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# Retaining the Scarlet Letter: The Tension Between Branch Powers, Law, and Equity with Inherent Authority Expungement—State v. M.D.T.

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# Retaining the Scarlet Letter: The Tension Between Branch Powers, Law, and Equity with Inherent Authority Expungement—State v. M.D.T.

## **Keywords**

Criminal records--Expungement--Minnesota

**RETAINING THE SCARLET LETTER: THE TENSION BETWEEN BRANCH  
POWERS, LAW, AND EQUITY WITH INHERENT AUTHORITY  
EXPUNGEMENT—STATE V. M.D.T.**

**Robert C. Whipps\***

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\* J.D. Candidate, William Mitchell College of Law, January 2015; B.A. Political Science, Augsburg College, 2010. I would like to send a special thank you to my friends, family, mentors, and teachers for helping guide me down my path. This note is dedicated to my Stephanie Lue for her enduring love, patience, and encouragement.

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### I. INTRODUCTION

Imagine you are twenty-one years old, uninsured, and you need to go to the doctor because of an illness. You can barely scrape the money together for the visit, and certainly cannot afford a second appointment. The doctor writes you a prescription for some cold medicine. Prior to visiting the pharmacy you change one number, doubling the prescription. You are relatively young and don't realize this split-second act of poverty will haunt you for at least the next fifteen years of your life.

Since this one-time mistake, you have completed college with honors, married, and started a family. However, due to your split-second act you will be denied jobs, face difficulty supporting your family, and even be prohibited from coaching your kid's sports teams. Now, imagine there was a form of relief.

Expungement means "[t]o erase or destroy,"<sup>1</sup> but in Minnesota expungement takes place in the form of a "court order sealing the records and prohibiting the disclosure of their existence or their opening except under court order or statutory authority."<sup>2</sup> For many years this process allowed deserving-rehabilitated people whose life would benefit from expungement to have their records sealed.

Expungement was used sparingly and only after the court gave due regard to public safety and other needs of the public to have access to criminal records.<sup>3</sup> In order to provide a petitioner any real benefit from an expungement, records held in the judicial and executive branch must be sealed. A partial expungement or the sealing of one branch's records without the others provides an illusory remedy to a petitioner.

In *State v. M.D.T.*,<sup>4</sup> the petitioner, M.D.T., found herself in the scenario described above. The Minnesota Supreme Court held that district courts lack inherent authority to reach criminal records held by the executive for the purposes of granting non-statutory expungement.<sup>5</sup> In deferring to the separation of powers, the court held that sealing records held in the executive branch is not a unique judicial function absent a constitutional violation.<sup>6</sup> This decision left M.D.T. and others similarly situated with a partial expungement—an illusory remedy.

This case note begins by examining the history of inherent authority in Minnesota.<sup>7</sup> It goes on to present the facts and the Minnesota Supreme Court's decision.<sup>8</sup> It argues that the court began its analysis incorrectly by treating inherent-authority expungement as a matter of law as opposed to its traditional role

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<sup>1</sup> BLACK'S LAW DICTIONARY 662 (9th ed. 2009).

<sup>2</sup> MINN. STAT. § 609A.01 (2012).

<sup>3</sup> See, e.g., *State v. L.W.J.*, 717 N.W.2d 451, 455 (Minn. Ct. App. 2006)("[E]xpungement of a criminal record is an extraordinary remedy to be granted only upon clear and convincing evidence that it would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety.").

<sup>4</sup> *State v. M.D.T.*, 831 N.W.2d 276 (Minn. 2013).

<sup>5</sup> *Id.* at 284.

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

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part II.

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as a matter of equity.<sup>9</sup>It addresses the court’s use of inherent authority and the separation of powers in past decisions, and the policy concerns left unaddressed when expungement is left available as only a partial remedy. This case note concludes that the Minnesota Supreme Court allowed its equitable jurisdiction to be curtailed by the statute and the legislature.<sup>10</sup>Finally, it concludes that based on the court’s actions it is imperative that the legislature take action to address the policy implications that a partial expungement remedy has on Minnesota.<sup>11</sup>

**II. HISTORY OF INHERENT AUTHORITY EXPUNGEMENT IN MINNESOTA**

**A. THE FOUNDING AND EXPANSION OF INHERENT AUTHORITY EXPUNGEMENT**

Judicial power and the court’s inherent authority in Minnesota stems from the Minnesota Constitution.<sup>12</sup> Criminal expungement cases date back to the early 1970s in Minnesota.<sup>13</sup> The Supreme Court of Minnesota recognized that in the absence of statutory authority, the judiciary still possessed the ability to grant expungement as a form of equitable relief where the petitioner’s constitutional rights had been infringed.<sup>14</sup>

Several years later, the Minnesota Supreme Court decided the most important historical case on expungements,<sup>15</sup> *State v. C.A.*, on April 17, 1981.<sup>16</sup> In *C.A.*, the Minnesota Supreme Court expanded on the use of inherent authority for criminal expungement and offered a more detailed account on exercising such authority.<sup>17</sup> The court recognized that “inherent authority of the courts to control the performance of

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<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* Part V.

<sup>11</sup> See *infra* Part V.

<sup>12</sup> MINN. CONST. art. VI, § 1.

<sup>13</sup> See *Morrissey v. State*, 174 N.W.2d 131 (Minn. 1970).

<sup>14</sup> *State v. Ambaye*, 616 N.W.2d 256, 258 (Minn. 2000); *In re R.L.F.*, 256 N.W.2d 803, 808 (Minn. 1977); see Ritesh Patel, *Hall v. Alabama: Do Federal Courts Have Jurisdiction to Expunge Criminal Records?*, 34 AM. J. TRIAL ADVOC. 401, 405–06 (2010) (discussing expungement where there has been a constitutional violation).

<sup>15</sup> Lindsay W. Davis, *An Amicus Perspective on Recent Minnesota Criminal Expungement*, 2 WM. MITCHELL J.L. & PRAC. 4 (2009).

<sup>16</sup> *State v. C.A.*, 304 N.W.2d 353 (Minn. 1981); see also STATE COURT ADMINISTRATOR’S OFFICE, MINNESOTA JUDGES CRIMINAL BENCHBOOK 17-13 (2006).

<sup>17</sup> Davis, *supra* note 15.

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judicial functions is well established.”<sup>18</sup> It acknowledged that “[i]nherent judicial power governs that which is essential to the existence, dignity, and function of a court because it is a court.”<sup>19</sup>

The court then extended the use of inherent authority beyond the scope of expungement in cases involving constitutional right infringement.<sup>20</sup> It stated that “[w]here denial of a constitutional right is not involved the court must decide whether expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing and monitoring an expungement order.”<sup>21</sup> The court determined that one of its judicial functions is to “control court records and agents of the court in order to reduce or eliminate unfairness to individuals . . . .”<sup>22</sup> However, the court recognized the need to proceed with caution when exercising inherent authority in order to respect the separation of powers.<sup>23</sup>

Following the C.A. decision, the district courts in Minnesota regularly sealed judicial and executive branch records using the balancing test laid out by the Minnesota Supreme Court in C.A.<sup>24</sup> The court of appeals regularly affirmed these decisions and even held that the courts had the power to expunge all public records held by the Bureau of Criminal Apprehension in order to grant expungement petitioners a meaningful remedy.<sup>25</sup>

### B. THE MINNESOTA COURT OF APPEALS SPLIT ON INHERENT AUTHORITY

A decade later, in 1999, the Minnesota Court of Appeals began whittling away at the expungement remedy and justifying this action under the separation of powers doctrine. In *State v. T.M.B.*, the court held the judiciary may not interfere with the executive branch’s record-keeping function unless an expungement petitioner produces evidence that executive agents abused their discretion in the performance of an executive function.<sup>26</sup> The court decided that in the absence of such evidence, granting expungement is impermissible under the separation-of-powers doctrine.<sup>27</sup> More importantly, the court

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<sup>18</sup> C.A., 304 N.W.2d at 358 (citing *State v. Osterloh*, 275 N.W.2d 578, 580 (Minn. 1978); Clerk of Court’s Comp. for Lyon Cnty. v. Lyon Cnty. Comm’rs (*In re Lyon*), 241 N.W.2d 781, 784, 786 (Minn. 1976); *In re Disbarment of Greathouse*, 248 N.W. 735, 737 (Minn. 1933)).

<sup>19</sup> C.A., 304 N.W.2d at 358 (citing *In re Lyon*, 241 N.W.2d at 784); see also Joseph M. Sayler, *Mischief Makers Beware: Minnesota Courts’ Broad Power to Sanction Misconduct in the Wake of Frazier v. BNSF*, 35 HAMLINE L. REV. 67, 71 (2012) (discussing inherent authority in Minnesota).

<sup>20</sup> C.A., 304 N.W.2d at 358.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (including where the unfairness does not have a constitutional dimension).

<sup>23</sup> *Id.* at 358–59 (citing *State v. Osterloh*, 275 N.W.2d 578, 580 (Minn. 1978); *In re Lyon*, 241 N.W.2d at 786; *In re Greathouse*, 248 N.W. 735, 737 (Minn. 1933)).

