



1999

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Recommended Citation

Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 *Stan. L. & Pol'y Rev.* 153 (1999). (reprinted with permission of the Board of Trustees, Leland Stanford Junior University)

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Citation: 11 Stan. L. & Pol'y Rev. 153 1999-2000

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Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences

by
Nora V. Demleitner

"The most heartrending deprivation of all is the inequality of status that excludes people from full membership in the community, degrading them by labeling them as outsiders, denying them their very selves."¹

I. INTRODUCTION

In early colonial history, even criminals could find a second home in North America. Many of the earliest founders of the state of Georgia, for example, had been released from English prisons. Upon arrival in the United States they were treated like law-abiding citizens, unburdened by restrictive sanctions.² This openness toward those who had criminal convictions was indicative of the willingness of the colonies to allow newcomers full membership.

Much has changed since then. Not only are most foreigners with criminal convictions excluded from admission to the United States, but since 1996, the federal government has increasingly focused on the deportation of even long-term permanent residents who have been convicted of criminal offenses.³

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*Collateral sentencing
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further serve to
reinforce the political,
economic and social
exclusion of the ex-
offender from the
polity.*

While the United States can banish non-citizen offenders from its territory, exile in penal colonies abroad for citizens has long been abolished. Nevertheless, upon release from prison or discharge from non-incarcerative sentences, many ex-offenders find themselves internally exiled.⁴ They are saddled with restrictions that exclude them from major aspects of society. An increasing number of mandatory exclusions from the labor force and governmental programs have followed a temporary decrease of some collateral consequences during the 1960s and early 1970s.

Despite their importance, collateral consequences arising from criminal convictions have not elicited much interest in recent years.⁵ One of the reasons for this neglect may be that some serious disqualifications have been abolished or restricted in scope.⁶ No longer are prisoners automatically divorced; no longer are they deemed incompetent to enter into contracts or to inherit. In most states ex-offenders eventually regain the right to vote. The additional disqualifications that have been added, however, frequently leave former offenders excluded from participation in important aspects of life. Increasingly, regulatory and administrative decisions denying governmental benefits also substantially impact the ex-offender's family by restricting her employment opportunities and participation in governmental programs. Moreover, the rise in the rate of individuals with criminal records has caused a growing number of ex-

offenders and their families to experience this *de facto* punishment.

Ultimately, exclusions from the political, economic and social spheres of life undermine the notion that offenders can ever be successfully rehabilitated. In conjunction with the exponential increase in the number and length of incarcerative sentences during the last two decades, collateral sentencing consequences have contributed to exiling ex-offenders within their country, even after expiration of their maximum sentences.

The impact of collateral consequences is especially disturbing since such consequences frequently lack penological justification. They merely add to the overall severity of the sentence without being grounded in theories of retribution, prevention, deterrence, or rehabilitation.

This article explains the different types of collateral sentencing consequences, and groups them into categories of political, economic and social rights.⁷ It then highlights how collateral consequences act in an exclusionary manner and cause ex-offenders to become society's outcasts. Because of the serious impact these sentencing consequences have on the individual and their potential violation of human rights norms, the article questions the rationale on which such consequences are based. Generally, the language of prevention is employed to justify collateral sentencing consequences. As currently constructed, however, collateral consequences are not grounded in sound penological theory and cause even non-dangerous and rehabilitated ex-offenders to feel exiled. To avoid wasting human potential by frustrating the reintegration of ex-offenders into society, I suggest a new framework for collateral sentences.

Collateral consequences should generally be imposed only if necessary, based on preventive and, to a lesser extent, retributive and denunciatory grounds. Sweeping, automatically imposed restrictions, which are reminiscent of mandatory sentences, should be abolished since they are unnecessarily punitive. Sentencing courts should announce all collateral consequences publicly and factor them into the overall sentence. Those collateral consequences that are retained should be based on guidelines constructed primarily on preventive grounds. New legislation imposing collateral consequences should include sunset provisions so as to force lawmakers to assess their efficacy.

II. THE BREADTH OF COLLATERAL SENTENCING CONSEQUENCES

Long in existence, collateral sentencing consequences encompass all civil restrictions that flow from a criminal conviction. Despite their innocuous name, for many convicted offenders, and especially those

who never serve any prison time, these "collateral" consequences "are . . . the most persistent punishments that are inflicted for [their] crime."⁸ This holds even more true today than in the past because of the large number of ex-offenders and the increased regulatory activity of state and federal governments. The quality and quantity of collateral sentencing consequences therefore should be scrutinized.

Today's officially sanctioned collateral consequences of criminal convictions are manifold.⁹ Many of them arise by operation of state law,¹⁰ but federal law governs an increasing number.¹¹ They range from the loss of civil and political rights to the deprivation of economic entitlements. Among them are the loss of voting rights and the right to run for or hold office, rejection from jury service, prohibition on certain federal benefits, and the ban on select professional licenses.¹² Collateral consequences of criminal convictions also include registration and community notification statutes.¹³ Sentencing consequences are imposed either automatically upon conviction or are discretionary; they may be part of the sentence or be assessed subsequently by a third party, such as a regulatory agency.¹⁴ While many such consequences are temporary, others are permanent unless the ex-offender takes extraordinary steps.¹⁵ The number and scope of such adverse consequences tend to be unknown even to the participants in the criminal justice system, often because they are scattered throughout different bodies of law.¹⁶ However, collateral sentencing consequences are far-reaching. "Even when the sentence has been completely served, the fact that a man has been convicted of a felony pursues him like Nemesis."¹⁷

Before the scope of current restrictions can be analyzed, it is necessary to explore their historical origin, recent changes, and prior attempts at modification. Subsequently, existing collateral sentencing consequences will be grouped and analyzed in terms of their impact on economic, political and social rights, categories that are indicative of membership in the modern state.¹⁸

A. COLLATERAL CONSEQUENCES AND THE RESTORATION OF RIGHTS: PAST TRENDS

Historically, continental European countries frequently imposed "civil death" upon those convicted of certain serious offenses. "Civil death" entailed, among other things, the permanent loss of the right to vote, to enter into contracts, and to inherit or bequeath property.¹⁹ The ex-offender was treated as if already dead. His membership in society, as conceived at the time, was over. While neither Great Britain nor the United States ever adopted the concept of "civil death" in its entirety, until the 1960s consequences of criminal convictions in

the United States included the automatic dissolution of marriage, the denial of licenses ranging from employment to fishing permits, and the inability to enter into contracts or to engage in civil litigation.²⁰

Starting in the 1950s, attempts were made to improve the post-release situation of ex-offenders. While often basing their views on different rationales, the advocates of change shared the belief that the civil rights of ex-offenders should be restored at the end of their sentences. The National Council on Crime and Delinquency's 1955 Standard Probation and Parole Act called for the restoration of all civil rights upon the discharge of a prisoner from imprisonment or parole.²¹ In 1956, the National Conference on Parole found that "[t]he present law on deprivation of civil rights of offenders is in most jurisdictions an archaic holdover from early times and is in contradiction to the principles of modern correctional treatment."²² The Model Act drafted by the National Council on Crime and Delinquency in 1962 called for the discretionary expungement of criminal records, which would restore the individual to the legal position he held prior to his conviction unless he committed another offense.²³

Apparently as a consequence of these efforts, the number and restrictiveness of statutes imposing collateral consequences on offenders declined during the 1960s and the early 1970s.²⁴ This apparent trend, however, was halted, if not reversed, in the late 1980s and the 1990s. By the mid-1980s, the "get tough" approach to crime included restrictions on ex-offenders' right to own firearms and on their parental rights.²⁵ Since then offenders have been increasingly required to register²⁶ and have been legally excluded from governmental benefit schemes.²⁷

Another consequence of the reform efforts of the 1960s was that a growing number of states came to permit the automatic, statutory restoration of civil rights for those convicted under their penal codes. Such restoration may occur either upon execution of the full sentence or after a certain period of time has passed since release.²⁸ Alternatively, an ex-offender can regain the full panoply of rights through the expungement or sealing of his criminal record after a certain number of years, either by operation of law or upon application.²⁹ Considered a reward for rehabilitation, such expungements at least alleviate the legal (but not the social) consequences of criminal convictions.

Prior to the passage of such legislation, gubernatorial pardons provided the sole avenue for ending collateral consequences.³⁰ This continues to be the case today in those states that do not allow for the automatic expiration of post-sentence consequences. However, state law, which determines the impact of

gubernatorial pardons,³¹ does not always lead to the restoration of an ex-offender's political rights.³² More problematically, because pardons are considered extraordinary procedures, they historically have been available only to a limited number of offenders.³³

The president has the power to pardon offenders convicted of federal offenses. Despite the rising number of federal prosecutions and convictions, however, the use of presidential pardons has fallen significantly over the last two decades.³⁴ Currently, only those convicted of minor offenses who were released from imprisonment many years ago and can be considered fully rehabilitated will even be considered for a presidential pardon.³⁵

The limited opportunities for ending collateral sentencing consequences after the offender's maximum sentence has expired emphasize their continuing importance. Collateral sentencing consequences continue to impact an ex-offender's employment, civil, and welfare rights significantly.

