage, the denial of licenses ranging from employment to fishing permits, and the inability to enter into contracts or engage in civil litigation."[14] But in the late 1950s and early 1960s, there were various movements aimed at improving the post-release situation of ex-offenders by, among other things, restoring civil rights at the end of the offender's sentence.[15] The movements resulted in a decline in the number of restrictive state and federal statutes in the 1960s and 1970s.[16] And it seemed only those thought necessary to safeguard the public interest were retained.[17] It is no wonder then, that within this climate, the drafters of the 1963 Criminal Code thought it necessary to include section 609.13 to ensure that the consequences imposed would be proportionate to the conviction.

Today, there is support for additional policy considerations that may have influenced the drafters of section 609.13 in their desire to spare defendants from the consequences of a felony if given a lesser sentence. For example, research has shown that a conviction can reduce an offender's earnings by 15-25%.[18] Though few comprehensive longitudinal studies have been

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[13] See Mirjan R. Damaska, Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study, 59 J. Crim. L. & Criminology 347, 356 (1968).
[14] Nora V. Demlietner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 Stan. L. & Pol'y Rev. 153, 154 (2000).
[15] Id. at 155.
[16] Id.
[17] Mirjan R. Damaska, Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study, 59 J. Crim. L. & Criminology 347, 356 (1968).
[18] Hard Time: Life After Prison (MPR radio broadcast, Mar. 13, 2003) transcript available at http://www.americanradioworks.org/features/hardtime/full.html; Joel Waldfogel, Does Conviction Have a Persistent Effect on Income and Employment?, 14 Int'l R. L. & Econ. 103, 103 (1994).

conducted, at least one study has shown that this effect is persistent, resulting in not only an immediate sharp decrease in earning potential but also a lasting impact over time.[19] The effect is believed to be caused partly by the stigma that attaches upon conviction.[20] It is logical to assume that the stigma would be greatest for a felony conviction, and proportionately decrease as the conviction level decreases; therefore, section 609.13 is likely very important to the ex-offender. When the ex-offender is confronted with a typical question on a job application – Have you ever been convicted of a felony? – if the person received a gross misdemeanor or misdemeanor sentence, or successfully completed probation after a stay of imposition, under section 609.13, that person can truthfully answer the question in the negative. Moreover, conviction can result in far-reaching consequences in addition to criminal punishment such as denial of public housing and benefits, barriers to employment in specific areas such as health care, childcare, and public sector jobs, and loss of parental custody. These are the types of consequences that can make it difficult for the ex-offender to reintegrate into society, to be employed, to remain law-abiding, and to avoid recidivism.[21] For this reason, the drafters of section 609.13 may have thought that a reduced conviction level would limit the imposition of these consequences for those offenders whose conduct did not seem to warrant the sanctions. However, as the next part of this article will demonstrate, section 609.13 was not drafted in a manner that would allow the provision to achieve this purpose.

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[19] Joel Waldfogel, Does Conviction Have a Persistent Effect on Income and Employment?, 14 Int'l R. L. & Econ. 103, 118-19 (1994).

[20] Joel Waldfogel, The Effect of Conviction on Income and Trust "Reposed in the Workmen", 29 J. Human Resources 62, 62-63 (1994).

[21] Gabriel J. Chin, Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 J. Gender Race & Just. 253, 254 (2002).

III. The Ineffectiveness of Minnesota Statutes, Section 609.13 at Reducing the Consequences of Conviction

As stated previously, it appears that one purpose of section 609.13 was to reduce the consequences of conviction for certain offenders. However, the statute, since its enactment, has failed to achieve that purpose for two overarching reasons: 1) section 609.13 differs significantly from the California law from which it was derived; and 2) section 609.13 does not affect the imposition of collateral consequences. The next two sections of this paper will address each in turn.

A. The Origin of the Statute

Minnesota's section 609.13 was purportedly adopted from a successful provision of California law.[22] However, a comparison of the proposed form of 609.13, and the law from which it was derived, California Penal Code, section 17 [hereinafter section 17], demonstrates that section 609.13 could never have operated fully in the manner intended by the drafters.

In 1962, when the proposed draft of section 609.13 was issued, California's section 17 read as follows:

> A felony is a crime which is punishable with death or by imprisonment in the State Prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the State Prison, is also punishable by a fine or imprisonment in a County Jail, in the discretion of the Court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the State Prison.[23]

In several aspects, this represented a very different structure and means of application than that presented by the newly proposed section 609.13.

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[22] Minnesota Criminal Code at 51 (Advisory Committee on Revision of the Criminal Law, Proposed Draft 1962).

[23] See Historical and Statutory Notes, Cal. Penal Code § 17 (West 1999) (detailing the form and content of the statute from enactment in 1872 to amendments made in 1998); see also California v. Banks, 348 P.2d 102, 110 n.6 (Cal. 1959).

First, California's section 17 was structured as a definitional statute. The purpose of section 17 was to differentiate a felony-level offense from a misdemeanor-level offense.[24] It did so by defining the punishment for each level. But recognizing that some offenses were punishable both as a felony and as a misdemeanor, section 17 also set forth the rule that, in such cases, the punishment *actually imposed* determined the level of the crime. In contrast, Minnesota's section 609.13 was structured as an operational statute. It existed independently from the offense level definitions proposed in section 609.02 of the draft 1963 criminal code,[25] and was, by its plain language, intended to operate *after* the moment of conviction. Conviction was defined in proposed section 609.02 as occurring upon acceptance of the plea or verdict of guilt or confession in open court.[26] As drafted, section 609.13 appeared to recognize that conviction would occur at this point; however, if at the next stage – sentencing – the person received a sentence that did not fit the punishment parameters of the level of the offense for which the person had been charged and convicted, section 609.13 would override the conviction level regardless of the offense level at the time of the plea or finding of guilt. The result of this structural difference was that, whereas in California, section 17 operated as a tool for putting a label on a person's conviction, in Minnesota, section 609.13 operated to *change* the level of conviction from one thing to another.

Since enactment, this structural difference has resulted in some confusion with regard to a person's criminal record. Because section 609.13 reduces the conviction level *after* the fact, a

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[24] Until 1968, California law defined only two offense levels: felony and misdemeanor. See 1968 Cal. Stat., ch. 1192, § 2 (adding the offense level of infraction).

[25] The proposed code defined a felony as a crime for which a sentence of imprisonment for more than one year could be imposed, a misdemeanor as a crime for which a sentence of not more than 90 days or a fine of more than $100 could be imposed, and a gross misdemeanor as any crime that was not a felony or misdemeanor. Minnesota Criminal Code at 19 (Advisory Committee on Revision of the Criminal Law, Proposed Draft 1962).

[26] Id. As originally proposed, the definition of conviction included a "judgment entered upon failure to plead as provided by law when demurrer is overruled." Id. However, this language was removed from the enacted version because it represented an antiquated practice. See Comment by Maynard E. Pirsig (1963) following Minn. Stat. Ann. § 609.02 (2003).

person's conviction level can be recorded at both the moment of the entry of the plea or finding of guilt *and* at the imposition of the sentence. Thus, the accuracy of the individual's criminal record may be dependent on which conviction information is transmitted to the Bureau of Criminal Apprehension (BCA), or, if information from both events is transmitted, how the BCA interprets the information. A review of the felony conviction data for 2001 shows there is error in at least a small percentage of cases. See Table 1, below. In that year, district court judges imposed 235 gross misdemeanor or misdemeanor sentences for felony offenses. A sample of 58 cases chosen at random revealed that in 4 of the 58 cases the BCA record incorrectly detailed the conviction as a felony. When that proportion is applied to the full population of cases, it is estimated that between 1 and 13% of the persons who received a misdemeanor or gross misdemeanor sentence for a felony offense in 2001 could instead have a felony on their record.[27] Moreover, 14% of the convictions shown in the BCA records for this sample failed to match the sentence level imposed by the court.[28] Applying this proportion to the full population of cases, it is estimated that the BCA record could show an inaccurate conviction level for 4 to 24% of the persons who received a misdemeanor or gross misdemeanor sentence for a felony offense in 2001.[29] This inaccuracy could very well be caused by the structural operation of section 609.13. That is, if the statute *resulted* in a lesser conviction level rather than *altering* it, there might be less room for error in recording the conviction level for all persons receiving a reduced sentence.

