# COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: CONFRONTING ISSUES OF RACE AND DIGNITY

MICHAEL PINARD*

*This Article adds to the burgeoning literature that explores the various collateral consequences that attach to criminal convictions in the United States. These consequences include ineligibility for public and government-assisted housing, public benefits, and various forms of employment, as well as civic exclusions such as ineligibility for jury service and disenfranchisement. This Article argues that decisionmakers in the United States failed to foresee the collective impact of these consequences when they expanded them dramatically in the 1980s and 1990s. They also failed to account for the disproportionate impact these consequences would have on individuals and communities of color. To provide a broader context for studying the United States' imposition of collateral consequences and the extent to which these consequences are rooted in race, this Article looks to England, Canada, and South Africa. These countries, which have criminal justice systems similar to the United States' and have similar histories of disproportionately incarcerating people of color, have in recent years adopted criminal justice practices similar to those of the United States and have turned to increasingly punitive punishment schemes. This Article is the first to offer a detailed comparative examination of collateral consequences and finds that the consequences in the United States are harsher and more pervasive than the consequences in these other countries. It also shows that Canada and South Africa have articulated broad protections for the dignity interests of incarcerated and formerly incarcerated individuals that are influenced by human rights notions of rights and privileges. Canada, in particular, has employed mechanisms to ease racial disparities in incarceration. Drawing lessons from these countries, this Article offers steps the United States should take to ease the legal burdens placed on individuals with criminal records, as well as to lessen the disproportionate impact these post-sentence consequences have on individuals and communities of color.*



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## INTRODUCTION

The United States has the world's highest incarceration rate.[1] While the United States has five percent of the world's population, nearly twenty-five percent of the world's prisoners are behind the bars of its prisons and jails.[2] The road to this astonishing incarceration rate began nearly three decades ago with the "war on drugs" and "tough on crime" movements of the 1980s and 1990s.[3] These movements led to dramatically increased incarceration of individuals for nonviolent offenses—especially nonviolent drug offenses—and longer sentences.[4]

Three decades after its incarceration explosion began, the United States is now experiencing a post-incarceration crisis: Record numbers of individuals—recently eclipsing 700,000 per year—are now exiting U.S. correctional facilities and returning to communities across the country.[5] These individuals must confront a wide range of collateral consequences stemming from their convictions, including ineligibility for federal welfare benefits, public housing, student loans, and employment opportunities, as well as various forms of civic exclusion, such as ineligibility for jury service and felon disenfranchisement.[6] As

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[1] THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN 2008, at 5 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

[2] PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 27 (2009); *see also* JONATHAN SIMON, GOVERNING THROUGH CRIME 6 (2007) ("[T]he portion of the population held in custody for crimes [in the U.S.] has grown well beyond historic norms.").

[3] MARC MAUER & RYAN S. KING, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 1 (2007), *available at* http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf ("The 'war on drugs,' officially declared in the early 1980s, has been a primary contributor to the enormous growth of the prison system in the United States during the last quarter-century . . . .").

[4] *See infra* notes 312–13.

[5] WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-228417, BULLETIN: PRISONERS IN 2008, at 4 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf (noting that 735,454 sentenced prisoners were released from state and federal prisons in 2008).

[6] *See* STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, introductory cmt. (2004) [hereinafter STANDARDS FOR CRIMINAL JUSTICE], *available at* http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf (describing various types of collateral consequences); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender*

a result, "[w]ith a criminal record comes official state certification of an individual's criminal transgressions; a wide range of social, economic, and political privileges become off-limits."[7]

Scholars from several fields have explored the contours of these consequences. Criminal justice actors, bar associations, and law school programs have all sought to understand the full extent and scope of these consequences;[8] attorneys in some jurisdictions have addressed the possibility that these consequences will attach by informing clients about them and negotiating plea agreements that take such consequences into consideration;[9] and lawmakers have recently called for the examination of these consequences.[10]

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*Reentry*, 45 B.C. L. REV. 255, 258 (2004) (same). An emerging parallel issue involves various court-related monetary obligations that states are increasingly imposing against individuals with criminal records. These financial costs of punishment include court fees, probation or parole fees, and fees for needed services such as drug and alcohol treatment. In many instances, individuals cannot afford to pay these fees because they do not have full-time employment. *See* REBEKAH DILLER ET AL., BRENNAN CTR. FOR JUSTICE, MARYLAND'S PAROLE SUPERVISION FEE: A BARRIER TO REENTRY 12–13 (2009), *available at* http://www.brennancenter.org/page/-/publications/MD.Fees.Fines.pdf (explaining that most parolees in Maryland do not pay forty-dollar monthly parole fee and that those parolees who are unemployed are less likely to pay it). These debts can lead to civil judgments, negative credit reports, and wage garnishment. *See id.* at 19–20 (discussing these effects on Maryland parolees).

[7] DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 33 (2007); *see also* Stephen C. Richards & Richard S. Jones, *Beating the Perpetual Incarceration Machine: Overcoming Structural Impediments to Re-entry*, *in* AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 201, 204 (Shadd Maruna & Russ Immarigeon eds., 2004) (discussing how collateral consequences of incarceration, including "disabilities, disqualifications and legal restriction[s]," impact reentry).

[8] *See, e.g.*, CIVIL ACTION PROJECT, THE BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS (2007), http://www.reentry.net/public2/library/item.90615; N.Y. STATE BAR ASS'N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS (2006), http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11415; THE REENTRY OF EX-OFFENDERS CLINIC, UNIV. OF MD. SCHOOL OF LAW, A REPORT ON THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN MARYLAND 3–6 (2007), *available at* http://www.sentencingproject.org/doc/publications/cc_report2007.pdf; WASH. DEFENDER ASS'N, BEYOND THE CONVICTION: WHAT DEFENSE ATTORNEYS IN WASHINGTON STATE NEED TO KNOW ABOUT COLLATERAL AND OTHER NON-CONFINEMENT CONSEQUENCES OF CRIMINAL CONVICTIONS (2007), http://www.defensenet.org/resources/publications-1/beyond-the-conviction/Beyond%20the%20Conviction%20-Updated%20-%202007.pdf.

[9] *See* McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 494–96 (2005) (describing innovative ways in which criminal defense organization The Bronx Defenders seeks to educate prosecutors and judges about collateral consequences).

[10] *See* Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.). In part, the Second Chance Act reauthorizes

These actors generally recognize that the problem of postconviction collateral consequences is rapidly becoming more severe for three interrelated reasons. First, collateral consequences have increased in number, scope, and severity since the 1980s.[11] Second, record numbers of individuals are now exiting U.S. correctional facilities.[12] Finally, collateral consequences hinder reentry and exacerbate the risks of recidivism; in fact, most individuals will be rearrested within three years of release.[13]

This Article seeks to explore the unforeseen aftereffects of this explosion of collateral consequences in the United States: the extent to which these consequences frustrate the ability of individuals with criminal convictions to reintegrate into their communities, move past their legal transgressions, and lead productive post-incarceration lives. This exploration reveals the extent to which the United States failed to foresee the collective weight of these consequences, which are now having a pernicious impact on individuals with criminal records, their families, and their communities.

To provide a broader context for the extent to which the federal, state, and local jurisdictions in the United States impose collateral consequences on individuals with criminal records, this Article compares some of these consequences to those that are imposed in other countries. While the scholarly literature on collateral consequences is expanding, no one has yet undertaken a comprehensive comparative

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local and state reentry demonstration projects that serve both incarcerated and released adults and juveniles. *Id.* § 101(a). It also authorizes the Attorney General to award grants to organizations that apply to set up and manage these projects. *Id.* § 101(d)–(e). However, the Attorney General can only award a grant if the organization, inter alia, "provides a plan for analysis of the statutory, regulatory, rules-based, and practice-based hurdles to reintegration of offenders into the community." *Id.* § 101(e)(4).

[11] *See* STANDARDS FOR CRIMINAL JUSTICE, *supra* note 6, introductory cmt. ("The collateral consequences of conviction have been increasing steadily in variety and severity for the past 20 years . . . ."); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators*,*"* 93 MINN. L. REV. 670, 673–74 (2008) (noting that collateral consequences have "greatly expanded in recent years" and "now apply to relatively minor criminal convictions, and even to certain noncriminal convictions").

[12] Thompson, *supra* note 6, at 256 ("The United States has commenced the largest multi-year discharge of prisoners from state and federal custody in history."); *see also* Alec C. Ewald & Marnie Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145, 145 (2008) (observing that record numbers of individuals being released from incarceration each year have drawn attention to collateral consequences).

[13] PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-193427, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf (finding that, in study of fifteen states, approximately two-thirds of individuals released in 1994 were rearrested within three years).

approach to these consequences that examines both their harshness and their permanence. This Article attempts to do so by examining collateral consequences in England and Wales,[14] Canada, and South Africa (the "Comparison Countries"). The Comparison Countries and the United States share similar criminal justice systems, similar concerns about increasing crime, and similar histories of racial marginalization (or of disproportionately incarcerating racial minorities).[15] The Comparison Countries have also adopted criminal punishment practices similar to those of the United States.[16]

Many lawyers and courts in the United States recognize the relevance and utility of comparative perspectives when litigating and interpreting constitutional issues.[17] These perspectives are also meaningful in the collateral consequences context, providing a broader framework to inform the policy debates about the purposes and effects of collateral consequences. This Article will therefore analyze how the Comparison Countries deal with their reentering populations, focusing on the extent to which these countries impose legal barriers that hinder successful reentry. As detailed below, the comparative analysis illustrates that U.S. policies on collateral consequences are harsher and more permanent than those in other countries.[18] In particular, the comparative examination shows that the United States is less forgiving of individuals with criminal records than are the Comparison Countries.[19] Thus, a comparative analysis of collateral consequences enables more critical analysis of U.S. policies, which

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[14] Although they are distinct countries within the United Kingdom, England and Wales have an integrated legal and penal system. MICHAEL CAVADINO & JAMES DIGNAN, PENAL SYSTEMS: A COMPARATIVE APPROACH 75 n.1 (2006). For convenience, the remainder of this Article will simply refer to both England and Wales as "England."

[15] *See infra* Part I.D. (examining similarities between Comparison Countries and United States).

[16] *See infra* notes 45–48 and accompanying text (describing instances where Comparison Countries have adopted policies that are similar to those adopted by United States).

[17] *See, e.g.*, Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003) (advocating reference to international documents and laws of other nations when interpreting U.S. Constitution). *But see* Justices Antonin Scalia & Stephen Breyer, U.S. Supreme Court, U.S. Association of Constitutional Law Discussion at American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0 (discussing utility of comparative law, with Justice Scalia stating that he does "not use foreign law in the interpretation of the United States Constitution," and Justice Breyer responding that "for years people all over the world have cited the Supreme Court, why don't we cite them occasionally?").

[18] *See infra* Part II.

[19] *See infra* Part II.B.

may encourage U.S. decisionmakers at the state and federal levels to adopt alternative ways of dealing with our reentering population.[20]

Comparative analysis can also enhance our understanding of the differential impact of criminal justice policies on different social groups. This Article examines the types of collateral consequences imposed by the Comparison Countries—which all have histories of racial marginalization—and also analyzes how two of these countries have recognized the differential impact of their collateral consequence policies on different ethnic and racial groups. Based on this comparison, this Article argues that the severity of collateral consequences in the United States is rooted in racial marginalization and the narrow dignity interests afforded to individuals with criminal records in the United States.

This Article's comparative analysis will help challenge the view that the disproportionate incarceration of people of color in the United States—specifically African Americans and Latinos—is a function of patterns of crime and law enforcement and not the result of racialized policies.[21] A natural corollary to this view is that collateral consequences disproportionately impact people of color because of these patterns and not because of racially targeted policies.

This Article will illustrate the extent to which the racialized aspects of the U.S. criminal justice system have been ignored. It will explore the racial overtones of the felon disenfranchisement laws that have historically attended criminal convictions, as well as the racial undertones of the other collateral consequence policies adopted in the

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[20] *See infra* Part IV. J. David Hirschel and William Wakefield have discussed the role of comparative analysis in facilitating domestic reform. *See* J. DAVID HIRSCHEL & WILLIAM WAKEFIELD, CRIMINAL JUSTICE IN ENGLAND AND THE UNITED STATES 3 (1995) ("Until one looks at another system there is always a tendency to take one's own system for granted, to assume that the way it operates is either the best or the only way for it to work."); *see also* Mathieu Deflem & Amanda J. Swygart, *Comparative Criminal Justice*, *in* HANDBOOK OF CRIMINAL JUSTICE ADMINISTRATION 51, 52 (M.A. DuPont-Morales et al. eds., 2001) ("In comparing different but related systems of criminal justice, researchers often suggest how one system can learn from the other.").

[21] *See* U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW 3 (2001), *available at* http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm (concluding that disproportionate number of minority defendants in federal capital cases "is not [due to] racial or ethnic bias, but the representation of minorities in the pool of potential federal capital cases"); *cf.* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA, at viii (1995) (arguing that "racial differences in patterns of offending, not racial bias by police and other officials, are the principal reason that such greater proportions of blacks than whites are arrested, prosecuted, convicted, and imprisoned" but that "cynical policies of the Bush and Reagan administrations, and not racial differences in patterns of offending, are the principal reason that racial disparities in the justice system steadily worsened after 1980").

1980s and 1990s as part of the "war on drugs" and "tough on crime" movements.[22] These policies have interacted with dramatically increased incarceration rates to disproportionately impact individuals and communities of color in ways that legislators and policymakers have failed to recognize.

By contrast, two of the Comparison Countries, Canada and South Africa, have significantly better records of recognizing the disparate impact of their criminal justice policies. For example, Canada has recognized both the historic and contemporary discrimination against Aborigines in its criminal justice system and has taken legislative steps to lessen racial disparities in incarceration.[23] These concerns about disparate impact were relevant to the Canadian Supreme Court's decision to strike down Canada's prisoner disenfranchisement law in 2002.[24] Similarly, the South African Constitutional Court, in its 2005 decision striking down South Africa's prisoner disenfranchisement law, pointed to historic disenfranchisement policies that denied voting rights to the majority of South Africans.[25]

The comparative perspective also illustrates the extent to which other countries, particularly Canada and South Africa, think about their criminal justice policies in the broader human rights context of preserving the dignity of individuals with criminal records. The highest courts in both Canada and South Africa have recently extended voting rights to sentenced prisoners. The Canadian Supreme Court's decision, in particular, declared disenfranchisement to be inconsistent with the dignity interests of all incarcerated individuals.[26] Similarly, the concept of dignity is a core principle of South Africa's Constitution and post-apartheid jurisprudence.[27]

As detailed below, these broad notions of dignity stand in stark contrast to the narrow dignity interests afforded prisoners and individuals with criminal records in the United States.[28] This Article asserts that the United States' harsh collateral consequences, particularly

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[22] *See infra* Part III.B.1.a.

[23] *See infra* notes 351–54 and accompanying text (describing statute requiring special judicial attention to Aboriginal status and Supreme Court assertion that such attention is necessary because Aboriginal offenders' circumstances are unique).

[24] *See infra* note 357 and accompanying text (discussing *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 (Can.)).

[25] *See infra* notes 359–60 and accompanying text (discussing *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)*, 2005 (3) SA 280 (CC) (S. Afr.)).

[26] *See infra* notes 238–41, 357 and accompanying text (discussing *Sauvé v. Canada*, [2002] 3 S.C.R. 519).

[27] *See infra* notes 254–57 and accompanying text (discussing S. AFR. CONST. 1996, ch. 2, s. 10, and *NICRO*, 2005 (3) SA 280).

[28] *See infra* notes 373–88 and accompanying text.

those that are unrelated to the underlying crime, continue to degrade individuals once they have completed their sentences.

Part I explains the need for a comparative examination of collateral consequences, noting that much of the available scholarship is either outdated or too narrow in scope. It then introduces the connections among race, dignity, and collateral consequences in the United States and sets out the various obstacles to comparative examination of these consequences. Last, it explains why England, Canada, and South Africa were selected for comparative study and gives an overview of criminal justice trends in each of these countries.

Part II describes collateral consequences in the United States and the Comparison Countries. Rather than providing an exhaustive account of these consequences—essentially an impossible feat—Part II will focus on consequences related to housing, public benefits, employment, and voting. The comparative findings illustrate that individuals with criminal records in the United States confront a broader and more severe array of collateral consequences, and are therefore more *legally* stigmatized, than similarly situated individuals in England, Canada, and South Africa. These findings also illustrate that both criminal convictions and their long-reaching effects are more *permanent* in the United States than in the Comparison Countries.

Part III attempts to explain why the United States particularly relies on these consequences. It examines and rejects several possible explanations, and then embraces two more persuasive explanations: (1) U.S. collateral consequences are extensions of historic and contemporary criminal justice policies that target racial minorities or that systematically ignore the disproportionate impact of these policies on racial minorities; and (2) the United States affords narrow dignity interests to incarcerated and formerly incarcerated individuals.

Part IV argues that decisionmakers should draw lessons from the Comparison Countries when assessing both the extent to which collateral consequences impact the lives of individuals with criminal records and the efficacy of these consequences as they are currently imposed. It then offers potential reform measures.

## I
## A Comparative Approach to Collateral Consequences

### *A. The Need for a Comparative Examination of Collateral Consequences*

Scholars from many disciplines have compared various aspects of the U.S. criminal justice system with other systems, particularly those

of European countries.[29] For example, scholars have given particularly close scrutiny to the dramatic increase in U.S. incarceration rates during the 1980s and have compared these rates to those of other countries to illustrate the extent to which the United States relies on incarceration.[30] Many of these commentators have concluded that the United States is more punitive than comparable Western democracies.[31]

However, scholars have not yet thoroughly compared the network of collateral consequences currently employed in the United States to those in other countries. The few comparisons that do exist in this area are either outdated or relatively limited in the number of countries and types of collateral consequences compared. The most thorough survey of collateral consequences across countries—a seminal article by Mirjan Damaska[32]—is now over forty years old and does not include the United States in its sample.[33] Thus, it does not account for recent U.S. policies stemming from the "war on drugs" and the "tough on crime" movements. More recently, in 1997, an article by Andrew von Hirsh and Martin Wasik provided a short discussion of different types of collateral consequences in England and the United States as a prelude to a longer normative analysis of collateral consequences.[34] However, even this more recent study predated

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[29] *See, e.g.*, SHAUN L. GABBIDON, RACE, ETHNICITY, CRIME, AND JUSTICE: AN INTERNATIONAL DILEMMA (2010) (comparing justice systems in United States, Canada, Australia, South Africa, and Great Britain from criminology perspective); MICHAEL TONRY, SENTENCING MATTERS 116–17, 124–26 (1996) (comparing use of nonincarcerative forms of punishment in United States, Germany, Netherlands, and England); Joe Foweraker & Roman Krznaric, *Differentiating the Democratic Performance of the West*, 42 EUR. J. POL. RES. 313, 328–32 (2003) (comparing treatment of minorities by criminal justice systems in United States, United Kingdom, and Canada from political science perspective); David Jacobs & Richard Kleban, *Political Institutions, Minorities, and Punishment: A Pooled Cross-National Analysis of Imprisonment Rates*, 82 SOC. FORCES 725 (2003) (comparing effects of corporatist and federalist political institutions on incarceration rates from sociology perspective).

[30] *See, e.g.*, BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 13–15 (2006) (noting that extent of incarceration in United States is "unusual by international standards" and that U.S. incarceration rate was five times higher than Britain's in 2001); Foweraker & Krznaric, *supra* note 29, at 328 ("From 1985 to 1995, the incarceration rate in the U.S. increased from 313 to 600 per 100,000 people (a rise of 92 per cent), whereas there was little or no change in the United Kingdom, Australia or . . . countries like Denmark and the Netherlands.").

[31] *See* sources cited *supra* note 30.

[32] Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347 (1968) (surveying collateral consequences in several countries, including Canada, France, Greece, Israel, Norway, Sweden, Switzerland, and Yugoslavia).

[33] *Id.* at 437.

[34] Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 601–04 (1997).

the dramatic expansion of collateral consequences in the late 1990s. Other recent comparisons have generally focused only on a single particular collateral consequence such as felon disenfranchisement instead of looking at the interplay of a range of different consequences.[35] This Article aims to fill a gap in the existing scholarly literature by providing a fresh and more comprehensive comparative account of several different types of collateral consequences, including not only felon disenfranchisement but also loss of eligibility for welfare benefits, public housing, and certain types of employment. This Article also offers reasons why the United States differs so dramatically from other countries with regard to these consequences.

A new comparative examination of collateral consequences is needed now because reentry has become a pressing issue both in the United States and abroad. Collateral consequences define to a large extent the legal status of individuals with criminal records and can make it quite difficult for these individuals to move past their sentences and to reintegrate successfully into their communities. Countries across the globe are devoting increased attention and resources to the various needs of individuals exiting prisons and returning to their communities.[36] These countries are also considering reentry strategies and implementing programs with the hopes of facilitating reintegration and reducing recidivism.[37]

In the United States, reentry has reached a critical point as communities absorb record numbers of individuals exiting correctional institutions.[38] The numerous collateral consequences that attach to

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[35] *See, e.g.*, JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 37–39, app. tbl.AI.I (2006) (comparing disenfranchisement policies of United States with several other countries, including England, South Africa, and Canada); Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753 (2000) (comparing disenfranchisement policies of U.S. and Germany).

[36] *See, e.g.*, JIM MCGINTY, REDUCING REOFFENDING—FOCUSING ON RE-ENTRY TO THE COMMUNITY (2002) (suggesting reentry strategies to reduce recidivism in Australia, based on visits to England, Norway, Denmark, Belgium, and France); Editorial, *A Positive Form of Punishment*, JAPAN TIMES (Tokyo), Aug. 3, 2006, at 12, *available at* http://search.japantimes.co.jp/cgi-bin/ed20060803a2.html (reporting Japanese Justice Minister's proposal for easing reentry and preventing recidivism); Joyce Mulama, *A "Soft Landing" To Keep Prisoners on the Straight and Narrow*, INTER PRESS SERV., July 15, 2006, http://ipsnews.net/news.asp?idnews=33976 (on file with the *New York University Law Review*) (noting statements by Kenyan NGO representative and prisons department spokesperson expressing need for initiatives to address prisoner reentry in wake of announcement that nearly 8000 inmates would be freed to reduce overcrowding in Kenyan prisons).

[37] *See* sources cited *supra* note 36.

[38] *See* Eric Cadora et al., *Criminal Justice and Health and Human Services: An Exploration of Overlapping Needs, Resources, and Interests in Brooklyn Neighborhoods*, *in* PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN,

convictions frustrate reintegration for both individuals and whole communities.[39] Because so many individuals are now being released each year from U.S. prisons,[40] these consequences are affecting greater numbers of individuals,[41] and, by extension, greater numbers of families[42] and communities. Studies show that a relatively small number of communities—specifically, neighborhoods in U.S. urban centers—disproportionately absorb the reentering population.[43] As a result, these communities face particularly difficult challenges in rein-

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FAMILIES, AND COMMUNITIES 285, 285 (Jeremy Travis & Michelle Waul eds., 2003) [hereinafter PRISONERS ONCE REMOVED] (describing challenges created by "unprecedented numbers of people return[ing] home from prison"); Thompson, *supra* note 6, at 256 (discussing "scale of the current [reentry] problem").