B. THE IMPACT OF COLLATERAL SENTENCING CONSEQUENCES IN THE 1990S

Citizenship implies full membership in the polity. Full membership encompasses a set of rights and duties that have evolved over time and that fall into three broad categories. First, the eighteenth century marked the recognition of rights such as freedom of speech and religion, which are "the rights necessary for individual freedom."³⁶ Together with the right to own property and to contract, these rights have been referred to as "civil rights."³⁷ Second, the nineteenth century witnessed the grant of political rights through the ballot box, which connoted "the right to participate in the exercise of political power."³⁸ Finally, the progressive extension of economic and social welfare rights characterized the twentieth century.³⁹ The latter set of rights includes entitlements to food and shelter, cultural rights, and access to welfare and education.⁴⁰ Historically in the United States, civil and political rights have played a much more dominant role than social and economic rights. With the growth of the welfare state and the rise of regulatory agencies, however, that situation has changed.⁴¹

In this tripartite framework, the right to work, or the right of access to the labor market, is a basic civil right.⁴² Since the liberal state assumes that "the labor market is the main instrument of incorporation,"⁴³ the position of individuals in such a society depends to a large extent on their participation in the labor force.⁴⁴ This holds particularly true for the United States, where the 1996 welfare legislation has reinforced individual responsibility and participation in the labor market as crucial underlying

requirements for full participation in society and the state.⁴⁵

Collateral sentencing consequences impact all of the above sets of rights. As the relative importance of these rights has evolved over time, the effect of collateral consequences has changed accordingly. Modifications in the standard conception of societal membership necessitate a reevaluation of the exclusionary nature of sentencing consequences.

I. Restricted Access to Employment

In U.S. society, work constitutes a prerequisite for full membership. An analysis of the impact of collateral sentencing consequences on the ex-offender's access to the labor market is therefore necessary. The effect of depriving ex-offenders of certain employment opportunities will depend on that person's educational and professional background and the state and typology of the current economy. At a time when the regulation of employment by governmental agencies and professional bodies was minimal and most labor force participants were employed as unskilled or low-skilled workers in the agricultural, or later, in the manufacturing sector, the exclusion of ex-offenders from certain types of employment had a limited effect. As low-skilled jobs continue to disappear and governmental regulatory mechanisms and professional organizations oversee an ever larger number of professions, however, collateral consequences will have an increasingly negative economic impact on ex-offenders.⁴⁶ The exclusion of ex-offenders from vast segments of the labor market as a result of governmental regulation of many professions parallels the effect of restrictions on the ex-offender's right to contract in the nineteenth and early twentieth centuries.

Ex-offenders are formally excluded from many employment opportunities that require professional licenses.⁴⁷ Such positions range from lawyer to bartender, from nurse to barber, from plumber to beautician.⁴⁸ Professional disqualifications do not depend on the existence of a connection between the prior offense and the employment. They have traditionally been justified as necessary "to foster high professional standards,"⁴⁹ and have been couched in general terms, such as "good moral character."⁵⁰ The Supreme Court has upheld the right of states to establish qualifications for entry into certain employment.⁵¹

Former offenders also often do not qualify for bonded positions because insurance companies are unlikely to provide fidelity insurance to employers who knowingly hire ex-offenders.⁵² Finally, as ex-offenders are frequently barred from possessing firearms, when their handling is a prerequisite for employment, ex-

offenders are indirectly excluded from these jobs.⁵³ As these restrictions indicate, felony convictions "impose . . . a status upon a person which not only makes him vulnerable to future sanctions . . . but which also seriously affects his reputation and economic opportunities."⁵⁴

In recent years, the number of employment and licensing arrangements that demand the disclosure of a prior criminal record also has increased substantially, and pressure continues to add additional disclosure requirements.⁵⁵ This means that ever more employers are mandated to require ex-offenders to reveal their convictions, which usually will result in the denial of jobs to these applicants.

In addition, ex-felons are often excluded from governmental programs because of their prior convictions. While those exclusions tend to be connected to the underlying offense, they frequently cause ex-offenders to be virtually barred from certain employment—often jobs for which they are most qualified. The following example will show how such restrictions, which are often based on preventive grounds, may be overinclusive and unjust in individual cases.

Medicare or Medicaid service providers convicted of program-related fraud or felony narcotics offenses may be excluded from federal Medicare/Medicaid reimbursement programs.⁵⁶ Information about a provider's loss of Medicare/Medicaid reimbursement privileges is made available to health plans and to federal and state government agencies responsible for licensing.⁵⁷ The potential professional ramifications of such a criminal conviction are limitless, and may lead to the exclusion of the ex-offender from employment in health care.

While the overall concept of such exclusions may be rational and defensible on preventive grounds, individual cases reveal their inequity and over-inclusiveness.⁵⁸ When Jane Smith pled guilty to Medicare fraud in 1992, she was sentenced to three years probation. The regulatory agency subsequently imposed a ten year Medicare/Medicaid exclusion.⁵⁹ While she did not appeal her sentence, her two co-defendants, the owners of the medical equipment company for which she had worked as a bookkeeper, appealed theirs. The Assistant United States Attorney in charge of the case stated publicly that Ms. Smith was by far the least culpable of the three defendants. Yet, in the end her Medicare/Medicaid exclusion was as long as that of the most culpable member of the group, and twice as long as that of the second most culpable offender.

After her conviction, Ms. Smith stayed home to bring up her children and later to take care of her ailing husband. During that time she developed an interest and skill in nursing, which she decided to turn into a

profession. She applied to nursing school in 1995, was accepted, and then realized that upon graduation she would not be able to find work as a nurse because of her still-continuing Medicare/Medicaid exclusion. Even though her only brush with the law had been her fraud conviction, and despite the cooperation of the prosecutor, it was, at this point, legally impossible to decrease or end Ms. Smith's exclusion.

This case illustrates the way in which collateral sentencing consequences that were designed to prevent further fraudulent conduct may serve to punish low-level offenders for long periods of time after their probationary period has expired. "Where such restrictions on the pursuit of a calling are placed upon ex-prisoners, the society has reinforced the definition of the prisoner as a non-citizen, almost a pariah."⁶⁰

While the removal of civil and political rights is frequently considered the most serious deprivation ex-offenders suffer, the impact of the denial of employment might be more dramatic in their daily lives. This is especially true given that our society treats labor force participation as a prerequisite for full membership in the polity. Therefore, practical and symbolic consequences of exclusion from employment combine to underscore the internal exile of ex-offenders.

Equally important in its symbolic character is the denial of civil and political rights to ex-offenders. Such deprivation of the benefits of citizenship carries a strong symbolic message stigmatizing convicted felons as less than full members of society.⁶¹

2. *The Denial of Political Rights*

In most states, ex-offenders are deprived of political rights at least temporarily. They are ineligible to vote, to be elected to public office, and to serve as jurors.⁶² These restrictions strike at the core of the traditional understanding of citizenship, as outlined in the U.S. Constitution.⁶³

While in many states the exclusion ends with the expiration of the maximum sentence, in others it amounts to a life-long ban.⁶⁴ In the latter, ex-offenders' voting rights can be restored only through gubernatorial pardons. Pardons, however, are rare.⁶⁵

The denial of political rights has been part of collateral sentencing consequences since the founding of this country, and existed in England even before then.⁶⁶ Justifications for this exclusion have changed over time, but today many states defend the disenfranchisement of ex-offenders with a "purity of the ballot box" argument. Ex-offenders are assumed either to engage in election fraud or to vote in an anti-democratic, anti-rule-of-law manner.⁶⁷ The latter claim especially pertains to the election of judges and prosecutors, where it is feared that

ex-offenders might elect a public official who is "soft" on offenders or fails to enforce the law.⁶⁸ No empirical evidence, however, substantiates either of these claims.⁶⁹

Despite their long-standing existence, some of the most restrictive denials of the franchise to ex-offenders grew out of attempts to disenfranchise African-Americans after Reconstruction.⁷⁰ The Supreme Court, in *Richardson v. Ramirez*, generally upheld a state's right to deprive ex-offenders of the right to vote.⁷¹ In *Hunter v. Underwood*, however, the Court declared a state constitutional provision to that effect in violation of the Fourteenth Amendment's Equal Protection Clause, since its passage had been motivated by discriminatory intent and it continued to have a disproportionate impact on African-Americans.⁷² Despite this ruling, fourteen states still deprive ex-offenders of the right to vote virtually for life, even though there is evidence indicating the disproportionate racial impact of their disenfranchisement laws.⁷³ Such exclusion is still more disturbing as the right to vote has been expanded in the twentieth century to include ever-larger segments of society. Not only have constitutional amendments granted voting rights to African-Americans, women, the poor, and those over eighteen,⁷⁴ but the courts and federal legislation also have helped open the ballot box to underrepresented groups.⁷⁵

The exclusion of ex-offenders from voting rights is particularly dramatic and of symbolic importance since political rights have traditionally "confer[red] a minimum of social dignity" upon their recipient.⁷⁶ Without voting rights, an individual "is not a member [of a democratic political community] at all."⁷⁷ A restriction on the right to vote, therefore, indicates exclusion from the polity⁷⁸ and undermines an individual's dignity as a citizen.