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[27] Estimation equation as follows: $\sqrt{\frac{\pi(1-\pi)}{n}} = \sqrt{\frac{.07(.93)}{58}} = .03$. Population proportion at 95% confidence falls within the interval: $.07 \pm 1.96(.03) = 0.7 \pm .06 = .01,.13$.

[28] See Minn. Stat. § 609.13 (2002) (stating notwithstanding a conviction is for a felony it shall be deemed to be for a misdemeanor or gross misdemeanor if the sentence imposed is within the limits provided by law for those offense levels); see also State v. Camper, 130 N.W.2d 482 (Minn. 1964) (holding in the first application of section 609.13, "as the code now reads, from and after September 1, 1963, the degree of the crime is determined by the sentence imposed and not the offense alleged in the indictment").

[29] Estimation equation as follows: $\sqrt{\frac{\pi(1-\pi)}{n}} = \sqrt{\frac{.14(.86)}{58}} = .05$. Population proportion at 95% confidence falls within the interval: $.14 \pm 1.96(.05) = 0.14 \pm .10 = .04,.24$.

Table 1 - Comparison of Sentence Level and BCA Record of Conviction

Sentence Level Pronounced in Court*[30]	Conviction Level Shown on BCA Record	#	% Error
Misdemeanor	Felony	1	20%
	Misdemeanor	3	
	No Record	1	
Gross Misdemeanor	Felony	3	13%
	Gross Misdemeanor	30	
	Misdemeanor	4	
	No Record	16	
	Total	58	14%

* Determined by pronounced length of confinement.

The second difference between California's section 17 and Minnesota's proposed section 609.13 was that the definitional rule articulated in section 17 applied to a very narrow range of convictions. It was limited to convictions for those offenses that were punishable by either: 1) death or imprisonment in the state prison; or 2) a fine or imprisonment in county jail. Such offenses were referred to in California as "wobbler statutes" because they could be punished, at the discretion of the court, as either felonies or misdemeanors.[31] Thus, the intent of section 17 appeared to be to *limit* judicial discretion to those cases in which the legislature perceived that the same behavior could possibly warrant different levels of punishment,[32] presumably due to the specific circumstances of the offender or the crime. In contrast, section 609.13 conferred *unlimited* judicial discretion by assuming the judge could enter any sentence in response to any offense and operating to reduce the conviction level whenever a punishment other than that

[30] Source: Minnesota Sentencing Guidelines Commission, 2001 Felony Conviction Data.

[31] A wobbler is "an offense that confers discretion as to felony or misdemeanor punishment [and] becomes a misdemeanor only *after* the judgment." See California v. Stanfill, 90 Cal. Rptr. 385, 890 (Cal. Dist. Ct. App. 1999). Unlike offenses in Minnesota, for which the offense level was determined solely by the length of punishment or amount of fine, California wobbler offenses could be deemed a misdemeanor simply because the punishment was to take place in the county jail, regardless of the duration of the confinement. See e.g., California v. Banks, 348 P.2d 102, 106 n.3 (Cal. 1959) (describing the offense of theft of a motor vehicle as punishable by imprisonment in the state prison for not less than one year nor more than five years or in the county jail).

[32] Under its police power, the legislature may classify crimes and prescribe severer punishment for the commission of one class than for another as a deterrent against the commission of more heinous crimes. California v. Smith, 24 P.2d 166, 168 (Cal. 1933).

which fit the definition of a felony was imposed. As a result of this structural difference, judges today are able to issue misdemeanor level sentences for offenses for which there is no statutory misdemeanor level.[33]

For example, looking again to the 235 misdemeanor- or gross misdemeanor-level sentences imposed for felony-level offenses in 2001, one finds that 119 of those sentences were imposed for just five offenses: 1) fleeing a police officer; 2) terroristic threats; 3) assault in the third degree; 4) theft of movable property; and 5) damage to property. See Table 2, below. Three of the five offenses – terroristic threats, theft of movable property, and damage to property – could have conceivably been charged and convicted at gross misdemeanor or misdemeanor levels.[34] However, the remaining two offenses – fleeing a police officer, and assault in the third degree – were statutorily defined as felonies, and therefore could only have been charged as such.[35] Thus, for the 62 defendants charged with fleeing a police officer and assault in the third degree, the court was able to override both the decision of the legislature (defining the crimes as felonies) and the decision of the prosecutor (charging the criminal behavior as felony offenses) by imposing a sentence that would serve to reduce the defendant's conviction level to a misdemeanor or gross misdemeanor. In contrast, this result would not have been possible if Minnesota's law were structured like California's section 17 because the judge's sentencing discretion would be limited to those situations in which the legislature deemed it to be

[33] For example, most controlled substance crimes enumerated in Minnesota Statutes, chapter 152 are classified strictly as felonies or gross misdemeanors. Thus, if a person is convicted of fifth degree possession, the statutory punishment for that offense is imprisonment for up to five years or a fine of up to $10,000 or both. Minn. Stat. § 152.025, subd. 3 (2002). However, if the sentence imposed is only 90 days in jail, by operation of Minn. Stat. § 609.13, the conviction is deemed to be a misdemeanor rather than a felony, even though the fifth degree possession statute does not provide for a misdemeanor-level offense. See State v. Clemons, C1-97-873, 1998 WL 61292 at *3 (Minn. Ct. App. 1998) (arguing that a prior conviction for marijuana possession could not be used to enforce the mandatory minimum provision of Minn. Stat. § 152.024, subd. 3(b) (1996) for a subsequent offense because the prior offense could not be considered a controlled substance offense since it had been reduced to a misdemeanor, and there were no misdemeanor controlled substance crimes in Minnesota).

[34] See Minn. Stat. §§ 609.713, subd. 1 (2000) (terroristic threats); 609.52, subd. 2(1) (2000) (theft of movable property); 609.595, subd. 1(3) (2000) (damage to property).

[35] See Minn. Stat. § 609.487, subd. 3 (2000) (fleeing a police officer); 609.223, subd. 1 (third degree assault).

appropriate[36] – the wobbler offenses – and because prosecutorial discretion would be preserved by the decision to charge the criminal behavior as such an offense.

Table 2 - Offense Frequencies for Gross Misdemeanor and Misdemeanor Sentences[37]

Offense Description	Off. Code	Minn. Stat. (2000)	# GM/M Sent.	% by Offense
Fleeing police officer	609487300	609.487,subd. 3	43	18.3
Terroristic Threats - Violence Threat/ Evacuation	609713100	609.713, subd. 1	25	10.6
Assault 3 - Substantial Bodily Harm	609223100	609.223, subd. 1	19	8.1
Theft - Movable Property	609520210	609.52, subd. 2(1)	16	6.8
Damage to Property - Over $500	609595130	608.595, subd. 1(3)	16	6.8
Other (representing 63 distinct offenses)	N/A	N/A	116	49.4

Third, California's section 17 and Minnesota's section 609.13 differed in their treatment of stays of imposition. Section 17 was silent as to the level of conviction rendered when a person received a stay of imposition whereas section 609.13 stated outwardly that if a person were discharged from probation without sentence, the conviction would be deemed a misdemeanor. At first blush, the Minnesota proposal would seem to be the more comprehensive. However, a closer looks reveals that this structure has led to two opportunities for inaccuracies in a person's criminal history score.