<sup>24</sup> Davis, *supra* note 15, at section II(B).

<sup>25</sup> See, e.g., *State v. P.A.D.*, 436 N.W.2d 808, 810–11 (Minn. Ct. App. 1989).

<sup>26</sup> *State v. T.M.B.*, 590 N.W.2d 809, 812 (Minn. Ct. App. 1999).

<sup>27</sup> *Id.* at 813.

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held that “the fashioning of meaningful remedies is not essential to the performance of the courts' unique judicial function.”<sup>28</sup>

Five years later, the Minnesota Court of Appeals expanded upon the *T.M.B.* decision in *State v. Schultz*.<sup>29</sup> The court acknowledged that “Minnesota case law has neither guided nor informed inherent authority expungement decisions in a totally consistent manner.”<sup>30</sup> The court held that criminal records are not judicial records and fall outside the scope of inherent authority.<sup>31</sup> The court cited the separation-of-powers doctrine in reaching its decision that the district court lacked the inherent authority to seal non-judicial criminal records.<sup>32</sup>

Between 2007 and 2008, the Court of Appeals decided two cases that once again blurred when it is appropriate to use the court’s inherent authority to grant expungement of records held by the executive branch. In 2007, the court of appeals decided in *State v. S.L.H.* that “absent a constitutional violation, [the district court] had no authority to expunge the non-judicial records . . . .”<sup>33</sup> Then in 2008, the court of appeals held in *State v. V.A.J.* that “when a district court orders an expungement of a criminal record by way of its inherent authority, that expungement order includes the judicially created public record maintained by the BCA.”<sup>34</sup> The Minnesota Supreme Court granted certiorari in both cases, but stayed certiorari in *V.A.J.* pending the outcome of *S.L.H.*<sup>35</sup>

### C. THE MINNESOTA SUPREME COURT HEARS *S.L.H.*

The Minnesota Supreme Court decided *State v. S.L.H.*<sup>36</sup> in 2008 following the recent disagreement at the appellate level. The court further explained its analysis in these types of cases. To start, a court identifies what the judicial function at hand is, such as “controlling ‘court records and agents of the court in order to reduce or eliminate unfairness to individuals.’”<sup>37</sup> The court then decides whether appropriate circumstances justify issuing an expungement that affects records held by the executive as agents of the

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<sup>28</sup> *Id.* (stating instead it is a “judicial want”).

<sup>29</sup> 676 N.W.2d 337 (Minn. Ct. App. 2004).

<sup>30</sup> *Id.* at 343.

<sup>31</sup> *Id.* (citing *T.M.B.*, 590 N.W.2d at 813).

<sup>32</sup> *Id.* at 343–44; *see also* Thomas R. Frenkel, Sealed Appellant v. Sealed Appellee, 130 F.3d 695 (5th Cir. 1997), 24 S. ILL. U.L.J. 627, 629 (2000) (discussing the “Seventh Circuit's contrary . . . holding that the judiciary has no jurisdictional authority to order the expungement of executive branch records”).

<sup>33</sup> *State v. S.L.H.*, No. A06-1750, 2007 WL 2769652, at \*1 (Minn. Ct. App. Sept. 25, 2007), *aff'd*, 755 N.W.2d 271 (Minn. 2008).

<sup>34</sup> *State v. V.A.J.*, 744 N.W.2d 674, 678 (Minn. Ct. App. 2008).

<sup>35</sup> Davis, *supra* note 15, at section II(A).

<sup>36</sup> 755 N.W.2d 271 (Minn. 2008).

<sup>37</sup> *Id.* at 276 (citing *State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981)).

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court.<sup>38</sup> If appropriate circumstances exist, the court then balances whether the advantages to the petitioner are commensurate with the disadvantages to the public and the court.<sup>39</sup>

The supreme court then applied this analysis to the facts of the case at hand. The court held that S.L.H.'s circumstances did not implicate a core judicial function and were not appropriate to justify issuing expungement orders upon the executive.<sup>40</sup> While the court did not limit the use of inherent authority exclusively to constitutional infringements, it did affirm the appellate court's decision.<sup>41</sup> Thus, the supreme court did not create a bright-line rule forbidding expungement of non-judicial records—it stated that helping an individual achieve employment goals is not a core judicial function.<sup>42</sup> In other applications, the question of whether the judiciary could exercise inherent authority to seal non-judicial records remained.

### III. THE *M.D.T.* DECISION

#### A. FACTS AND PROCEDURAL POSTURE

*M.D.T.* altered a prescription for Robitussin that contained the controlled substance codeine.<sup>43</sup> She then presented the altered prescription to the Shopko Pharmacy in Worthington, Minnesota.<sup>44</sup> When police arrested *M.D.T.* in 2006, she gave a statement that she altered the prescription by doubling the amount because she could not afford another doctor visit or an additional prescription if the medicine did not work.<sup>45</sup> *M.D.T.*'s record contained no other criminal offenses.<sup>46</sup>

The state brought three separate charges upon her including two counts of felony aggravated forgery and one count of felony-level controlled substance procurement by fraud.<sup>47</sup> *M.D.T.* entered an *Alford* plea on a single count of the aggravated forgery charge in violation of Minnesota Statute section 609.625,

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<sup>38</sup> *Id.*

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

<sup>40</sup> *Id.* at 277–78 (helping individuals achieve employment goals is not a core judicial function).

<sup>41</sup> *Id.* at 280.

<sup>42</sup> Lindsay W. Davis, *Minnesota's Inherent Authority Criminal Expungement Law: Two Years After State v. S.L.H.*, 5 WM. MITCHELL J.L. & PRAC. 2 (2012).

<sup>43</sup> *State v. M.D.T.*, 815 N.W.2d 628, 630 (Minn. Ct. App. 2012); *see also* MINN. STAT. § 152.02, subdiv. 3(b)(1)(ii) (B) (2012) (codeine is a Schedule II drug).

<sup>44</sup> *M.D.T.*, 815 N.W.2d at 630.

<sup>45</sup> *State v. M.D.T.*, 831 N.W.2d 275, 278 (Minn. 2013); *see also* Anna Light, *Another Chance for Second Chances?*, MINN. JUST. MONTHLY 1 (Sept. 2012), <http://www.crimeandjustice.org/pdffiles/mjmsep2012/Article%20-%20M%20D%20T%20Final.pdf>.

<sup>46</sup> *M.D.T.*, 815 N.W.2d at 630.

<sup>47</sup> *M.D.T.*, 831 N.W.2d at 278; *see also* MINN. STAT. §§ 152.025 subdiv. 2(a)(2)(i), 609.625 subdiv. 1(1), 3.

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subdivision 3.<sup>48</sup> At sentencing, the district court stayed imposition of sentence, gave her three years of probation, and fined her \$879.<sup>49</sup> In 2008, the court discharged M.D.T. from probation and forgave her remaining fines owed.<sup>50</sup>

M.D.T., representing herself pro se, filed a petition for expungement about six months after being discharged from probation.<sup>51</sup> She sought expungement in order to move on with her life and to pursue a career in business management and accounting.<sup>52</sup> M.D.T.'s demonstration of rehabilitation included that she retained a steady job and followed all court orders.<sup>53</sup> The district court denied M.D.T.'s petition finding she failed to provide clear and convincing evidence of rehabilitation in such a short time or that granting the petition would provide "a benefit to her that was commensurate with the public detriment of elimination of her record and the burden of issuing and administering the expungement order."<sup>54</sup>

Then in 2011, M.D.T. with the assistance of counsel filed a second petition for expungement.<sup>55</sup> She submitted a detailed account of her rehabilitation, and her job history including dismissals and rejections solely because of her criminal record.<sup>56</sup> Further, she presented her personal history, education, and career plans.<sup>57</sup> The Nobles County Attorney objected to the M.D.T.'s petition on the ground that facilitating employment goals is not a valid reason for expungement.<sup>58</sup> The Nobles County Attorney additionally objected stating that expungement is not necessary to a core judicial function and the district court lacked authority to order expungement outside of the judicial branch.<sup>59</sup>

Finding clear and convincing evidence that the expungement "would yield a benefit to [M.D.T.] commensurate with the disadvantages to the public and public safety," the district court granted the M.D.T.'s petition for expungement.<sup>60</sup> The court acknowledged that whether it had inherent authority to

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<sup>48</sup> *M.D.T.*, 815 N.W.2d at 631; *see also* BLACK'S LAW DICTIONARY 83 (9th ed. 2009) (defining an *Alford* plea as "[a] guilty plea that a defendant enters as part of a plea bargain, without actually admitting guilt.").

<sup>49</sup> *M.D.T.*, 815 N.W.2d at 631.

<sup>50</sup> *M.D.T.*, 831 N.W.2d at 278; *see also* Light, *supra* note 45, at 2.

<sup>51</sup> *M.D.T.*, 815 N.W.2d at 631.