In recent years, the disenfranchisement of ex-offenders has attracted increased attention, especially in light of its racially discriminatory impact. Thirty-six percent of the estimated 3.9 million Americans who are currently or permanently disenfranchised because of their felony record are African-American men.⁷⁹ This means that thirteen percent of the black adult male population is denied the right to vote.⁸⁰ An attempt to pass a congressional bill restoring voting rights in federal elections to all ex-convicts who have been released from prison, however, failed.⁸¹ The main battleground for the restoration of voting rights to ex-offenders should be in the states, since it is the states that set eligibility requirements for both state and federal elections.⁸² So far, however, there has been insufficient concern about the issue to lead to the reinstatement of political rights to ex-offenders.

3. *The Denial of Social and Welfare Rights*

The deprivation of social and welfare rights has further marginalized some ex-offenders. Welfare programs, designed to assist those in need, may provide cash, in-kind, or indirect financial assistance. The welfare system provides a threshold beyond which no member of society should fall, while at the same time assisting recipients in getting back into the labor market.

A number of welfare support programs explicitly exclude certain types of offenders from their coverage. For example, conviction for a drug trafficking offense can lead to the discretionary denial of certain federal benefits for up to five years for first offenders and up to ten years for those with one prior conviction.⁸³ Upon a third conviction, the court must exclude the offender from such benefit programs permanently.⁸⁴ Even those convicted of drug possession offenses may be barred from the receipt of federal benefits—up to one year for first offenders and up to five years for repeat offenders.⁸⁵ Ex-drug offenders also are excluded from the receipt of grants, contracts, loans, and licenses, including federal education and small business loans.⁸⁶ Another federal law bans individuals convicted of certain drug offenses from receiving assistance through select state programs—including food stamps—that are partially funded by the federal government.⁸⁷

While the denial of assistance to ex-offenders is not designed to affect the public support granted other family members, any denial of benefits to one family member necessarily impacts the others.⁸⁸ In that respect, the loss of social and welfare benefits differs from restrictions on civil and political rights. While civil and political rights serve a more symbolic function and largely concern only individuals, denial of social and welfare rights directly impacts the economic well-being of ex-offenders and their families.

The welfare state increases the collateral harm that ex-offenders, their families, and their communities suffer by partially excluding them from its coverage. Denials of social and welfare rights have a new and different quality because of their broad and potentially dramatic impact on the ex-offender and her environment. Ultimately, they serve to exclude the ex-offender from sharing in the benefits the modern state grants to those it considers full citizens.

III. SOCIETAL OUTCASTS

Collateral sentencing consequences deny ex-offenders the traditional rights of citizenship and indicia of societal membership. Their exclusion from the labor market and additional burdens imposed upon them have led to their status as outcasts.⁸⁹ Such legal deprivation of rights and benefits is particularly demeaning since its

effects often are permanent. Frequently, these collateral consequences foil possibilities for reintegration, and therefore relegate the ex-offender to a lifetime of exclusion. The permanence and scope of the exclusion of ex-offenders from society make it subject to challenge under international human rights norms.

The denial of membership rights to ex-offenders parallels the denial of rights to permanent residents. The restrictions on the rights of non-citizens, however, tend to be ameliorated by the fact that they are full members in another polity, that the rights of which they are deprived are more limited than those denied to ex-offenders, and that after five years of permanent residency they may naturalize, thus realizing all rights and benefits of citizenship. Ex-offenders often have no possibility of redemption.

A. COMPARING EX-OFFENDERS AND PERMANENT RESIDENTS: RESTRICTED MEMBERSHIP

Citizenship can be conceptualized in a number of different ways. Citizenship may be defined as “participation and membership within a democratic community”—a “social contract” concept of citizenship.⁹⁰ Alternatively, citizenship may include only those who are morally able and sufficiently virtuous to participate in governing—a “civic virtues” concept of citizenship.⁹¹

Citizenship, as construed in nationality law, determines who will have access “to scarce resources in society.”⁹² As modern welfare states have bestowed economic and social rights upon non-citizens, primarily legal, long-term residents, the conception of citizenship has become more inclusive. Some have even argued that citizenship has become tantamount to membership.⁹³ The expansion of membership rights, however, has bypassed ex-offenders. They continue to be denied rights that have been extended to an ever-larger group of societal members. Therefore, ex-offenders are “relegate[d] to second-class citizenship.”⁹⁴

1. *Second-Class Citizens*

Ex-offenders are prohibited from partaking in the political process because they are construed as a threat to the social order and to general norms of morality. That exclusion incapacitates convicted offenders and denies them the opportunity “to exercise any real power within the [democratic] community,”⁹⁵ based solely on their past actions. The denial of citizenship rights to ex-offenders may be explained either under an assumption that they have breached the social contract⁹⁶ or that they lack sufficient virtues for citizenship.⁹⁷

The ex-offender’s exclusion from the ballot box, political office, and jury service parallels the exclusion of non-citizens.⁹⁸ Presumably, neither group can be trusted

to have developed the necessary sense of right and wrong or an understanding of the rule of law. In many states, however, permanent residents may be able to gain voting rights (by becoming citizens) more quickly than ex-offenders are able to re-gain their lost franchise.⁹⁹ Therefore, the exclusion of ex-offenders is more comparable to past denials of access to political power for other marginalized groups, such as African-Americans, women, and the poor. The disenfranchisement of racial minorities, in particular, has alienated them from the political and legal system—a result also likely to befall many ex-offenders.¹⁰⁰ Moreover, ex-offenders generally do not benefit from the support of other groups unless their plight can be tied into other societal or group concerns, such as the disproportionate denial of voting rights to African-Americans.¹⁰¹

2. *The Undeserving*

Even though political rights have generally remained the prerogative of citizens, the last few decades witnessed an expansion of social and welfare rights to all those considered members of society, including legal, long-term residents.¹⁰² In the United States, the mid-1990s represented a switch to a “civic virtues” conception of citizenship in which the “undeserving,” citizens and non-citizens alike, were increasingly excluded from the benefits of membership in society.¹⁰³

The U.S. welfare state was built on the premise that the state is socially responsible for those who temporarily fall on hard times. Implicit in the New Deal and Great Society programs was the belief that the recipients of such benefits were worthy, and would rely on public support only for short-term survival before returning to work. As the public perception of the welfare recipient changed, a second rationale came to dominate. This rationale is reflected in the 1996 welfare legislation and its subsequent amendments, which adopted the notion that only “deserving” individuals should benefit from public largesse.¹⁰⁴ “[W]elfare policy in the United States ‘is fundamentally a set of symbols that try to differentiate between the deserving and undeserving poor in order to uphold such dominant values as the work ethic and family, gender, race, and ethnic relationships.’”¹⁰⁵

Once poor individuals are classified as morally undeserving, they can be viewed more easily as having forfeited the right to receive social assistance.¹⁰⁶ Therefore, the behavior of individuals determines whether they are deemed full members, eligible for and deserving of society’s assistance.¹⁰⁷ The work-welfare programs developed in the 1980s and 1990s, for example, are based on the assumption that citizens have obligations and duties to society that must be fulfilled before they can expect any non-contributory social benefits. After all, the

public views itself as only obligated to help those who fulfill their societal duties and who behave in socially accepted ways.¹⁰⁸ Consequently, the existence of the welfare state has “shaped Americans’ conception of the meaning and incidents of citizenship.”¹⁰⁹

Because they failed to live up to societal expectations, ex-offenders are deemed to have proven themselves unworthy of societal support. They are viewed as having forfeited their full membership rights—and with them their rights to assistance—at the time they commit their offense.¹¹⁰

The situation of non-citizens, however, is different. Even though they also are generally considered undeserving and the denial of welfare benefits serves to exclude and stigmatize them, they have the option of attaining citizenship or of becoming “worthy” of public assistance by joining the armed forces or accumulating a work history of ten or more years.¹¹¹ Moreover, immigrants’ rights groups and members of the public have criticized openly the exclusion of aliens from welfare programs.¹¹² The same, however, does not hold true for ex-offenders.

The effect of the denial of welfare benefits to ex-offenders is compounded by their systematic exclusion from large segments of the labor market. The requirement of civic-republican virtues, which has been extended from political participation to market participation, has been used to deny market access and market power to the “undeserving.”

While non-citizens and ex-offenders are prohibited from taking up certain types of employment, the list of exclusions is substantially longer for the latter. Permanent residents are barred only from a relatively limited category of public sector employment.¹¹³

Ultimately, neither group is treated like those “deserving” citizens who can enjoy the full panoply of civil, political, and economic rights. While permanent residents are provided with the opportunity to join the group of “deserving” citizens through naturalization, ex-offenders are excluded for a much longer period of time, if not permanently. This practice continues their stigmatization and punishment long after they have served their judicially imposed sentence.

B. RESTRICTED MEMBERSHIP AS A VIOLATION OF INTERNATIONAL HUMAN RIGHTS

Ex-offenders remain banished from mainstream society. Even upon expiration of the maximum sentence, collateral sentencing consequences continue to remove the ex-offender from society—at least figuratively—by bestowing outlaw status upon her and preventing her from regaining full membership rights. “Our actual practice is to permit almost all criminals to return to

society, in a physical sense, but to hold them off, make them keep their distance, segregate them in the midst of the ordinary community."¹¹⁴ By relegating the ex-offender to internal exile, existing restrictions on the rights of ex-offenders come into conflict with international human rights norms that have abolished banishment and exile as punishment for citizens.