The first opportunity for inaccuracy arises with regard to the interpretation of the sentence level when a person is given a stay of imposition. A stay of imposition is a sentencing option in which the defendant either enters a plea of guilty or is found guilty by a judge or jury, no sentence is pronounced, and the offender is placed on probation for a fixed term.[38] The sanction is generally considered to be appropriate for "those convicted of less serious offenses

[36] See California v. Beebe, 265 Cal. Rptr. 242, 243 (Cal. Ct. App. 1989) (stating the trial court lacks statutory authority to accept a plea that would reduce a "straight felony" to a misdemeanor); California v. Superior Court (Feinstein), 34 Cal. Rptr. 2d 503, 506-07 (Cal. Ct. App. 1994) (stating neither section 17 nor any other statute provides authority to reduce a "straight felony").

[37] Source: Minnesota Sentencing Guidelines Commission, 2001 Felony Conviction Data.

[38] Minn. Sentencing Guidelines III.A.1 (2002) See generally Minn. Stat. § 609.135 (2002).

and those with short criminal histories."[39] But due to the very fact that no sentence is pronounced at the time of the stay, there has been some confusion as to the resulting conviction level.

As alluded to earlier, "conviction" is defined by Minnesota law as "any of the following accepted and recorded by the court: (1) a plea of guilty; or (2) a verdict of guilty by a jury or finding of guilty by the court."[40] Thus, conviction occurs prior to and independent of sentencing, and, in the strictest sense, a person's conviction level is determined by the level of the offense to which he or she pleaded or for which he or she was found guilty. However, two factors complicate the determination of the conviction level. First, section 609.13, which is the focus of this paper, has the effect of reducing a person's conviction level based on the sentence given in court or based on his or her performance on probation. This complicates the nature of conviction because it implies that conviction occurs at a later point in the process – at sentencing – rather than at the plea or finding of guilt. Second, the Bureau of Criminal Apprehension (BCA) actually *does* look to the moment of sentencing to determine a person's conviction level for the purpose of recording the criminal history score.[41] This means that the BCA's level of conviction is based on the sentence imposed rather than the level of the offense with which the person was charged and for which the person pleaded to or was found guilty. However, because the judge does not pronounce sentence when issuing a stay of imposition, there is no sentence on which to base the conviction level.[42] Statute dictates that in that case, the conviction level should be equal to the level of the offense at the time of the finding or plea of guilty.[43] But the BCA, which is the

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[39] Minn. Sentencing Guidelines cmt. III.A.101 (2002).
[40] Minn. Stat. § 609.02, subd. 5 (2002).
[41] See *Conviction Chart Based on Sentence Lengths*, Minnesota Prosecutor Manual at 4-29 (Feb. 2003) (located herein as Figure 1).
[42] The results will also differ if the judge chooses to stay adjudication, but this outcome is less common.
[43] See Minn. Stat. § 609.02, subd. 5 (2002). Additionally, the appellate courts have indicated in several opinions that the conviction level is initially deemed to be equal to the offense level, and is not reduced until successful

main record house for a person's criminal history in Minnesota, has developed a different method of determining the conviction level, which bases the conviction level on the length of the stay (or probation) as shown in Figure 1.[44] The standards shown in Figure 1 are not related to the terms of incarceration that distinguish offense levels in Minnesota, but may instead have been derived from the maximum lengths of stay allowable under Minnesota law for each offense level.[45] So regardless of the level of the offense with which the person was charged and convicted, Figure 1 indicates the conviction will only be recorded as a felony on his or her criminal record if the judge orders probation for two years or more.[46] Thus, by including a reduction in conviction level for stays of imposition, the drafters of section 609.13 opened the door for inaccuracies in recording the person's conviction level during the interim period of the stay.

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completion of a probation. See, e.g., State v. Moon, 463 N.W.2d 517, 520 (Minn. 1990) (referring to the defendant's conviction as a "felony conviction," which was deemed a misdemeanor by operation of section 609.13); In re Woollett, 540 N.W.2d 829, 832 (Minn. 1995) (stating, "If Woollett was under the impression that he had not been *convicted* of a felony, this was not the case").

[44] *Conviction Chart Based on Sentence Lengths*, Minnesota Prosecutor Manual at 4-29 (Feb. 2003).

[45] See Minn. Stat. § 609.135, subd. 2 (2002). The original 1963 Criminal Code defined the maximum stay lengths as follows: 1) for a felony, not more than the maximum period for which the sentence of imprisonment might have been imposed; 2) for a misdemeanor, not more than 1 year; and 3) for a gross misdemeanor, not more than 2 years. See Minn. Stat. § 609.135, subd. 2 (1965). In 1987 and 1992, the legislature provided for longer maximum lengths of stays for misdemeanor and gross misdemeanor driving under the influence offenses, respectively. See 1987 Minn. Laws ch. 220, § 1; 1992 Minn. Laws ch. 570, art. 1, § 25. However, the BCA's conviction chart does not reflect these changes.

[46] See *Conviction Chart Based on Sentence Lengths*, Minnesota Prosecutor Manual at 4-29 (Feb. 2003).

Figure 1 - Conviction Chart from Prosecutor's Manual

Conviction Chart Based on Sentence Lengths

Offense Level/Type	Pronounced Sentence	Conditional Confinement	Probation	Maximum Fine (As of 8/1/83)
Felony 609.02.2 609.0341.2	1 Year, 1 Day or More	1 Year, 1 Day or More	2 Years or More	$50, 000
Gross Misdemeanor 609.02.4 609.0341.1	Up to 1 Year		Up to 2 Years	Maximum of $4,000
Misdemeanor 609.02.3 609.033	90 Days or Less	90 Days or Less	Up to 1 Year	$1,000
Petty Misdemeanor 609.02.4.a 609.0331, 609.0332.1	N/A	N/A	N/A	$300
Petty Misdemeanors for Violation of 152.027.4 or Chapter 168 or 169 609.0332.2	N/A	N/A	N/A	$100
DWI's You may add the conviction level to obvious misdemeanor, but do not add a conviction level to gross misdemeanor				

Note: This information is provided by the BCA.
Dollar amounts updated to reflect August 1, 2000 legislative revisions.

The second opportunity for inaccuracy arises upon completion of the probationary term. In California, case law reveals that the wobbler offenses addressed by section 17 were viewed as felonies until final judgment.[47] But a stay of imposition was not considered a final judgment because it represented a period during which the court maintained jurisdiction over the defendant, and during which the defendant might be recalled for behavior that violated the conditions of probation.[48] As such, a separate section of the California Penal Code provided a procedure whereby a person who had successfully completed a term of probation could apply to the court for a dismissal of the original charges.[49] The benefit of requiring this affirmative action

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[47] California v. Johnson, 330 P.2d 894, 897 (Cal. Dist. Ct. App. 1958).
[48] California v. Banks, 348 P.2d 102, 111-13 (Cal. 1959). See also California v. Williams, 163 P.2d 692, 696-97 (Cal. 1945) (explaining the same concept in the context of commitment to reform school for an act of juvenile delinquency).
[49] See id. at 106, n. 4 (citing to then existing Cal. Penal Code. § 1203.4).

by the defendant was that one could be assured that his or her criminal record would accurately reflect the change. The detriment was that if a person failed to apply to the court for dismissal, the conviction would remain on the person's record as a felony, regardless of the status of his or her probation term.[50]