[39] *See* JUSTICE KENNEDY COMM'N, AM. BAR ASS'N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 85 (2004), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports_Final_081104.pdf (recommending that jurisdictions "eliminate entirely those [collateral consequences] that . . . serve only to frustrate successful reentry"); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002) (describing how collateral consequences impact employment and ability "to lead law-abiding lives"); Nora V. Demleitner, *"Collateral Damage": No Re-entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1027 (2002) (noting that collateral consequences of drug convictions impede reintegration "by restricting welfare benefits, employment and skills training opportunities").

[40] *See supra* note 5 and accompanying text.

[41] JOAN PETERSILIA, WHEN PRISONERS COME HOME 136 (2003) (noting that collateral consequences are "being applied to a larger percentage of the U.S. population and for longer periods of time than at any point in U.S. history"). For an argument that collateral consequences are intertwined with the reentry process, see generally Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006).

[42] Donald Braman & Jennifer Wood, *From One Generation to the Next: How Criminal Sanctions Are Reshaping Family Life in Urban America*, *in* PRISONERS ONCE REMOVED, *supra* note 38, at 157, 171–74 (describing impact of employment-related obstacles on families); Jeremy Travis & Michelle Waul, *Prisoners Once Removed: The Children and Families of Prisoners*, *in* PRISONERS ONCE REMOVED, *supra* note 38, at 1, 22–25 (describing how collateral consequences impact families).

[43] *See, e.g.*, DIANA BRAZZELL & NANCY G. LA VIGNE, URBAN INST., PRISONER REENTRY IN HOUSTON: COMMUNITY PERSPECTIVES 1 (2009), *available at* http://www.urban.org/UploadedPDF/411901_prisoner_reentry_houston.pdf (noting that over twenty percent of inmates released from Texas prisons and jails return to Houston metropolitan area); LISA E. BROOKS ET AL., URBAN INST., PRISONER REENTRY IN MASSACHUSETTS 1 (2005), *available at* http://www.urban.org/UploadedPDF/411167_Prisoner_Reentry_MA.pdf (noting that over "one-third of [Massachusetts] prisoners released in 2002 came from two Massachusetts counties—Suffolk and Worcester," and that nearly half of those returning to Suffolk County ended up "clustered in a few Boston neighborhoods"); CHRISTY VISHER ET AL., URBAN INST., OHIO PRISONERS' REFLECTIONS ON RETURNING HOME 1 (2006), *available at* http://www.urban.org/UploadedPDF/311272_ohio_prisoners.pdf (noting that over twenty percent of prisoners released in Ohio in 2004 returned to Cuyahoga County, and nearly eighty percent of those returned to Cleveland); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African-American Communities*, 56 STAN. L. REV. 1271, 1276 (2004) ("[T]he exit and reentry of inmates is geographically concentrated in the poorest, minority neighborhoods.").

tegrating returning individuals.[44] Thus, assessing the extent to which the legal processes in the United States stigmatize individuals with criminal records compared to the legal processes in the Comparison Countries is of great import for reentering individuals, their families, and their communities.

In addition, comparative analysis of collateral consequences is fruitful because U.S. criminal justice policies appear to have influenced policies implemented in other countries,[45] including policies relating to individuals with criminal records.[46] The international impact of U.S. punishment schemes makes comparative analysis particularly useful. Other countries have adopted some U.S. policies while rejecting others. For example, in the wake of the widespread adoption of sex offender registration requirements in the United States,[47] the Comparison Countries all enacted similar but significantly less expansive laws.[48] Comparative analysis can thus illustrate alternative options for policymakers interested in reform.

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[44] *See* R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 596 (2003) ("Community stability may be impaired both by the loss of so many adults [to incarceration] and, paradoxically, by their reentry into the community after having endured the conditions of prison." (footnote omitted)).

[45] *See* CAVADINO & DIGNAN, *supra* note 14, at 50 ("[The United States] has . . . been leading in the sense of moving in directions that others follow, not only in its penal practices but also in the ideology of how countries should respond to crime."); Tim Newburn & Richard Sparks, *Criminal Justice and Political Cultures*, *in* CRIMINAL JUSTICE AND POLITICAL CULTURES: NATIONAL AND INTERNATIONAL DIMENSIONS OF CRIME CONTROL 1, 9–10 (Tim Newburn & Richard Sparks eds., 2004) [hereinafter CRIMINAL JUSTICE AND POLITICAL CULTURES] (noting influence United States. has had on other countries regarding crime control policies).

[46] *See infra* note 106.

[47] In the United States, every state requires sex offenders to register with local law enforcement or has some form of community notification law permitting members of the general public to learn about sex offenders who live in the area. *See* Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1237 (2009). Sex offender registration laws gained prominence in 1994, when the New Jersey legislature enacted its "Megan's Law," and the federal government "required states to register and gather information on sex offenders under threat of losing a portion of federal funds if they did not comply." Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172–73 (1999). By 1996, all of the states had enacted a registration requirement. *See id.* at 1173 n.26.

[48] In 1997, England enacted a statute that required sex offenders to notify law enforcement authorities of their names and addresses, as well as to update the authorities of any related changes. *See* Sex Offenders Act, 1997, c. 51 (Eng.), *amended by* Sexual Offenses (Amendment) Act, 2000, c. 44 (Eng.). There has been spirited debate about whether to enact community notification laws in addition to the reporting requirement. *See* Meghann J. Dugan, Note, *Megan's Law or Sarah's Law? A Comparative Analysis of Public Notification Statutes in the United States and England*, 23 LOY. L.A. INT'L & COMP. L. REV. 617, 618 (2001) (discussing public debate). England began a project in September 2008 that allows parents in four pilot areas in England to ask authorities whether individuals with

### *B. Race, Dignity, and Collateral Consequences*

Comparative analysis also illuminates the role that race and concepts of dignity play in collateral consequence policies. As will be detailed below, a significant correlation exists between collateral consequences and race in the United States.[49] Felon disenfranchisement, the most long-standing of these consequences, originated during the colonial era in the United States and continues, in various forms, in the vast majority of states today. Post-Reconstruction disenfranchisement laws, tailored to exclude African Americans from voting, were rooted in race.[50]

Other collateral consequences—such as restrictions on welfare and housing benefits—dramatically increased in the 1980s and 1990s in number and severity. Unlike the post-Reconstruction disenfranchisement laws, these consequences were not explicitly rooted in racial animus. However, this significant expansion occurred during the same time that the U.S. criminal justice system waged the "war on drugs" that led to the exploding incarceration rates that continue to disproportionately impact individuals and communities of color today. Indeed, several of the consequences enacted during these decades specifically targeted drug offenses, which are well-known to disproportionately impact African Americans and Latinos.[51]

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access to their children are convicted sex offenders or have been suspected of sexually abusing children. Matthew Hickley, *Sarah's Law Arrives 8 Years On, But Can It Really Protect Children?*, DAILY MAIL (U.K.), Sept. 15, 2008, at 11.

In 2000, "frustrated by the lack of any federal government response" in Canada, Alberta and Ontario enacted sex offender registration statutes. *See* Alfred J.C. O'Marra, *The Impact of Inquests on the Criminal Justice System in Ontario: A Decade of Change*, 10 CAN. CRIM. L. REV. 117, 144 (2006). Federal registration requirements were subsequently enacted in 2004. Sex Offender Information Registration Act, 2004 S.C., ch. 10 (Can.), *available at* http://laws.justice.gc.ca/PDF/Statute/S/S-8.7.pdf. However, unlike the sex offender registries in the United States, which are open to the public, the registry in Canada is available only to law enforcement authorities in order to protect sex offenders' privacy and facilitate their reentry into the community. *Id.* § 2; *see also* Paul Turenne, *'Peg Cop Slams Sex Offender Registry*, WINNIPEG SUN (Can.), Aug. 2, 2006, at 3 (quoting police commander stating that "[y]ou have to have reasonable grounds to believe the query will assist in the investigation of a sexual offence").

In 2007, South Africa adopted its sex offender registration law. *See* Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.), *available at* http://www.justice.gov.za/legislation/acts/2007-032.pdf. However, the registry is limited to offenders who commit their crimes "against a child or person who is mentally disabled." *Id.* s. 50. Moreover, like Canada, South Africa does not make its registry available to the general public. Instead, it is available to employers, licensing agencies, and adoption or foster care agencies. *See id.* ss. 43, 45, 47, 48.

[49] *See infra* Part III.B.1.a.

[50] *See infra* notes 319–22 and accompanying text.

[51] *See infra* notes 335–48 and accompanying text.

A comparative examination highlights the fact that race is significantly intertwined with current U.S. collateral consequence policies and practices. Accordingly, this Article will examine collateral consequences in countries whose criminal justice systems have significant similarities to the U.S. criminal justice system. In particular, it will illustrate the ways in which the Comparison Countries have accounted for the racially disparate impacts of their criminal justice practices.[52]

This Article's comparative analysis will also focus on the relationship between collateral consequences and the concept of human dignity.[53] Canada and South Africa, two countries that have embraced broad international human rights notions of dignity, impose fewer and less severe legal restrictions on individuals with criminal records than does the United States.[54] Similarly, England, Canada, and South Africa also have legal provisions—in the form of pardons or national expungement provisions—that more readily forgive individuals for their past legal transgressions.[55] The United States, in contrast, conceptualizes dignity very narrowly.[56] As a result, the legal stigma that attaches to a criminal record in the United States is more permanent than in other countries with similar criminal justice systems.[57]

### *C. Obstacles to Comparative Analysis*

While comparison is meaningful in the collateral consequences context, it is not seamless. Scholars have long recognized the obstacles to comparisons of legal practices across countries, particularly in the criminal justice setting. As a practical matter, it can be exceedingly difficult to obtain the materials necessary for meaningful comparisons.[58] And even when the relevant sources are available, countries have different customs, norms, laws, legal systems, and political systems that may make drawing meaningful comparisons extraordinarily difficult, if not impossible.[59] A nation's laws and systems, in addition

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[52] *See infra* Part III.B.1.b.

[53] *See infra* Part III.B.2.

[54] *See infra* Part II.A.3–4.

[55] *See infra* Part II.B.

[56] *See infra* Part III.B.2.

[57] *See infra* Part II.B.

[58] *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. 539, 551 (1990) (noting that comparative research presents methodological problems due to "lack of reliable, comparable data on the actual functioning of different systems").

[59] *See, e.g.*, Michael Tonry, *Determinants of Penal Policies*, *in* 36 CRIME AND JUSTICE: CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE 1 (Michael Tonry ed., 2007) [hereinafter CRIME, PUNISHMENT, AND POLITICS] ("In countries in which most or some penal policies have become more severe, the reasons are not rising crime rates,

to being rooted in localized traditions and customs, may also have originated in response to unique local social conditions, such as high crime rates or problems with particular types of criminal activity.

Scholars seeking to understand why the United States has the highest incarceration rate in the world[60] have confronted all of these methodological challenges.[61] They have offered several explainations for the incarceration disparity between the United States and other countries, including that the United States has particularly high crime rates, which in turn lead to broader criminal laws;[62] that the United States has particular problems with violent crime;[63] that incarceration rates expanded as part of the "war on drugs";[64] that the United States more frequently incarcerates individuals for nonviolent offenses;[65]

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increased awareness of risk, globalization, or the conditions of late modernity, but rather distinctive cultural, historical, constitutional and political conditions.").

60 This fact has drawn much scholarly and media attention in the United States and abroad. *See, e.g.*, Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 HARV. J.L. & PUB. POL'Y 33 (2003) (noting high U.S. incarceration rate); Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235 (2009) (same); J.C. Oleson, Comment, *The Punitive Coma*, 90 CAL. L. REV. 829 (2002) (same); Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, at A1 (same); *see also* THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: GROWTH IN POPULATION CONTINUES 1 (2006), *available at* http://www.sentencingproject.org/doc/publications/inc_newfigures.pdf (discussing trends in incarceration growth in United States). For country incarceration rates, see ROY WALMSLEY, HOME OFFICE (U.K.), WORLD PRISON POPULATION LIST (3d ed. 2002), *available at* http://www.homeoffice.gov.uk/rds/pdfs/r166.pdf.

61 Ian Dunbar and Anthony Langdon provide an informative discussion of the methodological difficulties inherent in efforts to establish the causes of high incarceration rates. *See* IAN DUNBAR & ANTHONY LANGDON, TOUGH JUSTICE: SENTENCING AND PENAL POLICIES IN THE 1990s, at 45 (1998) ("The prison population of any country is the product both of crime and of a highly complex mix of attitudes and decisions in police forces, prosecuting authorities, courts and legislatures.").

62 *See, e.g.*, James P. Lynch, *A Comparison of Prison Use in England, Canada, West Germany and the United States: A Limited Test of the Punitive Hypothesis*, 79 J. CRIM. L. & CRIMINOLOGY 180, 181 (1988) (identifying higher crime rates and more encompassing criminal laws as contributors to higher incarceration rate in United States).

63 *See, e.g.*, Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 256 n.102 (2007) ("[T]he higher actual rate of violent crime in the United States as compared to other industrialized countries may explain the imprisonment trend: violent crime may help establish the political climate that fuels a desire for incarceration."); Sebastian Roche, *Criminal Justice Policy in France: Illusions of Severity*, *in* CRIME, PUNISHMENT, AND POLITICS, note 59, at 471, 544 ("The contrast [in punishment] between European nations and the United States cannot be understood without taking violent and drug-related crime into account.").

64 *See, e.g.*, PETERSILIA, *supra* note 41, at 26 (noting number of women incarcerated for drug offenses increased 888% during decade following passage of mandatory minimum sentences for drug convictions in 1986); TONRY, *supra* note 21, at 81–82 (arguing that drug-offense sentences imposed as part of war on drugs were "single most important cause" of dramatic rise in prison population from 1980 to mid-1990s).

65 *See, e.g.*, MICHAEL TONRY, SENTENCING MATTERS 124–25 (1996) (noting that unlike United States, which relies heavily on incarceration, other Western nations rely heavily on

that judges and prosecutors in several jurisdictions across the United States are elected, rather than appointed, and are thus subject to political pressure;[66] and that issues of crime and punishment receive especially extensive media coverage in the United States.[67] The great variety of these explanations suggests that a comparative approach cannot divorce the subject(s) of comparison from the political, social, and cultural realities in which they developed and exist.

A comparative approach presents similar challenges in the collateral consequences context. To begin with, there are logistical difficulties in ascertaining the full range of consequences in other countries.[68] In addition, culture, custom, and localized needs dramatically affect the ways in which different societies view and treat individuals with criminal records. Jurisdictions within a country often have particular political or economic problems requiring locality-specific laws and regulations.[69] As noted below, this is particularly true in the United States, where the scope of collateral consequences differs among the states and even within each state.[70]

Another hurdle to comparative exploration of collateral consequences stems from the fact that in every society, individuals with criminal records confront tension and even some degree of rejection in the communities to which they return.[71] For the purposes of this Article, such tension and rejection are referred to as the "informal consequences" of criminal convictions. They are "informal" in the

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fines for "nontrivial" offenses); Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 414 (2006) ("[T]he United States . . . clearly incarcerate[s] many more nonviolent offenders than other nations . . . .").

66 *See, e.g.*, Tonry, *supra* note 59, at 23 ("Politicization of criminal justice policy is directly related to whether prosecutors and judges are selected politically or meritocratically.").

67 ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS 29 (2008) ("The news media [in the United States] continues to have a significant impact on the development of public policy in the related areas of prisons, crime, and delinquency."); Tonry, *supra* note 59, at 18 (noting that "particular forms of sensationalist journalism" are one determinant of country's penal policy).

68 *See* Damaska, *supra* note 32, at 350 ("There are few countries of the world in which we can find comprehensive surveys of consequences of conviction . . . .").

69 *See* Rick Ruddell & L. Thomas Winfree, Jr., *Setting Aside Criminal Convictions in Canada: A Successful Approach to Offender Reintegration*, 86 PRISON J. 452, 455 (2006) (noting U.S. and Canadian "intranational" differences with regard to punishment schemes).

70 *See infra* notes 183–88, 202–03, 206–07 and accompanying text.

71 HARJIT S. SANDHU, MODERN CORRECTIONS: THE OFFENDERS, THERAPIES AND COMMUNITY REINTEGRATION 267 (1974) (noting that many individuals who have exited correctional facilities "[c]arry[ ] with them the stigma of imprisonment, [and] are treated as suspects and outcasts").

sense that they are not rooted in law.[72] Informal consequences can include the ways in which neighbors, family members, prospective landlords, or employers treat the individual upon his or her return. They can also include the ways in which community members treat the family of the returning individual. For example, in South Africa individuals convicted of rape or child molestation, as well as their families, are often stigmatized and sometimes even banished from their communities.[73] In England and the United States, polls illustrate that employers are reluctant to hire individuals with criminal records.[74] Though these informal consequences are distinct from the legal consequences of criminal convictions, they may be just as harsh in practical effect on an individual's life.

While the informal limitations noted above are important,[75] this Article focuses on the formal consequences of criminal convictions. Formal consequences are those that are mandated through laws and/or regulations that place restrictions on individuals with criminal records. Comparisons of formal collateral consequences across countries have value because they shed light on the ways in which the law impacts reentry. Such comparisons can also identify alternative ways of addressing reentry issues and concerns in the United States, with the goal of enhancing opportunities for individuals to move past their criminal record. Specifically, this Article focuses on those collateral consequences that relate to housing, employment, public benefits, and voting. The first three consequences are perhaps the most critical to reentry because they directly impact an individual's ability to sustain him- or herself. Those related to voting have received the greatest scholarly and media attention in the United States, as the ability to vote acts as a measure of an individual's civic standing in his or her community.

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[72] Professor Mirjan Damaska describes these as the "social" consequences of a criminal conviction, which he defines as "those that do not attach by virtue of a legal norm, but rather on account of societal disapprobation (ostracism, refusal to employ, etc.)." Damaska, *supra* note 32, at 347.

[73] *See* Dirk van Zyl Smit, *Civil Disabilities of Former Prisoners in a Constitutional Democracy: Building on the South African Experience*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES 255, 259–60 (Christopher Mele & Teresa A. Miller eds., 2005) (discussing social consequences of conviction).

[74] Harry J. Holzer et al., *How Do Employer Perceptions of Crime and Incarceration Affect the Employment Prospects of Less-Educated Young Black Men?*, *in* BLACK MALES LEFT BEHIND 67, 73 (Ronald B. Mincy ed., 2006); *Ex-offenders 'Face Jobs Struggle*,' BBC NEWS, Aug. 31, 2005, http://news.bbc.co.uk/1/hi/business/4197808.stm.

[75] Social stigma is significant both in its own right and because it often interacts with collateral consequences to exacerbate reentry hurdles. HARRY E. ALLEN & CLIFFORD E. SIMONSEN, CORRECTIONS IN AMERICA 427 (8th ed. 1998).

### *D. Selection of Countries for Comparative Examination*

This Article comparatively examines the ways in which the United States, England, Canada, and South Africa impose legal obstacles upon formerly incarcerated individuals.[76] The United States, England, and Canada all possess democratic political institutions and share a similar legal culture rooted in English common law.[77] These countries' criminal justice systems have many similarities, including relatively high incarceration rates and the disproportionate incarceration of racial minorities.[78] Because of these similarities, commentators have compared various aspects of the U.S. criminal justice system, particularly its criminalization and punishment policies and methods, with the English and Canadian systems.[79] While many of these com-

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[76] Certainly, other countries have similar characteristics for comparative purposes. For instance, Scotland, Ireland, and Australia share similar histories with England, and their criminal justice systems are largely rooted in English common law. KENNETH ROBERTS-WRAY, COMMONWEALTH AND COLONIAL LAW 32–35, 665–69, 874–80 (1966). Moreover, like Canada, Australia has an Aboriginal population that has suffered historical discrimination and is overrepresented in its prisons. *Compare* JOHN WALKER & DAVID MCDONALD, AUSTRALIAN INST. OF CRIMINOLOGY, TRENDS AND ISSUES IN CRIME AND CRIMINAL JUSTICE, PUB. NO. 47, THE OVER-REPRESENTATION OF INDIGENOUS PEOPLE IN CUSTODY IN AUSTRALIA (1995), *available at* http://aic.gov.au/documents/D/2/6/%7BD260592C-A92B-4A5C-BAE0-ADBBBCBD3BFD%7Dti47.pdf (discussing overrepresentation of Australia's Aboriginal population in prison), *with* ROGER E. BOE, CORR. SERV. OF CAN., FORUM ON CORR. RESEARCH, ABORIGINAL INMATES: DEMOGRAPHIC TRENDS AND PROJECTIONS 7–9 (2000) (discussing overrepresentation of Canada's Aboriginal population in prison). While a broader comparative examination could include these countries and others, it simply would be too long for a law review article. As such, this Article focuses on England and Canada—whose criminal justice systems are often compared to that of the United States—as well as South Africa, which has a similar history of racial subjugation and scholarly literature that has exposed collateral consequences and reentry issues.

[77] *See* James Lynch, *Crime in International Perspective*, *in* CRIME: PUBLIC POLICIES FOR CRIME CONTROL 5, 7 (James Q. Wilson & Joan Petersilia eds., 2002) (noting that criminal justice systems in countries such as England and Canada would provide particularly "useful points of comparison" with United States "because they have similar levels of participation in the major institutions of social control . . . ; they are democracies; and they have common law legal traditions"). More broadly, Michael Tonry explains that the criminal justice systems of Western countries are very similar in their "reliance on imprisonment as the primary sanction for very serious crimes" and in the "content of [their] criminal law doctrine[s], rules of evidence, and procedural safeguards." Michael Tonry, *Punishment Policies and Patterns in Western Countries*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 3, 3 (Michael Tonry & Richard S. Frase eds., 2001).

[78] *See infra* Part I.D.1–2 (describing increases in incarceration rates, particularly with regard to racial minorities, in England and Canada in 1990s, and explaining influence of U.S. criminal justice policies on England and Canada).

[79] *See* Deflem & Swygart, *supra* note 20, at 52 (providing examples of comparative criminal justice research involving United States, Canada, and England); Candace Kruttschnitt & Rosemary Gartner, *Women's Imprisonment*, *in* 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1 (Michael Tonry, ed., 2003) (comparing rates of female incarceration in United States, Canada, and England); Lynch, *supra* note 77, at 7 (finding compari-

mentators have concluded that England and Canada have significantly less severe criminal sanctions than the United States,[80] these countries have actually become increasingly punitive in recent years[81] and have implemented more stringent punishment schemes.[82]

This Article also includes South Africa in its comparative examination. South Africa recently shifted from a White-controlled authoritarian government, in which Blacks comprised the majority but were treated as the underclass, to a Black-controlled democratic government.[83] Crime and public safety were significant issues in the immediate post-apartheid era and remain so today,[84] resulting in South Africa having one of the highest incarceration rates in the world.[85] In addition, prisoner reentry is a prominent issue in South Africa, which is dealing with an exploding prisoner population and with prisoners who are increasingly serving long sentences.[86]

Moreover, South Africa's recently adopted Constitution[87] has drawn the attention of several United States' commentators, who have detailed and analyzed the Constitution's governing principles.[88] South Africa's Constitution, post-apartheid and more recent criminal

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sons between United States and countries such as Canada and England to be useful because they exhibit "similar levels of participation in the major institutions of social control . . . ; they are democracies; and they have common law legal traditions").

80 Lynch, *supra* note 77, at 5 ("The United States uses imprisonment for every crime more often than other industrialized nations.").

81 *See* GABBIDON, *supra* note 29, at 52 ("[T]he increasing use of prisons in Britain during the 1990s clearly paralleled the 'get tough' approach in the United States that led to an inflated American prison population.").

82 *See infra* notes 102–07, 135–36 and accompanying text.

83 *See* GABBIDON, *supra* note 29, at 204 (discussing transition from Apartheid to democratic regime).