Outlaw status amounts not only to a denial of full citizenship but also to a violation of the ex-offenders' human rights.¹¹⁵ Such wrongdoing may not be surprising in light of the rhetoric surrounding crime and offenders. Some members of Congress, for example, have indicated in floor debates that criminal offenders are either lesser human beings or not human at all.¹¹⁶

Article 25(b) of the International Covenant on Civil and Political Rights, of which the United States is a signatory, generally guarantees citizens the right to vote and to be elected to public office.¹¹⁷ While it may permit the denial of voting privileges to certain ex-offenders, such as those who committed offenses against the political nature of the state—treason or election fraud—a general prohibition on voting by ex-offenders is likely to violate article 25(b).¹¹⁸

Access to employment generally constitutes a civil right. A host of international treaties guarantee access to work, some even postulate a *right* to work.¹¹⁹ While international law would presumably permit limiting such access under certain conditions, the stigmatization and exclusion of ex-offenders cannot be a sufficient justification. In light of the dramatic impact of the denial of employment opportunities, political rights, and social and welfare benefits to ex-offenders and its potential violation of human rights norms, such restrictions demand a better justification. Can a rationale for the exclusion of ex-offenders from full societal membership be found in penological grounds?

IV. PENOLOGICAL EXPLANATIONS FOR COLLATERAL SENTENCING CONSEQUENCES

To be justifiable, collateral sentencing consequences should be based on sound penological goals and be narrowly circumscribed to accomplish these goals. The primary purpose of collateral consequences lies in their potential for preventing future crime. Secondly, they could serve a denunciatory purpose. Thirdly, they may even have a limited retributive function. To accomplish any or a combination of these goals, however, the shape of collateral consequences must be redrawn. The current lack of a coherent framework for collateral consequences leads to disproportionate, irrational, and unjust results by painting with too broad a brush.

At this point, collateral sentencing consequences cannot be justified as based on denunciatory goals. Denunciation does not aim at permanent exclusion but rather at reintegrating the offender into society after shaming her. Collateral consequences, on the other hand, stigmatize the offender by "attaching visible signs of moral inferiority to [a] person[] . . ."¹²⁰ They label the ex-offender an "outcast," and frequently make it impossible for her ever to regain full societal membership. Many collateral consequences, therefore, seem to "fit more appropriately with the discarded idea that an offender should be eliminated or banished from society."¹²¹ That goal, however, makes reintegration and membership in society elusive.¹²² Since collateral sentencing consequences deprive ex-offenders of their membership rights in society even when they are back in their communities, they do not serve denunciatory goals. Finally, many collateral consequences are not highly publicized but rather follow automatically upon conviction or are imposed in an administrative setting.¹²³ The general public is unlikely therefore to know about them, which limits their denunciatory effect.

There is some, albeit limited, evidence that collateral consequences are designed to act retributively and to give the offender her "just deserts."¹²⁴ If that is the case, collateral sentencing consequences should be clearly designated as part of the sentence at the time punishment is imposed and explicitly considered part of the penalty. To be proportionate, which is a hallmark of retributive sentencing, they must also be calibrated specifically to the offense and the offender's background.¹²⁵ As currently structured, however, collateral sentencing consequences are neither explicitly included as part of the sentence nor are they subject to any proportionality review.¹²⁶ Many offenders experience collateral consequences as additional and disproportionate punishment that runs counter "to the adage that 'after the sentence is served, the offender has paid his or her debt to society.'"¹²⁷

There is widespread agreement that collateral sentencing consequences do not serve a rehabilitative function and may even actively thwart attempts at rehabilitation by preventing the ex-offender's reintegration into society.¹²⁸ Some have argued that because the numerous restrictions imposed on the ex-offender continually remind her of her second-class status, she is more likely to re-offend.¹²⁹

If one subscribes to the notion that ex-offenders should be given a second chance to rehabilitate themselves and become useful and productive members of society, society must also provide the means for such reintegration, including employment opportunities.¹³⁰ Based on these assumptions, numerous commentators have argued that civil disqualifications be applied only

sparingly to former offenders,¹³¹ and that "former offenders should retain opportunities to re-settle in their communities and to lead law-abiding existences."¹³² As rehabilitation has decreased in popularity as a sentencing purpose, however, the concern that civil consequences may interfere with rehabilitative goals has declined.

Collateral sentencing consequences are often deemed to serve a deterrent function.¹³³ As deterrents, however, civil disqualifications are subject to the general criticism that deterrents often are ineffective, since potential offenders do not usually weigh the costs and benefits of their actions. In addition, the relatively low visibility of collateral consequences makes them unlikely deterrents to crime.¹³⁴ Finally, even for adherents to the deterrence rationale, collateral consequences could only play a subordinate role to statutorily prescribed prison sentences in deterring crime.

Collateral sentencing consequences most often are justified on preventive grounds. They exist "in order to protect society from [the ex-offender's] corrupting influence,"¹³⁵ and to prevent the commission of future offenses by ex-offenders.¹³⁶ For fiscal reasons and out of proportionality concerns, not all offenders can be incarcerated for life. Upon release they must be prevented from re-offending through appropriate means. Proponents of the preventive rationale for collateral sentencing consequences argue that ex-offenders who are more likely to commit offenses than others must be prevented from re-offending.¹³⁷ The recent flood of sex offender notification and civil commitment statutes exemplifies this rationale.¹³⁸

Employment disqualifications for ex-offenders have traditionally been justified on preventive grounds. Since organizations and employers are generally considered responsible for their employees, they must be allowed access to applicants' backgrounds and have the right to exclude those who present a danger to society as measured by their prior record.¹³⁹ How successfully employment disqualifications operate to prevent crime is unclear. Many first-time offenders commit horrendous crimes; the exclusion of convicted felons from certain employment may be based on an overestimation of their likelihood of re-offending. The preventive success of these employment restrictions, however, cannot be tested empirically. Nevertheless, they are often loosely framed and sweeping in scope.

To act as successful preventors of crime, employment restrictions should be tied to the "character of the occupation or activity involved" and require a close connection between the employment and the conviction.¹⁴⁰ As currently used, however, the preventive rationale "place[s] social distance between the offender

and the law-abiding citizen."¹⁴¹ It leads, therefore, to societal fragmentation and thwarts possible rehabilitation.

Preventive, denunciatory, and even retributive goals could be achieved with a different conception of collateral consequences. Effective collateral consequences require a coherent theoretical framework and a public, proportionate, narrowly targeted, and individualized application. Ultimately, a well-planned system of collateral consequences may lead to the greater inclusion of ex-offenders within society.

V. AVENUES OF INCLUSION

The treatment of ex-offenders not only as less than citizens but also as less than human beings requires amelioration. Outlined below is a framework for accomplishing this goal while achieving the preventive, denunciatory, and retributive purposes of collateral sentencing consequences.

A. GUIDELINES

While preventive purposes justify the imposition of some collateral consequences for a limited period of time after release or the end of a probationary or parole period, they are less defensible if mandatory, overinclusive, and continued for a long time, as is currently the case. Collateral sentencing consequences are subject to some of the same criticisms that have been levied against mandatory minimum sentences.¹⁴² Like mandatory sentences, they follow automatically upon conviction of the offense without considering factors such as the offender's criminal background. To prevent injustice, collateral consequences should be individualized and remain discretionary with the court. To control judicial discretion and facilitate the decision-making process, a flexible guideline system should be constructed for collateral consequences. Rather than being grounded in retribution, however, it should aim primarily at prevention of future crimes.

Generally, collateral consequences should be short-lived. If based on preventive grounds, they should be subject to review at certain, regular intervals after release. This is particularly important when collateral consequences continue after probation, parole, or supervised release has expired. If they are not discontinued within a reasonable period of time, they will interfere with the ex-offender's rehabilitative efforts by continuing to stigmatize and label him.¹⁴³ Exclusionary measures that serve no other acceptable purpose contribute to the further alienation of offenders, and are "thus counterproductive to rehabilitation's aim of 'strengthening the criminal's community ties by reinforcing his identification with community values and the habits of law-abiding citizens.'"¹⁴⁴ Only strong

preventive reasons can justify long or permanent collateral consequences.

To accomplish the secondary goal of denunciation, the imposition of collateral consequences must be public and should be part of the sentencing process. Integrating collateral consequences into sentencing also would allow the court to factor them into the overall sentence rather than having the offender perceive them as a separate and additional punishment. Public awareness of the existence and impact of such consequences would grow, and perceived injustices might be more easily scrutinized.

B. RESTORATION, PARDONS, EXPUNGEMENT

Proposals in England and the United States during the 1960s and early 1970s advocated a different approach to collateral consequences. They would have either restored certain rights to the offender immediately upon release so as to permit easier rehabilitation, or upon rehabilitation as a reward for reintegration into society.¹⁴⁵ The Model Penal Code, for example, proposed limiting disqualifications from voting and jury service solely to the time of incarceration and/or total sentence, respectively.¹⁴⁶ A few states adopted these principles and automatically restored the civil rights of offenders upon their release from prison.¹⁴⁷ In England, the automatic restoration of civil rights may depend on whether an offender has led a crime-free life for a limited number of years after incarceration.¹⁴⁸ Such an approach is more desirable than requiring a gubernatorial pardon to restore an ex-offender's civil rights. Pardons do not always restore all civil and political rights,¹⁴⁹ and their award often depends on external, political influences.¹⁵⁰ In addition, the number of pardons granted in the state and federal systems in recent years has been very small, especially when compared to the overall number of offenders convicted.¹⁵¹ Neither pardons nor the restoration of civil rights assist the ex-offender, however, in regaining an occupational license even if she displays indicia of rehabilitation.¹⁵²

To prevent such negative collateral consequences for ex-offenders, a more comprehensive solution, adopted in some states, is needed: the expungement of criminal records after a certain period of time following the end of a sentence.¹⁵³ "[I]n those jurisdictions in which there is no statute of limitations or expungement mechanism, the criminal justice system is creating an ever-growing number of people with criminal records."¹⁵⁴ Based on a 1992 survey, almost fifty million people have criminal records in the United States.¹⁵⁵ Expungement would allow these individuals to eradicate their record of conviction after a certain amount of crime-free time.¹⁵⁶ This process would enable them, for example, to qualify

for employment licenses and receive bonded employment.