In contrast, no certainty was possible with the proposed draft of Minnesota's section 609.13. Because the reduction was set to take place automatically upon discharge from probation, there was no procedure in place to ensure that the defendant's criminal record was corrected. Thus, a person could be deemed either a convicted felon or convicted misdemeanant, depending on the accuracy of the record keeping of various agencies and, more importantly, upon the record keepers' understanding of the provision. To illustrate, in 2001, 35 people received a stay of imposition for a period of 24 months or less. See Table 3, below. A BCA records check of these convictions in July of 2003, well after the length of stay should have been completed for each person, showed two convictions as felonies, and three as gross misdemeanors. However, if the period of the stay of imposition had been completed successfully by these persons, all of the convictions should have appeared as misdemeanors. But because the criminal record does not provide any detail about the period of probation, there is simply no way to know whether the convictions appear as felonies and gross misdemeanors in error or because the individuals violated the conditions of parole and received an imposition of sentence. Similarly, there is no way to know whether the misdemeanor convictions appear as such because the individuals successfully completed probation or because of some other quirk. Unlike the structure of California law, which requires another step to reduce a conviction level after a stay

[50] See, e.g., California v. Banks, 348 P.2d 102 (Cal. 1959) (concluding that the defendant remained a convicted felon where he had successfully completed probation without revocation because he failed to go through the procedure under which he was entitled to obtain dismissal of the charge).

of imposition, the structure of section 609.13 simply does not provide for certainty with regard to the conviction level.

Table 3 - BCA Record for Stays of Imposition Under 24 Months[51]

Conviction Level Shown on BCA Record	#
Misdemeanor	14
Gross Misdemeanor	3
Felony	2
No Record	16
Total	35

Finally, the two provisions differed in their treatment of the consequences of conviction. California's section 17 provided that, if an offense was punishable as a felony or misdemeanor, and the court entered a punishment other than imprisonment in the state prison, the crime would be deemed a misdemeanor "for all purposes."[52] Through case law, this phrase has been interpreted to cover virtually every purpose following conviction[53] including impeachment,[54] enhancement of future bail conditions,[55] enhancement of a future sentence,[56] and applicability of the California three-strikes law.[57] In contrast, proposed section 609.13 was silent as to the purposes for which a conviction for a felony offense would be deemed a misdemeanor or gross

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[51] Source: Minnesota Sentencing Guidelines Commission, 2001 Felony Conviction Data.

[52] See Historical and Statutory Notes, Cal. Penal Code § 17 (West 1999) (detailing the form and content of the statute from enactment in 1872 to amendments made in 1998); see also California v. Banks, 348 P.2d 102, 110 n.6 (Cal. 1959).

[53] This may be excepted, however, in the case of statutes that operate based on the *possible* rather than *actual* punishment. See, e.g., Henry v. Dept. of Motor Vehicles, 102 Cal. Rptr. 26, 40 (Cal. Ct. App. 1972) (upholding the revocation of the defendant's license because the consequence was based upon conviction for an offense for which a felony offense might be meted out). In California, this seems to be a rare outcome.

[54] See, e.g., California v. McGee, 141 P. 1055, 1058 (Cal. Dist. Ct. App. 1914); California v. Holt, 690 P.2d 1207, 1215 n. 7 (Cal. Ct. App. 1984).

[55] See, e.g., California v. Weaver, No. E028634, 2001 WL 1555628 at *1-2 (Cal. Ct. App. 2001).

[56] See, e.g., California v. Marshall, 277 Cal. Rptr. 846, 848 (Cal. Ct. App. 1991).

[57] See, e.g., California v. Vessell, 42 Cal. Rptr. 2d 241, 246 (Cal. Ct. App. 1995).

misdemeanor, thus paving the way for subsequent erosion of the intended benefit of the provision.[58]

For example, in State v. Skramstad, the court of appeals found that the trial court did not err in allowing impeachment of the appellant's testimony by a prior conviction for a felony offense, even though it had been reduced to a misdemeanor by operation of section 609.13, because the language of the rule regarding admissibility referred to crimes "punishable by death or imprisonment in excess of one year."[59] Similarly, in State v. Clipper, the court of appeals found that while section 609.13 determined how a conviction showed up on a person's criminal *record*, it was not inconsistent to treat the conviction as a felony for purpose of the person's criminal *history* because the statute did not evince an intent to extend its reach to that purpose.[60] And in State v. Furman, which involved a challenge to the imposition of a conditional release term upon a subsequent conviction, the court of appeals stated, "section 609.13 does not necessarily change the consequences of a separate statute that is based upon the nature or elements of the offense for which a defendant was originally convicted."[61] Therefore, in application, section 609.13 has been successful in reducing the level of conviction for the purpose of a person's record, but has not had the effect of reducing the conviction for all other purposes.

Thus, though the concept of section 609.13 may have been derived from California's section 17, the differences in structure and application produced several unique effects. First, section 609.13 was drafted so as to confer greater discretion on the court. This effect may have

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[58] See In re Woollett, 540 N.W.2d 829, 833 (Minn. 1995) (acknowledging that the effect of section 609.13 has been diminished by cases that have determined that it does not require felony convictions to be treated as misdemeanors for all purposes).

[59] 433 N.W.2d 449, 452-53 (Minn. Ct. App. 1988). See also State v. Hofmann, 549 N.W.2d 372 (Minn. Ct. App. 1995) (reaching the same conclusion).

[60] 429 N.W.2d 698, 700-01 (Minn. Ct. App. 1988).

[61] 609 N.W.2d 5, 6 (Minn. Ct. App. 2001).

been intentional, but three other effects were probably accidental: 1) creating room for error with regard to a person's criminal record; 2) allowing the court to impose misdemeanor sentences for offenses that have no statutory misdemeanor level; and 3) limiting the purposes for which a person's conviction level will be deemed to be reduced. As the next section will show, the net effect has been that, while section 609.13 confers broad discretion on the sentencing judge, it does very little to effect the original purpose of the statute, which was to avoid imposition of the consequences of a felony conviction for a person whose conviction level was reduced by operation of the statute.

B. The Consequences of Conviction

Once a person is convicted of a crime, he or she will be subject to consequences that flow from the conviction. Theoretically, the consequences should differ based upon the seriousness of the offense and the criminal history of the offender.[62] But as this section will demonstrate, while that may be true in terms of punishment, it is not necessarily true in terms of other consequences.

There are two types of consequences: direct and collateral. *Direct consequences* are "those which flow definitely, immediately, and automatically from the guilty plea, namely, the maximum sentence to be imposed and the amount of any fine."[63] In contrast, *collateral consequences* are considered to be "civil and regulatory in nature and are imposed in the interest of public safety."[64] If the underlying purpose of section 609.13 was "not to impose the consequences of a felony if the judge decides that the punishment to be imposed will be no more than that provided for misdemeanors or gross misdemeanors,"[65] the drafters of the statute must have been referring to the avoidance of collateral consequences. As stated above, direct

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[62] See Minn. Sentencing Guidelines II (stating the Sentencing Guidelines Grid represents the two dimensions most important in sentencing and release decisions: offense severity and criminal history).
[63] Alanis v. State, 583 N.W.2d 573, 578 (Minn. 1998).
[64] State v. Kaiser, 641 N.W.2d 900, 904 (Minn. 2002).
[65] Minnesota Criminal Code at 51 (Advisory Committee on Revision of the Criminal Law, Proposed Draft 1962).

consequences are punishment, which is referred to explicitly in the stated purpose of the statute as "no more than that provided for misdemeanors or gross misdemeanors." With the direct consequences accounted for, the only consequences left to be mitigated are collateral consequences.