<sup>52</sup> *M.D.T.*, 831 N.W.2d at 278.

<sup>53</sup> *M.D.T.*, 815 N.W.2d at 631.

<sup>54</sup> *Id.*; *see also* Light, *supra* note 45, at 2.

<sup>55</sup> *M.D.T.*, 815 N.W.2d at 631.

<sup>56</sup> *Id.*

<sup>57</sup> *M.D.T.*, 831 N.W.2d at 279.

<sup>58</sup> *M.D.T.*, 815 N.W.2d at 631. However, the Rock Nobles Community Corrections was not opposed to expungement in M.D.T.'s case. *M.D.T.*, 831 N.W.2d at 279.

<sup>59</sup> *M.D.T.*, 815 N.W.2d at 631.

<sup>60</sup> *Id.*

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expunge executive records was unclear.<sup>61</sup> However, the court turned to several unpublished Minnesota Court of Appeals decisions and adopted an expansive view that the court had inherent authority to grant a meaningful remedy when deciding expungement cases.<sup>62</sup> The court then went on to order that several executive agencies seal records relating to M.D.T.'s arrest, indictment, trial, dismissal, and discharge.<sup>63</sup> The state appealed the district court's decision to the Minnesota Court of Appeals.<sup>64</sup>

On appeal, the court addressed two issues: "Did the district court abuse its discretion by ordering expungement of respondent's judicial branch criminal records?" and "Did the district court exceed its authority by ordering expungement of judicial branch records . . . ?"<sup>65</sup> The court went on to hold that the district court did not abuse its discretion by ordering expungement of criminal records in the judicial system.<sup>66</sup> The court then examined de novo whether the district court had inherent authority to seal executive records.<sup>67</sup> Through balancing the needs of the judiciary to issue an effective remedy, the needs of the executive to maintain criminal records, and the fundamental rights of M.D.T., the court held that the district court did not abuse its discretion by sealing records created by the judiciary and maintained by the executive.<sup>68</sup> Therefore, the court of appeals affirmed the district court's decision.<sup>69</sup> Once again, the state appealed the decision of the appellate court and the Minnesota Supreme Court granted the state's petition for further review.<sup>70</sup>

### B. THE MINNESOTA SUPREME COURT'S DECISION

After granting review, the Minnesota Supreme Court first acknowledged it reviews the decision of a lower court to grant expungement "under an abuse of discretion standard."<sup>71</sup> However, the court went on

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<sup>61</sup> *M.D.T.*, 831 N.W.2d at 279.

<sup>62</sup> *M.D.T.*, 815 N.W.2d at 631.

<sup>63</sup> *Id.* at 632. Executive agencies included: Nobles County Sheriff, Bureau of Criminal Apprehension, Minnesota Attorney General's Office, Minnesota Department of Corrections, Nobles County Attorney, Worthington City Police Department, Probation and Court Services Department, and the Worthington City Attorney. *Id.* The court reasoned that M.D.T.'s one-time mistake did not justify inhibiting her employment opportunities for fifteen years. *M.D.T.*, 831 N.W.2d at 279.

<sup>64</sup> *M.D.T.*, 815 N.W.2d at 630.

<sup>65</sup> *Id.* at 632.

<sup>66</sup> *M.D.T.*, 831 N.W.2d at 279.

<sup>67</sup> *M.D.T.*, 815 N.W.2d at 634 (citing *State v. N.G.K.*, 770 N.W.2d 177, 181 (Minn. Ct. App. 2009)).

<sup>68</sup> *Id.* at 639. The court here did not provide an explanation of why it used an abuse of discretion standard for an item it identified as an issue to be reviewed de novo.

<sup>69</sup> *Id.*

<sup>70</sup> See *State v. M.D.T.*, No. A11-1285, 2012 Minn. LEXIS 376, at \*1 (Minn. June 27, 2012).

<sup>71</sup> *M.D.T.*, 831 N.W.2d at 279 (citing *State v. Ambaye*, 616 N.W.2d 256, 261 (Minn. 2000)).

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to shape the issue as “whether the district court exceeded the scope of its inherent authority to grant expungement.”<sup>72</sup> The court then framed this issue as a question of law<sup>73</sup> that it would review de novo.<sup>74</sup>

The court differentiated between the two varieties of expungement that exist in Minnesota—expungement under Minnesota Statutes Chapter 609A and expungement granted under the judiciary’s inherent authority.<sup>75</sup> The court stated that inherent power stems from the Minnesota Constitution<sup>76</sup> and inherent judicial power “governs that which is essential to the existence, dignity, and function of a court because it is a court.”<sup>77</sup> *M.D.T.* did not make a claim under statutory authority and therefore the court went on to examine the issue of inherent authority.<sup>78</sup>

The court recognized that the judiciary’s inherent power “governs that which is essential to the existence, dignity, and function of a court because it is a court.”<sup>79</sup> Additionally, the court remarked that while all of the court’s power stems from the Minnesota Constitution,<sup>80</sup> it also came into existence with inherent authority.<sup>81</sup> The court identified the test to be used was “whether the relief requested by the . . . aggrieved party is necessary to the performance of the judicial function as contemplated in our state constitution.”<sup>82</sup>

Before addressing this issue, the court proceeded by identifying the separation-of-powers concerns at hand. The court admitted it must give “‘due consideration’ for the other branches of the government,” and the court must avoid serving its own “needs or . . . wants . . . .”<sup>83</sup> Further, the court recognized that it must not exercise inherent authority where it would step on the toes of either the executive or the legislative branches of government.<sup>84</sup> Last, the court acknowledged that when doubts as to the court’s inherent

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (citing *State v. Chauvin*, 723 N.W.2d 20, 23 (Minn. 2006)).

<sup>74</sup> *Id.* (citing *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003)).

<sup>75</sup> *Id.*; see also MINN. STAT. § 609A (2012); *State v. S.L.H.*, 755 N.W.2d 271, 274 (Minn. 2008); KELLY J. KEEGAN, EXPUNGEMENT IN MINNESOTA CLE, HOT ISSUES IN CRIMINAL LAW AND KEY CASES 8-3 (2012).

<sup>76</sup> MINN. CONST. art. VI, § 1.

<sup>77</sup> *M.D.T.*, 831 N.W.2d at 280 (quoting *Clerk of Court’s Comp. for Lyon Cnty. v. Lyon Cnty. Comm’rs (In re Lyon)*, 241 N.W.2d 781, 784 (Minn. 1976)).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *M.D.T.*, 831 N.W.2d at 280; see also MINN. CONST. art. VI, § 1 (vesting “[t]he judicial power of the state” in the “supreme court, a court of appeals, if established by the legislature, a district court and such other courts . . . as the legislature may establish”).

<sup>81</sup> *M.D.T.*, 831 N.W.2d at 280 (quoting *State by Archabal v. Cnty. of Hennepin*, 505 N.W.2d 294, 298 n.6 (Minn. 1993)).

<sup>82</sup> *Id.* (quoting *In re Lyon*, 241 N.W.2d at 786 (Minn. 1976)).

<sup>83</sup> *Id.* (citations omitted).

<sup>84</sup> *Id.* (quoting *Granada Indep. Sch. Dist. No. 455 v. Mattheis*, 170 N.W.2d 88, 91 (Minn. 1969)).

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authority arise, the court must yield to the co-ordinate branches, resolving those doubts in favor of the other branch.<sup>85</sup>

The court then acknowledged that it is permitted to use its inherent authority where the criminal record of a petitioner raises a serious risk of infringing his or her constitutional rights<sup>86</sup> and where expungement was necessary to the performance of a unique judicial function.<sup>87</sup> In the case at hand, M.D.T. never brought her constitutional rights into question.<sup>88</sup> Therefore, the court turned to the issue of whether M.D.T.'s expungement was necessary to the performance of a unique judicial function.<sup>89</sup>

Turning to this issue, the court acknowledged that in the past the judiciary recognized that one of its unique judicial functions concerned its ability to remedy unfairness from the accessibility of criminal records.<sup>90</sup> However, the court differentiated because the C.A. court was dealing with a petitioner who faced unfairness because his conviction had been set aside.<sup>91</sup> –Since that decision, the court had distinguished between cases resolved in favor of a plaintiff and those that were not.<sup>92</sup>

The court then pointed out that even where the conviction had been set aside, the court never ordered the sealing of records held in the executive branch<sup>93</sup> or held that the court's inherent authority extends to records in the possession of the executive.<sup>94</sup> The court clarified that it possesses the inherent authority to control its own internal records.<sup>95</sup> The court then determined that the authority to control its own records does not extend to records held by the executive branch even where such records are judicially created.<sup>96</sup>

Next, the court examined the legislative branch's intent and concern of keeping criminal records held by the executive in the form of public record.<sup>97</sup> The court recognized that the legislature provided for expungement of criminal records that do not result in conviction, but that it has not provided for

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<sup>85</sup> *Id.* (quoting *Gollnik v. Mengel*, 128 N.W. 292, 292 (Minn. 1910)).