84 *Id.* at 218–22.

85 *See* ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, KING'S COLLEGE LONDON, WORLD PRISON POPULATION LIST 1, 2 (8th ed. 2009), *available at* http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf (noting that while nearly three-fifths of countries incarcerate fewer than 150 individuals per 100,000 of their populations, South Africa incarcerates 335 per 100,000).

86 *See* Michelle Jones, *Prisons Are Overcrowded 'to the Point of Collapse*,' PRETORIA NEWS (S. Afr.), Oct. 13, 2009, at 5 (noting that South Africa's prisons are overcrowded and percentage of prisoners serving at least seven years had increased from thirty-five percent in 1998 to sixty-eight percent in 2009); *see also* LUKAS MUNTINGH, AFTER PRISON: THE CASE FOR OFFENDER REINTEGRATION 55–72 (2001) (discussing reentry services provided by nongovernmental organizations in South Africa).

87 S. AFR. CONST. 1996.

88 *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) (comparing U.S. Constitution with South Africa's and others); Jack Greenberg, *A Tale of Two Countries, United States and South Africa*, 41 ST. LOUIS U. L.J. 1291 (1997) (comparing constitutional jurisprudence regarding death penalty in South Africa and United States); Peter E. Quint, *What Is a Twentieth-Century Constitution?*, 67 MD. L. REV. 238 (2007) (comparing U.S. Constitution with constitutions of South Africa and Germany).

justice policies, increasing prison population, and close attention to reentry issues create robust avenues for comparison to U.S. policies.

While the Comparison Countries differ politically and socially from the United States in important ways, all three have high incarceration rates relative to other countries.[89] Moreover, Canada and England have adopted "law and order" reforms that are similar to practices in the United States.[90] Also, as will be explained below, individuals exiting penal institutions in England and particularly South Africa confront significant legal obstacles that can impede reintegration.

In addition, comparison with England, Canada, and South Africa is meaningful because they are *not* among the countries that provide the broadest support to individuals with criminal records; thus, they are still relatively similar to the United States. For example, other Western European countries, such as Germany and Finland, provide much more social welfare support to prisoners than the Comparison Countries, and they have reintegration policies that more affirmatively assist newly released individuals in rejoining their communities.[91]

Unlike individuals with criminal records in the Comparison Countries, those in the United States face a broad range of post-incarceration legal penalties that can span their lifetimes and therefore make it extraordinarily difficult, and oftentimes impossible, to move past their criminal records and lead productive post-incarceration lives. To illustrate this point, the following sections will compare some of the post-sentence legal penalties imposed on individuals in the United States with those imposed on individuals in England, Canada, and South Africa.

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[89] For England, see *infra* note 111 and accompanying text; for Canada, see *infra* note 141 and accompanying text; for South Africa, see *supra* note 85 and accompanying text.

[90] *See infra* notes 102–07, 135–36 and accompanying text.

[91] For instance, inmates in Germany are expected to hold prison jobs that resemble "real jobs" outside of prison, and they "enjoy far-reaching protection against arbitrary discharge, and . . . four weeks per year of paid vacation." JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 8 (2003). In addition, inmates who worked while in German prisons and who cannot find work upon release are eligible to receive unemployment benefits. Herta Tóth, *Comparative Report Based on National Reports' Fieldwork Findings*, *in* WOMEN, INTEGRATION AND PRISON 22, 56 (Marta Cruells & Noelia Igareda eds., 2005), *available at* http://cps.ceu.hu/jointpubl_womenintegrationprison.php. Moreover, the government will pay these inmates' outside housing rents for one year of incarceration to help preserve their housing. *Id.* In Finland, inmates with short sentences are permitted to work for wages, while inmates with longer sentences are expected to work or pursue vocational training. Tapio Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES, *supra* note 77, at 92, 100.

### *1. England*

The United States shares a uniquely close history with England.[92] British colonists brought practices rooted in English law and tradition to the United States. Many features of the U.S. criminal justice system, including collateral consequences, originated in England.[93] U.S. collateral consequences are vestiges of the "civil death" that historically accompanied conviction in England,[94] where individuals convicted of serious offenses lost all political, civil, and legal rights, including the right to contract, marry, and sue.[95]

In the latter part of the nineteenth century, the United States and England began reforming their penal systems based on the philosophy of "penal welfare," the main goal of which was to rehabilitate offenders.[96] Sentences were individualized, with the punishment tailored to meet offenders' particularized needs. Both the United States and England began to depart from the penal welfare model in the 1970s.[97] However, the United States took a sharper turn during this period, as it scaled back rehabilitative programs and shifted, to a considerable extent, to more punitive forms of punishment.[98] For example, during this period the United States moved from indeterminate sentencing schemes—which had given judges broad discretion in sentencing most cases—to determinate sentencing schemes, under

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[92] *See* HIRSCHEL & WAKEFIELD, *supra* note 20, at 20 (noting "many commonalities between England and the United States" including "a common language and a common cultural heritage").

[93] *See* HUGH C. BANKS ET AL., CIVIL DISABILITIES OF EX-OFFENDERS 3 (1974) ("Contemporary civil disabilities laws have their origins in English common law concepts such as infamy and civil death.").

[94] *See* Neil P. Cohen & Dean Hill Rivkin, *Civil Disabilities: The Forgotten Punishment*, 35 FED. PROBATION 19 (1971) (noting that American jurisprudence followed English tradition of civil death by adopting numerous civil disability laws).

[95] *See* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1049 n.13, 1060 (discussing civil death).

[96] *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 34–35 (2001) (tracing origins of penal welfarism to 1890s, stating that it was "established policy framework" in United States and Britain by 1970, and explaining that penal welfare principles included "indeterminate sentences linked to early release and parole supervision; . . . social work with offenders and their families; and custodial regimes that stressed the re-educative purposes of imprisonment and the importance of re-integrative support upon release").

[97] *See* PHILIP PRIESTLEY ET AL., SOCIAL SKILLS IN PRISON AND THE COMMUNITY: PROBLEM SOLVING FOR OFFENDERS 1 (1984) (noting that from end of World War II "until the mid-1970s, English penal policy was broadly characterised by an emphasis on keeping people out of custodial institutions").

[98] *See* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 6 (2003) (noting that rehabilitation was "the central professed goal of American criminal justice—at least in most public rhetoric—until the final quarter of the twentieth century").

which judges were bound by sentencing guidelines.[99] As a result of this shift, incarceration rates in the United States began to rise dramatically in the mid-1970s.[100]

Although England likewise began scaling back its penal welfare approach in the 1970s, its incarceration rates did not rise dramatically until the 1990s, when issues involving crime and punishment began to attract greater media and political attention in England.[101] In response, England scaled back its rehabilitative programs and adopted several "law and order" criminal justice policies similar to those implemented in the United States. Specifically, it criminalized certain types of "anti-social behaviour"[102] and implemented punishment schemes similar to some of those imposed in the United States,[103] such as mandatory minimums for specific offenses,[104] increased penalties for drug offenses,[105] and two- and three-strikes laws.[106]

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[99] *See* Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES, *supra* note 77, at 222, 223–24 (noting that many U.S. jurisdictions have adopted determinate sentencing schemes since 1970s, all of which "seek to cabin, or even eliminate, the former reservoirs of case-by-case sentencing discretion held by trial judges and parole officials"). However, several states have maintained indeterminate sentencing schemes. Richard S. Frase, *Comparative Perspectives on Sentencing Policy and Research*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES, *supra* note 77, at 259, 262.

[100] *See* Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1184–85 (2006) (noting several commonly offered explanations for increased incarceration rates over last quarter century, including mandatory minimum sentencing laws and "the increased adoption of sentencing guidelines"); *see also* Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 858 (2009) ("From 1974, the prison population began to grow, and the incarceration rate increased continuously for the next three decades.").

[101] *See* Andrew Ashworth, *The Decline of English Sentencing and Other Stories*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES, *supra* note 77, at 62, 85 (describing influence of mass media in England on "recent sentencing policy and practice"); Tim Newburn, *"Tough on Crime": Penal Policy in England and Wales*, *in* CRIME, PUNISHMENT, AND POLITICS, *supra* note 59, at 425, 426 ("[I]n the early 1990s, . . . the two main political parties locked themselves into a second-order consensus around the need to be seen to be 'tough on crime.'").

[102] Adam Crawford, *Criminalizing Sociability Through Anti-social Behaviour Legislation: Dispersal Powers, Young People and the Police*, 9 YOUTH JUST. 5, 5 (2009) ("[T]he capacious definition of anti-social behaviour extends to a wide range of activities, misdemeanours, incivilities and (sometimes quite serious) crimes. In legislation it is defined as behaviour that 'causes or is likely to cause harassment, alarm or distress' to others." (footnote omitted)).

[103] England is not alone among European countries in this regard. *See, e.g.*, WHITMAN, *supra* note 91, at 69–70 (explaining that France and Germany have implemented harsher punishment schemes in past thirty years).

[104] *See* CAVADINO & DIGNAN, *supra* note 14, at 70 (noting that mandatory minimum sentence for illegal possession of firearm was implemented in 2003).

[105] Criminal Justice Act, 2003, c. 44, § 284, sched. 28 (Eng.) (increasing maximum penalties for certain drug-related offenses from five to fourteen years of imprisonment).

Crime control strategies in the United States and England have also grown increasingly similar in recent years.[107] Perhaps most significantly, the incarceration rates in England have increased dramatically in the past two decades.[108] England's prison population grew nearly seventy percent between 1993 and 2005,[109] and its custodial sentences increased forty percent between 1997 and 2007.[110] As of 2005, England had the highest incarceration rate in Western Europe.[111]

In addition, vast racial disparities exist within the incarcerated populations of both the United States and England. In the United States, African Americans and Latinos are disproportionately incarcerated at both the state and federal levels relative to their representation in the overall population.[112] Similarly, in England, which began to

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106 *See* Crime (Sentences) Act, 1997, c. 43, § 2 (Eng.) (providing for mandatory life sentence for second commission of "serious offence"). *See generally* Trevor Jones & Tim Newburn, *Three Strikes and You're Out: Exploring Symbol and Substance in American and British Crime Control Politics*, 46 BRIT. J. CRIMINOLOGY 781 (2006) (comparing two- and three-strikes laws enacted in United Kingdom in late 1990s with U.S. three-strikes laws and explaining that U.K. laws are more moderate than U.S. versions).

107 *See* GARLAND, *supra* note 96, at 168 (noting similarity of crime control strategies in United States and United Kingdom since 1980s, including increases in length of prison sentences, average time served, use of custodial sentences, and "likelihood of being returned to custody from parole"); Trevor Jones & Tim Newburn, *The Convergence of U.S. & U.K. Crime Control Policy: Exploring Substance and Process*, *in* CRIMINAL JUSTICE AND POLITICAL CULTURES, *supra* note 45, at 123, 126 (noting that United States has influenced crime control policies in United Kingdom).

108 *See* Shadd Maruna et al., *Ex-offender Reintegration: Theory and Practice*, *in* AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION, *supra* note 7, at 6 (noting that prison population in United Kingdom has risen dramatically since 1992).

109 Newburn, *supra* note 101, at 434. Incarceration rates in the United States and England are affected greatly by the vast number of individuals who are returned to prisons for violating technical conditions of their release, as opposed to committing new crimes. In the United States, "[h]igh parole revocation rates [are] one of the major factors linked to the growing . . . prison population." PETERSILIA, *supra* note 41, at 148. Similarly, individuals in England have been increasingly "recalled" to custody. Just over half of these individuals are recalled for violating conditions of release, such as missing curfew or missing appointments with probation officers. Nicola Padfield & Shadd Maruna, *The Revolving Door at the Prison Gate: Exploring the Dramatic Increase in Recalls to Prison*, 6 CRIMINOLOGY & CRIM. JUST. 329, 330–32 (2006).

110 MINISTRY OF JUSTICE (U.K.), 2007 SENTENCING STATISTICS: ENGLAND AND WALES 31 (2008), *available at* www.justice.gov.uk/about/docs/sentencing-statistics-2007.pdf. These statistics include those who were sentenced to "immediate" custody and those who received suspended custodial sentences. Although immediate custodial sentences in 2007 were the second lowest recorded in a decade, the increased custody rate between 1997 and 2007 is attributed to the more frequent use of immediate custody in the first part of this decade followed by the more recent increased use of suspended custodial sentences. *Id.*

111 Newburn, *supra* note 101, at 435; *see also* Philip Johnston, *Jails Almost at Bursting Point*, THE DAILY TELEGRAPH (London), June 30, 2006, at 2 (noting that jails in England are overcrowded and that incarcerated population is expected to continue increasing in near future).

112 *See* SABOL ET AL., *supra* note 5, at 2 tbl.2 (finding that, as of year-end 2008, there were approximately 3161 African American male prisoners per 100,000 African American

monitor prisoner ethnicity in 1984,[113] persons of African and African Caribbean descent are disproportionately incarcerated.[114] Moreover, "[p]rison receptions of all known Black and Minority Ethnic groups increased by 37 per cent between 1998 and 2002—more than 8 times the increase for white prisoners."[115] The overrepresentation of people of color in England's criminal justice system, particularly the "alarming increase in the number of mostly second-generation males and females of African Caribbean origin in the prison population,"[116] has received significant scholarly and media attention.[117]

Moreover, the United States and England have both recently seen significant shifts in the numbers of women prisoners. In the United States, the number of women prisoners has increased dramatically from 64,403 women prisoners in 1994[118] to 106,410 women prisoners at midyear 2008.[119] In England, the number of women prisoners likewise surged between 1990 and 2000.[120] In addition, women of

men, 1200 Hispanic male prisoners per 100,000 Hispanic men, and 487 White male prisoners per 100,000 White men).

113 STEPHEN SHUTE ET AL., A FAIR HEARING? ETHNIC MINORITIES IN THE CRIMINAL COURTS 2–3 (2005).

114 As of June 2007, Black English nationals were incarcerated at rates five times greater than Whites, and individuals from mixed-ethnic backgrounds were incarcerated at rates nearly three times greater than Whites. ALEX JONES & LAWRENCE SINGER, MINISTRY OF JUSTICE (U.K.), STATISTICS ON RACE AND THE CRIMINAL JUSTICE SYSTEM—2006/7, at 91 (2008), *available at* http://www.justice.gov.uk/docs/stats-race-criminal-justice.pdf.

115 SMARTJUSTICE, THE RACIAL JUSTICE GAP: RACE AND THE PRISON POPULATION BRIEFING 2 (2004), *available at* http://www.bulger.co.uk/prison/SmartJusticeRaceBriefing.pdf. Specifically, "[t]he numbers of Black people, Chinese and other, South Asians and White people rose by 34 per cent, 61 per cent, 24 per cent and 4 per cent respectively" between 1998 and 2002. *Id.*; *see also* Anthony Goodman & Vincenzo Ruggiero, *Crime, Punishment, and Ethnic Minorities in England and Wales*, 2 RACE/ETHNICITY 53, 56 (2008) ("[Black and Minority Ethnic] groups are overrepresented at each stage of the criminal justice system . . . .").

116 SHUTE ET AL., *supra* note 113, at 2–3.

117 *Id.* at 2, 3 & nn.3 & 5 (citing academic articles about and press coverage of these disparities).

118 ALLEN J. BECK & DARRELL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-151654, BULLETIN: PRISONERS IN 1994, at 5 (1995), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/Pi94.pdf.

119 HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-225619, PRISON INMATES AT MIDYEAR 2008—STATISTICAL TABLES, 10 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf.

120 *See* Kruttschnitt & Gartner, *supra* note 79, at 11 (reporting that number of women prisoners in England increased more than 100% between 1990 and 2000). The number of women sentenced to prison has decreased since 2002. MINISTRY OF JUSTICE (U.K.), STATISTICS ON WOMEN AND THE CRIMINAL JUSTICE SYSTEM 38 (2009), *available at* http://www.justice.gov.uk/docs/women-criminal-justice-system-07-08.pdf. However, the overall number of women prisoners—which includes those awaiting trial, those who have been convicted but not yet sentenced, and those who have been sentenced—has fluctuated

color in both the United States and England are incarcerated at rates disproportionate to their numbers in the general population.[121] As in the United States, the reentry issues for women in England are particularly complex, largely due to the fact that many are mothers of dependent children, have unmet housing needs,[122] have difficulty establishing child benefit claims,[123] and receive inadequate rehabilitation services.[124]

Last, like the United States, England has recognized reentry—termed there as "resettlement"—as a critical moment in the lives of the formerly incarcerated.[125] As increasing numbers of individuals exit English penal institutions and resettle into communities, attention to resettlement has heightened.[126] While both England and the United States recognize that reentry/resettlement affects not only formerly incarcerated individuals, but also their families and communities, England has richer and more sustained traditions of providing reentry services than the United States.[127] In addition, an extensive study in England has detailed the many financial difficulties individuals exiting

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in the past decade, increasing from an average female prison population of 4299 in 2002 to 4467 in 2005, and decreasing to 4374 in 2007. *Id*. at 45–46.

121 As of 2008, an African American woman was three times more likely to be serving a federal or state prison sentence than a White woman. SABOL ET AL., *supra* note 5, at 2 tbl.2 (finding that 149 African American women per 100,000 African American women and 50 White women per 100,000 White women were incarcerated). This is a decrease from 2000, when African American women "were incarcerated at a rate 6 times that of White women." WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISON INMATES AT MIDYEAR 2007, at 8 (2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf; *see also* Kruttschnitt & Gartner, *supra* note 79, at 19 ("In England and Wales, . . . a black woman is about ten times more likely to be serving time in prison than is a white woman.").

122 *See* IAN PAYLOR, HOUSING NEEDS OF EX-OFFENDERS 33–34 (1995) ("The proposition that women prisoners [in England] suffer disproportionately in terms of the housing market upon release has indeed been borne out by the limited research that has been conducted into the experiences of women who have fallen foul of the criminal justice system.").

123 Pat Carlen & Anne Worrall, *National Report England and Wales*, *in* WOMEN, INTEGRATION AND PRISON, *supra* note 91, at 117, 122.

124 *See* SUNITA TOOR, SAVING OTHERS THROUGH VOLUNTEER ACTION, MANUAL ON TACKLING BARRIERS TO EMPLOYMENT FOR WOMEN LEAVING PRISON 9 (2005), *available at* http://www.equal-works.com/resources/contentfiles/405.doc (noting "need for the development of a holistic approach . . . [for] helping women back into the job market").

125 *See* Mike Maguire & Peter Raynor, *How the Resettlement of Prisoners Promotes Desistance from Crime: Or Does It?*, 6 CRIMINOLOGY & CRIM. JUST. 19, 20–21 (2006).

126 *See, e.g.*, *id.* at 21–22 ("The case for more government attention to [reentry] was built up through a combination of academic research findings, campaigning by agencies . . . and a joint [government agency] report on the problems of prisoners leaving custody. . . ." (citations omitted)).

127 *See id.* at 21 (noting that charitable organizations have assisted formerly incarcerated individuals leaving prison in England throughout nineteenth and twentieth centuries); Maruna et al., *supra* note 108, at 6 (opining that reentry issues are arguably "less dire" in

correctional facilities face.[128] Despite these long-standing efforts, however, England confronts recidivism rates similar to that of the United States, with approximately two-thirds of individuals released from its prisons reconvicted of an offense within two years of release.[129]

### *2. Canada*

The United States and Canada have "very similar origins in British Common Law and shar[e] many cultural similarities."[130] Both countries have federalist political structures[131] and have experienced similar patterns of fluctuations in crime rates.[132] Like the United States, the number of incarcerated individuals in Canada has increased since the mid-1970s, largely as a result of "get tough" policies and public pressure to increase sentences.[133] In the past two decades, the number of crimes in Canada that carry mandatory minimum sentences has quadrupled.[134] In this same period, Canada has also significantly increased sentences for certain offenses[135] and has

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Britain than in United States because Britain has longer history "of addressing the housing, employment and counselling needs of released prisoners").

128 *See generally* ANN HAGELL ET AL., FINANCIAL DIFFICULTIES ON RELEASE FROM PRISON (1995) (discussing, inter alia, need for accommodation and employment).

129 PRISON REFORM TRUST, BROMLEY BRIEFINGS: PRISON FACTFILE 5 (2006), *available at* http://www.prisonreformtrust.org.uk/uploads/documents/factfile1807lo.pdf.

130 Ruddell & Winfree, *supra* note 69, at 455.

131 *See* Jean-Paul Brodeur, *Comparative Penology in Perspective*, *in* CRIME, PUNISHMENT, AND POLITICS, *supra* note 59, at 49, 68 (noting that both Canadians and Americans elect representatives at local (provincial) and national levels).

132 Cheryl Marie Webster & Anthony N. Doob, *Punitive Trends and Stable Imprisonment Rates in Canada*, *in* CRIME, PUNISHMENT, AND POLITICS, *supra* note 59, at 302–03 (noting that Canada has "crime culture" similar to both United States and England, and that reported crimes increased substantially in Canada and United States beginning in 1960s and then "level[ed] off" in both countries in early 1990s).

133 COLIN H. GOFF, CORRECTIONS IN CANADA 18 (1999).

134 *See* Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. LEGAL STUD. 57, 70 (2008) (noting that number of crimes that carry mandatory minimum sentences have increased from nine in late 1980s to approximately forty in 2007). The number of offenses that carry mandatory minimum sentences may expand still further in the near future, as the Canadian Parliament is considering a bill to impose mandatory sentences for particular drug offenses. TANYA DUPUIS & ROBIN MACKAY, PARLIAMENTARY INFO. & RESEARCH SERV., LEGISLATIVE SUMMARY, BILL C-15: AN ACT TO AMEND THE CONTROLLED DRUGS AND SUBSTANCES ACT AND TO MAKE RELATED AND CONSEQUENTIAL AMENDMENTS TO OTHER ACTS 1 (2009), http://www2.parl.gc.ca/content/LOP/LegislativeSummaries/40/2/c15-e.pdf.

135 *See* Webster & Doob, *supra* note 132, at 316 ("Canada witnessed the introduction in 1996 of mandatory minimum sentences (of four years in prison) that were enacted for offenders committing any of ten serious violent crimes with a firearm. Similarly, the maximum sanctions for certain offenses were increased during the 1990s.").

expanded the bases for charging youth as adults.[136] As a result, Canada's incarceration rates rose dramatically in the early 1990s.[137] However, Canadian prison rates declined from 1997 to 2005[138] due to conscious government efforts to reduce the imprisonment rate in order to contain escalating costs.[139] Yet the number of individuals currently incarcerated has been on the rise again since 2005,[140] and Canada still has one of the highest incarceration rates among Western nations.[141]

Canada is also similar to England and the United States in that it disproportionately incarcerates members of ethnic minority groups, notably Aborigines.[142] In 2007–2008, Aborigines constituted approximately four percent of the Canadian adult population.[143] However, they constituted seventeen percent of the total federal offender population.[144] As of April 2008, Aboriginal women and men constituted

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136 *Id.* (noting that process for youth transfers was altered "by creating 'presumptive transfers' to adult court of those over sixteen years old charged with a serious violent offense").

137 Vivien Stern, *The International Impact of U.S. Policies*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 279, 282 (Marc Mauer & Meda Chesney-Lind eds., 2002).

138 STATISTICS CAN., THE DAILY, ADULT AND YOUTH CORRECTIONAL SERVICES: KEY INDICATORS 2 (2008), http://www.statcan.gc.ca/daily-quotidien/081209/dq081209-eng.pdf.