Collateral consequences may be imposed by state or federal law, by administrative rule, by court rule, or by the actions of private individuals. For example, by operation of federal law: 1) an alien who is convicted of a crime involving moral turpitude, a drug offense, a firearms offense, or domestic abuse will be subject to deportation proceedings;[66] 2) an individual who is convicted of a felony is ineligible to enlist in any service of the armed forces;[67] 3) a person who is convicted of a federal or state drug offense is ineligible to receive federal student loans, grants, or work-study funds;[68] and 4) a person who is subject to a lifetime registration requirement under a state sex offender registration program is ineligible for federally assisted housing.[69] By operation of the Minnesota Rules of Professional Responsibility, a person convicted of a felony who is also an attorney will be subject to disciplinary proceedings.[70] And in the private sector, there are numerous collateral consequences including businesses refusing to hire, and landlords refusing to rent or lease property to persons who have criminal records.

Laws that impose collateral consequences may be written generally, so as to target all persons sentenced at a certain level (e.g., felony),[71] or very specifically, so as to target all persons who have committed certain types of offenses (i.e., fraud, a crime involving moral turpitude, or a

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[66] 18 U.S.C. § 1227(a)(2) (2000).
[67] 10 U.S.C. § 504 (1998).
[68] 20 U.S.C. § 1091(r) (2000).
[69] 42 U.S.C. § 13663 (Supp. 2003).
[70] Minn. R. Prof. Responsibility 17.
[71] See, e.g., Minn. Const. art VII, § 1 (stating a person who has been convicted of a felony is ineligible to vote); Minn. Stat. § 367.42, subd. 3 (2002) (stating a person may not be employed as a deputy constable if a criminal records check shows the person has been convicted of a felony within the past 10 years).

crime of violence).[72] Because of these differing structures, there has been confusion with regard to their imposition. Some have argued that the reduction in sentence afforded by section 609.13 precludes the imposition of collateral consequences. However, Minnesota's appellate courts have analyzed the issue differently, stating that the propriety of imposition is dependent on whether the drafters' intent was to impose the consequences based on the nature of the offense for which the person was convicted or based on the person's subsequent treatment (i.e., the sentence imposed).[73] Table 4 demonstrates the type of language the courts have interpreted as evincing an intent to base imposition of the offense on the nature of the offense rather than the sentence level. In each case, rather than referring to convictions by level (i.e., felony, gross misdemeanor, etc.), the text imposing the consequence describes the offense that triggers its imposition. In some cases, the description refers to specific crimes, whereas in other cases it describes an offense in terms of its possible maximum punishment.

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[72] See, e.g., Minn. Stat. § 256J.26, subd. 1 (2002) (denying Minnesota Family Investment Plan benefits to person who have been convicted of controlled substance crimes); Minn. Stat. § 624.713, subd. 1 (2002) (prohibiting persons who have been convicted of crimes of violence from possessing firearms).

[73] State v. Moon, 463 N.W.2d 517, 519 (Minn. 1990).

Table 4 - Comparison of Text Imposing Collateral Consequences

Text of Statute, Court Rule, or Administrative Law	Court Interpretation of Intent	Source
A 1988 Rule of Evidence stated in part: "evidence that [a defendant] has been convicted of a crime shall be admitted if ...the crime (1) was punishable by ...imprisonment in excess of one year under the law under which [the defendant] was convicted, and the court determines that the probative value of admitting the evidence outweighs the prejudicial effect"	Imposition of the consequence is based on the maximum punishment possible, not the punishment actually given nor any subsequent alteration of the defendant's record	State v. Skramstad, 433 N.W.2d 449, 453 (Minn. Ct. App. 1988)
A 1990 criminal statute stated in part: "a person who has been convicted of a crime of violence ...may not ship, transport, possess or receive a firearm until ten years have elapsed since the person was restored to civil rights"	Imposition of the consequence is based on the commission of certain criminal acts, which the legislature has defined as crimes of violence	State v. Moon, 463 N.W.2d 517, 521-22 (Minn. 1990)
A 1998 criminal statute provided for the application of a ten-year conditional-release term "(i)f the person was convicted for a violation of [specified sex offenses, including fourth-degree criminal sexual conduct] a second or subsequent time"	Imposition of the consequence is based on the nature of the offense – the subsequent reduction of the conviction level does not make the elements of the crime different from what existed at the time of the conviction	State v. Furman, 609 N.W.2d 5, 6 (Minn. Ct. App. 2000)
A 1994 administrative rule denied eligibility for a corrections officer's license based on "having been convicted of a felony in any state or federal jurisdiction," with felony conviction defined as "a person [who] has been charged with a crime punishable by more than one year and * * * the person was convicted of that crime regardless of a stay of imposition or stay of execution"	Imposition of the consequence is based on the nature of the offense (i.e., offense *punishable* as a felony)	In re Woollett, 540 N.W.2d 829 (Minn. 1995)

The breadth of the language interpreted in Table 4 as triggering imposition of the collateral consequence by the nature of the offense indicates that it would be very difficult to frame a statute that would be interpreted so as to trigger imposition of the consequence by the sentence imposed. To test this hypothesis, a survey was conducted of collateral consequences

imposed by Minnesota statute or court rule. Appendix A details the results of that survey.[74] The first column of the appendix identifies the consequences imposed and the fourth column notes whether the consequences is triggered by the sentence level or nature of the offense. An application of the concepts gleaned from case law reveals that the sentence level triggers imposition of only 15 of the 59 identified consequences.[75] But in 13 of those 15 cases, in addition to being triggered by a felony conviction, the consequence may also be triggered by other specific offenses.[76] For example, a person is ineligible to vote if he or she has been convicted of a felony (sentence level trigger) or has committed treason (nature of the offense trigger).[77] This means that even if the judge decides that "the punishment to be imposed will be no more than that provided for misdemeanors or gross misdemeanors,"[78] the sentence imposed by the court will be solely determinative with respect to the imposition of just 2 of the identified collateral consequences: imposition of disciplinary proceedings for an attorney, and denial of employment as a deputy constable. In all other cases, the nature of the offense to which the

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[74] The collateral consequences shown in Appendix A were located through the research of this author. However, because collateral consequences are scattered throughout the statutes, the appendix does not represent an exhaustive list of all collateral consequences currently in existence.

[75] The sentence level triggers the following eleven collateral consequences: 1) ineligibility to run for office; 2) denial of right to vote; 3) imposition of disciplinary proceedings for an attorney; 4) denial of collection agency licensure; 5) denial of employment agent licensure; 6) refusal of entertainment licensure; 7) denial, revocation, or censure of gambling device or gambling operation licensure; 8) revocation, suspension, or denial of physical therapy licensure; 9) revocation or denial of teacher's licensure; 10) refusal, revocation, or suspension of professional counselor licensure; 11) limitation, suspension, or revocation of veterinary licensure; 12) ineligibility of employment as a deputy constable; 13) ineligibility for employment as a detective or protective agent; 14) ineligibility for employment with the Minnesota State Lottery; and 15) ineligibility for employment as operative personnel for electronic certification authority;

[76] Of the eleven consequences that are triggered by the sentence level, the following nine are also triggered by conviction for other offenses: 1) ineligibility to run for office; 2) denial of the right to vote; 3) denial of collection agency licensure; 4) denial of employment agent licensure; 5) revocation, suspension, or denial of physical therapy licensure; 6) refusal of entertainment licensure; 7) denial, revocation, or censure of gambling device or gambling operation licensure; 8) refusal, revocation, or suspension of professional counselor licensure; 9) revocation or denial of teacher's licensure; 10) limitation, suspension, or revocation of veterinary licensure; 11) ineligibility for employment as a detective or protective agent; 12) ineligibility for employment with the Minnesota State Lottery; and 13) ineligibility for employment as operative personnel for electronic certification authority.