While the effect of such measures would be crucial, the process by which an ex-offender is welcomed back into the larger community also may be of consequence. Like many applicants for citizenship who prefer the official swearing-in ceremony conducted by a federal judge over the quicker but less ceremonious administrative naturalization process, ex-offenders should have access to a ceremony marking their official reintegration into the community and the end of their exclusion and degradation.

The restoration of civil and political rights, pardons and expungement are back- rather than front-end measures. They attempt to ameliorate the negative impact of collateral consequences after sentencing. It would be more effective, however, if courts were to consider the value and necessity of collateral consequences in each individual case prior to their imposition.

C. REVIEW OF EXISTING COLLATERAL CONSEQUENCES AND SUNSET PROVISIONS

Some of the existing collateral sentencing consequences may fit only uneasily into the proposed preventive and denunciatory framework. For example, prevention may justify the denial of active voting rights only in a minute number of cases.¹⁵⁷ Collateral consequences that serve merely exclusionary purposes should be limited in scope or abolished entirely.

Recently passed new collateral consequences, especially those directed at drug and sexual offenders, mandate careful review. Congress and state legislatures should include sunset provisions in such bills. Such a safeguard would mandate review of the efficacy and effectiveness of such laws and assure that these consequences, if they do not fulfill preventive and denunciatory goals, will not exist forever due to legislative inertia.

VI. CONCLUSION

Sentences in the United States are on average substantially longer than in other highly industrialized Western countries.¹⁵⁸ Collateral sentencing consequences, which are also more stigmatizing and exclusionary than abroad,¹⁵⁹ further serve to reinforce the political, economic and social exclusion of the ex-offender from the polity. While such additional sanctions are generally not penologically justified and have increasingly been abolished abroad,¹⁶⁰ they define American society as exclusionary and non-communitarian. Is this the model of a democracy and society we want to paint for the rest of the world? If not, then it is time to re-think collateral consequences in a

principled manner and make a concerted effort to limit their negative impact.

NOTES

¹ KENNETH L. KARST, *BELONGING TO AMERICA – EQUAL CITIZENSHIP AND THE CONSTITUTION* 4 (1989).

² Susan Martin, *U.S. Immigration Policy: The Founding Myth Meets Contemporary Realities* (manuscript at 16, on file with the *Stanford Law & Policy Review*).

³ See Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 386 (1999) (stating that with the passage of the Immigration Reform & Control Act (IRCA) in 1986 and the Illegal Immigration Reform & Immigrant Responsibility Act (IIRIRA) in 1996, Congress revealed its "growing demand and heightened priority for the swift removal of criminal aliens"); see also *id.* at 384-85 (charting the increase in the number of criminal removals from 7,338 in 1989 to 56,011 in 1998).

⁴ The article will generally employ the term "ex-offender" to describe a convicted offender who has fully served her sentence.

⁵ For a noteworthy exception, see Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599 (1997). A number of articles also have been written on the disenfranchisement of ex-offenders. See, e.g., Alice Harvey, Comment, *Ex-Felon Disenfranchisement and its Influences on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the 'Purity of the Ballot Box'*, 102 HARV. L. REV. 1300 (1989) [hereinafter Note, *Disenfranchisement of Ex-Felons*]; Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993).

⁶ See, e.g., Douglas R. Tims, Note, *The Disenfranchisement of Ex-Felons: A Cruelly Excessive Punishment*, 7 SW. U. L. REV. 124, 125-27 (1975) (recounting decline in state provisions disenfranchising ex-offenders).

⁷ The framework of political, economic and social rights is borrowed from T.H. MARSHALL, *Citizenship and Social Class*, in CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT 65, 71 (1964). Marshall used this structure to analyze membership rights in the state.

Despite their importance, firearms disabilities imposed on ex-offenders are not discussed separately in this article. For a listing of the panoply of firearms restrictions on ex-offenders, see OFFICE OF THE PARDON ATT'Y, U.S. DEP'T OF JUSTICE, CIVIL

DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY app. B (1996) [hereinafter CIVIL DISABILITIES OF CONVICTED FELONS]. The ability to carry firearms can be classified as an economic, political or social right. Therefore, the proposals made in this article for limitations on collateral consequences also apply to firearms disabilities.

⁸ Velmer S. Burton, Jr., et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, FED. PROBATION, Sept. 1987, at 52.

⁹ This article will focus on legally imposed civil disabilities. The ex-offender is also confronted with social disabilities arising from his identification as a felon. See, e.g., SAMUEL P. STAFFORD II, NAT'L CTR. FOR STATE CTS, CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE 3-4 (1977) ("[B]eyond . . . formal legal disabilities, a record of conviction has a considerable disadvantage for the offender on the informal level, particularly in his identification as an ex-convict.").

¹⁰ See CIVIL DISABILITIES OF CONVICTED FELONS, *supra* note 7, at 1 (noting that many disabilities imposed upon conviction are imposed under state law, even when the conviction is a federal offense).

¹¹ See, e.g., *infra* notes 83-88 and accompanying text (discussing recent restrictions on access to welfare benefits for ex-offenders).

¹² See CIVIL DISABILITIES OF CONVICTED FELONS, *supra* note 7, at 1, 11.

¹³ See, e.g., "Megan's Law," 42 U.S.C. §§ 14071-14072 (1999). Megan's Law requires the registration of certain convicted sex offenders and allows for community notification. Its purpose and that of similar state statutes is to alert the public to the presence of convicted sex offenders in their communities. For a critical discussion of community notification statutes see Eric Lotke, *Politics and Irrelevance: Community Notification Statutes*, 10 FED. SENTENCING REP. 64 (1997).

¹⁴ See von Hirsch & Wasik, *supra* note 5, at 601.

¹⁵ See CIVIL DISABILITIES OF CONVICTED FELONS, *supra* note 7, at 3 (discussing the fact that "the right to vote is most likely to be restored upon release from incarceration or completion of the sentence" while "the right generally hardest to regain is the right to sit on a jury"). See also *infra* notes 30-35 and accompanying text (discussing pardons).

¹⁶ See Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 347, 347 (1968)

[hereinafter Damaska, *Part I*]. See also MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES* 1328 (1998) (discussing cases delineating the difference between a direct penal consequence, about which a defendant is entitled to know, and a collateral sentencing consequence, about which a defendant need not be told).

¹⁷ National Council on Crime and Delinq., *Annulment of a Conviction of Crime: A Model Act*, 8 *CRIME & DELINQ.* 97, 98 (1962).

¹⁸ MARSHALL, *supra* note 7, at 65, 71. For other possible classifications of collateral sentencing consequences, see Damaska, *Part I*, *supra* note 16, at 348-49 (discussing various ways of classifying collateral consequences).

¹⁹ See PAUL W. TAPPAN, *CRIME, JUSTICE, AND CORRECTION* 427 (1960).

²⁰ See *id.*; Damaska, *Part I*, *supra* note 16, at 349-50. In contrast to the United States, automatic collateral consequences of criminal convictions have been very limited in England since 1870, when the English government abolished the penalty of "attainder," which had deprived offenders of all property rights. See GARDINER COMM., *LIVING IT DOWN: THE PROBLEM OF OLD CONVICTIONS* 10-11 (1972).

²¹ See National Council on Crime and Delinq., *supra* note 17, at 99.

²² *Id.*

²³ See *id.* at 99-100.

²⁴ See Burton et al., *supra* note 8, at 60.

²⁵ See *id.* For a discussion of the termination of parental rights of imprisoned parents, see Eleanor Bush, *Considering the Defendant's Children at Sentencing*, 2 *FED. SENTENCING REP.* 194 (1989/90); Teresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 *EMORY L.J.* 393, 437-38 (1991); Steven Fleischer, Note, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 *SETON HALL L. REV.* 312 (1998).

²⁶ See, e.g., "Megan's Law," 42 U.S.C. §§ 14071-14072 (1999) (requiring registration of certain convicted sex offenders).

²⁷ See, e.g., *infra* notes 83-88 and accompanying text (discussing exclusion of ex-offenders from certain welfare programs).

²⁸ STAFFORD, *supra* note 9, at 5.

²⁹ See *CIVIL DISABILITIES OF CONVICTED FELONS*, *supra* note 7, at 3 (discussing five patterns in states' restoration of rights, including the pattern under which rights automatically are restored upon the completion of sentence, by obtaining a certificate of discharge from the sentence, or by the passage of time); see also *id.* at app. A (detailing policies for restoration of political rights in all 50 states and the District of Columbia). For the English situation, see von Hirsch & Wasik, *supra* note 5, at 604; GARDINER COMM., *supra* note 20, at 10-11.