<sup>86</sup> *Id.* (quoting *In re R.L.F.*, 256 N.W.2d 803, 808 (Minn. 1977)).

<sup>87</sup> *Id.* at 281 (citations omitted).

<sup>88</sup> *Id.* at 280.

<sup>89</sup> *See id.* at 281.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (citing *State v. S.L.H.*, 755 N.W.2d 271, 277 (Minn. 2008)).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (citations omitted).

<sup>95</sup> *Id.* (citing *State v. C.A.*, 304 N.W.2d 353, 361. (Minn. 1981)).

<sup>96</sup> *Id.* at 282. In reaching this conclusion the court once again cited the need to proceed cautiously under the separation of powers, and that it must respect the equal authority of another branch of government. *Id.* (citations omitted).

<sup>97</sup> *Id.*

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expungement in cases like M.D.T.'s, where the petitioner stands convicted of a criminal offense.<sup>98</sup> Secondly, the legislature created the Minnesota Government Data Practices Act<sup>99</sup> that creates a presumption that government data records, such as M.D.T.'s, are public.<sup>100</sup> Further, all data "created or collected by" law enforcement, including records of citations, arrests, and incarcerations is to "be public at all times in the originating agency."<sup>101</sup> Additionally, all records held by the Bureau of Criminal Apprehension are to be kept public "for fifteen years following the discharge or the sentence imposed for the offense."<sup>102</sup> Thus, the court concluded that, because fifteen years has not passed, the legislature has determined M.D.T.'s records are to remain public.<sup>103</sup>

The court then decided that the expungement of M.D.T.'s records was not necessary to the performance of a unique judicial function.<sup>104</sup> Therefore, the court held that the district court lacked the authority to expunge criminal records held by the executive, and accordingly reversed that portion of the lower decision.<sup>105</sup>

### C. JUSTICE DAVID STRAS' CONCURRENCE

Justice Stras concurred with the majority opinion in result, but disagreed as to reasoning.<sup>106</sup> He framed the issue as "whether district courts may, consistent with the Minnesota Constitution, expunge executive branch records."<sup>107</sup> Justice Stras first dispensed with the term "inherent authority," labeling the term as "a misnomer—one devoid of any real meaning."<sup>108</sup> In Justice Stras' opinion, the court is really just referring to judicial power under Article VI, section one of the Minnesota Constitution.<sup>109</sup> Additionally, Justice Stras differentiates between the United States Constitution and the Minnesota Constitution—noting the Minnesota Constitution contains a freestanding separation-of-powers clause.<sup>110</sup>

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<sup>98</sup> *Id.*; see also MINN. STAT. § 609A.02, subdiv. 1–3 (2012).

<sup>99</sup> MINN. STAT. § 13.

<sup>100</sup> *M.D.T.*, 831 N.W.2d at 282 (citing MINN. STAT. § 13.01, subdiv. 3).

<sup>101</sup> *Id.* (quoting MINN. STAT. § 13.82, subdiv. 2).

<sup>102</sup> *Id.* (quoting MINN. STAT. § 13.87, subdiv. 1(b)).

<sup>103</sup> *Id.* at 282–83.

<sup>104</sup> *Id.* at 284.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 288 (Stras, J., concurring).

<sup>107</sup> *Id.* at 284.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; see also MINN. CONST. art. III, § 1.

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Justice Stras goes on to define judicial power.<sup>111</sup> He notes that judicial power only extends to actual controversies.<sup>112</sup> Justice Stras then points out that the judiciary has misused inherent authority “to promulgate the rules of evidence and procedure.”<sup>113</sup> He offers a variety of cases in which the guise of inherent authority was used to justify an outcome desirable to the judiciary.<sup>114</sup>

Further, Justice Stras points out that the judiciary invokes its inherent authority when the “interests of justice” permits.<sup>115</sup> To him, the “interests of justice” lacks definability and can be invoked under a “kaleidoscope of circumstances.”<sup>116</sup> He contends that “interests of justice” acts as an ace up the court’s sleeve that it may play when constitutional authority for court action is missing.<sup>117</sup> He argues that when exercising inherent authority, the court turns constitutional analysis on its head by asking whether the constitution expressly forbids the action in place of asking whether the court’s action is included within its judicial power under the Minnesota Constitution.<sup>118</sup>

After expressing his concerns with the court’s use of “inherent authority,” Justice Stras turns to examine whether it is within the court’s judicial power to grant expungement of criminal records held by the executive branch.<sup>119</sup> He contends that granting such expungement would go beyond the traditional understanding of judicial power and ignore the separation of powers doctrine enshrined in the Minnesota Constitution.<sup>120</sup> Thus, Justice Stras departs from the majority’s reasoning but joins in its result that the district court lacks the authority to grant M.D.T.’s request for expungement of records held by the executive.

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<sup>111</sup> *M.D.T.*, 831 N.W.2d at 285 (Stras, J., concurring). Judicial power as the “power that adjudicates upon the rights or persons or property and to that end declares, construes, and applies the laws.” *Id.* (citations omitted). It “extends to any matter which from its nature is subject to a suit at common law, or in equity, and the core power is to decide cases.” *Id.* (citation omitted).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (examples include: striking down statutory limits on attorney fees; ordering public entities to hold settlement conferences; placing a fee (tax) on lawyers to fund the Public Defender’s Office; hearing appeals in the interests of justice where there is otherwise no jurisdiction). However, Justice Stras does not feel all of these examples are abuses of judicial power. *Id.* at 287.

<sup>115</sup> *Id.* at 286.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 287.

<sup>120</sup> *Id.* at 288.

**D. JUSTICE PAUL ANDERSON'S DISSENT**

Justice Paul Anderson, joined by Justice Alan Page, dissented.<sup>121</sup> After reviewing the facts and procedure of the case, Justice Anderson reflected on his concurrence in *S.L.H.* where he expressed concern that the majority's interpretation of its inherent authority would be construed too narrowly.<sup>122</sup> He went on to point out that the majority's opinion in *M.D.T.* confirmed his concern was grounded in logic.<sup>123</sup>

When Justice Anderson turns to the issue at hand, he starts by examining the term expungement.<sup>124</sup> Justice Anderson notes that the district court simply ordered that the records be sealed—as opposed to destroyed.<sup>125</sup> With this distinction in mind, he frames the issue as “whether the district court abused its discretion by ordering the expungement—sealing—of M.D.T.'s criminal records.”

Justice Anderson starts his analysis by reflecting upon the court's decision in *C.A.*,<sup>126</sup> where the court held that one of the judiciary's unique judicial functions is to “control court records and agents of the court . . . .”<sup>127</sup> He noted that the court held that under appropriate circumstances it may exercise its inherent authority to grant expungement orders affecting court records and agents of the court where “expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing, and monitoring an expungement order.”<sup>128</sup> Therefore, Justice Anderson believes the court neither misapplied the law nor abused its discretion.<sup>129</sup>

Then, Justice Anderson took issue with the majority opinion. In his view, the majority was off base with its interpretation of *C.A.*, which in turn created problems with the majority's analysis. The majority interpreted *C.A.* as asserting that the court may exercise inherent authority to grant expungement of an individual's records to remedy unfairness only when the petitioner's conviction had been set aside.<sup>130</sup> As noted above, Justice Anderson identified the court's unique judicial function in *C.A.* as controlling court records and agents of the court.<sup>131</sup>

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<sup>121</sup> *Id.* at 303 (P. Anderson, J., dissenting).

<sup>122</sup> *Id.* at 294 (citing *State v. S.L.H.*, 755 N.W.2d 271, 282 (Minn. 2008)).

<sup>123</sup> *Id.* (expressing concern the judiciary will no longer be able to grant a meaningful remedy).

<sup>124</sup> *Id.* at 295. Expungement means “[t]o erase or destroy.” *Id.* However, in Minnesota, expungement “may consist of the return of the records to the person seeking relief, or the sealing of the records, subject to reopening only upon court order, rather than destruction.” *Id.* (citing *State v. C.A.*, 304 N.W.2d 353, 357 (Minn. 1981)).

<sup>125</sup> *Id.*

<sup>126</sup> *C.A.*, 304 N.W.2d 353.

<sup>127</sup> *M.D.T.*, 831 N.W.2d at 295 (P. Anderson, J., dissenting) (citing *C.A.*, 304 N.W.2d at 358).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 296.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (citing *C.A.*, 304 N.W.2d at 358).

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Next, Justice Anderson agrees with the majority that reducing and eliminating unfairness to individuals is not a unique judicial function in either case—whether resolved in favor of a petitioner or not.<sup>132</sup> He notes that the majority disregards the “balancing test” as immaterial after “engaging in a rather tortured reading of *C.A.*”<sup>133</sup> Justice Anderson next turns to the majority’s concern with the separation of powers.