139 *See* GOFF, *supra* note 133, at 23–25 (noting that concerns regarding costs of incarceration led Canadian federal government to embrace less costly crime control strategies such as community prevention programs); Julian V. Roberts & Thomas Gabor, *Lessons from the Canadian Experience in Decarceration*, 44 BRIT. J. CRIMINOLOGY 92, 94 (2004) (noting that Canada introduced conditional sentences in 1996 "with the express goal of reducing the use of incarceration as a sanction, for [it] has traditionally had a high rate of incarceration relative to other Western nations"); Stern, *supra* note 137, at 282 (noting that incarceration rate fell in wake of 1996 reforms to conditional sentencing).

140 STATISTICS CAN., *supra* note 138, at 2 ("Canada's incarceration rate in 2007/2008 rose by 2% from the previous year, the third consecutive annual increase.").

141 *Id.*

142 Canada generally measures its incarcerated population by ethnicity (Aboriginal/non-Aboriginal) rather than race (for example, Black/White). *See, e.g.*, STATISTICS CAN., CANADIAN CTR. FOR JUSTICE STATISTICS, ADULT CORRECTIONAL SERVICES IN CANADA: 2003–2004, at 10 (2005) (tracking ethnicity but not race); Julian V. Roberts & Anthony N. Doob, *Race, Ethnicity and Criminal Justice in Canada*, *in* 21 CRIME AND JUSTICE: ETHNICITY, CRIME AND IMMIGRATION 469, 478 (Michael Tonry ed., 1997) (noting that while Ontario tracks data for other racial groups, such as Blacks and Asians, Quebec and British Columbia do not). Canada implemented sentencing reforms in 1996 aimed at addressing the overrepresentation of Aboriginal offenders in its provincial prisons. However, at least one study has concluded that these reforms "failed to generate a lower volume of sentenced admissions for Aboriginal offenders[.]" Julian V. Roberts & Ronald Melchers, *The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001*, 45 CAN. J. CRIMINOLOGY & CRIM. JUST. 211, 236 (2003).

143 PUB. SAFETY CAN. PORTFOLIO CORRECTIONS STATISTICS COMM., CORRECTIONS & CONDITIONAL RELEASE STATISTICAL OVERVIEW 57 (2008), *available at* http://www.publicsafety.gc.ca/res/cor/rep/_fl/2008-04-ccrso-eng.pdf.

144 *Id.*

thirty-three percent and nineteen percent, respectively, of those incarcerated in federal or provincial institutions.[145]

Despite these similarities, there are vast differences between the U.S. and Canadian criminal justice and correctional systems. These differences in large measure reflect Canada's more liberal, "penal welfare" approach to issues such as sentencing and incarceration,[146] which have made the Canadian punishment system a model for several other Western countries.[147] Because it resisted many of the policies associated with the "war on drugs" in the United States,[148] Canada did not experience the dramatic incarceration increases that occurred in the United States. While Canada's incarceration rates increased significantly in the early 1990s,[149] its overall rates have remained relatively constant from 1960 to 2005.[150]

In-prison rehabilitative programs are also more readily available in Canada than in the United States.[151] Canada's more accessible rehabilitative programs are attributable, in part, to the fact that all individuals in Canada sentenced to two or more years of incarceration

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145 *Id.*

146 *See* Debra Parkes, *Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 73, at 237, 240 (noting that while Canadian penal law and policy has become more punitive in recent years, "a considerable amount of the law and policy governing sentencing and imprisonment remains consistent with liberal, penal welfare concepts").

147 *See* Dawn Moore & Kelly Hannah-Moffat, *The Liberal Veil: Revisiting Canadian Penality*, *in* THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES 85, 85 (John Pratt et al. eds., 2005) ("[T]he practices and rationales of punishment in Canada are exported through the Western world.").

148 For instance, in 1987, the Supreme Court of Canada declared that a mandatory seven-year sentence for importing narcotics violated the cruel and unusual punishment protections of the Canadian Charter. R. v. Smith, [1987] 1 S.C.R. 1045 (Can.). Canada's existing narcotics statute establishes a number of mandatory *maximum* sentences. Controlled Drugs and Substances Act, 1996 S.C., ch. 19, §§ 4–7 (Can.). However, legislative efforts to impose mandatory *minimum* sentences for drug offenses continue. In 2007, a bill was introduced seeking to impose a range of mandatory minimum sentences for drug offenses. Controlled Drugs and Substances Amendment Act, C-26, 39th Parliament (2007) (Can.). The bill was reintroduced in February 2009, and passed in the House of Commons in June 2009. Controlled Drugs and Substances Amendment Act, C-15, 40th Parliament (2009) (Can.). After passing the Senate with amendments, as of December 2009, this bill was awaiting action in the House. Parliament of Canada, LEGISInfo, Status of Bill C-15 (Dec. 30, 2009), http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=5739&List=toc&Session=22 (follow "Status of the Bill").

149 *See supra* notes 135–37 and accompanying text (discussing reason for increase).

150 Canada's imprisonment rate from 1960–2003 hovered around 100 per 100,000 residents. Webster & Doob, *supra* note 132, at 311 fig.7. The lowest incarceration rate was 83 per 100,000 residents in 1974, and the highest rate was 116 per 100,000 residents in 1995. *Id.* Canada's stable imprisonment rates stand in stark contrast to trends in England and the United States, where incarceration rates have increased sharply in recent decades. *Id.* at 298–99.

151 Ruddell & Winfree, *supra* note 69, at 455–56.

serve their time in federal (as opposed to provincial) prisons,[152] and to the fact that the Canadian federal correctional system treats rehabilitation and reintegration as interconnected goals.[153] As a result, "there is more similarity in the types and availability of treatment and rehabilitative opportunities that Canadian prisoners serving more than [two] years will receive than their American counterparts in state prisons."[154]

### *3. South Africa*

South Africa is particularly fascinating for comparative purposes in the collateral consequences context. It has a long and pernicious history of imposing collateral consequences on individuals with criminal convictions. During the apartheid era, the White-controlled government used criminal law "as a vehicle of control."[155] Not only were individuals prosecuted because of their opposition to the government's policies but they were also subjected to numerous civil disabilities upon release.[156] Among other constraints, these individuals were often detained after having served their sentences, subjected to house arrest, and denied the right to stand for parliament.[157]

The dismantling of apartheid in the 1990s ushered in a Black-controlled democratic government, as well as a wave of new rights, privileges, and reforms that traversed all aspects of South Africa's society, including the criminal justice system.[158] At the same time,

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[152] *See* Allan Manson, *The Structure of the Canadian Sentencing System*, 9 FED. SENT'G REP. 235, 235 (1997) ("For a reason which history has entrusted only to the long-since departed participants in the constitutional conferences which occurred between 1864 and 1867, the *Constitution Act, 1867* gave the federal Parliament authority over penitentiaries while provincial governments are responsible for local prisons, jails, remand centers and other correctional facilities. The distinction between the two kinds of correctional institutions is clear: penitentiaries house those sentenced to terms of imprisonment of two years or more while prisoners awaiting trial and those sentenced to terms of less than two years are confined in provincial and territorial institutions."). Individuals sentenced to less than two years are housed in provincial jails. Roberts & Doob, *supra* note 142, at 478.

[153] Corrections and Conditional Release Act, 1992 S.C., ch. 20, § 3(b) (Can.) ("The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by . . . assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.").

[154] Ruddell & Winfree, *supra* note 69, at 456.

[155] Charles J. Ogletree, Jr., *From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa*, 75 B.U. L. REV. 1, 11 (1995).

[156] van Zyl Smit, *supra* note 73, at 255.

[157] van Zyl Smit, *supra* note 73, at 255–56.

[158] *See generally* Kristin Henrard, *Post Apartheid South Africa's Democratic Transformation Process: Redress of the Past, Reconciliation and 'Unity in Diversity*,' GLOBAL REV. ETHNOPOLITICS, Mar. 2002, at 18 (discussing South Africa's transition from Apartheid to democratic regime).

there was widespread fear of crime throughout South Africa during this historic transition period.[159] As a result, during this period the criminal justice system focused on incapacitation and retribution, rather than rehabilitation.[160] Thus, despite its dramatic political transformation, South Africa "remains a country with high levels of punishment and a punitive public mentality."[161] Beginning in 1997, South Africa toughened its punishment scheme in various ways, such as imposing minimum sentences for particularly serious crimes.[162] Consequently, South Africa's prisoners have been serving dramatically longer sentences since 1998, and its prisons are now well beyond capacity.[163]

South Africa's recent history of apartheid and widespread inequality and exclusion make it difficult to isolate the effects of collateral consequences.[164] As one commentator has observed, "The notion of offender reintegration in South Africa society is conceptually challenging when considered against the background of widespread exclusion, marginalisation and inequality."[165]

Despite these methodological challenges, a comparative analysis of U.S. and South African collateral consequences can still be illuminating. Like formerly incarcerated individuals in the United States, South Africans who are released from incarceration confront significant civil disabilities upon reentry. As in the United States, the recidivism rate in South Africa is high, with estimates running up to eighty

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159 *See* Steve Pete, *Prisoners' Rights*, *in* 7 SOUTH AFRICA HUMAN RIGHTS YEARBOOK 1996, at 231–32 (1998) (discussing how fear of crime led to emphasis on "retribution, incapacitation and deterrence"); *see also* Paul van Zyl Smit, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 J. INT'L AFF. 647, 652 (1999) (noting "a collapse in the capacity of the police to investigate and arrest, attorneys general to prosecute, judges to convict and correctional facilities to imprison" for "crimes such as murder, armed robbery, rape and serious assaults").

160 Pete, *supra* note 159, at 231–32.

161 CAVADINO & DIGNAN, *supra* note 14, at 94.

162 *See id*. at 95–96.

163 Jones, *supra* note 86, at 5.

164 *See* LUKAS MUNTINGH, INST. FOR SEC. STUDIES & CIVIL SOC'Y PRISON REFORM INITIATIVE, A SOCIETAL RESPONSIBILITY: THE ROLE OF CIVIL SOCIETY ORGANISATIONS IN PRISONER SUPPORT, REHABILITATION AND REINTEGRATION 1 (2008), *available at* http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/publications-1/cspri-publications/SOCIETALRESPONSIBILITYREPORT.pdf (noting difficulty with considering offender reintegration in South African society due to widespread inequality); *see also* Julie Berg & Wilfried Schärf, *Crime Statistics in South Africa 1994–2003*, 17 S. AFR. J. CRIM. JUST. 57, 66 (2004) (discussing "rising levels" of unemployment in mid-1990s to early 2000s and "economic deprivation and inequalities" in South Africa).

165 MUNTINGH, *supra* note 164, at 1.

percent.[166] Given these extraordinary recidivism problems, scholars and journalists in South Africa have called attention to the plight of those with criminal records. Specifically, they have written about the lack of services available to individuals upon reentry as well as the effects of collateral consequences on these individuals.[167] South Africa has numerous reentry-related organizations that work with individuals upon their release from incarceration,[168] and its Department of Correctional Services has implemented programs geared toward reintegration.[169]

Moreover, like the United States, Canada, and England, South Africa has historically disproportionately incarcerated members of certain racial groups, specifically Africans and Coloureds.[170] Furthermore, Coloureds are still disproportionately incarcerated in South Africa; in fact, as of October 2007, Coloureds were incarcerated at a higher rate than Africans. At that time, Africans constituted approximately eighty percent of the prison population, but were also eighty percent of the South African general population,[171] while Coloureds were incarcerated at approximately twice their representation in the general population.[172]

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166 Lavern De Vries, *Huge Cash Boost for Anti-crime Drive: Nicro's 'Alternative Sentencing Programme' Aims To Slash Nation's 80% Recidivism Rate*, THE ARGUS (Cape Town, S. Afr.), Feb. 19, 2009, at 3.

167 *See, e.g.*, MUNTINGH, *supra* note 86, at 55 (noting that reintegration programs in South Africa are "isolated" and not "comprehensive"); van Zyl Smit, *supra* note 73, at 260–61 ("The existing legal disabilities of former prisoners mostly affect their right to certain types of employment.").

168 *See* MUNTINGH, *supra* note 164, at 4–8 (describing services offered by several reentry organizations in South Africa).

169 *See* DEP'T OF CORRECTIONAL SERVICES (S. AFR.), ANNUAL REPORT FOR THE 2007/08 FINANCIAL YEAR, at 70–72 (2008), *available at* http://www-dcs.pwv.gov.za/Publications/Annual%20Reports/DCS%20Annual%20Report%202008.pdf (describing Social Reintegration Programme).

170 *See* Ogletree, *supra* note 155, at 10–15 (providing history of South Africa's Apartheid criminal justice system and explaining that "criminal defendants were disproportionately black"); *see also* Dirk van Zyl Smit, *South Africa*, *in* IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS 589, 605–06 (Dirk van Zyl Smit & Frieder Dunkel eds., 2d ed. 2001) (noting that in 1976 Blacks were imprisoned at rate more than four times greater than Whites, and Coloureds were imprisoned at a rate more than nine times greater than Whites).

171 S. AFRICAN INST. OF RACE RELATIONS, SOUTH AFRICA SURVEY 2007/2008, at 6, 609 (2008).

172 *Id.*

## II
## Collateral Consequences in the United States and the Comparison Countries

### *A. Severity of Collateral Consequences*

Individuals with criminal records in the United States and the Comparison Countries confront collateral consequences to varying degrees. This Part explores the respective severity of these consequences, first in the United States and then in the Comparison Countries.

#### *1. United States*

Collateral consequences in the United States have garnered extensive attention over the past decade.[173] In the early years of the American Republic, collateral consequences were very severe by modern standards.[174] These consequences decreased in severity during the 1960s and 1970s[175] before expanding again both in number and scope starting in the early 1980s.[176] As a result of this most recent expansion, collateral consequences now dramatically impact the lives of many individuals with criminal records, making successful reintegration into society more difficult than ever.

Collateral consequences have been codified in federal, state, and local statutory and regulatory schemes, with the consequences varying widely between, and even within, the states.[177] The difficulties in quantifying the full range of these consequences, especially those at

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173 *See supra* notes 8–10 and accompanying text.

174 *See* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* Invisible Punishment: The Collateral Consequences of Mass Imprisonment, *supra* note 137, at 15, 17–18 (observing that early American legislatures "den[ied] convicted offenders the right to enter into contracts, automatically dissolv[ed] their marriages, and barr[ed] them from a wide variety of jobs and benefits").

175 *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 Stan. L. & Pol'y Rev. 153, 155 (1999) (noting that decline in collateral consequences statutes in 1960s and 1970s stemmed from efforts in 1950s "to improve the post-release situation of ex-offenders").

176 *See supra* note 11 and accompanying text.

177 *See* Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339, 357–58 (2005) (arguing that as result of "the panoply of state-imposed collateral sanctions that vary dramatically, federal convictions have an inherently inequitable impact on offenders"). The Legal Action Center issued a report in 2004 that provided a state-by-state account of collateral consequences. Legal Action Ctr., After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records (2004), *available at* http://hirenetwork.org/pdfs/LAC_PrintReport.pdf. Although slightly outdated at this point, the report provides some idea of the variance among the states.

state and local levels,[178] pose particular problems for analyzing their scope. Because of this local variation, one must be careful when generalizing about the nature and scope of collateral consequences in the United States for purposes of international comparison.

Despite these local differences, broad exploration of the legal hurdles confronting individuals with criminal records is nonetheless possible because many collateral consequences are rooted in federal law. While these laws for the most part provide discretion to state governments and local agencies to opt out of certain consequences or to broaden or narrow their scope,[179] federally imposed financial and political incentives encourage their adoption.[180]

Below is a brief overview of some of the most prominent consequences in the United States: exclusion from public or government-assisted housing, employment-related legal barriers, ineligibility for public benefits, and felon disenfranchisement.[181]

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[178] *See* Demleitner, *supra* note 175, at 154 (explaining that collateral consequences are "scattered throughout different bodies of law"). For a description of the variance between states regarding collateral consequences, see LEGAL ACTION CTR., *supra* note 177.

[179] For instance, states can opt out of the federal law barring individuals convicted of felony drug offenses from receiving federal welfare benefits. *See infra* notes 201–03 and accompanying text. Similarly, while federal law bans individuals convicted of specific offenses from public housing premises, it provides that local housing authorities may define the scope of criminal activity that disqualifies individuals from their respective housing facilities. *See infra* notes 182–88 and accompanying text.

[180] For example, federal funding for local public housing authorities is conditioned upon barring individuals who engage in certain criminal activities. 42 U.S.C. §§ 1437d(l)(6), 1437f(d)(1)(B)(iii), 1437f(o)(6)(C)–(7)(D) (2006).

[181] Deportation of noncitizens convicted of criminal offenses is also considered to be among the most drastic collateral consequences in the United States. *See* Padilla v. Kentucky, No. 08-651, slip op. at 2 (U.S. Mar. 31, 2010). Recognizing this harsh result, several state statutes require judges to inform noncitizen defendants of possible deportation consequences during the guilty plea process. *See* Pinard, *supra* note 41, at 644 n.126 (listing such statutes). In fact, the U.S. Supreme Court recently declared that defense counsel has a duty to warn the defendant about the possible deportation consequences of a guilty plea. *Padilla*, slip op. at 17. Counsel's failure to do so can be grounds for a claim of ineffective assistance of counsel. *Id.* The Court's reasoning rested in part on the particular "seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in [the United States]." *Id.* This Article does not analyze deportation precisely because it has already received extensive scholarly and judicial attention. *See, e.g.*, Tyler Atkins, Note, *Immigration Consequences of Guilty Pleas: What* State v. Paredez *Means to New Mexico Criminal Defendants and Defense Attorneys*, 36 N.M. L. REV. 603 (2006) (discussing case holding that defense counsel's failure to inform clients about immigration consequences of guilty pleas was considered ineffective assistance of counsel); Attila Bogdan, *Guilty Pleas by Non-Citizens in Illinois: Immigration Consequences Reconsidered*, 53 DEPAUL L. REV. 19 (2003) (urging defense attorneys to advise clients of immigration consequences that follow guilty pleas); John J. Francis, *Failure To Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691 (2003) (arguing that courts should advise noncitizen criminal defendants that entering guilty plea could adversely impact their ability to remain in United States).

a. Housing

The U.S. federal government imposes restrictions on individuals with certain criminal records from receiving public housing assistance. For instance, federal law bans registered sex offenders and convicted methamphetamine producers from obtaining government-assisted housing for life.[182] Federal law also grants local public housing authorities broad discretion to determine the scope of other criminal activity that will disqualify individuals from public housing.[183] Local housing authorities across the United States have expanded the types of conduct that will preclude individuals from obtaining public housing.[184] The lengths of these bans often differ by the type of conduct. For example, felony convictions typically lead to longer exclusionary periods than misdemeanors.[185] In addition, several housing authorities ban individuals whose conduct did not lead to a conviction, such as individuals who received violations or other noncriminal dispositions.[186] While some jurisdictions, including New York City, allow oth-

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182 42 U.S.C. § 13663(a) (2006) (banning sex offenders who are subject to lifetime registration requirements); 24 C.F.R. § 966.4(l)(5)(i)(A) (2008) (banning individuals convicted of manufacturing or producing methamphetamine on premises of federal housing). For an overview of the federal housing laws relating to individuals with criminal records, see Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing–Denial of Benefits to Drug Offenders*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, *supra* note 137, at 37, 43–46.

183 *See* 42 U.S.C. § 13661(c) (2006) (granting authority to public housing agencies to deny admission to applicants who have "engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents"); *id.* § 1437f(d)(1)(B)(iii) (2006) (declaring that criminal activity of tenant, member of tenant's household, or anyone "under the tenant's control, shall be cause for termination of tenancy").

184 *See e.g.*, Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 566–69 (2005) (discussing local measures excluding prospective tenants based on prior arrests and minor and/or nonviolent offenses); *see also* Rubinstein & Mukamal, *supra* note 182, at 45–46 (noting that local agencies have discretion to deny housing for any "drug-related or violent criminal activity or any other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents if the criminal activity occurred a 'reasonable' time before the person seeks admission").

185 *E.g.*, HOUS. AUTH. OF BALT. CITY, 3 ANNUAL PLAN FISCAL YEAR 2010: THE PUBLIC HOUSING ADMISSIONS & CONTINUED OCCUPANCY POLICY 2–9 (2009), *available at* http://static.baltimorehousing.org/pdf/vol3_fy2010.pdf (noting that Housing Authority of Baltimore City "will deny eligibility for admission [into public housing] based upon felony or misdemeanor convictions for a period of no more than 18 months for a misdemeanor offense and three years for a felony offense beginning on the date of conviction or the release from incarceration, whichever date is later").

186 *See, e.g.*, Carey, *supra* note 184, at 566 (explaining that many housing authorities exclude individuals solely on arrest records "even if the charges were ultimately dropped"); Smyth, *supra* note 9, at 482 (noting that pleading guilty to noncriminal disorderly conduct offense in New York "makes a person presumptively ineligible for New York City public housing for two years").

erwise ineligible individuals to reside in public housing or receive housing assistance within the exclusionary period upon a showing of rehabilitation,[187] other jurisdictions provide no exceptions, and individuals must wait out the entire exclusionary period before becoming eligible for public housing.[188]

b. Employment

"In most jurisdictions, the stigma [of a criminal record] takes on a legal significance" in the employment context.[189] Individuals with criminal records confront numerous federal and state employment restrictions[190] in both the public and private sectors.[191] Federal and state laws and regulations impose collateral employment consequences through various mechanisms, including statutory prohibitions, licensing provisions, and statutorily required background checks.[192]

For example, an individual with a criminal conviction will no longer be eligible for numerous categories of employment.[193] Additional employment consequences are enforced by licensing agencies.[194] Scores of jobs require occupational licenses,[195] and state and

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187 NEW YORK CITY HOUS. AUTH., DEPARTMENT OF HOUSING APPLICATIONS MANUAL 21 (2001), *available at* http://www.reentry.net/ny/library/attachment.97782 (explaining that finding of ineligibility is reversible if housing applicant "presents substantial evidence to indicate a reasonable probability that the offending person's future behavior will not adversely affect the safety, or welfare of other tenants, or [Housing] Authority staff").

188 Carey, *supra* note 184, at 572–73.

189 WESTERN, *supra* note 30, at 112.

190 Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 23 (2005). For an overview of federally imposed employment restrictions, see AM. BAR ASS'N COMM'N ON EFFECTIVE CRIM. SANCTIONS & PUB. DEFENDER SERV. FOR D.C., INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS 19–33 (2009), *available at* http://www.abanet.org/cecs/internalexile.pdf [hereinafter INTERNAL EXILE]. For an overview of employment-related restrictions imposed by states, see LEGAL ACTION CTR., *supra* note 177, at 10.

191 PAGER, *supra* note 7, at 33. In addition to these legal restrictions, individuals with criminal records also face discrimination in hiring by the private sector. *See generally* Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195 (2009).

192 *See* PAGER, *supra* note 7, at 33 (discussing state and federal statutory prohibitions and licensing restrictions); INTERNAL EXILE, *supra* note 190, at 19–37 (describing federal restrictions on employment and licensing and explaining federal background check requirements).

193 *See* PAGER, *supra* note 7, at 33 ("In some states, for example, ex-offenders are restricted from jobs as septic tank cleaners, embalmers, billiard room employees, real estate agents, plumbers, eyeglass dispensers, and barbers.").