[77] See Minn. Const. art. VII, § 6; Minn. Stat. § 201.014, subd. 2 (2002).

[78] Minnesota Criminal Code at 51 (Advisory Committee on Revision of the Criminal Law, Proposed Draft 1962).

defendant pleads or is found guilty is determinative and will trigger the consequence regardless of the sentence imposed by the judge.

The findings from this survey mean that section 609.13 has virtually no effect on collateral consequences that are imposed by Minnesota statute because a reduced conviction level does not result in their avoidance. But Minnesota statutes are not unique in their structure. Case law indicates that the imposition of federal consequences is even stricter, resulting in their application even in the rare cases when the structure of the statute would seem to allow avoidance of the consequence by operation of a reduced conviction level under section 609.13.[79] This is significant because, in addition to contravening the intent of the drafters of section 609.13, the indiscriminate imposition of collateral consequences on the class of convictions intended to be affected by section 609.13 has two additional and far reaching effects.

First, the indiscriminate imposition of collateral consequences results in a shift in the balance of power between the legislature, the prosecutor, and the court. As shown in Figure 2, the roles these entities occupy within the criminal justice system result in a system of checks and balances with regard to case initiation (crime definition and charging) and outcome (sentencing). The legislature has "exclusive province to define by statute what acts shall constitute a crime."[80] In so doing, the goal of the legislature is to enact a body of law that "embodies fundamental social values, reflecting and reaffirming social standards of law-abiding conduct."[81] In addition, the legislature has established the Minnesota Sentencing Guidelines Commission to determine

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[79] See, e.g., United States v. Glasgow, 478 F.2d 850, 851-52 (8th Cir. 1973) and United States v. Matter, 818 F.2d 653, 654 (8th Cir. 1987) (holding that for the purpose of the federal firearms prohibition, which is triggered by a conviction for a felony, the maximum punishment for the act is determinative, regardless of how the state might classify the conviction).

[80] State v. Soto, 378 N.W.2d 625, 627 (Minn. 1985).

[81] Dale G. Parent, Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines 8 (Butterworth Legal Pub. 1988).

appropriate punishments based on average offense severities and criminal histories.[82] But these actions are at the societal level, and are not sensitive to the unique situation of the individual. To check the province of the legislature, the prosecutor and the court are both infused with discretion. The prosecutor acts as a check on the power of the legislature by exercising discretion in determining who will be charged. Similarly, the court acts as a check on the legislature by exercising judicial discretion in sentencing. However, each of these discretionary powers is also checked. "Generally, a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor's exercise of that discretion."[83] However, the court may circumvent the charging decision by departing from the presumptive sentence or, in cases in which there has been an obvious abuse of charging discretion, by staying adjudication.[84] But the court's power is not unlimited. The presumptive sentences established by the Sentencing Guidelines Commission constrain judicial power, allowing for deviation only when substantial and compelling aggravating or mitigating circumstances exist, and the judge can provide written reasons demonstrating why the sentence given is more appropriate or fair than the presumptive sentence.[85]

Collateral consequences upset this balance of power by interfering both with prosecutorial and judicial discretion. Collateral consequences exist independently from the criminal code. Thus, a prosecutor who is charging an offense cannot choose to initiate or forego imposition of consequences, and in many cases, may not even be aware of the consequences that

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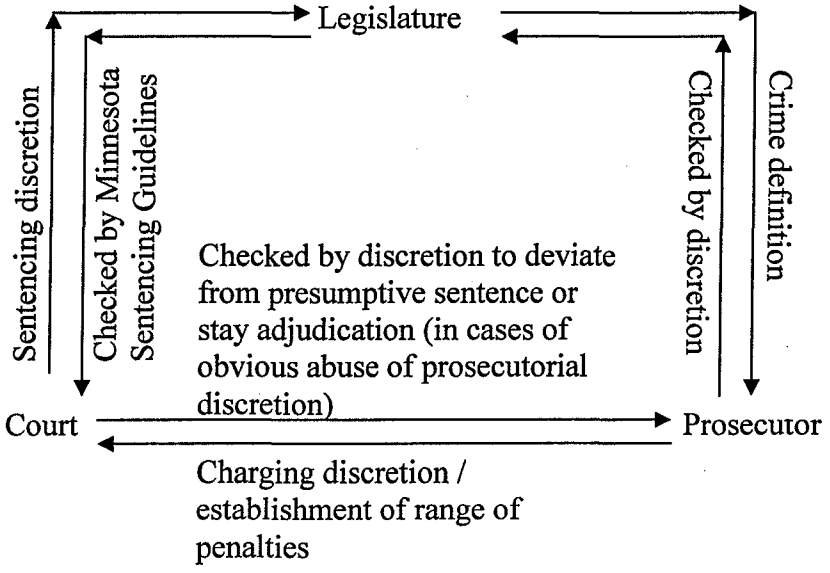
[82] See Minn. Stat. § 244.09 (2002) (promulgating the Minnesota Sentencing Guidelines Commission); Minn. Sentencing Guidelines I (establishing the purpose and principles of the Guidelines).
[83] State v. Foss, 556 N.W.2d 540, 540 (Minn. 1996). See also State v. Dargon, No. C6-01-1605, 2002 WL 1315401, at *2 (Minn. Ct. App. 2002) ("although a court cannot interfere with the prosecutor's charging authority, it retains broad discretion over how the case proceeds once it is filed").
[84] State v. Foss, 556 N.W.2d 540, 541 (Minn. 1996).
[85] Minn. Sent. Guidelines II.D.

might be triggered by successful conviction. Thus, simply by making the charging decision, the prosecutor can have a greater impact on the defendant's future than the court. Because most collateral consequences are triggered by the *nature of the offense* rather than the sentence actually imposed, the sentence announced by the judge has no affect whatsoever. In fact, the consequences are referred to as "collateral" because "the sentencing district court judge does not control what the outcome will be."[86]

Figure 2 – Balance of Power Between the Legislature, Prosecutor, and Court



Second, the indiscriminate imposition of collateral consequences erodes the benefits of a stay of imposition. As explained above, a stay of imposition is considered to be a less severe sanction, and is meant for persons who commit less serious offenses and who have lower criminal history scores. For offenses and persons who fall into this range, the Minnesota Sentencing Guidelines presumes that the sentence will be stayed.[87] The major benefit of a stay

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[86] State v. Johnson, Nos. C9-99-1046, CX-99-1265, 2000 WL 365051, at *4 (Minn. Ct. App. 2000).

[87] The guidelines are presented in grid form representing "the two dimensions most important in current sentencing and releasing decisions – offense severity and criminal history." Minn. Sentencing Guidelines II. The presumptive sentence for each offense can be located on the grid according to the intersection of these dimensions, and the decision as to whether the sentence should be executed or stayed is determined by its position relative to the diagonal line that divides the grid. Minn. Sent. Guidelines II.B.C. See also Minnesota Sentencing Guidelines Grid. It should be noted that although a stay of execution (sentence is pronounced and stayed) is significantly different

of imposition to the individual is that the offender is placed on a program of probation rather than sentenced to a period of incarceration. The benefit to society, as has been empirically established, is that the persons who are identified for and placed on probation are the persons who are less likely to recidivate than persons who are incarcerated.[88] But despite the fact that there is a recognized distinction between offenders whose situation warrants probation and offenders whose situation warrants incarceration, there is no such distinction with regard to the imposition of collateral consequences. Collateral consequences are imposed automatically on all offenders regardless of their sentence.