First, Justice Anderson agrees with the majority in taking a cautionary approach when assessing separation of powers concerns and that doubts should be deferred to a coordinate branch.<sup>134</sup> However, he believes the court is compelled by duty to exercise power granted to it by the Minnesota Constitution and the people of Minnesota to “render a judgment that vindicates the existence of that power.”<sup>135</sup>

He then points out that the majority’s decision relies on the “*situs*” of records and whether the records are stored with an entity that is labeled executive or judicial.<sup>136</sup> Anderson argues that the majority takes an approach that is too formalistic and had been rejected in *C.A.*<sup>137</sup> Justice Anderson then points out that the majority reliance on *situs* leaves the threshold question of whether expungement is necessary to the performance of a judicial function unanswered.<sup>138</sup>

Next, Justice Anderson addresses the ability to differentiate between each branch’s functions and that some functions “cannot readily be separated and distinguished.”<sup>139</sup> Justice Anderson acknowledges that a criminal conviction involves all three branches working together, but believes it is certainly within the court’s province and a core function of the court to control its records.<sup>140</sup>

Last, Justice Anderson addressed some of the policy issues at hand. He started this by acknowledging that the result reached by the majority is not inevitable because several past district court decisions have not been appealed or disputed.<sup>141</sup> He points out that the majority’s opinion leaves the court essentially without remedy to grant expungement.<sup>142</sup> He argues that such interpretation leaves a growing number of people without the ability to turn their lives around and subjects them to collateral consequences of a conviction

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 297. The majority avoids the balancing test by determining that it should only be engaged in where a case had been set aside. *See id.*

<sup>134</sup> *Id.* at 297 (P. Anderson, J., dissenting).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 298.

<sup>137</sup> *Id.* (citing *C.A.*, 304 N.W.2d at 360–61).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (quoting *State ex rel. Patterson v. Bates*, 104 N.W. 709, 711 (Minn. 1905)).

<sup>140</sup> *Id.* at 298–99.

<sup>141</sup> *Id.* at 299.

<sup>142</sup> *See id.* at 302. The expungement remedy is illusory and meaningless as the public will still be able to access a petitioner’s records through the Bureau of Criminal Apprehension. *Id.*

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for a substantial period of time beyond their original sentence.<sup>143</sup> Additionally, he points out that these consequences have a disproportionate impact on communities of color.<sup>144</sup> For all of the above reasons, Justice Anderson and Justice Page dissent from the majority's opinion.<sup>145</sup>

## IV. ANALYSIS

## A. GETTING OFF ON THE WRONG FOOT: EQUITY V. LAW

In *M.D.T.*, The Minnesota Supreme Court began its analysis off-course by framing the issue as a question of law subject to de novo review.<sup>146</sup> In the past, the Minnesota Supreme Court treated inherent authority expungement as an equitable remedy.<sup>147</sup> The court offered no justification for departing from this precedent and framing *M.D.T.*'s issue as an issue of law.<sup>148</sup>

Equity is “the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict rules.”<sup>149</sup> Under the rigidity of law, a person with a criminal record has no available remedy to address the secondary effects of his or her criminal record. Upon petition and balancing the equities, a court may mitigate this rigidity of the law to prevent further injustice to the individual from the preservation of his or her past indiscretion. The expungement of criminal records is properly considered a matter of equity.

As such, the Minnesota Supreme Court recognized that *M.D.T.* did not seek statutory expungement.<sup>150</sup> The expungement remedy provided for by the statute leaves petitioners like *M.D.T.* without any real available legal remedy.<sup>151</sup> When a legal remedy is inadequate or unavailable, equitable relief is

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*; see also Shawn D. Stuckey, *Decreasing the Accessibility to Criminal History Records to Diminish the Devastating Impacts of Collateral Effects on African Americans in Minnesota*, 27 CHICANO-LATINO L. REV. 203, 204 (2008) (“Minnesota is one of the nation's leaders in the disparity of incarceration rates.”).

<sup>145</sup> *M.D.T.*, 831 N.W.2d at 303.

<sup>146</sup> *Id.* at 279. The court relied on *State v. Chauvin*, 723 N.W.2d 20, 23 (Minn. 2006), a case deciding whether the court had inherent authority to impanel a jury, to justify reviewing the issue in *M.D.T.* de novo. *M.D.T.*, 831 N.W.2d at 279.

<sup>147</sup> *State v. Ambaye*, 616 N.W.2d 256, 261 (Minn. 2000). Matters of equity are reviewed under an abuse of discretion standard—unless there is a clear abuse-of-discretion a lower court's decision will be upheld. *Id.*

<sup>148</sup> In addition to *State v. Ambaye*, 616 N.W.2d 256, 261 (Minn. 2000), even if the issue was a question of law, the Minnesota Supreme Court had already decided it had the inherent authority to seal records held outside of the judicial branch. See *State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981) (establishing that when appropriate circumstances exist, inherent authority allows for expungement of records of the court and its agents—thus allowing the sealing of records held outside the judiciary).

<sup>149</sup> Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 609 (1997).

<sup>150</sup> See *M.D.T.*, 831 N.W.2d at 279.

<sup>151</sup> See MINN. STAT. § 609A (2012).

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permissible and may be granted by the courts to “accomplish justice according to the facts of a particular case.”<sup>152</sup> Thus, because the law left M.D.T. without legal remedy, she was forced to seek expungement as a matter of equity.<sup>153</sup>

Where a matter is based in equity, “courts of equity have *exclusive* jurisdiction, there can be no statute barring the *legal* remedy for there *is no right of action at law*.”<sup>154</sup> M.D.T. had no right of action at law and no legal remedy was available to her. Thus, the court’s reliance on the Government Data Practices Act as barring the legal remedy M.D.T. sought was misplaced.<sup>155</sup> The Government Data Practices Act could not bar M.D.T. because she was not seeking a legal remedy—she sought an equitable remedy.

Because courts of equity have *exclusive* jurisdiction in matters of equity, the separation of powers forbids the legislature from placing limits on a court’s equitable power. Further, Minnesota recognized the distinction between law and equity at the time the Minnesota Constitution was adopted.<sup>156</sup> Where a legislative act encroaches on an exclusive judiciary function, the act violates the separation of powers and is unconstitutional.<sup>157</sup> Thus, when the court submits to legislative will, the judicial branch’s power granted to it by the Minnesota Constitution is undercut.

The court should have recognized that expungement is a matter of equity and proceeded to decide whether the district court abused its discretion in granting the equitable remedy of expungement.<sup>158</sup> When a matter is decided in equity, the court reaches its decision by balancing the equities.<sup>159</sup> With equitable expungement, the court weighs and balances whether granting expungement will “yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing, and monitoring an expungement order.”<sup>160</sup> When balancing these equities, the court looks at five factors:

(1) the extent that the petitioner has demonstrated difficulties in securing employment or housing;

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<sup>152</sup> *Minnesota Odd Fellows Home v. Pogue*, 73 N.W.2d 615, 619–20 (Minn. 1955); *see also Equity*, LEGAL INFO. INST. (Aug. 19, 2010), <http://www.law.cornell.edu/wex/equity>.

<sup>153</sup> *See M.D.T.*, 831 N.W.2d at 279.

<sup>154</sup> *Ozman v. Reynolds*, 11 Minn. 459, 462 (1866); *see also Bensel v. Hall*, 225 N.W. 104, 105 (Minn. 1929) (“[R]egardless of statute[,] equity will enforce a legal obligation in the absence of an adequate legal remedy for its enforcement.”).

<sup>155</sup> *M.D.T.*, 831 N.W.2d at 284 (allowing expungement of executive records undermines the legislative policy judgments set forth in the Minnesota Government Data Practices Act); *see also* MINN. STAT. §§ 13.01, 13.87.

<sup>156</sup> *See Olson v. Synergistic Tech. Bus. Sys., Inc.*, 628 N.W.2d 142, 154 (Minn. 2001) (“This statute was in force at the time of the adoption of the Minnesota Constitution and the specific language of the statute was merely intended ‘to preserve in substance the common law distinction between actions at law and suits in equity.’”).

<sup>157</sup> *See Irwin v. Surdyk’s Liquor*, 599 N.W.2d 132, 141–42 (Minn. 1999).

<sup>158</sup> *See State v. Ambaye*, 616 N.W.2d 256, 261 (Minn. 2000).

<sup>159</sup> *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 860–61 (Minn. 2011). If the court rules as a matter of law, the standard of review is *de novo*. *Id.*

<sup>160</sup> *State v. K.M.M.*, 721 N.W.2d 330, 335 (Minn. Ct. App. 2006).