194 THOMPSON, *supra* note 67, at 110 ("[E]x-offenders face a wide array of licensing barriers that have [a] . . . devastating impact on their ability to gain employment.").

municipal licensing agencies often have authority to conduct background checks with discretion to deny licenses based on an applicant's criminal history.[196]

Theoretically, these consequences should be attenuated by federal[197] and, in some cases, state antidiscrimination statutes, which afford statutory antidiscrimination protections to individuals with criminal records.[198] While many of these statutes only pertain to public employment or licensing authorities, a few extend to the private sector as well.[199] However, as some commentators have observed, these laws generally have weak enforcement mechanisms.[200] As a result, despite these statutory protections, criminal

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195 For instance, in Maryland over 500 jobs require licenses. *See* MD. INST. FOR CONTINUING PROF'L EDUC. OF LAWYERS, INC., MARYLAND TRIAL JUDGES' BENCHBOOK 149–97 (1999) (listing such occupations, which include electricians, massage therapists, retail merchants, and security guards).

196 *See, e.g.*, Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 536–37 (2006) (providing examples of occupational licensing laws in several states that bar or limit employment opportunities for individuals with criminal records).

197 Title VII of the Civil Rights Act of 1964 requires employers to show a "business necessity" for refusing to hire an individual because of his or her criminal record. *See* Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975) (holding railroad's blanket refusal to hire applicants with conviction for any offense other than minor traffic offense had racially disparate impact and was not justified by business necessity). The Equal Employment Opportunity Commission has articulated a three-factor test for whether an employer's decision was justified by business necessity: (1) "the nature and gravity of the offense"; (2) "the time that has passed since the conviction"; and (3) "the nature of the job." EQUAL EMPLOYMENT OPPORTUNITY COMM'N, POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000E *ET SEQ.* (1982) (Feb. 4, 1987), http://www.eeoc.gov/policy/docs/convict1.html.

198 MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 62 (2006) (noting that approximately two-thirds of states "have general laws that prohibit firing or refusal to hire and/or issue a professional or occupational license to a person 'solely' because of a criminal record"); PAGER, *supra* note 7, at 37 (explaining that several states passed antidiscrimination legislation for individuals convicted of criminal offenses in 1960s and 1970s out of "concern[ ] about the lingering stigma attached to ex-offenders").

199 *See* LOVE, *supra* note 198, at 64 (noting that only four states—Hawaii, New York, Pennsylvania, and Wisconsin—have "comprehensive laws that regulate consideration of a conviction in public and private employment and occupational licensure"); THOMPSON, *supra* note 67, at 115–16 (describing employment discrimination protections that Hawaii, Wisconsin, and New York provide to ex-offenders); Christine Neylon O'Brien & Jonathan J. Darrow, *Adverse Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination*, 42 WAKE FOREST L. REV. 991, 995–96 (2007) (describing range of state antidiscrimination statutes).

200 LOVE, *supra* note 198, at 63 ("Few states have any mechanism for enforcement of their nondiscrimination laws, and it is not clear how effective they are.").

records often bar individuals with criminal records from meaningful employment opportunities.

c. Public Benefits

Most criminal convictions do not have an effect on an individual's eligibility for federal welfare benefits. However, since 1996, federal law has denied welfare benefits assistance (cash assistance and food stamps) to individuals convicted of felony drug offenses.[201] States can opt out of this law,[202] and many have. Currently, fourteen states have adhered to the federal ban and as a result completely exclude individuals convicted of felony drug offenses from these benefits; twenty-two states enforce the ban in part; and fourteen states and the District of Columbia have opted out of the ban entirely.[203]

d. Voting

The U.S. Supreme Court has declared voting restrictions based on convictions permissible under Section 2 of the Fourteenth Amendment.[204] Such restrictions, both with respect to federal and state elections, are matters of state law.[205] Forty-eight states and the District of Columbia ban individuals who are incarcerated for felony offenses from voting; thirty-five states ban individuals on parole for a felony offense from voting; and thirty states ban individuals on felony probation from voting.[206] Two states, Virginia and Kentucky, impose lifetime exclusions for individuals convicted of felony offenses.[207]

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201 21 U.S.C. § 862a (2006) (denying assistance and benefits to individuals convicted of felony drug offenses).

202 *Id.* § 862a(d)(1)(A); *see also* THE 2009 CRIMINAL JUSTICE TRANSITION COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 125 (2008), *available at* http://2009transition.org/criminaljustice/index.php?option=com_docman&task=doc_download&gid=10&Itemid.

203 *Id.*

204 *See* U.S. CONST. amend. XIV, § 2 (providing for proportional reduction in congressional representation for states that deny their male inhabitants right to vote on any basis "except for participation in rebellion, *or other crime*") (emphasis added). In *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974), the Court found that this provision created an "affirmative sanction" for state felon disenfranchisement laws. Such restrictions are permissible as long as they do not violate the Equal Protection Clause of the Fourteenth Amendment. *See* Hunter v. Underwood, 471 U.S. 222, 229 (1985) (holding that Alabama's disenfranchisement law violated Fourteenth Amendment because it "was enacted with the intent of disenfranchising blacks").

205 For an overview of the various state disenfranchisement laws, see THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2008), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus.pdf [hereinafter FELONY DISENFRANCHISEMENT LAWS].

206 *Id.* at 1.

207 *Id.* at 3.

### 2. *England*

As in the United States, formerly incarcerated individuals in England face numerous obstacles upon reentry. While individuals in England can be disqualified from receiving public benefits because of a criminal conviction, the set of disqualifying crimes is narrower in scope than the broad array of drug-related crimes that can disqualify individuals in the United States from receiving these benefits. Also, the disqualifications in England are temporary, in contrast to the lifetime bans imposed upon individuals convicted of felony drug offenses in some American jurisdictions. England also has less restrictive felon disenfranchisement laws than the United States. As explained below, the most significant collateral consequences for offenders in England relate to employment and housing, but even these consequences are less severe than those in the United States.[208]

Many former offenders in England have difficulty securing employment because of their criminal records.[209] Some of these employment hurdles result from English laws that permit professional and trade associations to make rules that exclude individuals with criminal records.[210] These legal barriers to employment have been tied to England's high recidivism rates,[211] and various mechanisms have been implemented or proposed to increase the availability of employment opportunities for former offenders.[212]

In the aggregate, however, employment-related collateral consequences are less severe in England than in the United States. The vast majority of employment-related barriers for formerly incarcerated

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[208] Commentators and studies have explained that housing and employment are the most substantial barriers to successful reentry for formerly incarcerated individuals in England. *See, e.g.*, VIVIEN STERN, BRICKS OF SHAME: BRITAIN'S PRISONS 54 (1989) (noting that prison record presents obstacles to obtaining employment and that housing very often is lost as result of incarceration); *see also* CRIMINAL JUSTICE SYS. (U.K.), JUSTICE FOR ALL 109 (2002), *available at* http://www.cjsonline.gov.uk/downloads/application/pdf/CJS%20White%20Paper%20-%20Justice%20For%20All.pdf (noting that employment and stable housing significantly reduce reoffending and reconviction rates).

[209] CRIMINAL JUSTICE SYS. (U.K.), *supra* note 208, at 111.

[210] *See* Hirsch & Wasik, *supra* note 34, at 603 (providing examples of regulatory bodies that have been granted such powers). Hirsch and Wasik note that "[w]ide discretion is granted in the exercise of these powers, with which the courts will rarely interfere." *Id.*

[211] *See* RUSSELL WEBSTER ET AL., HOME OFFICE RESEARCH, DEV. & STATISTICS DIRECTORATE (U.K.), RES. STUDY NO. 226, BUILDING BRIDGES TO EMPLOYMENT FOR PRISONERS 8 (2001), http://unlock.org.uk/upload_pdf/Building%20bridges%20to%20employment%20for%20prisoners.pdf ("Several studies support the idea that unemployment is related to continuing to offend . . . .").

[212] *See, e.g.*, Terry Macalister, *Give a Prisoner a Job, Get a Natural Entrepreneur: Governor Says Companies Can Solve Jail Crisis*, THE GUARDIAN (U.K.), July 8, 2005, at 22 (reporting that governor of Brixton's prison urged employers to hire individuals with criminal records, both to reduce recidivism and to ease jail overcrowding).

individuals in England are tied to the availability of resources, the lack of employment-related qualifications among these individuals, or to the informal stigma that these individuals confront when seeking employment.[213] Studies and polls in England indicate the extent to which employers are reluctant to hire individuals with criminal records.[214] As a result, the various reentry-related service providers focus specifically on trying to secure employment for these individuals.

Individuals in England are entitled to receive a housing benefit that provides financial assistance to help pay rent.[215] However, entitlement to the benefit "stops for all sentenced prisoners expected to be in prison for more than 13 weeks."[216] This loss is quite significant because a majority of prisoners rely on the housing benefit to help cover their rent before entering custody[217] and because individuals exiting custody are often severely constrained by a lack of financial resources and have difficulties securing employment.[218] Thus, the practical effect of this housing policy is to render many individuals unable to obtain housing upon release from custody.

England restricts eligibility for welfare benefits only based on criminal convictions for welfare fraud offenses.[219] Individuals with drug or other convictions remain eligible for these benefits. Unlike the United States' lifetime welfare ban on individuals convicted of felony drug offenses, England's disqualification from welfare benefits lasts for the four-week period immediately following conviction.[220]

Former prisoners can also receive various other forms of welfare benefits, including a Job Seekers Allowance and emergency Crisis

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213 *See* WEBSTER ET AL., *supra* note 211, at 1 ("Ex-offenders face many difficulties when seeking employment[,] including poor reading, writing and numeracy skills; behavioural and health problems; debt and homelessness; as well as discrimination from employers."); Julie Vennard & Carol Hedderman, *Helping Offenders into Employment: How Far Is Voluntary Sector Expertise Valued in a Contracting-Out Environment?*, 9 CRIMINOLOGY & CRIM. JUST. 225, 227 (2009) ("A criminal record itself creates a barrier to employment, but also the majority of offenders lack skills and qualifications and have a poor work history.").

214 *See* DEL ROY FLETCHER ET AL., RECRUITING AND EMPLOYING OFFENDERS 11 (2001) (noting that majority of employers surveyed had "formal or informal policy on recruiting people with criminal records," with many of these policies "restrict[ing] the recruitment of offenders"); *Ex-offenders 'Face Jobs Struggle*,*' supra* note 74 (reporting poll in which thirty-seven percent of British employers responded that they would not hire individual with criminal record).

215 *See* PRISON REFORM TRUST, *supra* note 129, at 32.

216 *Id.*

217 *Id.*

218 *See* Stern, *supra* note 208, at 54 (discussing the difficulties faced by individuals with prison records who are seeking employment).

219 Welfare Reform Act, 2009, c. 24, § 24(1) (Eng.).

220 *Id.*

Loans.[221] Approximately eighty percent of former prisoners qualify and apply for these benefits upon release,[222] but there are significant logistical hurdles to securing these benefits, such that there is often a long delay between when a former prisoner applies for the benefits and when he or she actually starts receiving them. This "prisoner finance gap" has been identified as a key resettlement issue.[223]

Prisoner disenfranchisement has strong roots in English law,[224] and convicted prisoners incarcerated in England (as well as the rest of the United Kingdom) cannot vote during the period of their incarceration.[225] As in the United States, disenfranchisement in England is not "part and parcel of formal sentencing as it may not be factored in or out of a prison term."[226] Unlike most U.S. states, the United Kingdom restores to individuals the right to vote immediately upon release from incarceration.[227]

The European Court of Human Rights recently declared that Britain's blanket ban on voting by the incarcerated violates the European Convention of Human Rights.[228] In response to this ruling, the United Kingdom has "embark[ed] on a . . . consultation process to find a solution [to comply with the court ruling] which would command support in Parliament."[229] Thus, it is possible that in the future, England will grant the right to vote to an even broader group of individuals convicted of crimes.

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221 PRISON REFORM WORKING GROUP, THE CTR. FOR SOC. JUSTICE, LOCKED UP POTENTIAL: A STRATEGY FOR REFORMING PRISONS AND REHABILITATING PRISONERS 200–01 (2009), *available at* http://www.centreforsocialjustice.org.uk/client/downloads/CSJLockedUpPotentialFULLREPORT.pdf. However, individuals can receive a "benefit sanction" of one week if they are convicted or cautioned for violent or threatening behavior against the agency staff responsible for handling their benefits claim. Welfare Reform Act § 25(2).

222 PRISON REFORM WORKING GROUP, *supra* note 221, at 200.

223 *Id.* at 200–02.

224 Susan Easton, *Electing the Electorate: The Problem of Prisoner Disenfranchisement*, 69 MODERN L. REV. 443, 443 (2006) (tracing English disenfranchisement to ancient Greek and Roman law, as well as medieval notions of civil death).

225 Representation of the People Act, 1983, c. 2, § 3 (Eng.).

226 Robert Jago & Jane Marriott, *Citizenship or Civic Death? Extending the Franchise to Convicted Prisoners*, 5 WEB J. CURRENT LEGAL ISSUES (2007), http://webjcli.ncl.ac.uk/2007/issue5/jago5.html.

227 *Id.*

228 *See infra* notes 397–406 and accompanying text (discussing *Hirst v. United Kingdom (No. 2)*, 2005-IX Eur. Ct. H.R. 187).

229 MINISTRY OF JUSTICE (U.K.), VOTING RIGHTS OF CONVICTED PRISONERS DETAINED WITHIN THE UNITED KINGDOM: SECOND STAGE CONSULTATION 7 (2009). The first stage of the consultation process involved a questionnaire that sought responses to various ideas about methods of enfranchising prisoners, including limiting the ban to individuals serving sentences of particular lengths. However, the questionnaire garnered a "relatively small number of respondents," whose opinions "were sharply divided." *Id.*

### *3. Canada*

Collateral consequences in Canada are generally less severe than in the United States: Canada does not disenfranchise individuals convicted of crimes, nor does it restrict eligibility for public housing on the basis of criminal convictions. Canada does prohibit parolees and individuals subject to long-term supervision from obtaining welfare benefits, but it does not limit the eligibility of others convicted of crimes. Like the United States, however, Canada does impose significant restrictions on the employment opportunities of individuals convicted of crimes.[230]

Collateral consequences in Canada are particularly problematic for convicted individuals who serve a sentence of incarceration and who are then released on parole or long-term supervision. Such individuals cannot access social welfare benefits at all because they are technically considered to be under the auspices of the correctional system.[231] However, these individuals are able to access such benefits upon completing their parole or long-term supervision.[232]

Former prisoners in Canada confront pronounced practical difficulties in obtaining housing. As in the other Comparison Countries, Canadian ex-prisoners often lack the financial resources necessary to pay for housing.[233] Moreover, "in most provinces, landlords can legally discriminate against those with criminal records."[234] Public, or subsidized, housing is often not an option because of long waiting lists.[235] However, it is important to note that these obstacles are not the result of exclusionary laws.[236] Rather, they are tied mainly to ex-prisoners' inadequate resources and the refusal of landlords to rent to individuals with criminal records. As defined above, these are *informal* consequences, as opposed to the *formal* consequences of U.S. laws that specifically bar individuals with criminal records from living in public housing.[237]

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230 *See infra* notes 242–44 and accompanying text.

231 Telephone Interview with Renée Collette, Executive Vice-Chairperson, Can. Nat'l Parole Bd. (Jan. 16, 2009) (interview notes on file with the *New York University Law Review*).

232 *Id.*

233 CAN. MORTGAGE & HOUS. CORP., HOUSING OPTIONS UPON DISCHARGE FROM CORRECTIONAL FACILITIES (2007), http://www.cmhc-schl.gc.ca/odpub/pdf/65340.pdf?fr=1268066207578.

234 *Id.*

235 *Id.*

236 *Id.*

237 *See supra* notes 71–74 and accompanying text.

Canadian prisoners retain the right to vote during and after their incarceration. In *Sauvé v. Canada (Chief Electoral Officer)*,[238] the Canadian Supreme Court, in a 5-4 decision, overturned a law that denied the right to vote to individuals sentenced to more than two years of imprisonment. While the Court offered several reasons for striking down the law, it broadly declared disenfranchisement to be "inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the [Canadian Charter of Rights and Freedoms]."[239] The Court opined that disenfranchisement further isolates prisoners from society and "undermines correctional law and policy directed towards rehabilitation and integration."[240] It also noted that allowing prisoners to vote would help teach them "democratic values and social responsibility."[241]

Canada is similar to the United States in one regard: It imposes broad employment restrictions on individuals with criminal records. There are several jobs in Canada that require criminal background checks, including any job involving the supervision of children[242] or social work, or any job within an educational institution, law enforcement, health care, and taxi driving.[243]

In all other respects—housing, welfare benefits, and the right to vote—Canada imposes much less severe collateral consequences than the United States. Moreover, where it does impose restrictions, Canada couches its punishment policies specifically in the concept of maintaining the human dignity of prisoners and ex-prisoners.

### *4. South Africa*

The move toward democracy brought spirited optimism to South Africa, as well as broad reforms to its criminal justice system.[244] Nonetheless, individuals with criminal records in post-apartheid South Africa continue to face significant legal disabilities. These disabilities, combined with the dire economic conditions in South Africa,[245] create

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238 [2002] 3 S.C.R. 519 (Can.).

239 *Id.* at 522.

240 *Id.* at 523.

241 *Id.* at 547.

242 *See* CRIMINAL RECORDS REVIEW ACT, 1996 R.S.B.C., ch. 86, § 8(1) (Can.) ("An employer must ensure that every individual who is hired for employment involving work with children and every employee who works with children undergoes a criminal record check in accordance with this Part.").

243 *See* THE NAT'L PARDON CTR., EMPLOYMENT RESTRICTIONS, http://www.nationalpardon.org/NPC_employmentrestrictions.html (last visited Mar. 8, 2010) (listing careers requiring background checks).

244 *See supra* note 158 and accompanying text.

245 For instance, the unemployment rate in South Africa has fluctuated between approximately twenty to thirty percent from 2000 to 2007. STATISTICS S. AFR., LABOR FORCE

tremendous obstacles to successful reentry, which in turn contribute to South Africa's high recidivism rate.[246]

As in the United States, the scope and extent of collateral consequences in South Africa have been largely ignored until recently.[247] However, scholars and service providers in South Africa have begun to devote attention to these consequences[248] and to the related issue of the provision of services to facilitate reentry.[249]

The research conducted for this Article has not uncovered collateral consequences in South Africa related to housing restrictions or other forms of government assistance. Rather, the most significant collateral consequences in South Africa affect various types of employment. For instance, individuals with convictions can be prohibited from working as private security officers[250] or police officers[251] and from continuing to serve on regulatory bodies.[252]

While South Africans with criminal records face enormous reentry barriers as a result of both collateral consequences and the harsh economic conditions noted above, they enjoy constitutional rights that are not recognized for their counterparts in the United States.[253] Dignity is a foundational principle of South Africa's Constitution, set forth in large measure to respond to the country's

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SURVEY: HISTORICAL REVISION, SEPTEMBER SERIES, 2000 TO 2007, at 6–7 (2009), *available at* http://www.statssa.gov.za/publications/P0210/P0210September2000,2001,2002,2003,2004,2005,2006,2007.pdf.

246 *See supra* notes 161–67 and accompanying text.

247 van Zyl Smit, *supra* note 73, at 263 ("There has been no systematic review in South Africa of the legal disabilities that various laws have imposed on former offenders.").

248 *See, e.g.*, B.C. Naudé, *The Pardoning Power as a Duty of Justice*, 15 S. AFR. J. CRIM. JUST. 159, 167 (2002) (listing various restrictions persons with criminal records face in South Africa).

249 *See, e.g.*, MUNTINGH, *supra* note 164 (analyzing results of surveys of twenty-one organizations supporting prisoners and assisting offender reintegration).

250 *See* Private Security Industry Regulation Act 56 of 2001 s. 23(1)(d) (S. Afr.) (barring from registration as security service provider any person who was "found guilty of [certain] offence[s] . . . within a period of 10 years immediately before the[ir] application").

251 Specifically, a person applying to the South African Police must "have no previous criminal convictions." Regulations for the South African Police (GN) R1599/2002 § 11(1)(a)(xii) (S. Afr.). However, this prohibition is not absolute, as "the National Commissioner may in his or her discretion and in exceptional circumstances, waive any of the requirements where and if such waiver will be in the interest of the Service." *Id.* § 11(2).

252 *See, e.g.*, Social Housing Act 16 of 2008 s. 9(7)(d) (S. Afr.) ("A member of the Council [of the Social Housing Regulatory Authority] ceases to be a member if . . . he or she is convicted of an offence and sentenced to imprisonment without the option of a fine."). Individuals with convictions can also be prohibited from securing a firearm license. *See* Naudé, *supra* note 248, at 167.

253 At least one commentator expresses the view that South Africa's relatively new constitution "suppl[ies] the basis for asserting the rights of former prisoners in a way that could diminish their civil disabilities." van Zyl Smit, *supra* note 73, at 256.

history of apartheid.[254] The Bill of Rights in South Africa's recently enacted Constitution, for example, requires that all individuals be treated with "inherent dignity."[255] South African courts have invoked this foundational principle in various contexts, including incarceration. Perhaps the best illustration of the connection between the principle of dignity and individuals with criminal records is found in the voting rights context. In 2004, the South African Constitutional Court held that prisoners cannot be denied the right to vote by reason of their incarceration.[256] In so holding, the Court struck down as unconstitutional an election law that disenfranchised individuals who were sentenced to imprisonment without the option of paying a fine.[257]

As a result, while South Africa shares many of the same recidivism problems as the United States and has some similar collateral consequences—specifically related to loss of employment opportunities—South Africa still has fewer collateral consequences overall than the United States, as exhibited by the ban on felon and prisoner disenfranchisement.

### *5. Summary*

The preceding comparative examination reveals that the United States imposes collateral consequences that are harsher and more pervasive than those in England, Canada, and South Africa. These consequences in the United States impact many aspects of formerly incarcerated individuals' lives: housing, employment, the ability of individuals to sustain themselves and their families, and civic inclusion. For instance, unlike the Comparison Countries, many jurisdictions in the United States deny welfare benefits to individuals convicted of drug offenses and disenfranchise individuals post-incarceration. As a result, a criminal record in the United States inflicts a greater degree of legal stigma than does one in England,

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254 *See* Lourens W.H. Ackerman, *The Legal Nature of the South African Constitutional Revolution*, 2004 N.Z. L. REV. 633, 644 (2004) ("In interpreting the Constitution, and particular provisions thereof, it is permissible and indeed necessary to look at the ills of the past that they seek to rectify and in this way try to establish what equality and dignity mean in the relevant provisions.").

255 S. AFR. CONST. 1996, ch. 2, § 10 ("Everyone has inherent dignity and the right to have their dignity respected and protected.").

256 *Minister of Home Affairs v Nat'l Instit. for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC) at 281–83 (S. Afr.).

257 *Id.* at 283. In addition, the Court rejected arguments that extending the franchise to this group of prisoners would be logistically difficult and expensive. *Id.* at 297–98.

Canada, or South Africa,[258] and individuals in the United States must confront significantly more post-incarceration legal obstacles.

### *B. A Comparative View of the Permanence of Criminal Convictions*

All four of the countries surveyed in this Article have legal measures that lessen the sting of a criminal record. However, in England, Canada, and South Africa, these measures are more broadly available and more easily accessible than in the United States. Thus, individuals incarcerated in the United States face not only more severe collateral consequences, but they also have much more difficulty obtaining relief from those consequences.