³⁰ See STAFFORD, *supra* note 9, at xvi-xvii.

³¹ See *id.* at 4.

³² KATHLEEN DEAN MOORE, *PARDONS* 224 (1989) (noting a pardon does not guarantee restoration of civil rights). For a compilation of state clemency procedures and their effects, see NATIONAL GOVERNORS' ASS'N CTR. FOR POL'Y RESEARCH, U.S. DEP'T OF JUSTICE, *GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES* (1988).

³³ National Council on Crime and Delinq., *supra* note 17, at 101.

³⁴ See MOORE, *supra* note 32, at 82-83 (discussing the decline in presidential pardons).

³⁵ Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 *TEX. L. REV.* 569, 602-604 (1991).

³⁶ MARSHALL, *supra* note 7, at 71.

³⁷ *Id.*

³⁸ *Id.* at 72.

³⁹ See GEOFFREY FINLAYSON, *CITIZEN, STATE, AND SOCIAL WELFARE IN BRITAIN 1830-1990*, at 5 (1994).

⁴⁰ Bryan S. Turner, *Citizenship Studies: A General Theory*, 1 *CITIZENSHIP STUDIES* 5, 7 (1997).

⁴¹ See YASEMIN NUHOĞLU SOYSAL, *LIMITS OF CITIZENSHIP* 167 (1994).

⁴² MARSHALL, *supra* note 7, at 75. Alternatively, the right to work can be reframed as a duty.

⁴³ SOYSAL, *supra* note 41, at 38.

⁴⁴ This argument applies to a more limited extent to permanent resident aliens whose position is more tenuous since they are always subject to deportation. Permanent resident aliens are non-citizens who have been granted permission to stay in the country, access to the labor market, some civil rights, limited welfare rights, and yet more restricted political rights. Most permanent residents, however, who are convicted of criminal offenses lose their right to residence in the United States. With the passage of the 1996 immigration acts, it has become easier to deport permanent residents as the category of "aggravated felony," the group of offenses whose commission make a permanent resident deportable, has expanded dramatically. An analysis of deportation as a collateral sentencing consequence and the expansion of the aggravated felony category is beyond the scope of this paper. For a discussion of these issues, see STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 447-48 (2d ed. 1997); Lisa R. Fine, *Preventing Miscarriages of Justice: Reinstating the Use of "Judicial Recommendations against Deportation,"* 12 *GEO. IMMIGR. L.J.* 491, 498-99 (1998); Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law,* 15 *BERK. J. INT'L L.* 1 (1997); Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant,* 50 *ARK. L. REV.* 269, 272 (1997).

⁴⁵ See Thomas J. Espenshade & Gregory A. Huber, *Antecedents and Consequences of Tightening Welfare Eligibility for U.S. Immigrants,* in *IMMIGRATION, CITIZENSHIP, AND THE WELFARE STATE IN GERMANY AND THE UNITED STATES* pt. B, at 29, 33 (Hermann Kurthen et al. eds., 1998) (discussing factors behind the 1996 welfare reform legislation, including the greater prevalence of "nonworking poverty" and the growing number of immigrants receiving public assistance).

⁴⁶ For a discussion of the effects of convictions once they are disclosed to potential employers or public agencies, see BILL HEBENTON & TERRY THOMAS, *CRIMINAL RECORDS* 113 (1993).

⁴⁷ See JAMES W. HUNT ET AL., *AMERICAN BAR ASS'N, LAWS, LICENSES, AND THE OFFENDER'S RIGHT TO WORK* 5 (1974) (discussing three types of prohibitions on licensing ex-offenders: provisions that specifically deny licenses to convicted felons, provisions that require "good moral character," and provisions denying licenses to those convicted of offenses involving "moral turpitude").

⁴⁸ See *id.* at app. A (listing licensed occupations that exclude former offenders).

⁴⁹ Note, *Civil Disabilities of Felons,* 53 *VA. L. REV.* 403, 406 (1967) [hereinafter Note, *Civil Disabilities of Felons*].

⁵⁰ Neil P. Cohen & Dean Hill Rivkin, *Civil Disabilities: The Forgotten Punishment,* *FED. PROBATION,* June 1971, at 19, 21.

⁵¹ See *DeVeau v. Braisted,* 363 U.S. 144 (1960) (finding exclusion of convicted felons from positions at waterfront union office did not violate Fourteenth Amendment's Due Process Clause); *Hawker v. New York,* 170 U.S. 189, 197 (1898) (noting that a felony conviction "is evidence of the unfitness" of ex-offenders to gain professional license). *But see Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957) (holding exclusion from state bar violates Fourteenth Amendment Due Process Clause if it is based merely on arrest record, past membership in the Communist Party, and past use of aliases).

⁵² Cohen & Rivkin, *supra* note 50, at 20.

⁵³ Among positions that may require the handling of firearms are private security services, private investigators, and bodyguards. For other employment, such as certain night work, the ability to handle a gun may not be a job prerequisite but may be considered an advantage.

⁵⁴ *Parker v. Ellis,* 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting).

⁵⁵ See HEBENTON & THOMAS, *supra* note 46, at 109.

⁵⁶ 42 U.S.C. § 1320a-7a (1999). See James M. Becker et al., *Avoiding Multiple Sanctions and Collateral Consequences When Settling Fraud and Abuse Cases,* 1993 *HEALTH L. HANDBOOK* 187, 194 (Alice G. Gosfield ed., 1993). For other examples of exclusions from governmental programs because of criminal convictions, see, e.g., 10 U.S.C. § 2408 (1999) (prohibition on armed forces to enter into contracts with persons convicted of defense-contract-related felonies); 25 U.S.C. § 2711(e)(1)(B) (1999) (felony conviction as bar to management contracts involving Indian gaming); 42 U.S.C. § 7606 (1999) (certain convictions constitute bar for federal procurement contracts).

⁵⁷ 42 U.S.C. § 1320a-7e (1999).

⁵⁸ The following facts are based on a real case. Names and dates have been modified so as not to disclose the true identity of any individuals mentioned.

⁵⁹ The mandatory exclusion in this case was five years. Because Ms. Smith was convicted of Medicaid fraud, the agency ultimately opted for a ten year exclusion. The statute does not provide a maximum exclusionary period.

⁶⁰ JAMES B. JACOBS, *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 30 (1983).

⁶¹ Developing countries have criticized Western democracies for overemphasizing civil and political rights at the expense of social and welfare rights. Even among Western democracies, however, stark disparities exist. Though the United States has transformed itself into a (partial) welfare state, political rights continue to play a primary, and welfare rights a secondary role. In many Western European countries, however, welfare rights are at least as important as civil and political rights. See Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35, 39-40 (1997) [hereinafter Demleitner, *The Fallacy of Social "Citizenship"*].

⁶² See HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *LOSING THE VOTE I* (1998). Federalism, the history of race relations, and the impact of criminal justice reforms in the 1960s have led to a "crazyquilt" of disenfranchisement laws. *Id.* at 6.

⁶³ See, e.g., U.S. CONST. amends. XV (1870) (right of citizens to vote not to be denied or abridged on account of race); XIX (1920) (right of citizens to vote not to be denied or abridged on account of sex); XXIV (1964) (right of citizens to vote not to be denied or abridged for failure to pay poll tax or other tax); XXVI (1971) (right of citizens to vote not to be denied or abridged on account of age).

Should the possession of a firearm be viewed as the right of a citizen under the Second Amendment, as some argue, then the denial of firearms licenses to ex-offenders can be deemed a restriction on political membership.

⁶⁴ Compare, e.g., Delaware (right to serve on jury and to vote restored only through pardon) with California (right to vote restored upon completion of sentence). CIVIL DISABILITIES OF CONVICTED FELONS, *supra* note 7, at A-1; see generally *id.* at app. A (detailing laws on the loss and restoration of political rights in all 50 states and the District of Columbia).

⁶⁵ See *supra* notes 33-35 and accompanying text (pardons have generally been available only to a limited number of offenders).

⁶⁶ HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *supra* note 62, at 2-3 (discussing civil disabilities imposed on offenders that were brought to North America by English colonists).

⁶⁷ See Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L. J. 537, 561 (1993).

⁶⁸ See *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968) (noting that "it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the

legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.").

⁶⁹ See Note, *Disenfranchisement of Ex-Felons*, *supra* note 5, at 1303.

⁷⁰ See HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *supra* note 62, at 3; Shapiro, *supra* note 67, at 538-42.

⁷¹ 418 U.S. 24 (1974).

⁷² 471 U.S. 222 (1985).

⁷³ See HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *supra* note 62, at 1.

⁷⁴ U.S. CONST. amends. XV (1870), XIX (1920), XXIV (1964), XXVI (1971).

⁷⁵ See, e.g., 42 U.S.C. § 1971-1974e (1999) (codification of Voting Rights Act and its amendments).

⁷⁶ JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP 2* (1991).

⁷⁷ Heather Lardy, *Citizenship and the Right to Vote*, 17 OXFORD J. LEGAL STUD. 74, 86 n. 48 (1997).

⁷⁸ See SHKLAR, *supra* note 76, at 3.

⁷⁹ HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *supra* note 62, at 2.

⁸⁰ *Id.*

⁸¹ Andrew L. Shapiro, *The Disenfranchised*, THE AM. PROSPECT, Nov./Dec. 1997, at 60, 62.