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- (2) the seriousness and nature of the offense;
- (3) the potential risk that the petitioner poses and how this affects the public's right to access the records;
- (4) any additional offenses or rehabilitative efforts;
- (5) other objective evidence of hardship under the circumstances.<sup>161</sup>

In *M.D.T.*'s case, the district court balanced these equities and held expungement should be granted based on the facts of her particular case.<sup>162</sup> When the issue was appealed, the court of appeals upheld the district court's grant of expungement.<sup>163</sup> However, the Minnesota Supreme Court eschewed reviewing the district court's equitable balance by deciding the court did not have inherent authority to grant expungement in the first place.<sup>164</sup>

The court permitted the policy judgments of the legislature to violate the separation of powers and control the scope of the court's remedy. Thus, the court allowed its independent judicial function, of providing an equitable remedy in the interest of justice, to be curtailed. As Justice Paul Anderson recognized, "[a]n expungement remedy that does not extend to . . . records held by the executive branch is essentially no remedy at all."<sup>165</sup>

## B. SEPARATION OF POWERS: INCONSISTENCIES

Although this case note argues granting inherent authority expungement is a matter of equity and does not violate the separation of powers, the Minnesota Supreme Court relied heavily on the separation-of-powers doctrine in reaching its decision in *M.D.T.*<sup>166</sup> The court began the examination of separation of powers by recognizing the court is limited and must proceed cautiously when exercising its inherent authority—as to not disrespect the authority of another branch.<sup>167</sup> Thus, the court's use of its inherent authority and the separation of powers must be subjected to further examination.

When looking at the big picture over time, the court often applies the separation-of-powers doctrine arbitrarily when exercising its inherent authority. At times the court has adopted an expansive view of its inherent authority. For instance, in 2009, while citing inherent authority, the Minnesota Supreme Court exercised a power exclusively belonging to the legislature by creating a fee or tax to be paid by all

<sup>161</sup> *Id.* (citing *State v. H.A.*, 716 N.W.2d 360, 364 (Minn. Ct. App. 2006)).

<sup>162</sup> *See State v. M.D.T.*, 815 N.W.2d 628, 631 (Minn. Ct. App. 2012).

<sup>163</sup> *Id.* at 634 (finding the district court did not abuse its discretion); *see also Nadeau v. Cnty. of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979).

<sup>164</sup> *State v. M.D.T.*, 831 N.W.2d 276, 284 (Minn. 2013). "[A] district court abuses its discretion if it acts against logic and the facts on record, or if it enters fact findings that are unsupported by the record, or if it misapplies the law." *In re Adoption of T.A.M.*, 791 N.W.2d 573, 578 (Minn. Ct. App. 2010) (internal quotation marks and citations omitted).

<sup>165</sup> *M.D.T.*, 831 N.W.2d at 302 (P. Anderson, J., dissenting).

<sup>166</sup> *Id.* at 282.

<sup>167</sup> *Id.*

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Minnesota lawyers.<sup>168</sup> This collection is to be used to help fund the state's public defender system.<sup>169</sup> In the past, the Minnesota Supreme Court had recognized that "tax policy is a peculiarly legislative function."<sup>170</sup> In using its inherent authority to increase the fee, the court demonstrated that it has broad inherent authority, even when exercising authority arguably belonging to the legislative branch.

More recently in *Dickhoff v. Green*,<sup>171</sup> the Supreme Court decided to incorporate the loss-of-chance doctrine in medical malpractice claims in Minnesota.<sup>172</sup> In the past, the Supreme Court addressed the issue of loss-of-chance twice and elected not to develop the doctrine.<sup>173</sup> Thus, loss-of-chance had never been recognized under common law. Prior to *Dickhoff*, the court heard a case, *Hickman v. Group Health Plan, Inc.*,<sup>174</sup> requesting the establishment of wrongful birth and wrongful life doctrines in medical malpractice claims.<sup>175</sup> The Supreme Court recognized that "[b]ecause of these problems and the fact that no such action exists at common law, we consider the establishment of wrongful birth or wrongful life suits to be best within the *exclusive* jurisdiction of the legislature."<sup>176</sup> Under separation of powers, the court's decision in *Dickhoff* should have been left to the exclusive jurisdiction of the legislative branch.

At other times the Minnesota Supreme Court has used its inherent authority in a protective manner as when it cited its inherent authority when striking down a statute placing limitations on attorney sanctions.<sup>177</sup> The court held that allowing the statute to stand impinged on the court's inherent authority to oversee attorneys and attorney fees because the statute would deprive the court "of a final, independent review of attorney fees."<sup>178</sup> The court would not allow the legislature to encroach into a judicial function and violate the separation of powers.<sup>179</sup> However, as the dissent points out, several other jurisdictions have held set statutory maximum fees do not impede upon the court's ability to regulate the practice of

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<sup>168</sup> See *Order Temporarily Increasing Lawyer Registration Fees*, No. C1-81-1206, Order at 1-3 (Minn. filed Nov. 4, 2009); see also *M.D.T.*, 831 N.W.2d at 285-86 (Stras, J., concurring). The nature of a tax cannot be avoided by entitling it a fee.

<sup>169</sup> See *Order Temporarily Increasing Lawyer Registration Fees*, *supra* note 168; see also *M.D.T.*, 831 N.W.2d at 285-86 (Stras, J., concurring). One cannot avoid the nature of a tax by entitling it a fee.

<sup>170</sup> *Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 14 (Minn. 2005).

<sup>171</sup> 836 N.W.2d 321 (Minn. 2013).

<sup>172</sup> *Id.* at 336.

<sup>173</sup> See *Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993); *Leubner v. Sterner*, 493 N.W.2d 119 (Minn. 1992).

<sup>174</sup> 396 N.W.2d 10 (Minn. 1986).

<sup>175</sup> *Id.*

<sup>176</sup> *Hickman v. Grp. Health Plan, Inc.*, 396 N.W.2d 10, 13 (Minn. 1986) (emphasis added) ("Barring constitutional violations, that should end the matter.").

<sup>177</sup> *Irwin v. Surdyk's Liquor*, 599 N.W.2d 132, 141 (Minn. 1999).

<sup>178</sup> *Id.* at 142.

<sup>179</sup> *Id.* at 141-42.

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law.<sup>180</sup> As evidenced in these other jurisdictions, the separation of powers does not, as a matter of absolute necessity, prohibit the legislative branch from creating such caps on fees.

In another example, *State by Archabal v. County of Hennepin*,<sup>181</sup> the Minnesota Supreme Court used its inherent authority and the separation of powers to avoid application of a statutory law mandating all meetings involving public bodies remain open to the public.<sup>182</sup> This situation is analogous to *M.D.T.* because both cases involve a legislative determination of the public's right to information. The *Archabal* court stated if it "orders a litigating public body into a closed settlement conference as a practical necessity in deciding the case and carefully and narrowly limits the scope of the conference to the issues involved in the litigation, application of the Open Meeting Law would violate the separation of powers . . ."<sup>183</sup> The *Archabal* court did not defer to the legislature's policy judgment that such meetings ought to be open in order to protect the public's access to information. The court refrained from deferring to the legislature in order to protect its own ability to grant a remedy and resolve cases.

This is by no means an exhaustive list of times where the judiciary refrains from deferring to a co-branch of government in the name of separation of powers. It does illustrate that there is a variance in the court's deference to the legislature and the court's use of inherent authority. At times the court's inherent authority is broad and exercised "in a 'kaleidoscope of circumstances' that defies categorization."<sup>184</sup> However, the court's variance is understandable given the nature of governance with three branches of government.

Each branch cannot be neatly compartmentalized.<sup>185</sup> The constitution only prohibits each branch from exercising power *exclusively* assigned to another branch.<sup>186</sup> In many instances, governance requires inter-branch cooperation in the performance of government functions, and these functions are often "so interwoven and connected that they cannot readily be separated and distinguished."<sup>187</sup> This is the case with the creation of criminal records as it necessarily involves the work of all three branches—legislature defines crime; executive investigates and charges crimes; and the judiciary convicts crimes.<sup>188</sup>

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<sup>180</sup> *Id.* at 146 (R. Anderson, J., dissenting).

<sup>181</sup> 505 N.W.2d 294, 298 (Minn. 1993).

<sup>182</sup> See MINN. STAT. § 13.D (2012) (stating that settlement conferences within the court are not listed as an exception to the Public Open Meeting statute).

<sup>183</sup> *Archabal*, 505 N.W.2d at 298.

<sup>184</sup> *State v. M.D.T.*, 831 N.W.2d 276, 286 (Minn. 2013) (Stras, J., concurring) (quoting *State v. Beecroft*, 813 N.W.2d 814, 867–68 (Minn. 2012) (Stras, J., dissenting)).

<sup>185</sup> *State ex rel. Patterson v. Bates*, 04 N.W. 709, 711 (1905) (noting "it is not always easy to discover the line which marks the distinction between executive, judicial, and legislative functions . . .").

<sup>186</sup> MINN. CONST. art. III, § 1; see also *M.D.T.*, 831 N.W.2d at 285 (Stras, J., concurring); *Quam v. State*, 391 N.W.2d 803, 809 (Minn. 1986).

<sup>187</sup> *Bates*, 104 N.W. at 711.

<sup>188</sup> Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota—State v. Schultz*, 31 WM. MITCHELL L. REV. 1331, 1367 (2005).