In England, the Rehabilitation of Offenders Act allows an individual to expunge his or her conviction in certain circumstances.[259] To be eligible, the individual must not have been sentenced to more than thirty months in prison[260] and must have made it through the applicable rehabilitation period without reoffending.[261] After that time, the criminal record becomes "spent" and the individual "shall . . . be treated as a rehabilitated person,"[262] meaning that he or she "shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction."[263]

England's Rehabilitation of Offenders Act also alleviates employment-related barriers for individuals with criminal records, as they are not required to disclose their "spent" convictions to potential

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258 *See* Devah Pager, *Double Jeopardy: Race, Crime and Getting a Job*, 2005 WIS. L. REV. 617, 620 (noting that unlike other forms of social stigma, "criminal stigma has the added dimension of formalized legal status").

259 Rehabilitation of Offenders Act, 1974, c. 53 (Eng.).

260 *Id.* § 5(1)(b). The Act has been criticized for excluding the large number of individuals sentenced to thirty months or more in custody. *See* DEL ROY FLETCHER ET AL., *supra* note 214, at 2 (arguing that thirty month cutoff "contrasts with practice in most other European countries where all criminal convictions can become spent after the relevant rehabilitation period"); Jonathan Aitken, *Comment & Debate: A Second Chance*, THE GUARDIAN (U.K.), June 8, 2009, at 28 ("Such an arbitrary cut-off period is irrational in today's world of ever-lengthening sentences.").

261 For instance, the rehabilitation period for a person sentenced to six months or less is seven years from the conviction date. Rehabilitation of Offenders Act § 5(2) tbl.A. The rehabilitation period for a person sentenced to more than six months is ten years. *Id*. Individuals seeking employment within these waiting periods must disclose their criminal record to potential employers. *Id*. § 4(3)(b). These "disclosure periods have been criticised as complicated and excessively long." CRIMINAL JUSTICE SYS. (U.K.), *supra* note 208, at 111.

262 Rehabilitation of Offenders Act § 1(1).

263 *Id.* § 4(1). One commentator has described this Act as "legal rebiographing," because it allows an individual to "rewrite his or her history to make it more in line with his or her present, reformed identity." SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 164 (2001).

employers.[264] Employers, in turn, are not allowed to use spent convictions, or the individual's failure to disclose such convictions, as a reason to fire or refuse to hire such individuals.[265] However, the Act has exceptions that require disclosure for certain types of employment, such as teaching and social work,[266] and the Act has been amended several times to expand the types of employment that require such disclosure of spent convictions.[267]

In Canada, large segments of the formerly incarcerated population are eligible to have their criminal record pardoned or sealed.[268] These individuals can have their convictions "set[ ] aside" by applying to the National Parole Board for a pardon,[269] which is defined as the "formal attempt to remove a stigma for people found guilty of a federal offence who, having satisfied the sentence imposed and a specific waiting period, have shown themselves to be responsible citizens."[270] It is available to individuals convicted of both summary (misdemeanor) offenses and indictable (felony) offenses as long as they remain crime-free for a specific amount of time.[271]

Pardons are granted routinely to individuals who satisfy the various requirements. A recent study found that from 1996 to 2003,

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264 Rehabilitation of Offenders Act § 4(3)(b).

265 *Id.*

266 *See* Rehabilitation of Offenders Act 1974 (Exceptions) Order, 1975, S.I. 1975/1023, sched. 1 (U.K.). The types of employment that require applicants to disclose spent convictions include school teachers, youth and social workers, social services providers to the elderly and mentally or physically disabled, and police/probation officers. *Id.* The legal and medical professions also require applicants to disclose these convictions during the admissions process. *Id.*

267 For instance, the Act was amended in 2007 to add exceptions for several professions where individuals would have access to personal information relating to children or would otherwise work with children or "vulnerable adults." The Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order, 2007, S.I. 2007/2149, § 7 (U.K.). The 2007 amendments also apply to individuals seeking employment with the Gambling Commission, seeking to become "authorised search officers," or seeking employment that involves working in a supervisory capacity with "persons aged under 18 serving in the naval, military or air forces of the Crown." *Id.*

268 *See* Ruddell & Winfree, *supra* note 69, at 457. However, pardons are not available to individuals sentenced to life imprisonment and released on parole, and individuals convicted of a violent or sexual offense must undergo a more rigorous application process. *Id.* at 459.

269 *Id.* at 457 (describing application process for setting aside conviction in Canada).

270 PERFORMANCE MEASUREMENT DIV., CANADIAN NAT'L PAROLE BD., PERFORMANCE MONITORING REPORT 2007–2008, at 37 (2008), *available at* http://www.npb-cnlc.gc.ca/rprts/pmr/pmr_2007_2008/2007-2008-eng.pdf.

271 Individuals convicted of a summary offense who remain crime-free automatically become eligible for a pardon after three years, while individuals convicted of an indictable offense who remain crime-free must wait five years and must demonstrate "good conduct" to be eligible. *Id.* at 37.

98.5% of all pardon applications were granted.[272] While there are several fields of employment in Canada that require background checks, and criminal records can disqualify individuals from these opportunities, a pardon, once granted, still significantly "reduces the stigma of conviction and reduces barriers to employment."[273]

Like England and Canada, South Africa allows for certain criminal convictions to be expunged, although its expungement law only applies to minor crimes. Specifically, its Criminal Procedure Act provides that convictions for an offense punishable by less than six months of incarceration will "fall away" after ten years have lapsed since the date of conviction.[274] Once a conviction "falls away," courts are precluded from relying on them when imposing sentences on subsequent convictions.[275]

Thus, all three Comparison Countries have mechanisms that, to various degrees, relieve individuals of the collateral consequences of their criminal records. These countries recognize that at some point individuals have moved past their criminal offenses and provide the legal apparatus necessary to restore these individuals to their pre-offense status. While not all convictions in the Comparison Countries are eligible to be spent, expunged, or pardoned, these countries do, to a significant extent, provide individuals with the legal tools to put their criminal pasts behind them.

In contrast, there are no general federal expungement or sealing provisions in the United States.[276] As a result, federal convictions remain on an individual's criminal record forever, unless he or she

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272 Ruddell & Winfree, *supra* note 69, at 458. The National Parole Board notes that in 2007–2008, "[t]he grant/issue rate for pardons was 99%." PERFORMANCE MEASUREMENT DIV., *supra* note 270, at xviii.

273 Ruddell & Winfree, *supra* note 69, at 459.

274 Criminal Procedure Act 51 of 1977 s. 271A (S. Afr.), *amended by* Criminal Procedure Amendment Act 65 of 2008 s. 2 (S. Afr.). Such convictions will not fall away if the conviction was for an offense punishable by more than six months of incarceration without the option of a fine, or if the individual was convicted within the ten-year period of an offense punishable by more than six months without the option of a fine. *Id.*; *see also* B.C. Naudé, *Legislative Expungement of Criminal Records*, 15 S. AFR. J. CRIM. JUST. 287 (2002) (discussing statute and explaining benefits of expungement).

275 *See S. v Muggel* 1998 (2) SACR 414 (Cape Provincial Div.) at 419 (S. Afr.).

276 *See* Margaret Colgate Love, *The Debt That Can Never Be Paid: A Report Card on the Collateral Consequences of Conviction*, 21 CRIM. JUST. 16, 21 (2006). There is one minor instance in which expungement is available for a federal offense: A person found guilty of simple drug possession and who has no prior federal or state convictions relating to controlled substances can be placed on probation "for a term of not more than one year without [a court] entering a judgment of conviction." 18 U.S.C. § 3607(a) (2006). The court may dismiss the charges once the person has successfully completed probation. *Id.* If the person was twenty-one years of age or younger when he or she committed the offense, "the court shall enter an expungement order upon the application of such person." *Id.* § 3607(c). For an argument in support of federal expungement legislation, see generally

receives a presidential pardon,[277] which is exceedingly rare. At the state level, gubernatorial pardons are technically available in every jurisdiction and are the most powerful tools "to avoid or mitigate conviction-related disabilities and disqualifications affecting employment, housing, and a myriad of other benefits and opportunities."[278] However, like the presidential pardon, state pardons are very rare.[279]

While most states have expungement or sealing provisions for state offenses, these mechanisms are generally limited to relatively narrow circumstances and cannot be applied to federal offenses. Expungements are usually restricted to certain types of offenses, such as misdemeanors,[280] to individuals with certain types of criminal records,[281] and/or to first offenders.[282] Only a few states have expungement or sealing provisions for adults convicted of felony offenses.[283] Moreover, there are often limits on the number of convictions a person can expunge,[284] and there are usually waiting periods before a person is eligible for expungement.[285] Furthermore, a state pardon or expungement, even if obtained, can be relatively limited because it "may have no effect upon disabilities imposed under

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Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1 (2008).

277 Margaret Colgate Love, *In Defense of Pardons*, WASH. POST, Nov. 18, 2008, at A27 (noting that presidential pardon "is the only way to overcome the legal and social consequences of conviction, since a federal conviction cannot be expunged").

278 LOVE, *supra* note 198, at 18.

279 *Id.* at 19 ("In most states only a handful of pardons are granted each year.").

280 *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 10-105(a)(9)(i)–(ix) (LexisNexis Supp. 2009) (listing nuisance crimes eligible for expungement); MISS. CODE ANN. § 99-19-71(1) (West 2006) (limiting expungement to misdemeanors); OKLA. STAT. ANN. tit. 22, § 18(8) (West Supp. 2010) (limiting expungement to misdemeanors); *see also* LOVE, *supra* note 198, at xi (summarizing state variations in expungement provisions).

281 *E.g.*, ARK. CODE ANN. § 16-93-1207(b)(1) (Supp. 2009) (limiting expungement to individuals with "no more than one (1) previous felony conviction"); KY. REV. STAT. ANN. § 431.078(4)(b) (LexisNexis Supp. 2009) (permitting court to seal record of misdemeanor conviction if at expungement hearing it finds, inter alia, that defendant "had no previous felony conviction").

282 *E.g.*, MISS. CODE ANN. § 99-19-71(1) (West 2006); OHIO REV. CODE ANN. § 2953.32(A)(1) (West Supp. 2009); R.I. GEN. LAWS § 12-1.3-2(a) (2002).

283 LOVE, *supra* note 198, at xi.

284 *See, e.g.*, N.J. STAT. ANN. § 2C:52-8(b) (West 2005) (limiting expungement to one conviction).

285 *E.g.*, MASS. GEN. LAWS ANN. ch. 276, § 100A (West 2005) (providing for ten- and fifteen-year waiting periods for misdemeanors and felonies, respectively); N.J. STAT. ANN. §§ 2C:52-2(a), 52-3, 52-4 (West 2005) (providing for ten-, five-, and two-year waiting periods for felonies, misdemeanors, and ordinance violations, respectively); OHIO REV. CODE ANN. § 2953.32(A)(1) (West Supp. 2009) (providing for three- and one-year waiting periods for felonies and misdemeanors, respectively); R.I. GEN. LAWS § 12-1.3-2(b) to (c) (2002) (providing for five- and ten-year waiting periods for misdemeanors and felonies, respectively).

federal law."[286] Some states also have administrative restoration policies.[287] However, commentators have noted the inconsistency and limited scope of these provisions, as well as the burdensome logistical obstacles to obtaining relief.[288]

Thus, in addition to imposing fewer and less severe collateral consequences up front, the Comparison Countries are also more forgiving than the United States of individuals with criminal records on the back end: They more fully allow individuals to recover from their legal transgressions. Through their relative lack of formal collateral consequences as well as their legal provisions that allow more individuals to expunge or seal their criminal records or to receive pardons, the Comparison Countries provide meaningful legal opportunities for individuals with criminal records to reintegrate into society. In contrast, the United States, through its complex web of post-sentence collateral consequences imposed by federal, state, and local laws, continues to penalize individuals with criminal records in ways that adversely affect their ability to move beyond their criminal conviction.

## III
## Explanations for the United States' Greater Reliance on Collateral Consequences

There are many potential explanations for why the legal disabilities confronting individuals with criminal records in the United States are more pervasive and severe than those imposed in the Comparison Countries. This Part sets forth and examines these explanations. As discussed below, the most convincing explanations for the United States' particular reliance on collateral consequences are: (1) differences in race-based criminal justice policies; and (2) the narrower dignity interests of incarcerated and formerly incarcerated individuals in the United States. However, before getting to these explanations, this Part will first debunk several plausible but ulti-

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286 Love, *supra* note 198, at 16.

287 *See, e.g.*, Cal. Penal Code §§ 4852.01, 4852.03 (West 2000) (setting out eligibility for certificate of rehabilitation); 730 Ill. Comp. Stat. Ann. 5/5-15(a) (West 2007) (permitting circuit court to "issue a certificate of relief from disabilities to an eligible offender . . . if the court imposed a sentence other than one executed by commitment to . . . the Department of Corrections"); Miss. Code Ann. § 97-37-5(3) (West Supp. 2009) (allowing court to grant certificate of rehabilitation to person convicted of felony); N.Y. Correct. Law § 701(1) (McKinney Supp. 2010) (noting that certificate of relief from disabilities may "relieve an eligible offender of any forfeiture or disability, or . . . remove any bar to his employment, automatically imposed by law by reason of his conviction").

288 *See, e.g.*, Love, *supra* note 198, at x ("While every jurisdiction provides at least one way that convicted persons can avoid or mitigate . . . collateral consequences[,] . . . the actual mechanisms for relief are generally inaccessible and unreliable, and are frequently not well understood even by those responsible for administering them.").

mately unconvincing explanations for these differences. It will then detail the ways in which issues of race and dignity—particularly the ways in which they are valued or ignored—account for the expansive collateral consequences confronting individuals with criminal records in the United States.

### *A. Implausible Explanations*

Logically, the factors that explain the dramatic incarceration rates in the United States might also explain why the legal disabilities confronting individuals with criminal records in the United States are more pervasive and severe than those imposed in countries with relatively similar issues and criminal justice systems. As noted above, the expansion of collateral consequences targeting drug offenses in the 1980s and 1990s paralleled a rapid increase in U.S. incarceration rates.[289] Comparative analyses have offered several explanations for why the United States incarcerates individuals at dramatically higher rates than other countries, including that the United States encounters higher rates of crime (particularly violent crime), more often confronts violent criminal activity, more exhaustively criminalizes certain behaviors such as drug use, and has a political climate that is simply different from that of other countries.[290]

Choosing among these explanations is challenging because of the myriad social, cultural, political, and legal factors that influence criminalization and incarceration.[291] Nonetheless, these explanations are important: They foster reflection on, and perhaps reexamination of, the practices that lead to these disparities.

It is not implausible to think that the factors commonly invoked to explain growing incarceration rates may at least partly account for the expansion of collateral consequences in recent decades. Collateral consequences align criminal justice policies with "law and order" political views. Arguably, they can help minimize criminal activity and enhance safety. Nonetheless, as the following sections will demonstrate, there is strong reason to doubt that these explanations fully explain the greater severity of collateral consequences in the United States.

#### *1. Collateral Consequences Linked to Underlying Offense*

These potential explanations hold most true where the collateral consequences imposed are directly related to the underlying criminal

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289 *See supra* notes 4–13 and accompanying text.
290 *See supra* notes 62–67 and accompanying text.
291 *See supra* Part I.C (discussing methodological difficulties in comparative analysis).

act. In such instances, one can argue that the collateral consequence is necessary to prevent future harm. An obvious example can be found in the employment context, when individuals convicted of child sex offenses are barred from working with children.

However, this rationale cannot explain why individuals with criminal records in the United States confront such a broad array of collateral consequences because most of these consequences are wholly unrelated to the underlying criminal conduct.[292] For example, in some U.S. jurisdictions, convicted individuals are unable to secure public housing because of *any* felony or misdemeanor conviction, are denied voting privileges because of *any* felony conviction, or can be denied an employment license for *any* felony or misdemeanor offense. In these jurisdictions, the underlying goals and political realities noted above do not correlate with the blanket imposition of these consequences.

### *2. General Deterrence*

One might also argue that collateral consequences unrelated to the underlying criminal act are still legitimate because they serve deterrence purposes and thus enhance public safety. The idea here is that deterrence could be a plausible goal even when the nexus between the criminal act and the collateral penalty is tenuous or nonexistent. In this context, denying public housing to an individual convicted of any misdemeanor (or, in some jurisdictions, even a noncriminal violation)[293] may not be the result of any assumption that the particular individual would pose a danger to his or her neighbors. Rather, the penalty serves to deter individuals living in public housing and prospective public housing tenants from engaging in criminal activity.

However, there are reasons to doubt that deterrence explains the proliferation of collateral consequences in recent decades. A basic precept of general deterrence theory is that individuals, to be deterred by a penalty, must be aware of its existence.[294] For deterrence to work, the fear of the resulting penalty must outweigh the benefits that

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[292] *See* Demleitner, *supra* note 39, at 1027–28 ("While 'collateral restrictions' that are closely tied to the risk an individual offender poses may be defensible, many of those currently imposed are not justifiable on punishment grounds.").

[293] *E.g.*, Smyth, *supra* note 9, at 482 (noting that noncriminal violation "makes a person presumptively ineligible for New York City public housing for two years").

[294] Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 181 (2008) ("[T]he effectiveness of deterrence is premised on the actor's knowledge of the sanctions themselves and an ability to weigh not only the severity of the sanction with which he or she will be met, but also the likelihood of being met with that sanction.").

would flow from the criminal act.[295] However, collateral consequences are often invisible to potential offenders.[296] Actors in the criminal justice system—defendants, defense attorneys, prosecutors, and even judges—are also largely unaware of the scope of collateral consequences[297] because these consequences are not considered part of the "criminal" punishment; are deemed to be separate from the criminal justice system;[298] and derive from a complex and scattered mix of statutes, regulations, and policies. Thus, unlike "direct" sentencing consequences, such as jail/prison sentences, probation, and fines,[299] collateral consequences are largely unknown to the audience that a deterrence-based policy would seek to reach.

### *3. Retribution*

Another potential explanation for the expansion of collateral consequences is that the political and moral landscapes in the United States, as expressed through its laws and public discourse, require that convicted individuals be punished further at the conclusion of their sentences. Under this retributive theory, collateral consequences are imposed as extensions of the "criminal" punishment—in essence, they supplement the direct punishment. This theory holds particular weight in instances where collateral consequences are imposed automatically upon conviction for particular criminal offenses regardless of individual circumstances and in instances where the collateral consequences are not directly connected to the underlying criminal conduct (or where the connection between consequence and conduct has not been articulated legislatively).

However, this explanation is legally flawed because courts have routinely held that collateral consequences do not constitute criminal

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295 *Id.*

296 Jeremy Travis is credited with coining the phrase "invisible punishment" to describe collateral consequences. *See* Travis, *supra* note 174, at 16.

297 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 6, § 19-2.1 cmt. (describing difficulty of ascertaining all collateral consequences that apply to particular conviction); Chin, *supra* note 39, at 253–54 (noting that it would be extremely difficult for judges or attorneys to gather information about all collateral consequences relevant to particular charge).

298 *See* Nora V. Demleitner, *A Vicious Cycle: Resanctioning Offenders*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 73, at 185, 186 ("[C]ourts have generally declined to find . . . collateral sanctions punishment for constitutional purposes . . . ."); Pinard, *supra* note 41, at 642–44 nn.110–11, 113–19, 121 & 123 (citing state court decisions rejecting appellate claims that defendants should have been informed of various collateral consequences prior to guilty pleas).

299 FED. R. CRIM. P. 11(b)(1)(H)–(I) (stating that before accepting guilty plea, court must inform defendant of direct sentencing consequences, such as "any maximum possible penalty, including imprisonment, fine, and a term of supervised release," and "any mandatory minimum penalty").

punishment.[300] Instead, courts have held these consequences to be civil disabilities, or indirect consequences of criminal convictions.[301] As such, while these consequences might "punish" individuals in the colloquial sense, they fall outside the legal scope of *criminal* punishment.[302]

Another retributive explanation for the expansion of collateral consequences is that, while they are not part of the criminal punishment itself, they represent an extension of the penal harshness that is imposed in the United States. James Whitman has persuasively written about the greater harshness of U.S. policies, arguing that the U.S. criminal justice system more thoroughly degrades prisoners than those in European countries.[303] He observes, for instance, that the United States relies much more on prisons,[304] sentences individuals to longer periods of incarceration,[305] and accords less "respect" to its prisoners than do European countries.[306] He opines that punishment in the United States is collective and de-individualized, in contrast to the individualized punishment imposed in European countries.[307]

Although Whitman does not discuss collateral consequences, his views could be extended to the collateral consequences imposed in the

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300 In doing so, the courts have rejected claims that such consequences violate constitutional protections against double jeopardy and ex post facto laws. *E.g.*, Smith v. Doe, 538 U.S. 84, 105–06 (2003) (holding that Alaska's sexual offender registration requirement was not criminal punishment and therefore applying it retroactively did not violate Ex Post Facto Clause); Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (holding that Kansas's civil commitment law did not violate double jeopardy or ex post facto protections because it did not constitute criminal punishment); Turner v. Glickman, 207 F.3d 419, 428–31 (7th Cir. 2000) (rejecting double jeopardy challenge to federal law banning individuals convicted of certain drug-related felonies from receiving welfare benefits). Courts have also rejected claims that defendants must be informed of these consequences by defense attorneys or judges prior to entering guilty pleas. *See* Pinard, *supra* note 41, at 642–44 (citing cases rejecting claims that defendants should have been informed about consequences involving, inter alia, civil commitment, sex offender registration, employment, and voting).

301 These courts have held that these disabilities are "civil" because they are imposed by agencies independent from the criminal justice system. *See, e.g.*, Commonwealth v. Duffey, 639 A.2d 1174, 1176 (Pa. 1994) (holding that trial court was not required to inform defendant that his driver's license would be suspended as result of guilty plea because suspension was "collateral civil consequence"); *see also* Travis, *supra* note 174, at 16 (observing that courts and legislatures have defined collateral consequences "as 'civil' rather than criminal in nature, as 'disabilities' rather than punishments, [and] as the 'collateral consequences' of criminal convictions rather than the direct results").

302 *See, e.g.*, People v. Boespflug, 107 P.3d 1118, 1121 (Colo. App. 2004) (holding that trial court was not required to inform defendant he would lose right to vote while incarcerated, because disenfranchisement does not constitute criminal punishment).

303 *See generally* WHITMAN, *supra* note 91.

304 *Id.* at 8.

305 *Id.*

306 *Id.* at 43.

307 *Id.* at 73.

United States to the extent that these sanctions degrade, aggregate, and stigmatize the formerly incarcerated, and thus exacerbate the ways in which individuals with criminal records are negatively perceived and treated as outcasts.[308] Under this view, the more encompassing collateral consequences that attach to convictions in the United States are consistent with the greater overall harshness of the U.S. criminal justice system.

While this theory, at first blush, seems persuasive, it fails to recognize an interesting fact: While Canada and England have adopted crime control policies and punishment schemes that are similar to those of the United States, they have stopped short of adopting the vast network of collateral consequences that besets individuals in the United States.[309] Rather, as discussed in Part II, these countries have not imposed collateral consequences nearly as harsh or as permanent as those imposed in the United States. This suggests that factors aside from the harshness of U.S. sentencing and crime control policies are responsible for the unique harshness of collateral consequences in the United States.

### *B. Plausible Explanations*

#### *1. Race-Based Criminal Justice Policies*

##### a. United States

Collateral consequences have always attached to criminal records in the United States. Scholars have explained that these consequences descend from England's notion of "civil death," which historically accompanied convictions.[310] These consequences became less severe over time, particularly in the 1960s and 1970s, but they expanded dramatically in the 1980s and 1990s as part of the "war on drugs" and "tough on crime" movements.[311] The incarceration rate in the United States soared as a result of policies adopted during these move-

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[308] Similarly, the governments of England, Canada, and South Africa provide broader welfare support to their citizens than the United States, including in their policies relating to the formerly incarcerated. Thus, a related explanation is that these countries do not have the web of collateral consequences imposed in the United States because they have social support structures that are generally more sustaining. *See* SIMON, *supra* note 2, at 26 ("The complex strategic problems formed by the separation of executive and legislative branches, and by the separation of state and federal governments, have made the fashioning of a full-fledged welfare state . . . virtually impossible in the United States.").