To illustrate the impact of this lack of distinction, in 2001, 26 of 70 cells, or 37%, of the Sentencing Guidelines Grid indicated a presumptive stayed sentence.[89] In that year, there were 10,796 felony convictions.[90] Of that number, 4,575 received a stay of imposition.[91] As a result, 42% of the felony population for 2001 faced the impact of 57 of the collateral consequences identified in Appendix A,[92] and the denial of employment in 49 lines of work. For these offenders, the direct consequences of conviction were mitigated by the sentencing decision. But the sentencing decision did nothing to affect the imposition of the collateral consequences of conviction. Moreover, because most collateral consequences are triggered by the nature of the offense at the point of conviction rather than the sentence level, the offenders were unable to avoid imposition even when they successfully completed probation and their convictions were

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from a stay of imposition (sentence is not pronounced, and imposition is stayed to a later date), there is little consistency in the manner in which the two options are utilized. For this reason, the guidelines presume a "stay," but not which type, and treat both the same for purposes of the criminal history score. Minn. Sent. Guidelines cmt. II.B.105.

[88] Office of the Legislative Auditor, State of Minnesota, Recidivism of Adult Felons, Report # 97-01 at 51, 59 (Jan. 1997) (stating 45% of released prisoners were reconvicted of an offense within three years compared to 28% of released probationers who were reconvicted within the same period).

[89] See Minn. Sent. Guidelines and Commentary, rev. Aug. 1, 2000.

[90] Source: Minnesota Sentencing Guidelines Commission, 2001 Felony Conviction Data.

[91] Id.

[92] The collateral consequences relating to professional counselors and veterinarians must be excluded because they were enacted in 2003 and 2002, respectively. See Appendix A.

deemed to be misdemeanors. Rather, they could only then be guaranteed a restoration of two civil rights: voting and eligibility for public office. Some lines of employment would be reopened to them after several years had elapsed, but they would be permanently banned from several others.[93]

Thus, if collateral consequences were the consequences the drafters of section 609.13 were referring to in stating, "it is believed desirable not to impose the consequences of a felony if the judge decides that the punishment to be imposed will be no more than that provided for misdemeanors or gross misdemeanors," then the drafters utterly failed to attain their goal. Collateral consequences operate without regard to sentence, and circumvent the natural balance of power within the judicial system. For that reason, some other solution must be found in order to effect the intent of the drafters.[94]

IV. Reinstating the Intended Effect of Section 609.13

There is no one solution that will accomplish the goal of the drafters of section 609.13 in sparing offenders from the consequences of a felony when given a lesser sentence or after successfully completing probation following a stay of imposition. But a combination of approaches may be effective.

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[93] See, e.g., Minn. Stat. § 148.261, subd. 1 (2002) (authorizing the indefinite denial of a nursing license for conviction of certain crimes); Minn. Stat. § 171.3215, subd. 2 (2002) (prohibiting licensure as a school bus driver for 1-5 years after conviction of a disqualifying offense); Minn. Stat. §§ 245C.14-.15 (Supp. 2003) (prohibiting licensure in any human services field for 7-15 years, or indefinitely, based on the offense committed).

[94] It could be argued that expungement is an effective alternative to the intended effect of section 609.13. However, under Minnesota law, the remedy of expungement is limited to a court order sealing and prohibiting disclosure of court records. Minn. Stat. § 609A.01 (2004). The remedy does not extend to non-judicial records retained by the executive branch. State v. Schultz, 676 N.W.2d 337, 342-344 (Minn. Ct. App. 2004). Thus, even after expungement, a criminal history check might reveal the original conviction.

First, section 609.13 should be amended as follows:

Subdivision 1. Felony. Notwithstanding a conviction is for a felony:

(1) The conviction is deemed to be for a misdemeanor or a gross misdemeanor for all purposes if the sentence imposed is within the limits provided by law for a misdemeanor or gross misdemeanor as defined in section 609.02; or

(2) The conviction is deemed to be for a misdemeanor for all purposes if the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence.

Subd. 2. Gross misdemeanor. Notwithstanding that a conviction is for a gross misdemeanor, the conviction is deemed to be for a misdemeanor for all purposes if:

(1) The sentence imposed is within the limits provided by law for a misdemeanor as defined in section 609.02; or

(2) If the imposition of the sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without sentence.

Subd. 3. Misdemeanors. If a defendant is convicted of a misdemeanor and is sentenced, or if the imposition of sentence is stayed, and the defendant is thereafter discharged without sentence, the conviction is deemed to be for a misdemeanor for purposes of determining the penalty for a subsequent offense.

The simple addition of the phrase "for all purposes" should have the effect of limiting the imposition of the consequences of conviction that are based solely on the conviction level. Thus, the new text of section 609.13 would override the case law that has allowed the offense level to control for consequences such as impeachment by a prior conviction, inclusion of the offense when calculating the offender's criminal history score, and enhancement of the charges for future offenses. The change would not, however, affect the imposition of collateral consequences that are based on the nature of the offense rather than the offender's subsequent treatment at sentencing.

Second, the courts should capture both the offense level at the time of conviction (entry of the guilty plea or verdict) *and* the sentence level. Capturing the offense level will provide a

complete record of the nature of the offense, and will put an end to the fiction that the nature of the offense is never relevant. Rather, the offense level will be very useful for those situations in which the consequences of conviction are triggered by the nature of the offense rather than the eventual treatment of the offender. Capturing the sentence level will provide a more accurate account of the offender's final conviction level. This is the value that should be used to populate the offender's criminal record, and to calculate criminal history. Additionally, capturing the sentence level will bring clarity to the stay of imposition sentence. As discussed above, in that case, no sentence is pronounced, so there is no information other than the offense level with which to determine the conviction level until the person does or does not successfully complete probation. If the courts capture both the offense level and sentence level, the sentence level can be set to mirror the offense level when imposition is stayed, and then can be revised to a misdemeanor if the defendant successfully completes probation. Deliberately capturing and revising this information will bring clarity and accuracy to the offender's criminal history, which will be helpful not only to the offender, but also to the many agencies and members of the public that rely on it.[95]

Third, though no single change can halt the imposition of collateral consequences, steps should be taken to ensure that all parties in the criminal justice system are fully aware of them. As discussed above, collateral consequences exist in a variety of places, including statutes and rules. The consequences are diverse and have different triggers (i.e., specific crimes, specific

[95] In fall 2003, the author, in conjunction with other members of the Minnesota Judicial Branch, submitted a proposal to the steering committee for the Judicial Branch's new electronic case management system, MNCIS, to approve a Uniform Court Practice (UCP) requiring the system to capture both the offense level and sentence level. The UCP was approved in September 2003, and a work group was formed, including the author, which developed the rules that would be used by the system to calculate the sentence level based on the parameters announced in court by the sentencing judge. See Appendix B. The rules were designed to include protocols for revising the defendant's sentence level after successful completion of probation when given a stay of imposition. Development work then proceeded to incorporate the level of sentence functionality into the MNCIS system, and the functionality was released into production in summer 2005.

behavior, or specific events such as charging or conviction). Each consequence when viewed alone may be supported by legitimate public safety or other policy concerns; therefore, it would be impossible to say as a rule that all collateral consequences should be suspended in certain situations. However, it *is* legitimate to say that some collateral consequences should be suspended for some offenders in some situations. To achieve that, information is key. If all of the parties in the criminal justice system are aware of the possible collateral consequences an individual will face, this knowledge could influence the prosecutor's charging decision, the court's sentencing decision, and the defendant's plea decision. For that reason, the collateral consequences contained in state statutes should be collected or indexed in one location, and arranged in such a way that each party can easily discern which consequences are relevant to the defendant. This could take the form of a chapter in the Minnesota Statutes, or an annually updated pamphlet. Alternatively, a database could be developed to categorize collateral consequences by their triggers so that a search could be run based on the characteristics of the defendant to yield all possible consequences. One or all of these methods of categorization are essential to full disclosure in the criminal system and knowing and intelligent pleas by the defendant.[96]