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Where there is overlap, if the exercise of a power is not *exclusively* entrusted to either the executive or judicial branches, the branch to which the power belongs must be determined by law—by the legislature.<sup>189</sup> Thus, in order to grant expungement, as the court has recognized in the past, the court must be exercising power *exclusively* assigned to it. The majority in *M.D.T.* identifies the power it is exercising as remedying unfairness to individuals—a power not *exclusively* within the judicial branch’s sole discretion.<sup>190</sup>

The court should have identified the power it was exercising as controlling court records and agents of the court as this power is *exclusively* a unique judicial function.<sup>191</sup> The judicial power of the court to control court records is further evidenced by the supreme court’s decision in *In re Welfare of J.J.P.*, where the court held that sealing a judicially created order adjudicating a juvenile as a delinquent and in possession of the executive branch was permissible in the absence of explicit legislative authority.<sup>192</sup> Surprisingly, this decision was released the same day as *M.D.T.*<sup>193</sup>

Additionally, in the majority’s opinion, the court simply differentiated between records based on the location of where the records were held—classifying all records as either executive or judicial.<sup>194</sup> However, during oral argument, the justices addressed and discussed three categories of records—records created and maintained by the judiciary; records created by the judiciary and its agents, but maintained by the executive; and records created and maintained by the executive entities that are not agents of the court.<sup>195</sup>

It is not clear why the judiciary elected to brush over the third category of records, but from past decisions, it is clear that Minnesota district courts have the power to expunge records that are judicially created and maintained.<sup>196</sup> The Minnesota Supreme Court has also recognized the ability of the courts to

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<sup>189</sup> *Bates*, 104 N.W. at 712 (“There may be cases in which a particular power cannot be said to be either executive, legislative, or judicial; and if such a power is not by the Constitution unequivocally entrusted to either the executive or judicial departments of the government, the mode of its exercise and the agency must necessarily be determined by law—that is, by the Legislature.”).

<sup>190</sup> *State v. M.D.T.*, 831 N.W.2d 276, 286 (Minn. 2013) (P. Anderson, J., dissenting).

<sup>191</sup> *Id.* (P. Anderson, J., dissenting). The court may control records and agents in order to remedy unfairness to individuals. *Id.*

<sup>192</sup> *In re Welfare of J.J.P.*, 831 N.W.2d 260, 262 (Minn. 2013). Unlike Minnesota statute section 609A.02, section 609B.198 subdivision 6 does not include the language “all records.” Thus, under the plain language of Minnesota statute section 609B.198, permission of the judicial branch to seal executive records is not explicitly present. However, this did not prevent the court from permitting at least one variety of judicially created records held by the executive from being sealed. *J.J.P.*, 831 N.W.2d at 262.

<sup>193</sup> Both cases were decided May 22, 2013. *See id.*, *M.D.T.*, 831 N.W.2d 276.

<sup>194</sup> *See generally id.* (differentiating between records created and maintained by the judiciary and records in possession of the executive).

<sup>195</sup> *See generally* Oral Argument, *State v. M.D.T.*, 831 N.W.2d 276 (No. A111285), *available at* [http://www.tpt.org/courts/MNJudicialBranchvideo\\_NEW.php?number=A111285](http://www.tpt.org/courts/MNJudicialBranchvideo_NEW.php?number=A111285).

<sup>196</sup> *See State v. V.A.J.*, 744 N.W.2d 674, 676 (Minn. Ct. App. 2008); *State v. S.L.H.*, A06-1750, 2007 WL 2769652 (Minn. Ct. App. Sept. 25, 2007), *aff’d*, 755 N.W.2d 271 (Minn. 2008); *State v. T.M.B.*, 590 N.W.2d 809, 811 (Minn. Ct. App. 1999).

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order expungement of records maintained by agents of the courts.<sup>197</sup> Additionally, one can infer from *C.A.* the court does not have a right to order expungement of records that are created and held by executive branch members who are not subject to judicial control as agents of the court.<sup>198</sup>

In place of the recognizing the three historical categories, the court lumped the second and third categories together as executive records. This action allowed the court to circumvent its prior application of inherent authority to control its own records, including those held outside of the judiciary by agents of the court. In the past, district courts had authority to seal judicial records and records held outside of the judiciary by agents of the court, and when the district court exercised its authority it was reviewed under an abuse of discretion standard. The court should have discussed all three categories as it had in past decisions.

### C. EXPUNGEMENT AS A MATTER OF POLICY

The policy justifications permitting the judiciary to grant equitable expungements are quite compelling. Criminal records subject former offenders to collateral consequences. In recent years, the public's access to criminal records has increased as records have become readily available. Members of society from certain populations such as veterans, minorities, people living in poverty, and those suffering from mental illness or addiction are more likely to have criminal records. Last, the criminal justice system includes a focus on rehabilitation.

Citizens with criminal records face a substantial amount of collateral consequences—consequences that result from a criminal conviction, but are not imposed directly by the court.<sup>199</sup> In Minnesota, collateral consequences number in the hundreds.<sup>200</sup> These can limit an offender's ability work in certain careers.<sup>201</sup> Collateral consequences can act as barriers preventing offenders from obtaining occupational or professional licensing.<sup>202</sup> These also may limit a returning citizen's chances to obtain housing.<sup>203</sup> The

<sup>197</sup> See *State v. C.A.*, 304 N.W.2d 353, 360–63 (Minn. 1981) (listing some agents of the court and including others to whom orders may possibly extend). Such expungements were granted under the judiciary's inherent authority to control its own records. See *M.D.T.*, 831 N.W.2d at 295 (P. Anderson, J., dissenting).

<sup>198</sup> See *C.A.*, 304 N.W.2d at 361 (noting that it is beyond the scope of judicial control to order officials of a state security hospital not to disclose information).

<sup>199</sup> *M.D.T.*, 831 N.W.2d at 302 (P. Anderson, J., dissenting).

<sup>200</sup> Brief and Addendum of Council on Crime and Justice et al. as Amici Curiae Supporting Petitioner at 9, *State v. M.D.T.*, 831 N.W.2d 302 (Minn. 2013) (No. A11-1285); see also *National Inventory of Collateral Consequences of Conviction*, AM. BAR ASSOC., <http://www.abacollateralconsequences.org/search/?jurisdiction=2> (last visited Apr. 17, 2014).

<sup>201</sup> See, e.g., MINN. STAT. § 44.11, subdiv. 5 (2012) (employment in the municipal civil service); *id.* § 420.07(6) (service as a firefighter); *id.* § 617.242, subdiv. 6 (ownership or management of adult entertainment facilities). See generally AM. BAR ASSOC., *supra* note 201.

<sup>202</sup> See, e.g., MINN. STAT. § 144.99 subdiv. 9 (health department licenses); *id.* § 325J.03(a)(2) (pawnbroker license). See generally AM. BAR ASSOC., *supra* note 201.

<sup>203</sup> See, e.g., MINN. STAT. § 245C.14, .15 (residing in a household at which services are provided by any Department of Human Services licensee). See generally AM. BAR ASSOC., *supra* note 201.

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person's ability to obtain government benefits may also be inhibited by collateral consequences.<sup>204</sup> There are several additional forms of collateral consequences a returning citizen may experience well after he or she has completed a court-ordered sentence.<sup>205</sup>

Minnesota has seen a sharp rise in the number of criminal convictions over the last three decades.<sup>206</sup> As the number of convictions have risen, so has the public's ability to easily obtain access to criminal records.<sup>207</sup> In Minnesota, criminal records are readily available to the public through the Bureau of Criminal Apprehension<sup>208</sup> and the judicial branch.<sup>209</sup> These public access changes have taken place over the last ten years.<sup>210</sup> The public's ease in access to criminal records further subjects an ex-offender to collateral consequences and can even lead to the exploitation of a person's criminal record.<sup>211</sup>

Collateral consequences have a disproportionate impact on certain communities.<sup>212</sup> Communities of color are incarcerated in greater numbers, subjecting these communities to an increased number of criminal records and collateral consequences.<sup>213</sup> Crime rates are higher among the poor and downtrodden.<sup>214</sup>

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<sup>204</sup> See, e.g., MINN. STAT. § 256D.024, subdiv. 1(a) (general assistance); *id.* § 256J.26, subdiv. 1 (Minnesota Family Investment Program); See generally AM. BAR ASSOC., *supra* note 201.

<sup>205</sup> Criminal records may affect: participation in government contracts; political and civil engagement; family and domestic rights; hunting, fishing, and firearm permits; registration, notification, and residency restrictions; motor vehicle registration and licensing; and other additional items. See generally AM. BAR ASSOC., *supra* note 201.

<sup>206</sup> In 1981, there were 5500 felony convictions in Minnesota. In 2010, that number had almost tripled to 14,311. MINNESOTA SENTENCING GUIDELINES COMMISSION, MSGC REPORT TO THE LEGISLATURE 5 (2012), available at <http://mn.gov/sentencing-guidelines/images/2012%2520Legislative%2520Report.pdf>; see also PEW CTR. ON THE STATES, ONE IN THIRTY-ONE: THE LONG REACH OF AMERICAN CORRECTIONS 42 (March 2009), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2009/PSPP\\_lin31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_lin31_report_FINAL_WEB_3-26-09.pdf).