[309] *See supra* Part II (comparing collateral consequences imposed in the United States, England, Canada, and South Africa).

[310] *See supra* notes 93–95 and sources cited therein (describing origins of U.S. collateral consequences in English law).

[311] *See infra* notes 327–31 and accompanying text.

ments.[312] Scholars have argued that these policies not only disproportionately impact people of color,[313] but were designed, at least in part, specifically to do so,[314] as their disproportionate impact was quite foreseeable.[315]

Scholars have similarly argued that the growth of collateral consequences, like the incarceration explosion, has been rooted in race.[316] The role of race is particularly evident when it comes to felon disenfranchisement, where contemporary policies follow a long historical pattern of racial exclusion. Criminal disenfranchisement laws reach back to colonial times in the United States and were extended in original state constitutions.[317] Even with the adoption of the Fifteenth Amendment in 1870,[318] African American disenfranchisement continued in the South. After Reconstruction, disenfranchisement laws were retooled specifically to exclude African Americans from voting.[319] Several "southern states tailored their disenfranchisement

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312 *See* BUTLER, *supra* note 2, at 46 ("The War on Drugs is the single most important explanation for mass incarceration."). In 1973, the United States incarcerated 200,000 individuals. 1997 BUREAU OF JUST. STATS. SOURCEBOOK OF CRIM. JUST. STATS. 490 tbl.6.35 (1998) (noting that 204,211 individuals were incarcerated in federal and state prisons at end of 1973). At midyear 2008, the United States incarcerated over 2.3 million individuals in its prisons and jails. WEST & SABOL, *supra* note 119, at 16 tbl.15. The shift away from the rehabilitation model in the 1970s also impacted the reentry-related services available in U.S. prisons. *See* Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, *in* PRISONERS ONCE REMOVED, *supra* note 38, at 33, 36 ("Abandoning the once-avowed goal of rehabilitation certainly decreased the perceived need for and availability of meaningful programming for prisoners, as well as social and mental health services provided to them both inside and outside the prison.").

313 *See* MARC MAUER, RACE TO INCARCERATE 145 (1999) (arguing that increased law enforcement budgets and enhanced political and media attention related to "war on drugs" led to more resources directed at drug offenders in 1990s, with "police increasingly . . . target[ing] low-income minority communities for drug law enforcement").

314 *Id.*; *see also infra* notes 332–48 and accompanying text.

315 TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 54–55 (2007) (arguing that various factors, such as drug markets being "concentrated in poor, urban areas," drug distribution at street level being dominated "by poor African-American (and to a lesser extent in some regions, Hispanic) males," and "[e]nforcement practices that concentrate undercover work on apprehending street dealers in impoverished neighborhoods," were "well known at the time the War on Drugs got underway, and . . . could have convinced us that the negative consequences of the war would fall disproportionately on poor minority males").

316 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 139–60 (2010) (analogizing collateral consequences to Jim Crow–era policies that targeted and excluded African Americans).

317 Ewald, *supra* note 95, at 1062–63.

318 U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

319 *See* Ewald, *supra* note 95, at 1090–95 (describing disenfranchisement laws rewritten in several southern states post-Reconstruction to single out African Americans); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A*

laws" to crimes purportedly committed primarily by African Americans, "while excluding crimes purportedly committed primarily by whites."[320] Others imposed poll taxes, literacy tests, and grandfather clauses.[321] Along with these measures, "the explicit use of felon disenfranchisement contributed to preventing African Americans . . . from voting."[322] Thus, felon disenfranchisement in the United States is tied to broader efforts to prevent African Americans from voting.

As scholars Jeff Manza and Christopher Uggen explain, disenfranchisement laws remained relatively stable between the 1920s and 1950s.[323] From the late 1950s to the 1970s, many states eased their felon disenfranchisement laws, providing greater access to voting booths for individuals with criminal records.[324] Although this trend continues today,[325] categories of individuals with criminal records are excluded from voting in most states, and these prohibitions continue to fall hardest on African Americans. For example, "13 percent of African-American men have lost the right to vote, a rate that is seven times the national average."[326]

The other collateral consequences discussed in this Article do not share similar records of explicit racial targeting. However, these consequences expanded dramatically in the 1980s and 1990s as part of the "war on drugs." To help fight this "war," Congress created several collateral consequences that disqualify drug offenders from various federal aid programs.[327] For example, Congress passed laws that disqualify those convicted of felony drug offenses from receiving spe-

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*New Strategy*, 103 YALE L.J. 537, 540 (1993) (noting that although disenfranchisement laws in South preceded Fifteenth Amendment, "between 1890 and 1910, many Southern states tailored their criminal disenfranchisement laws . . . to increase the effect of these laws on black citizens"). For a detailed history of the intersection of felon disenfranchisement laws and race, see MANZA & UGGEN, *supra* note 35, at 41–68.

320 Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, 31 HUM. RTS. 16, 16 (2004).

321 THOMPSON, *supra* note 67, at 126 (noting these restrictions and explaining that their "express purpose . . . was to disenfranchise as many Blacks as possible without violating the . . . Fifteenth Amendment").

322 MANZA & UGGEN, *supra* note 35, at 57.

323 *Id.* at 58.

324 *Id.* at 59.

325 *See, e.g.*, Gregg [NMI] Sangillo, *Ex-felons Push for Voting Rights*, NAT'L J., Jan. 20, 2007, at 63 (reporting that "16 states have implemented policy reforms to loosen felon disenfranchisement law since 1997").

326 ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 7 (2009), *available at* http://brennan.3cdn.net/5c8532e8134b233182_z5m6ibv1n.pdf (citation omitted).

327 *See* Chin, *supra* note 39, at 259–60 (observing that "drug offenses are subjected to more and harsher collateral consequences than any other category of crime" and listing various federal aid programs affected).

cific public benefits, including food stamps;[328] that make individuals convicted of distribution or possession of controlled substances ineligible for a variety of federal benefits;[329] that disqualify individuals convicted of specific drug offenses from federal health care programs;[330] and that disqualify, for certain periods of time, students convicted of any drug offense (including misdemeanors) from receiving federal student loans.[331]

Unlike felon disenfranchisement laws, these consequences did not explicitly target African Americans. However, at the very least, the decisionmakers who enacted these consequences ignored both the racial history of drug criminalization and the predictably disproportionate impact that these consequences would have on people of color. Legal scholars such as Paul Butler, Gabriel Chin, and David Sklansky have explained that drug criminalization began largely in response to perceived associations between particular drugs and particular minority groups. Butler has explained that drug criminalization began in the late 1800s, out of fear in San Francisco "that Chinese men were using opium to seduce white women."[332] Chin has described how purported links between cocaine and African Americans in the early 1900s helped provoke the criminalization of cocaine.[333] Sklansky has explained that opium, powder cocaine, marijuana, and heroin were strongly associated, respectively, with Chinese immigrants in the late nineteenth century, African Americans in the South in the early twentieth century, Mexican Americans in the 1920s and 1930s, and African Americans in the 1950s.[334]

Similar concerns with minority drug use in the 1980s and 1990s help to explain the dramatic expansion of collateral consequences during these decades. In both decades, media accounts portrayed various "pathologies" linked to poor African American communities,

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328 *See supra* note 201 and accompanying text.

329 21 U.S.C. § 862 (2006). These benefits are defined as "the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States." *Id.* § 862(d)(1)(A).

330 Individuals convicted after August 21, 1996, of a felony offense "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" are ineligible to participate in any federal healthcare program. 42 U.S.C. § 1320a-7(a)(4) (2006). In addition, the Secretary of Health and Human Services has the discretion to exclude from these health care programs individuals convicted under federal or state law of a misdemeanor relating to these offenses. *Id.* § 1320a-7(b)(3).

331 20 U.S.C. § 1091(r)(1) (2006). To fall under this statute, the student had to be receiving a federal "grant, loan, or work assistance" at the time of the offense. *Id.*

332 BUTLER, *supra* note 2, at 44.

333 Chin, *supra* note 39, at 257–58.

334 David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283, 1292–94 (1995).

including the convergence of illicit drug consumption and public benefits. These media accounts presented the stereotypical welfare recipient as an African American female.[335] Media coverage of the proliferation of crack cocaine in communities across the country during the late 1980s further linked race with drugs and crime.[336]

Against this backdrop of race, drugs, crime, and welfare, Congress waged a "war on drugs," which resulted in harsh sentencing schemes that have fallen overwhelmingly on African Americans and Latinos.[337] African Americans and Latinos make up the majority of those arrested for and convicted of drug offenses despite studies showing that Whites constitute the majority of drug users.[338] This perverse result is the byproduct of the influence of race at key decision points in the criminal process, such as the arrest and charging stages, and scholars have found that biases, both conscious and unconscious, can influence policing practices, prosecutorial discretion, and sentencing.[339] Studies have detailed the extent to which sentencing laws—such as the federal sentencing policy which imposes more severe punishment for possession of crack than for powder

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335 *See, e.g.*, THOMPSON, *supra* note 67, at 38 (describing terms like "welfare queens" as part of "new 'coded' terminology . . . employed to recast public welfare as an issue of race").

336 *See id.* at 13–14 (describing media coverage of crack cocaine in 1980s and 1990s as well as studies concluding that media stories on drug war coverage linked drugs with race); Sklansky, *supra* note 334, at 1293–94 (noting that sponsors of first federal legislative bills that proposed enhanced penalties for crack cocaine offenses cited some of these media stories with approval).

337 *See, e.g.*, Fagan & Meares, *supra* note 294, at 175, 178 (observing that incarceration in United States "increased massively" beginning in 1980s, with "high rates of African-American involvement with the criminal justice system clearly [being] tied to drug offending"); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 257 (2009) ("What is not debatable . . . is that th[e] ostensibly race-neutral effort [of the war on drugs] has been waged primarily against black Americans."); Ian F. Haney Lopez, *Post-racial Racism: Policing Race in the Age of Obama*, 98 CAL. L. REV. (forthcoming June 2010) (manuscript at 115, on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418212 ("Since the late 1960s, Republicans and Democrats have competed by punishing criminals and welfare queens. Posturing through ever-more punitive crime policies and ever-more restrictive social programs, federal and state party politics drove mass imprisonment and simultaneously dismantled the social net.").

338 *See* Chin, *supra* note 39, at 265–66 (noting that although Whites "represent the vast majority of drug offenders," they are "less likely to be arrested; if arrested, less likely to be convicted; and if convicted, less likely to be imprisoned than members of other races"); *see also* TONRY, *supra* note 21, at 108–10 (discussing studies showing disparate arrest rates).

339 *See, e.g.*, Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 202–03 (2007) ("Prosecutors, along with other criminal justice officials, must be willing to acknowledge the role they play in contributing to [unwarranted racial] disparities.").

cocaine[340]—and school zone drug laws[341] have had a disproportionate impact on African Americans. Studies also illustrate that young African Americans are disproportionately prosecuted as adults[342] and that African Americans disproportionately receive life sentences.[343]

At the same time that they were increasing penalties for drug offenses,[344] legislators were also hastily expanding collateral consequences.[345] Some scholars trace the expansion of these consequences to public and media pressure on politicians in the 1980s, who "[i]n fear of being perceived as soft on crime, . . . moved to increase penalties, incarceration, and collateral sanctions with little or no research as to the long-term consequences of these policies."[346] Much like the dramatically higher incarceration rates that followed the "war on drugs" in the 1980s and 1990s, the dramatic expansion of collateral consequences has disproportionately impacted people of color.[347]

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340 U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2–3, 15–16 (2007), *available at* http://www.ussc.gov/r_Congress/Cocaine2007.pdf (reporting extent to which African Americans have been disproportionately convicted and sentenced for crack-cocaine offenses, which trigger substantially longer sentences than powder-cocaine offenses).

341 *See* JUDITH GREENE ET AL., JUSTICE POLICY INST., DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAWS IMPACT RACIAL DISPARITY–AND FAIL TO PROTECT YOUTH 4, 16–18, 26–28 (2006), *available at* http://www.justicepolicy.org/images/upload/06-03_REP_DisparitybyDesign_DP-JJ-RD.pdf (concluding that drug-free zone laws, which enhance penalties for drug-related crimes committed within specific distances from certain locations such as schools, parks, and public housing have fallen disproportionately on African Americans).

342 *See* Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 85 n.87 (2003) (citing studies finding that African American youth are disproportionately adjudicated as adults).

343 *See* ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 13, 20–21 (2009), *available at* http://www.sentencingproject.org/doc/publications/inc_noexit.pdf (finding that African Americans comprise nearly half of both juveniles and adults sentenced to life imprisonment).

344 *See* Thompson, *supra* note 6, at 262–64 (describing legislative decisions to increase sentences).

345 Legislators implemented many of the collateral consequences for drug-related convictions at this time. For example, legislators imposed restrictions on federal welfare benefits, student loans, and public housing. *See* 20 U.S.C. 1091(r) (denying federal student loans to individuals convicted of drug-related offenses); 21 U.S.C. 862a (1996) (denying federal welfare benefits to individuals convicted of drug-related offenses); 24 C.F.R. § 966.4(l)(5)(i)(A) (2008) (denying public housing assistance to individuals convicted of manufacturing or producing methamphetamine on premises of federal housing).

346 THOMPSON, *supra* note 67, at 16.

347 *See, e.g.*, *id.* at 10 (observing that collateral consequences "have had at once a disparate and a devastating impact on communities of color"); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477, 482 (2009) ("Because the War on Drugs has resulted in felony convictions for many African American men, the special collateral consequences of drug convictions profoundly

While it is impossible to determine the extent to which, if at all, racial animus motivated this legislation, given the imprint that the criminal justice system has stamped on racial minorities throughout U.S. history, it was foreseeable that the expansion of collateral consequences would impact African Americans and Latinos disproportionately. Thus, the dramatic growth of collateral consequences, particularly those that attach to drug offenses, can be understood as extensions of criminal justice policies that unfairly target people of color.[348]

b. Comparison Countries: Canada and South Africa

The relationship between race and collateral consequences becomes even more evident when patterns in the United States are compared with those in Canada and South Africa.[349] Like the United States, these countries have histories of employing criminal justice policies that disproportionately affect racial minorities and indigenous peoples.[350]

Unlike the United States, however, Canada has recognized both the historic and contemporary discrimination in its criminal justice system and has actively taken steps to lessen disparities in incarceration. In 1996, in response to both its overall escalated incarceration rate and its disproportionate incarceration of Aborigines, Canada codified in its Criminal Code a statute providing for conditional sentence of imprisonment[351] with "the express goal of reducing the use of incarceration as a sanction."[352] Under this statute, "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances."[353] While the statute requires judges to consider "all available sanctions other than imprisonment that are reasonable in the circumstances . . . for all offenders," it requires

impact African American community life."); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideas of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 138 (2007) (observing that collateral consequences "have the biggest impact on minorities").

348 *See* Chin, *supra* note 39, at 258–59 ("The history of drug policy and of collateral consequences reflects an unfortunate tendency to criminalize conduct thought to have been engaged in by minority groups, and to impose special punishments on those convicted of such crimes and not others.").

349 Unlike courts in Canada and South Africa, English courts appear to have not yet articulated a connection between race and particular collateral consequences, as searches for relevant cases turned up no results.

350 *See supra* Part I.D.2–3.

351 Canada Criminal Code, R.S.C., ch. C-46, § 718.2(d) (2009), http://laws.justice.gc.ca/PDF/Statute/C/C-46.pdf. For an empirical evaluation of the impact of conditional sentences on imprisonment rates in Canada, see Roberts & Gabor, *supra* note 139, at 94, 99–104.

352 *See* Roberts & Gabor, *supra* note 139, at 94.

353 R.S.C., ch. C-46, § 718.2(d).

judges to pay "particular attention to the circumstances of aboriginal offenders."[354]

In interpreting this statute, the Supreme Court of Canada, in *Regina v. Gladue*, asserted that "judges should pay particular attention to the circumstances of aboriginal offenders *because those circumstances are unique*, and different from those of non-aboriginal offenders."[355] The Court emphasized that this statute is "remedial" because it directs "sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavor to achieve a truly fit and proper sentence in the particular case."[356] Similarly, in *Sauvé v. Canada*, the Court struck down a law that disenfranchised prisoners sentenced to more than two years of incarceration, emphasizing that because of "the disproportionate number of Aboriginal people in penitentiaries," the restriction would have "a disproportionate impact on Canada's already disadvantaged Aboriginal population."[357]

Similarly, South African courts, in post-apartheid cases, have in several contexts explicitly considered South Africa's history of racial subjugation. Judges and courts have declared this history to be not only relevant but central to determining particular legal claims and interpreting the Constitution. For instance, in his concurring opinion in *Brink v Kitshoff NO*, Justice O'Regan of the Constitutional Court stated that the Equality Clause of South Africa's Constitution "needs to be interpreted" in light of apartheid's "system[atic] discriminat[ion] against black people in all aspects of social life" and "the enduring legacy that it bequeathed."[358] Likewise, in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)*, the Constitutional Court declared unconstitutional a law that disenfranchised those individuals sentenced to prison without the option of paying a fine in lieu of imprisonment.[359] In the context of discussing the centrality of the right to vote to democratic values, the Court observed that "[i]n the light of our history, where denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for

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354 *Id.* § 718.2(e).

355 [1999] 1 S.C.R. 688, 708 (Can.) (emphasis in original).

356 *Id.* at 706.

357 [2002] 3 S.C.R. 519, 523 (Can.); *see also supra* notes 238–41 and accompanying text (discussing *Sauvé*'s holding that felon disenfranchisement is inconsistent with Canadian Charter of Rights and Freedoms).

358 1996 (4) SA 197 (CC) at 217 (S. Afr.) (O'Regan, J., concurring).

359 2005 (3) SA 280 (CC) (S. Afr.).

us a precious right which must be vigilantly respected and protected."[360]

### 2. *The Narrower Dignity Interests of Incarcerated and Formerly Incarcerated Individuals in the United States*

While its boundaries are vague,[361] "human dignity has come to be accepted as a core value of [human rights] jurisprudence."[362] The human rights model of dignity seeks to provide robust protections for the dignity of individuals who are incarcerated. The United States has adhered to a much narrower vision of the dignity interests of incarcerated and formerly incarcerated individuals than have the Comparison Countries, particularly Canada and South Africa.

Perhaps the most vivid example of these narrower interests is found in the voting rights context. As detailed above, sentenced prisoners in Canada[363] and South Africa[364] retain their right to vote during incarceration, and the European Court of Human Rights recently struck down the United Kingdom's blanket disenfranchisement of individuals convicted of a crime.[365] In striking down laws that disenfranchised prisoners, both Canadian and South African courts invoked the human rights concept of dignity. For example, the Canadian Supreme Court held that disenfranchisement compromised

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[360] *Id.* at 297.

[361] *See* Arthur Chaskalson, *Human Dignity as a Constitutional Value*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 133, 134 (David Kretzmer & Eckart Klein eds., 2002) (recognizing "breadth" of concept of dignity and noting "difficulty . . . defining its limits"); Rory O'Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 6 INT'L J. CONST. L. 267, 268 (2008) (noting that dignity is "an ambiguous concept, one which conceals very different ideas of what constitutes a life with dignity"). The concept of dignity is similarly vague in U.S. Supreme Court jurisprudence. *See* Jordan J. Paust, *Human Dignity as a Constitutional Right*, 27 HOW. L.J. 145, 149–50 (1984) (noting that concept of dignity is "extremely broad" and "open-ended").

[362] Chaskalson, *supra* note 361, at 137; *see also* Paulo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EUR. J. INT'L L., 931, 932 (2008) ("[T]he idea of human dignity serves as the single most widely recognized and invoked basis for grounding the idea of human rights generally . . . ."); Alan Gewirth, *Human Dignity as the Basis of Rights*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 10, 10 (Michael J. Meyer & William A. Parent eds., 1992) ("The relations between human dignity and human rights are many and complex, but one relation is primary: human rights are based upon or derivative from human dignity.").

[363] *See supra* notes 238–41 and accompanying text (discussing *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 (Can.), which overturned law denying right to vote to individuals sentenced to more than two years imprisonment).

[364] *See supra* notes 256–57 and accompanying text (discussing *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)*, 2005 (3) SA 280 (CC) (S. Afr.), which held that people who have been incarcerated cannot be denied right to vote).

[365] Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 187.

the dignity interests enjoyed by all incarcerated individuals.[366] Specifically, it declared that individuals are not wholly disconnected from larger society when incarcerated, and that their voices in societal affairs, while perhaps muted, must not be silenced altogether.[367] Similarly, the European Court of Human Rights' decision in *Hirst v. United Kingdom (No. 2)* was premised on notions of human dignity,[368] and much of South Africa's post-apartheid constitutional jurisprudence is tied to broader human rights notions of dignity.[369]

In contrast to Canadian, South African, and English prisoners, individuals incarcerated in state and federal prisons in the United States—with the exception of those incarcerated in Maine and Vermont—cannot vote in any election.[370] While felon disenfranchisement has received the most scholarly and media coverage of any collateral consequence in the United States, the debates have centered primarily on whether to restore voting rights to individuals after they have been released from incarceration or have otherwise completed their sentences.[371] The United States virtually stands alone as "the only country in the democratic world that systematically disenfranchises large numbers of nonincarcerated offenders."[372]

In contrast to Canada and South Africa, the United States' "jurisprudence touching on human rights is impoverished."[373] Indeed, U.S. constitutional jurisprudence, at least in the contexts of criminal

366 Sauvé v. Canada, [2002] 3 S.C.R. at 522; *see also supra* notes 238–41 and accompanying text.

367 Sauvé v. Canada, [2002] 3 S.C.R. at 522; *see also supra* notes 238–41 and accompanying text.

368 *See Hirst*, 2005-IX Eur. Ct. H.R. at 208–18 (striking down U.K. blanket felony disenfranchisement law as inconsistent with dignity-based rights guaranteed to prisoners under European Convention on Human Rights).

369 *See supra* notes 253–57 and accompanying text.

370 *See* FELONY DISENFRANCHISEMENT LAWS, *supra* note 205, at 1.

371 *See* Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 75 (2003) (noting that opponents of disenfranchisement have focused reform efforts on those who have been released from incarceration and "have left largely unchallenged the law and policy that justifies disenfranchising the two million individuals currently incarcerated in the United States" (citation omitted)). In contrast, "debates within European nations over disenfranchisement . . . [are] over *which prisoners* should be barred from voting. In almost all cases, the debate stops at the prison walls." LALAH ISPAHANI, AM. CIVIL LIBERTIES UNION, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE UNITED STATES AND OTHER DEMOCRACIES 4 (2006), *available at* http://www.aclu.org/files/images/asset_upload_file825_25663.pdf).

372 MANZA & UGGEN, *supra* note 35, at 38.

373 Peggy Cooper Davis, *Toward a Relational Constitutionalism*, *in* DIGNITY, FREEDOM AND THE POST-APARTHEID LEGAL ORDER: THE CRITICAL JURISPRUDENCE OF LAURIE ACKERMANN 239, 243 (Aj Barnard-Naudé et al. eds., 2008).

sentencing and confinement conditions,[374] articulates a narrow vision of dignity that is rooted in the Eighth Amendment's protection against cruel and unusual punishment.[375] This vision sets outer boundaries on the types and levels of punishment that can be inflicted without offending constitutional protections.