⁸² U.S. CONST. arts. I, II; amends. XIII, XIX, XVII, XXVI. See also Nora V. Demleitner, *Continuing Payment on One's Debts to Society: The German Model of Felon Disenfranchisement*, 84 MINN. L. REV. (forthcoming spring 2000) (manuscript at 4, on file with the *Stanford Law & Policy Review*) [hereinafter Demleitner, *Continuing Payment on One's Debts to Society*].

⁸³ See 21 U.S.C. § 862(a)(1)(A), (B) (1999).

⁸⁴ See 21 U.S.C. § 862(a)(1)(C) (1999).

⁸⁵ See 21 U.S.C. § 862(b)(1) (1999). The statute permits exceptions for drug addicts who go into treatment programs. It does not cover numerous benefit programs, such as survival-

type welfare programs, public housing, and participatory retirement, health, disability, and veterans' benefits. See 21 U.S.C. §§ 862(a)(2), (b)(2), (d) (1999).

⁸⁶ See Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1160, 1168 n.34 (1995) (citing Office of Nat'l Drug Control Pol'y, Executive Office of the President, National Drug Control Strategy (1991) which found that ex-offenders could lose over 462 deniable benefits from 53 federal agencies). See also Stephen Burd, *Law Barring U.S. Aid to Drug Offenders Concerns Administrators and Activists*, CHRON. HIGHER EDUC., Apr. 30, 1999, at A30. The U.S. Department of Education recently published regulations restricting access to student loans to applicants convicted of drug offenses. 34 C.F.R. § 668.40 (1999).

⁸⁷ See 21 U.S.C. § 862a(a) (1999). This law includes an opt-out provision, which allows states to exempt any of its residents from coverage. 21 U.S.C. § 862a(d)(1)(A) (1999). Alternatively, states may limit the length of time for which the exclusion is to apply to their citizens. 21 U.S.C. § 862a(d)(1)(B) (1999).

⁸⁸ See Recent Legislation, *Welfare Reform – Punishment of Drug Offenders – Congress Denies Cash Assistance and Food Stamps to Drug Felons – Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 110 HARV. L. REV. 983, 984 n.11 (1997). The provision also will have a racially disparate effect because of the high percentage of African-Americans convicted of drug offenses. See *id.* at 985.

One of the 1988 Amendments to the 1986 Drug-Abuse Act directly affects family members of drug offenders who live in public housing. It provides for their eviction if any member or guest of their household was involved in certain drug offenses. A criminal conviction of the offender is not a prerequisite for the family's eviction. See 42 U.S.C. § 1437d(l)(6) (1999).

⁸⁹ Any exclusionary measure allows society to define boundaries between insiders and outsiders and provides insiders with "an increased sense of their own esteem . . . and [permits them to] deny responsibility for the creation or elimination of criminal behavior." Note, *Disenfranchisement of Ex-Felons*, *supra* note 5, at 1301.

⁹⁰ Kim Rubenstein, *Citizenship in Australia: Unscrambling Its Meaning*, 20 MELBOURNE U. L. REV. 503, 503 (1995).

⁹¹ See *id.* at 504. The conception of citizenship as "participation and membership within a democratic community" is grounded in the Lockean assumption that a social contract between individuals lies at the foundation of the state. Alternatively, the "civic virtues" concept of citizenship is based

on Kantian notions of citizenship. For a Lockean/Kantian analysis, see Note, *Disenfranchisement of Ex-Felons*, *supra* note 5, at 1304-09.

⁹² Turner, *supra* note 40, at 6.

⁹³ See, e.g., Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1, 1 (1989) (arguing that "United States citizenship . . . confers few legal or economic advantages over the status of permanent resident alien."); SOYSAL, *supra* note 41, at 1 ("To an increasing extent, rights and privileges once reserved for citizens of a nation are codified and expanded as personal rights, undermining the national order of citizenship.").

⁹⁴ Von Hirsch & Wasik, *supra* note 5, at 605.

⁹⁵ Rubenstein, *supra* note 90, at 519.

⁹⁶ The Canadian government relied on the social contract theory to justify the denial of voting rights to prison inmates incarcerated for two or more years. See Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law*, 11 CAN. J. L. & JURISPRUDENCE 23, 25 (1998).

⁹⁷ See Rubenstein, *supra* note 90, at 504.

⁹⁸ Note, *Disenfranchisement of Ex-Felons*, *supra* note 5, at 1309.

⁹⁹ This phenomenon may occur, for example, in states, such as Alabama, where the right to vote is restored only through pardon. See CIVIL DISABILITIES OF CONVICTED FELONS, *supra* note 7, at A-5.

¹⁰⁰ Cohen & Rivkin, *supra* note 50, at 25 (noting that similar to the disenfranchisement of minority groups, which often increased their alienation and frustration, disenfranchisement of ex-offenders is likely to sap their desire to participate in society).

¹⁰¹ State laws excluding ex-offenders from the ballot box recently have come under attack because they have a racially discriminatory impact by denying a large number of African-Americans voting rights. Those exclusions further diminish the political power of a particular racial group in the United States. See, e.g., *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (equally divided circuit court affirmed district court dismissal of challenge to New York's disenfranchisement provision under the Voting Rights Act).

¹⁰² SOYSAL, *supra* note 41, at 137 (describing the reconfiguration of citizenship in the postwar era: "Rights that used to belong solely to nationals are now extended to foreign populations, thereby undermining the very basis of national citizenship."); Demleitner, *The Fallacy of Social "Citizenship," supra* note 61, at 47 (describing how, with the development of the welfare state after World War II, long-term legal residents increasingly became eligible for social service programs).

¹⁰³ Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1453-54 (1995) (describing the convergence of heightened anti-immigration policies, including 103 bills to tighten immigration policies or make English the official language introduced in Congress by March 1995, with increasing hostility toward welfare recipients).

¹⁰⁴ Demleitner, *The Fallacy of Social "Citizenship," supra* note 61, at 49 (describing how "[t]he distinction between 'worthy' and 'unworthy' runs throughout the entire welfare bill.").

¹⁰⁵ Legomsky, *supra* note 103, at 1455 (quoting JOEL HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* 11 (1991)).

¹⁰⁶ See Herbert J. Gans, *Über die positiven Funktionen der unwürdigen Armen – Zur Bedeutung der "underclass" in den USA*, in 32/1992 ARMUT IM WOHLFAHRTSSTAAT, KÖLNER ZEITSCHRIFT FÜR SOZIOLOGIE UND SOZIALPSYCHOLOGIE 48, 49 (Stephan Leibfried & Wolfgang Voges eds., 1992). During the nineteenth century English workhouses even physically separated the poor from the rest of society so as "to draw a line, placing the occupants of the workhouse outside the community." See KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION* 138 (1993).

¹⁰⁷ See Kathleen B. Jones, *Citizenship in a Woman-Friendly Polity*, 15 SIGNS 781, 785 (1991).

¹⁰⁸ See William Julius Wilson, *Ghettoisierte Armut und Rasse – Zur öffentlichen Meinungsbildung in den USA*, in 32/1992 ARMUT IM MODERNEN WOHLFAHRTSSTAAT, KÖLNER ZEITSCHRIFT FÜR SOZIOLOGIE UND SOZIALPSYCHOLOGIE, *supra* note 106, at 221, 225.

¹⁰⁹ PETER SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 205 (1998).

¹¹⁰ See Note, *Disenfranchisement of Ex-Felons*, *supra* note 5, at 1304-05.

¹¹¹ Demleitner, *The Fallacy of Social "Citizenship," supra* note 61, at 49 (classifying non-citizens who were still considered worthy of public assistance).

¹¹² See, e.g., Lynn H. Fujiwara, *The Impact of Welfare Reform on Asian Immigrant Communities*, SOCIAL JUSTICE, Mar. 22, 1998, at 82 (discussing petitions and demonstrations by advocacy groups and lobbyists following the 1996 cuts in welfare assistance to legal permanent residents); *Punishing Legal Immigrants*, WASH. POST, Sept. 27, 1996, at A24 ("The welfare reform bill passed earlier this year unfairly excludes legal aliens from many important federal assistance programs.").

¹¹³ See, e.g., Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 192 n.51 (1998) (listing cases upholding the exclusion of non-citizens from various public sector jobs, including parole officers, teachers, and state police officers).

¹¹⁴ See EDWIN H. SUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 518 (5th ed. 1955).

¹¹⁵ While no direct international pronouncements have been issued on these matters, the European Court of Human Rights was asked in the early 1960s to consider whether a long list of legal disabilities arising under Belgian law violated the European Convention on Human Rights. Although the Belgian government chose to modify its law prior to a hearing on the merits, the Committee of Ministers of the Council of Europe subsequently cautioned against extensive restrictions on the electoral, civil and social rights of prisoners during the execution of the sentence. See Damaska, *Part I, supra* note 16, at 356.

¹¹⁶ See Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 346 n.64 & 65 (1995) (referencing members of Congress who have called drug dealers "animals," "scourge," and other derogatory names).

¹¹⁷ International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, art. 25, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976). The United States ratified the ICCPR on June 8, 1992.