<sup>207</sup> Davis, *supra* note 15; see also Shawn D. Stuckey, *Collateral Effects of Arrests in Minnesota*, 5 U. ST. THOMAS L.J. 335, 337 (2008).

<sup>208</sup> *Minnesota Public Criminal History*, MINN. BUREAU OF CRIM. APPREHENSION, <https://cch.state.mn.us/pcchOffenderSearch.aspx> (last visited Oct. 27, 2013).

<sup>209</sup> *Access Case Records*, MINN. JUD. BRANCH, <http://www.mncourts.gov/publicaccess> (last visited Oct. 27, 2013).

<sup>210</sup> Davis, *supra* note 15.

<sup>211</sup> Susanna Kim, *Businesses Charge Hundreds to Remove Mug Shots Online*, ABC NEWS (Apr. 23, 2012), <http://abcnews.go.com/Business/businesses-make-profit-copying-mug-shots-online-critics/story?id=16157378> (posting mug shots online and forcing offenders to pay for removal).

<sup>212</sup> *State v. M.D.T.*, 831 N.W.2d 276, 302 (Minn. 2013) (P. Anderson, J., dissenting).

<sup>213</sup> *Id.*; see Erin Westbrook, Comment, *Collateral Sanctions As Punitive Sentences and the Minnesota Judiciary's Expungement Authority*, 9 U. ST. THOMAS L.J. 959, 966 (2012) (noting collateral consequence disproportionately punish minorities); see also Brief and Addendum of Council on Crime and Justice et al. as Amicus Curiae Supporting Petitioner, *supra* note 200, at 18.; Lucy Wieland, Editorial, *Minnesota's Racial Disparities: A Judge's View*, STAR TRIB. (Minneapolis), Apr. 17, 2011, <http://www.startribune.com/opinion/commentaries/119948639.html> ("Since 1981, the prison population in Minnesota has tripled, and 47 percent of inmates are now men and women of color.").

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Criminal records contribute to problems Minnesota veterans face in obtaining employment and housing as well.<sup>215</sup> People with mental health conditions also are excessively involved in the criminal justice system.<sup>216</sup> People suffering from addiction to either drugs or alcohol disproportionately come under the cloud of a criminal record.<sup>217</sup> These communities continue to face what can be insurmountable consequences stemming from criminal records even after they have paid their debt to society.<sup>218</sup>

It is at times forgotten that the Criminal Code in Minnesota focuses not on punishment, but on deterrence and *rehabilitation*.<sup>219</sup> In fact, “rehabilitation of the convicted person has been widely accepted as a primary goal of post-sentence procedures . . . .”<sup>220</sup> Rehabilitation is “[t]he restoration of one convicted of a crime to a respected and useful position in society . . . .”<sup>221</sup> Rehabilitation is accomplished by improving “a criminal’s character and outlook so that he or she can function in society without committing other crimes.”<sup>222</sup>

Additionally, the legislature has declared:

[I]t is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship. The opportunity to secure employment or to pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession or business is essential to rehabilitation and the resumption of the responsibilities of citizenship.<sup>223</sup>

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<sup>214</sup> Westbrook, *supra* note 214, at 966 (noting collateral consequence disproportionately punish minorities).

<sup>215</sup> Brief and Addendum of Council on Crime and Justice et al. as Amicus Curiae Supporting Petitioner, *supra* note 201, at 21.

<sup>216</sup> *Id.*; see also NAT’L ALLIANCE ON MENTAL ILLNESS MINN., ADVOCATING FOR PEOPLE WITH MENTAL ILLNESS IN THE MINNESOTA CRIMINAL JUSTICE SYSTEM 2 (Nov. 2009), available at <http://www.namihelps.org/advocatingbooklet2.pdf> (stating that 60% of Minnesotans in jail suffer from mental illness).

<sup>217</sup> MINN. DEP’T OF HUMAN SERVS., DRUG AND ALCOHOL ABUSE IN MINNESOTA: A BIENNIAL REPORT TO THE 2009 MINNESOTA LEGISLATURE 18 (2009), available at [http://www.dhs.state.mn.us/main/groups/disabilities/documents/pub/dhs16\\_144046.pdf](http://www.dhs.state.mn.us/main/groups/disabilities/documents/pub/dhs16_144046.pdf) (“The majority of cases coming to our courts involve alcohol/drug dependent persons. Alcohol/drug abuse and addiction is a factor in 80 to 90 percent of Minnesota’s criminal cases . . . .”).

<sup>218</sup> Zainab Wurie, *Tainted: The Need for Equity Based Federal Expungement*, 6 S. REGION BLACK L. STUDENTS ASS’N L.J. 31, 36 (2012) (noting that “[C]onsequences of a criminal conviction linger long after the sentence imposed by the court has been served . . . .”).

<sup>219</sup> MINN. STAT. § 609.01 (2012); see also Westbrook, *supra* note 214, at 962.

<sup>220</sup> MINN. STAT. § 609 Advisory Committee’s Comment (1963).

<sup>221</sup> BALLENTINE’S LAW DICTIONARY 1081 (3d ed. 1969).

<sup>222</sup> BLACK’S, *supra* note 1, at 1398–99.

<sup>223</sup> MINN. STAT. § 364.01 (2012).

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Collateral consequences inhibit rehabilitation by preventing ex-offenders from reintegrating into society.<sup>224</sup> Minnesota has not followed the trend of other states in limiting third-party public access to criminal records.<sup>225</sup> Additionally, criminal records affect underrepresented groups, further disadvantaging these communities.<sup>226</sup> When circumstances are appropriate, full expungement is imperative for helping Minnesotans to rehabilitate their lives after they have paid their debt to society as imposed by the courts.<sup>227</sup>

### V. CONCLUSION

In *M.D.T.*, the Minnesota Supreme Court determined that a district court does not have inherent authority to grant expungement of criminal records held by the executive.<sup>228</sup> It did so in the name of the separation of powers doctrine because sealing records held in the executive is not a unique judicial function.<sup>229</sup>

The court began astray by treating the court's authority to grant expungement as a matter of law. As in the past, the court should have recognized that expungement is an equitable matter for which it can grant a complete remedy where it has properly weighed the equities at hand.<sup>230</sup> By relying on a statute or *law*, the court allowed its equitable power to be limited by the legislature in violation of the separation of powers.<sup>231</sup>

Over the years, the Minnesota Supreme Court has at times broadly applied its inherent authority and used its inherent authority to protect the integrity of its unique judicial power.<sup>232</sup> Criminal records are the creation of the cooperative effort of the three branches.<sup>233</sup> The judiciary is not prohibited from sealing records because the creation and storage of criminal records do not fall under any power belonging exclusively to any branch of government in Minnesota.<sup>234</sup> In the past, the court divided criminal records

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<sup>224</sup> Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999); see also Westbrook, *supra* note 214, at 969.

<sup>225</sup> Brief and Addendum of Council on Crime and Justice et al. as Amid Curiae Supporting Petitioner, *supra* note 201, at 6.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> State v. M.D.T., 831 N.W.2d 276, 284 (Minn. 2013).

<sup>229</sup> *Id.*

<sup>230</sup> See *supra* Part IV.

<sup>231</sup> See *supra* Part IV.

<sup>232</sup> See *supra* Part IV.

<sup>233</sup> See *supra* Part IV.

<sup>234</sup> See *supra* Part IV.

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into three categories and the court determined it had the authority to seal records held outside of the judiciary if the records were held by an agent of the court.<sup>235</sup>

There are strong policy justifications in favor of allowing a past offender's records to be sealed regardless of the location of such records.<sup>236</sup> Records are readily available to the public leaving room for certain communities to face hundreds of collateral consequences.<sup>237</sup> This inhibits rehabilitated members of these communities from reentering society as restored citizens.<sup>238</sup>

In its decision, the Minnesota Supreme Court deferred to the legislature to make policy judgments and create any new law allowing the court to decide to expunge records held outside of the judiciary.<sup>239</sup> With the ball in the legislature's court, the community must await legislative action permitting the judiciary to seal all records. In the past, the legislature has made attempts to ease restrictions on expungement without success.<sup>240</sup> Following the *M.D.T.* decision, an Expungement Working Group within the Minnesota House of Representatives has once again been meeting in the interim.<sup>241</sup> Due to the holding in *M.D.T.*, it is now of greater importance for the legislature to timely address these policy concerns in future legislative sessions.

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<sup>235</sup> See *supra* Part IV.

<sup>236</sup> See *supra* Part IV.

<sup>237</sup> See *supra* Part IV.

<sup>238</sup> See *supra* Part IV.

<sup>239</sup> See *State v. M.D.T.*, 831 N.W.2d 276, 283 (Minn. 2013). It is plainly appropriate to recognize and accommodate legislative policy judgments in the context of expungement of criminal records held outside the judiciary.

<sup>240</sup> Davis, *supra* note 15.

<sup>241</sup> Audio Files: Expungement Working Group Audio & Video Archives 2013–2014, held by Minnesota House of Representatives Expungement Working Group, <http://www.house.leg.state.mn.us/comm/workinggroups/expungaudio.asp>.