In accord with this change, sentencing judges should be given the discretion to consider collateral consequences in sentencing. Currently, it is the rare exception when trial courts are

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[96] In fall 2003, the author became involved in a task force whose goal was to propose legislation to index collateral consequences in a single chapter of the Minnesota Statutes. The task force succeeded in introducing legislation to accomplish that goal in the 2004 legislative session. H.F. 2276 83rd Legislative Session (Minn. 2004); S.F. 2357, 83rd Legislative Session (Minn. 2004). The legislation passed the Senate, but failed to pass the House prior to the end of the session. See Journal of the Senate at 2981, 83rd Legislative Session (Minn. 2004) (showing passage of the Senate File); Journal of the House at 4625, 83rd Legislative Session (Minn. 2004) (showing introduction as the last action on the House File); Journal of the House at 5620, 83rd Legislative Session (Minn. 2004) (showing receipt from the Senate as the last action on the Senate File). A similar bill was introduced in the 2005 legislative session. S.F. 607, 84th Legislative Session (Minn. 2005). The provisions of that bill were passed within the Public Safety Omnibus Bill. 2005 Minn. Laws. ch. 136, art. 14, § 18.

successful in including a consideration of collateral consequences with respect to sentencing.[97] Rather, the courts are generally forbidden to consider collateral consequences in sentencing because they are beyond the control of the district court and because their imposition is uncertain.[98] But collateral consequences can alter a person's citizenship or residency status, bar a person from entire lines of employment, and impact numerous civil rights. In these respects, collateral consequences can have a greater and longer lasting impact than direct punishment. Therefore, it makes sense for the courts to be permitted to consider collateral consequences in sentencing if the defendant's situation so warrants.

Finally, to engender even greater certainty with regard to collateral consequences, the Legislature should reconsider some of the consequences currently in existence. Some statutes impose consequences based on vague triggering phrases that require legal definition such as "moral turpitude" and "fraud."[99] The Legislature could consider refining these so the offenses that trigger them are more explicit. Others specify consequences for those "guilty of" or "who have committed" or "who have violated," making it difficult to determine whether conviction is necessary for imposition.[100] These could be refined to clarify whether a charge or conviction is necessary to substantiate the violation. Still other statutes require some interpretation to determine whether the consequence should be imposed such as when the triggering factor is "crimes reasonably related to the practice of podiatric medicine."[101] The Legislature could consider clarifying the scope of these statutes. If the Legislature were to apply these concepts across the board, the result would be greater clarity and predictability in the area of collateral

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[97] See, e.g., State v. Krotzer, 548 N.W.2d 252, 253-255 (Minn. 1996) (upholding the trial court's decision to stay adjudication so the defendant would not be required to register as a sex offender).
[98] See State v. Mendoza, 638 N.W.2d 480,484 (Minn. Ct. App. 2002).
[99] E.g., Minn. Stat. § 58.12, subd. 1 (2002) (barring a person from being a residential mortgage originator or servicer); Minn. Stat. § 148.10, subd. 1 (2002) (imposing consequences for persons licensed as a chiropractor).
[100] E.g., Minn. Stat. §148.7813 (2002) (imposing consequences for an athletic trainer); Minn. Stat. § 148.261, subd. 1 (2002) (imposing consequences for a licensed nurse).
[101] Minn. Stat. § 153.19 (2002) (crimes relating to podiatric medicine).

consequences, which would in turn result in defendants being able to enter more knowing and intelligent guilty pleas.

V. Conclusion

Section 609.13 was drafted and enacted during a period in which it appeared the trend was to assist ex-offenders in reintegrating into society by imposing only those consequences that were necessary to effect rehabilitation, deterrence, and to protect public safety. Those policy considerations are still valid today, but as this paper has shown, section 609.13 as currently drafted cannot achieve the purpose for which it was intended. In fact, due to the legal developments with regard to collateral consequences, no single statute can effect the purpose for which section 609.13 was intended. However, a combination of steps can make a difference: 1) section 609.13 should be amended to clarify legislative intent to affect the conviction level for all purposes; 2) the courts should capture and report both the offense level and the sentence level; 3) all collateral consequences should be indexed or collected in one place for easy reference; 4) the sentencing judge should be permitted to consider collateral consequences when pronouncing sentence if the situation so warrants; and 5) the legislature should consider standardizing the language of the statutes imposing collateral consequences to bring greater clarity to this area. Though it is true that offenders deserve punishment, it is also true, as the drafters of 609.13 stated so effectively, it is "desirable not to impose the consequences of a felony if the judge decides that the punishment to be imposed will be no more than that provided for misdemeanors or gross misdemeanors." The steps outlined in this article should achieve that to the greatest extent possible.

APPENDIX B
RULES FOR DETERMINING SENTENCE LEVELS

The sentence level is typically thought of as the level of conviction, although statute defines conviction as occurring at the finding or plea of guilty rather than at the time of sentence. For this reason, capturing the sentence level correctly is critical to reporting an accurate criminal history score for an individual. This document provides basic rules for determining the sentence level in distinct sentencing situations.

A. Sentence Imposed and Executed. In general, the sentence level is determined by the length or amount of punishment imposed at sentence. From the statutory definitions of felonies, gross misdemeanors, misdemeanors, and petty misdemeanors, the following rules have been derived for determining sentence level when a sentence is imposed and executed:

1) A **felony** sentence level is one in which a sentence of imprisonment for more than one year, or a fine of more than $3,000, or both, is imposed.

2) A **gross misdemeanor** sentence level is one in which a sentence of imprisonment for 91 to 365 days, or a fine of $ 1,001 to 3,000, or both, is imposed.

3) A **misdemeanor** sentence level is one in which a sentence of imprisonment for up to 90 days, or a fine of $301 to $1,000, or both, is imposed.

4) A **petty misdemeanor** sentence level is one in which a sentence of a fine of up to $300 is imposed.

For all levels, the sentence level is first determined by the term of imprisonment. If there is no term of imprisonment, the sentence level is then determined by the amount of the fine.

B. Stay of Imposition. When the court utilizes the stay of imposition, there is a finding or plea of guilty, but no sentence is pronounced. Therefore, the sentence level is equal to the offense level at the time of the finding or plea of guilty. The sentence level is not determined by the length of stay or probation. If the person is subsequently discharged from probation without a prison sentence, by operation of Minn. Stat. § 609.13, the sentence level will be reduced as follows:

Felony → Misdemeanor
Gross Misdemeanor → Misdemeanor
Misdemeanor → No change[1]

C. Stay of Execution. When the court utilizes the stay of execution, there is a finding or plea of guilty, and sentence is pronounced but stayed. The pronounced sentence is used to determine

[1] In some localities, it is the practice to vacate the plea and dismiss the charges if the defendant successfully completes a period of probation for a misdemeanor offense.

the sentence level according to the rules set forth in part A. The sentence level is not determined by the length of stay or probation.

D. Continuance for Dismissal / Stay of Adjudication. Under continuance for dismissal or stay of adjudication, the defendant may or may not enter a guilty plea, but in either case, the court will not enter a final judgment of guilt. Following the stay, either the case is dismissed, in which case there is no sentence level, or a sentence is imposed, in which case the sentence level is determined according to rules set forth in part A.

E. Diversion Proceedings Pursuant to Minn. Stat. § 152.18. Under diversion proceedings pursuant to Minn. Stat. § 152.18, the defendant is found or pleads guilty, but the court does not enter a judgment of guilty. Following successful completion of probation under the diversion proceedings, either the case is dismissed, in which case there is no sentence level, or the court enters an adjudication, in which case the sentence level is determined according to the rules set forth in part A.