¹¹⁸ See Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS 209, 243 (Louis Henkin ed., 1981). See also HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *supra* note 62, at 20-21 (reviewing U.N. Human Rights Committee pronouncements on disenfranchisement of ex-offenders and concluding that, although the Committee has not examined U.S. disenfranchisement laws, "there is little doubt it would conclude

that [U.S.] laws excluding ex-convicts from voting for life are unreasonable and disproportionate" and that depriving all prisoners of the right to vote is also likely to violate Article 25).

¹¹⁹ See, e.g., the Universal Declaration of Human Rights (UDHR), G.A. Res. 217, U.N. GAOR, 3d Sess., pt.1, U.N. Doc. A/810 (1948), art. 23, ¶ 1 (stating that "[e]veryone has the right to work"). Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which the United States is not a signatory, also recognizes the right to work. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, art. 6, U.N. Doc. A/6316 (entered into force Jan. 3, 1976). See also Ger P. van den Berg & Rene M.A. Guldenmund, *The Right to Work in East and West*, in *ESSAYS ON HUMAN RIGHTS IN THE HELSINKI PROCESS* 103 (A. Bloed & P. van Dijk eds., 1985) (surveying international human rights treaties guaranteeing a right to work).

¹²⁰ R. Paul Davis, *The Mark of Cain: Some Subliminal Effects of Criminal Process*, 44 SASKATCHEWAN L. REV. 219, 219 (1980).

¹²¹ Note, *Civil Disabilities of Felons*, *supra* note 49, at 423.

¹²² Banishment implies that the offender be quarantined so as to prevent the community from becoming infected with the contagious germ of crime. See MARTHA GRACE DUNCAN, *ROMANTIC OUTLAW, BELOVED PRISONS* 140-44 (1996).

¹²³ Von Hirsch & Wasik, *supra* note 5, at 601 (stating that collateral consequences generally fall into three categories—those that follow automatically upon conviction, those that are judicially imposed and those that are imposed by regulatory agencies).

¹²⁴ Damaska, *Part I*, *supra* note 16, at 354 (noting that disqualification of offenders often was motivated by a desire to degrade the offender); Note, *The Equal Protection Clause as a Limitation on the States' Power To Disfranchise Those Convicted of a Crime*, 21 RUTGERS L. REV. 297, 309-10 (1967) ("The original purpose in depriving the criminal of certain civil rights appears to have been to ostracize and degrade him in the eyes of the community—a form of further punishment.")

¹²⁵ See Harvey, *supra* note 5, at 1170 (noting that retribution includes principles of proportionality under the Lockean model); Burton et al., *supra* note 8, at 60 ("[A] number of scholars suggest that depriving offenders of rights, when no direct relationship exists between the conviction and the right which is restricted, is an unnecessarily punitive approach that serves no legitimate state purpose.").

¹²⁶ See MOORE, *supra* note 32, at 168 (explaining that proportionality concerns justify pardons in a system of retributive justice "when the lingering effects of a felony conviction add punishment beyond what is deserved.").

¹²⁷ Burton et al., *supra* note 8, at 60. Based on a contractual analysis, two 18th-century European criminal codes explicitly abolished all legal disqualifications following release from a sentence. See Damaska, *Part I*, *supra* note 16, at 352.

¹²⁸ Burton et al., *supra* note 8, at 60 (referencing scholars who argue that civil rights restrictions inhibit the efforts of correctional agencies by impeding reintegration into society and increasing the chances of recidivism).

¹²⁹ See, e.g., Davis, *supra* note 120, at 219-20 ("[T]he oppressive restrictions imposed upon convicted criminals, both in contemporary American society and to a lesser extent in Canada and Great Britain, conspire to remind the former offender repeatedly of his status as a second-class member of society, and in doing so enhance the likelihood of further offending.").

¹³⁰ See HEBENTON & THOMAS, *supra* note 46, at 109.

¹³¹ See, e.g., *supra* notes 21-23 and accompanying text.

¹³² Von Hirsch & Wasik, *supra* note 5, at 605.

¹³³ Spencer, *supra* note 116, at 344 (describing the 1988 Amendments to 1986 Drug-Abuse Act, including civil consequences of drug-related criminal activity, as deterrent).

¹³⁴ Note, *Disenfranchisement of Ex-Felons*, *supra* note 5, at 1307. There is some indication that the public has, albeit limited, knowledge of collateral sentencing consequences. See John P. Reed & Dale Nance, *Society Perpetuates the Stigma of a Conviction*, FED. PROBATION, June 1972, at 27, 28 (discussing the results of a study showing that "[s]eventy-one percent of the teachers [surveyed], 45 percent of the farmers, and 37 percent of the maintenance men said they were aware that criminals lost some of their rights when they went to prison and did not regain all of them when they were released.").

¹³⁵ Note, *Civil Disabilities of Felons*, *supra* note 49, at 406.

¹³⁶ See von Hirsch & Wasik, *supra* note 5, at 606 ("We think that disqualifications . . . should ordinarily be viewed as being civil risk-prevention measures.").

¹³⁷ See Tony M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1895 n.75 (1991).

¹³⁸ See Nora V. Demleitner, *Searching for a Solution: How to Punish, Restrain and Treat Sex Offenders*, 10 FED. SENTENCING REP. 59, 60 (1997) (discussing supervised release, community notification laws, and civil commitment statutes as means used to prevent sex offenders from reoffending).

¹³⁹ See HEBENTON & THOMAS, *supra* note 46, at 109.

¹⁴⁰ See von Hirsch & Wasik, *supra* note 5, at 608.

¹⁴¹ EDWIN H. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 543 (1934).

¹⁴² For a critique of mandatory minimums, see, e.g., William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1279 (1996) (quoting Justice Kennedy as opposing mandatory minimums because they “are an imprudent, unwise and often unjust mechanism for sentencing”); John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551, 552 n.10 (1993) (finding that many judges oppose mandatory minimums because they consider them unjust).

¹⁴³ See Gary L. Reback, Note, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 STAN. L. REV. 845, 863-64 (1973).

¹⁴⁴ Harvey, *supra* note 5, at 1171 (quoting Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 732 (1973)).

¹⁴⁵ See proposal put forth by GARDINER COMM., *supra* note 20, at 14-23.

¹⁴⁶ See MODEL PENAL CODE § 306.3 (West 1998).

¹⁴⁷ MOORE, *supra* note 32, at 224 (noting that Florida, Colorado, and Washington have adopted such provisions). See also CIVIL DISABILITIES OF CONVICTED FELONS, *supra* note 7, at app. A (detailing specific restoration provisions for all 50 states and the District of Columbia).

¹⁴⁸ See MOORE, *supra* note 32, at 224 (describing English model).

¹⁴⁹ *Id.*

¹⁵⁰ See generally *id.* at 82-84 (discussing how the Reagan administration's reluctance to grant pardons came, in part, out of a desire to reflect its philosophy toward crime); Kobil, *supra* note 35, at 607-11 (discussing political pressures on state governors in their clemency decisions and concluding that “the

most important factor in successful clemency applications appears to be the widespread support of influential individuals in the community.”). For a discussion of types of reinstatement proceedings, see Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2)*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 542, 563-67 (1968) [hereinafter, Damaska, *Part II*].

¹⁵¹ NATIONAL GOVERNORS' ASS'N CTR. FOR POL'Y RESEARCH, *supra* note 32, 166-67 tbls.3 & 4.

¹⁵² Cohen & Rivkin, *supra* note 50, at 24; see also CIVIL DISABILITIES OF CONVICTED FELONS, *supra* note 7, at 19-144 (outlining state laws on the loss of occupational and professional licenses, as well as the means by which civil and political disabilities—but not occupational licenses—may be restored).

¹⁵³ See Julian Roberts, *The Role of Criminal Record in the Sentencing Process*, in 22 CRIME AND JUSTICE: A REVIEW OF RESEARCH 303, 340 (Michael Tonry ed., 1997).

¹⁵⁴ *Id.* at 356.

¹⁵⁵ See BUREAU OF JUSTICE STAT., *SURVEY OF CRIMINAL HISTORY INFORMATION SYSTEMS* 13 1992 tbl.1 (1993).

¹⁵⁶ See Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L. Q. 147, 149. But see T. Marcus Funk, *Considering Juvenile Crime Records in Criminal Sentencing*, 11 FED. SENTENCING REP. 282 (1999) (recommending creation of a national database that catalogues serious juvenile records).

¹⁵⁷ See Demleitner, *Continuing Payment on One's Debt to Society*, *supra* note 82 (manuscript at 59, on file with the *Stanford Law & Policy Review*) (arguing that since few offenders pose a threat to the foundation of the state, “safety-based denial of the franchise” is generally unnecessary).

¹⁵⁸ See, e.g., Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542, 655 (1990) (noting that empirical data appear to suggest that French sentences are more lenient in some respects than U.S. sentences); James B. Jacobs, *Sentencing By Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 262 (1982) (“Criminal penalties in this country are markedly higher than in most countries of Europe.”).

¹⁵⁹ For example, in England, unlike in the United States, offenders are guaranteed freedom from any handicap resulting from a criminal conviction after a certain period of crime-free

time. See MOORE, *supra* note 32, at 224. A number of Continental European governments regularly grant pardons and amnesties which provide relief from collateral sentencing consequences. See Frase, *supra* note 158, at 650.

¹⁶⁰ See Damaska, *Part II*, *supra* note 150, at 567 (punitive disqualifications have been, if necessary, replaced by non-punitive disqualifications that serve utilitarian purposes).