As a result, the United States asks whether a certain measure, practice, or deprivation violates the personal dignity interests protected by the Constitution, rather than asking whether the overall legislative scheme is consistent with a robust belief in human dignity generally. In essence, in the United States the concept of dignity is an end point that cannot be passed; it is invoked only in response to the most egregious laws or government conduct. In the Comparison Countries, by contrast, the courts use dignity as the starting point for interpretation, from which rights flow. Consequently, the Comparison Countries offer much more robust protection of dignity interests than the United States.

Moreover, Eighth Amendment protections extend primarily to the contexts of sentencing and prison conditions, both of which are considered criminal punishment. But because collateral consequences are not considered criminal punishment,[376] the protections of the Eighth Amendment do not apply to them.[377] This serves to further

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374 The U.S. Supreme Court has articulated dignity interests in wide-ranging contexts. *See generally* Paust, *supra* note 361, at 149–84 (tracing Court's use of concept of human dignity since 1940s).

375 *See* Roper v. Simmons, 543 U.S. 551, 560 (2005) ("[T]he Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."); Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."). Scholars have argued both that the Supreme Court has narrowed Eighth Amendment protections and that the Court's jurisprudence in this area has been inconsistent. *See* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1062 (2004) (observing that Court has "emphasized proportionality" in death penalty cases, forfeiture cases, and punitive damages cases involving due process issues, but has "refused to find prison sentences disproportionate"); Nilsen, *supra* note 347, at 140–42 (noting that Court has narrowed Eighth Amendment protections since 1980s).

Dignity protections also exist outside of the sentencing and confinement areas in the criminal justice context. *See, e.g.*, Rochin v. California, 342 U.S. 165, 174 (1952) (holding that forced extraction of capsules from Rochin's stomach was "offensive to human dignity" and violated Fourteenth Amendment Due Process Clause).

376 *See supra* notes 300–02 and accompanying text.

377 *See* Kansas v. Hendricks, 521 U.S. 346, 363–69 (1997) (upholding Kansas civil commitment law against constitutional challenge because commitment is not form of "punishment"); Nilsen, *supra* note 347, at 144 ("[U]nder the Court's current view, no constitutional weight is given to the multifold assaults on dignity that arise when ex-prisoners are continuously prevented from becoming fully participating members of their families and communities.").

narrow the United States' conception of human dignity vis-à-vis the Comparison Countries.

The various collateral consequences imposed upon individuals in the United States seriously infringe upon the dignity interests of those with criminal records. Indeed, the Supreme Court recognized as much in *Lawrence v. Texas*.[378] In *Lawrence*, the Court overturned a Texas statute that banned same-sex sodomy. Writing for the majority, Justice Kennedy tied collateral consequences to dignity, noting that although sodomy was considered to be a minor offense in Texas because it was a low-level misdemeanor, it "[s]till . . . remains a criminal offense with all that imports for the dignity of the persons charged."[379] In this context, Kennedy was referring to the potential sex offender registration requirements that would attach to such a conviction, as well as "the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example."[380]

Thus, the Court recognized that collateral consequences extend the dignity-stripping punishments that accompany incarceration and, as a result, continue to degrade individuals after they have finished their sentences. By continuing to exclude these individuals from mainstream society, these consequences make it nearly impossible for them to provide for themselves and, in many ways, isolate them from their families and communities.

The differing views in the United States and the Comparison Countries about how collateral consequences impact dignity may result from a deeper philosophical disagreement over how society should conceive of and apportion the amenities and opportunities that collateral consequences temporarily or permanently eliminate. As Patricia Allard has convincingly argued, collateral consequences expose a dichotomy in the United States between rights and privileges.[381] Allard observes that collateral consequences in the United States simply eliminate privileges, which can be stripped away from individuals with relative ease, as opposed to rights, which enjoy enhanced protections.

This dichotomy helps to explain the distinctions between the United States and the Comparison Countries with regard to collateral consequences. For example, voting in Canada and South Africa is a

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[378] 539 U.S. 558 (2003).

[379] *Id.* at 575.

[380] *Id.* at 576.

[381] Patricia Allard, *Claiming Our Rights: Challenging Postconviction Penalties Using an International Human Rights Framework*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 73, at 223, 228–29.

true right specifically guaranteed to all adult citizens,[382] and these countries' courts have rejected attempts to strip this right from prisoners.

In contrast, while the U.S. Supreme Court has declared that the right to vote "is regarded as a fundamental political right, . . . preservative of all rights,"[383] the ability to exercise this right has often been limited by conditions and exceptions. Historically, African Americans were excluded from the franchise in many parts of the country, despite the Fifteenth Amendment.[384] After the passage of the Voting Rights Act of 1965[385] and key decisions by the Warren Court,[386] the right to vote became more firmly established in the United States. Nonetheless, obstacles to exercising the right to vote are not confined to history. For example, in *Crawford v. Marion County Election Board*,[387] the Court upheld Indiana's requirement that in-person voters have photographic identification at primary and general elections, even though the requirement imposes burdens on some otherwise qualified voters.[388]

Felon disenfranchisement—which is the rule in forty-eight states—is the paradigmatic example of the fragility of the right to vote in the United States. Thus, unlike voting rights in Canada and South Africa, the right to vote in the United States is so diminished by the Constitution's broad felony exception that it seems more akin to a privilege, rather than a true right. Moreover, this illustrates the limited dignity interests that the United States affords to individuals with criminal records.

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382 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 3 (U.K.) ("Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly . . . ."); S. AFR. CONST. 1996, ch. 2, § 19 ("Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution . . . .").

383 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

384 *See supra* notes 317–24 and accompanying text.

385 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973–1973aa-6 (2006)).

386 *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (striking down poll tax as violation of Equal Protection Clause); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that state legislative districts must be equally apportioned).

387 128A S. Ct. 1610, 1613–15 (2008).

388 *See id.* at 1628–35 (Souter, J., dissenting) (discussing serious burdens imposed by identification requirements—including travel costs and fees for obtaining license—and inadequacy of provisional ballot exception as remedy).

# IV
# PROPOSALS

As one scholar observes, "reintegration rests on the fulfillment of a necessary condition: the punishment must *end* at some point to allow for the possibility of reintegration."[389] However, the United States has a uniquely extensive and debilitating web of collateral consequences that continue to punish and stigmatize individuals with criminal records long after the completion of their sentences. These consequences stifle reintegration by making it difficult, if not impossible, for individuals to move past their criminal records and for families to reunite and thrive.[390]

The United States should draw lessons from the Comparison Countries analyzed in this Article and reshape its web of collateral consequences. The overall goal of collateral consequences in any country should be to best position formerly incarcerated individuals to become productive contributors to their families and communities. To move closer to this goal, the United States should: (1) implement measures that enhance the dignity interests of individuals with criminal records; (2) tailor any collateral consequences to the underlying offense; (3) implement mechanisms to alleviate the legal penalties that accompany a criminal record; and (4) analyze the racially disproportionate impact of collateral consequences. As explained below, these recommendations are interrelated.

## *A. Implement Measures That Enhance the Dignity of Individuals with Criminal Records*

The United States should follow the lead of the Comparison Countries and recast its post-sentence penalties to enhance the dignity of individuals with criminal records so as to provide them with the tools to live productive post-incarceration lives. The first step is to remove unnecessary legal impediments to reentry. As much as is possible, a dignity-based approach would seek to respect these individuals as potential contributors to their families and communities. For example, the Comparison Countries have legal mechanisms that more readily allow individuals with criminal records to participate in the political process.[391] By contrast, the United States still disenfranchises millions of individuals with criminal records, imposes broad

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[389] Jean-Paul Brodeur, *Comparative Penology in Perspective*, *in* CRIME, PUNISHMENT, AND POLITICS, *supra* note 59, at 49, 59.

[390] The impact of collateral consequences on families has been exacerbated by the increasing numbers of women prisoners being released from incarceration. *See supra* notes 118–19 and accompanying text.

[391] *See supra* Part II.A.

employment-related legal restrictions, and prohibits many individuals with criminal records from accessing public housing and other benefits.[392] These consequences—by restricting the ability of individuals with criminal records to obtain employment and housing, by silencing their civic voices, and by isolating them from their families and communities—compromise core dignity interests.[393]

Decisionmakers in the United States should look to international human rights instruments to gain broader insights on punishment practices that would best preserve the dignity of individuals with criminal records.[394] Several treaties and conventions, as well as the courts and commissions that interpret these documents, set out limitations on punishment.[395] A burgeoning scholarly literature argues that particular collateral consequences in the United States, most notably felon disenfranchisement, violate various human rights protocols.[396]

An example of a human rights approach to collateral consequences can be found in *Hirst v. United Kingdom (No. 2)*.[397] In *Hirst*, the European Court of Human Rights considered whether a statute that disenfranchised convicted prisoners in the United Kingdom

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392 Leena Kurki, *International Standards for Sentencing and Punishment*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES, *supra* note 77, at 331, 359–60.

393 *See* Allard, *supra* note 381, at 228 (arguing that "[t]he present trend of punishing beyond prison walls through postconviction penalties is incompatible with human dignity").

394 This is not to say that that these instruments are without flaws. As commentators have pointed out, human rights protocols have been hampered by their lack of enforcement mechanisms. *See, e.g.*, Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1769 (2008) (noting that "many people have attributed the limited effects of human rights treaties to the absence of strong enforcement mechanisms" in those treaties).

395 *See* ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 14–16 (3d ed. 2002) (discussing international treaties that set limits on use of death penalty); Richard C. Dieter, Executive Dir., Death Penalty Info. Ctr., Address at the Ford Foundation Symposium: The US Death Penalty and International Law: US Compliance with the Torture and Race Conventions (Nov. 12, 1998), http://www.deathpenaltyinfo.org/us-death-penalty-and-international-law-us-compliance-torture-and-race-conventions (discussing impact of various international conventions and treaties upon legality of death penalty in United States).

396 *See, e.g.*, Kurki, *supra* note 392, at 369 (arguing that "[s]weeping authorization to deprive ex-offenders of their right to vote, restrict their ability to obtain jobs and occupational licenses, or deny them social services or welfare benefits might be considered inhuman or degrading punishment" in violation of various international agreements); Robin L. Nunn, Comment, *Lock Them Up and Throw Away the Vote*, 5 CHI. J. INT'L L. 763, 781–83 (2005) (arguing that U.S. felon disenfranchisement laws violate Convention on Elimination of All Forms of Racial Discrimination and International Covenant on Civil and Political Rights).

397 Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 187; *see also supra* note 368 and accompanying text.

violated the European Convention of Human Rights.[398] Hirst was barred by Section Three of The Representation of the People Act 1983 from voting in parliamentary or local elections because he was a convicted prisoner. He claimed that this statute violated The Convention, arguing that the ban did not serve legitimate punitive ends and was overly broad and disproportionate because it was "unrelated to the nature or seriousness of the offence."[399]

While the Court recognized that there could be instances where disenfranchising prisoners would not violate the European Convention on Human Rights,[400] it noted that *Hirst* was "the first time that [it] has had occasion to consider a general and automatic disenfranchisement of convicted prisoners."[401] Although the Court accepted the Government's asserted goals of preventing crime and punishing offenders,[402] it rejected the Government's argument that the statute only affected individuals "convicted of crimes serious enough to warrant a custodial sentence."[403] The Court noted that the disenfranchisement statute applied to a broad cross-section of prisoners, "from one day to life and from relatively minor offences to offences of the utmost gravity."[404] It further observed that even for crimes serious enough to warrant imprisonment, disenfranchisement would hinge "on whether the sentencing judge impose[d] such a sentence or opt[ed] for some other form of sanction, such as a community sentence."[405] Thus, the Court held that the "general, automatic and indiscriminate restriction on a vitally important . . . right . . . [was] incompatible with" the Convention.[406]

A dignity-based approach to individuals' post-incarceration lives would seek to promote, rather than suppress, their standing in the community. It would aim to restore the individuals, as much as possible, to their prior status, rather than impose broad legal restrictions

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398 The provision at issue was Article 3 of Protocol No. 1 of the European Convention on Human Rights, which states, "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." *Id.* at 203 (citing European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, 213 U.N.T.S. 221, *as amended by* Protocol No. 11).

399 *Id.* at 205.

400 *Id.* at 212 (suggesting that Convention would not prohibit "restrictions on electoral rights . . . imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations").

401 *Id.* at 211.

402 *Id.* at 213–14.

403 *Id.* at 214.

404 *Id.*

405 *Id.* at 214–15.

406 *Id.* at 216.

that serve to degrade and marginalize them. In doing so, it would aim to truly reintegrate these individuals into society.

### *B. Tailor Collateral Consequences to the Underlying Offense*

A dignity-based approach to collateral consequences would also impose only those consequences that directly relate to the underlying criminal conduct and are therefore necessary to minimize the risk of further harm. Under this approach, the post-sentence penalties would be proportionate to the criminal conduct, rather than imposed broadly on classes of offenders regardless of their specific conduct.

The European Court of Human Rights' concern in *Hirst* about the breadth of the United Kingdom's disenfranchisement statute thus reflects a dignity-based approach to collateral consequences. By contrast, collateral consequences in the United States are imposed upon whole classes of individuals without regard to the magnitude of the offense committed or the relationship between the underlying criminal conduct and the resulting penalty.[407]

A dignity-based approach is consistent with the American Bar Association's recommendation that collateral consequences not be imposed upon an individual unless the legislature determines that the conduct underlying the offense "provides so substantial a basis for imposing the sanction that [it] cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified."[408] The ABA defines such consequences as those that "closely relate[ ] to the offense conduct involved."[409] It offers a few examples of "closely related" consequences, such as "exclusion of those convicted of sexual abuse from employment involving close contact with children, loss of public office upon conviction of bribery, denial of licensure where the offense involves the licensed activity, and prohibition of firearms to those convicted of violent crimes."[410] Such "closely related" consequences serve a positive public purpose because they are directly responsive to the harmful conduct and work to minimize the risk that such conduct will recur.

This focus on linking collateral consequences to specific criminal conduct can be found in recent employment laws passed in several American cities and counties. These jurisdictions have implemented so-called "ban the box" ordinances,[411] which remove from city and

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[407] *See supra* notes 182–207 and accompanying text.

[408] STANDARDS FOR CRIMINAL JUSTICE, *supra* note 6, § 19-2.2.

[409] *Id.* § 19-2.2 cmt.

[410] *Id.* (footnotes omitted).

[411] Jurisdictions that have implemented "ban the box" measures include Austin, Baltimore, Berkeley, Boston, Chicago, Minneapolis-St. Paul, New Haven, San Francisco,

county employment applications the question requiring applicants to disclose whether or not they have a criminal record.[412] Jurisdictions adopting these measures recognize that this question deters individuals from applying for city employment and also prejudices employers against those applicants who have criminal records from the very beginning of the application process.[413] Instead, in "ban the box" jurisdictions, all applicants are assessed equally based on their qualifications for the job. An applicant's criminal background becomes relevant only when he or she has advanced through the process and has been deemed qualified for the job. At this point, the city or county conducts a background check, and "a criminal record would only be relevant if it created an unacceptable risk that the applicant could not fulfill the job's requirements."[414] While the factors that these jurisdictions consider regarding the applicant's criminal record vary slightly,

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Alameda County (California), Multnomah County (Oregon), and Travis County (Texas). NAT'L EMPLOYMENT LAW PROJECT, MAJOR U.S. CITIES AND COUNTIES ADOPT HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 1, http://www.nelp.org/page/-/SCLP/CityandCountyHiringInitiatives.pdf?nocdn=1 (last visited Jan. 10, 2010).

412 *See* Jessica S. Henry & James B. Jacobs, *Ban the Box To Promote Ex-offender Employment*, 6 CRIMINOLOGY & PUB. POL'Y 755, 757–58 (2007) (describing "ban the box" initiatives).

413 There are also several federal and state laws that prohibit employers from discriminating against applicants on the basis of criminal records. *See, e.g.*, HAW. REV. STAT. ANN. § 378-2(1)(A) (LexisNexis 2009) (making it unlawful for employers to discriminate against potential or existing employees on basis of "court record"); MINN. STAT. ANN. § 364.03(1) (West 2009) ("[N]o person shall be disqualified from public employment, nor shall a person be disqualified from pursuing . . . or engaging in any occupation for which a license is required solely . . . because of a . . . conviction," unless conviction relates directly "to the position of employment sought or the occupation for which the license is sought."); N.Y. CORRECT. LAW § 752(1)–(2) (McKinney 2010) (prohibiting discrimination against applicants for employment or employment-related licenses, or against those who hold license or employment, on basis of criminal record unless "direct relationship between one or more of the . . . offenses and the specific license or employment sought . . ." exists); *id.* § 750(4) (defining "direct relationship" as criminal conduct having "a direct bearing on [the person's] fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question"); WIS. STAT. ANN. § 111.321 (West 2009) (prohibiting employers, labor organizations, and licensing agencies from "engag[ing] in any act of employment discrimination . . . on the basis of . . . [a] conviction record"). For a detailed explanation of these laws, see generally O'Brien & Darrow, *supra* note 199. However, commentators have noted the difficulties of enforcing these laws. *See, e.g.*, James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 212 (2008) ("Employers may actually disqualify job applicants based on a criminal record, but offer other reasons or no reason at all for having rejected the ex-offender in favor of another job applicant.").

414 Henry & Jacobs, *supra* note 412, at 757.

they all consider the relationship between the record and the requirements of the particular job.[415]

By limiting collateral consequences to those that are connected to the underlying offense, these "ban the box" policies are consistent with a dignity-based approach to collateral consequences.

### *C. Provide Mechanisms That Allow Individuals with Criminal Records To Be Relieved of the Legal Penalties That Accompany a Criminal Record*

Jurisdictions in the United States should implement mechanisms that truly allow individuals to move past their records. Organizations in the United States have long recognized that expungement and/or sealing provisions would facilitate reentry by reducing, if not altogether eliminating, collateral consequences. Efforts began in the 1950s to introduce expungement measures that aimed to minimize the effects of these consequences.[416] These efforts, however, have been largely unsuccessful.[417] Moreover, while some commentators have championed expungement as a tool to allow individuals to move past their records,[418] others have argued against it, suggesting that expungement "seeks to rewrite history, establishing that something did not happen although it really did,"[419] and, by essentially erasing the conviction from public view, "devalue[s] legitimate public safety concerns."[420]

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[415] *See, e.g.*, CITY OF CAMBRIDGE, CRIMINAL OFFENDER RECORD INFORMATION (CORI) POLICY § 10 (2007), http://www.cambridgema.gov/purchasing1/CORI_CITY_POLICY.pdf (considering factors such as "[r]elevance of the crime to the position sought," "nature of the work to be performed," time that has elapsed since conviction, age of applicant at time of conviction, and "[s]eriousness and specific circumstances of the offense"). Two commentators have lauded "ban the box" policies' potential to reform broader employment practices, observing that "[i]f cities successfully demonstrate that ex-offenders can be safely hired for most public-interest jobs, a strong argument will exist for repealing many de jure restrictions on ex-offender licensing and employment." Henry & Jacobs, *supra* note 412, at 758.

[416] For a brief history of these efforts, see Pinard, *supra* note 41, at 636–37.

[417] *See* Love, *supra* note 276, at 22 ("[T]he limited and/or uncertain legal effect of expungement in some jurisdictions, the general unreliability of criminal record systems and the additional uncertainties introduced by new information-sharing technologies . . . all combine to raise questions about the usefulness of expungement as a restoration device.").

[418] *E.g.*, Demleitner, *supra* note 177, at 162 (arguing that expungement would relieve individuals of collateral consequences).

[419] James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 411 (2006). Jacobs observes that "[t]he problem is compounded if the expungement policy allows or requires lying [by defendants, police officers, or prosecutors] to support the false history." *Id.* Given these problems, he explains, expungement has traditionally been limited to relatively minor convictions. *Id.*

[420] Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1726 (2003).

Regardless of the merits of expungement, jurisdictions should implement practical measures allowing individuals to be relieved of various collateral consequences. Again, the ABA has recommended several promising reforms. The ABA's proposal divides collateral consequences into "collateral sanction[s]" and "discretionary disqualification[s]."[421] It defines "collateral sanction" as a "legal penalty, disability or disadvantage . . . that is imposed on a person automatically upon that person's conviction."[422] A "discretionary disqualification" is defined as a "penalty, disability or disadvantage, . . . that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense."[423]

The ABA proposal offers mechanisms that would allow individuals to be relieved of collateral sanctions or discretionary disqualifications. Specifically, it recommends that courts and/or "specified administrative bod[ies]" be authorized "to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by . . . law."[424] It further recommends that state legislatures "establish a process for obtaining review of, and relief from, any discretionary disqualification."[425] This approach strikes a balance that allows individuals to move past collateral consequences without compromising the broader veracity of public criminal records and public safety concerns articulated by opponents of expungement.

### *D. Analyze the Racially Disproportionate Impact of Collateral Consequences*

The United States should draw lessons from Canada, which took steps in 1996 to ease its disproportionate incarceration of Aborigines.[426] As explained above, African Americans and Latinos, as well as the relatively few core communities across the United States to which these individuals return upon release, are uniquely burdened by collateral consequences.[427]

A few states have implemented measures in the sentencing context that offer some hope that most states, and perhaps the federal government, will soon consider the impact of collateral consequences on people of color. Specifically, Iowa, Connecticut, and Wisconsin

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421 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 6, § 19-1.1.

422 *Id.*

423 *Id.*

424 *Id.* § 19-2.5(a); *see also* Jeremy Travis, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 77 (2005) (arguing "for judicial or administrative relief if a [collateral] sanction causes undue hardship").

425 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 6, § 19-3.2.

426 *See supra* notes 351–57 and accompanying text.

427 *See supra* notes 38–44, 337–48 and accompanying text.

have recently taken affirmative steps to address the disproportionate impact of criminal justice policies on people of color. A study by The Sentencing Project found that in 2005 Iowa had the highest ratio of African American to White prisoners in the United States, at nearly fourteen to one.[428] In response to these findings, Iowa enacted legislation in April 2008 that requires that any "propose[d] . . . change in the law which creates a public offense . . . or changes existing sentencing, parole or probation procedures" be accompanied by a correctional impact statement.[429] This statement "shall include information concerning . . . the impact of the legislation on minorities."[430]

Connecticut, which had the fourth highest ratio of African American to White prisoners in the United States,[431] followed Iowa in June 2008 by enacting legislation requiring that "a racial and ethnic impact statement . . . be prepared with respect to certain bills and amendments that could, if passed, increase or decrease the pretrial or sentenced population of the correctional facilities in [Connecticut]."[432]

In 2008, Wisconsin's governor issued an executive order "[d]irect[ing] all state agencies with relevant information and capability . . . to develop reporting mechanisms to track traffic citation, arrest, charging, sentencing and revocation patterns by jurisdiction and race."[433] The executive order also called for the creation of the Racial Disparities Oversight Commission, which was to "exercise oversight and advocacy concerning programs and policies to reduce disparate treatment of people of color across the spectrum of the criminal justice system."[434] As in Iowa, the efforts that led to this executive order began with a national study on racial disparities in the juvenile justice system. That report found that, in 2003, youth of color in Wisconsin were ten times more likely to be detained than White youth—the highest ratio in the country.[435] In response to this report,

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[428] MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 10 (2007), *available at* http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf.

[429] IOWA CODE ANN. § 2.56(1) (West 2010).

[430] *Id.* In addition, the legislation requires the legislative services agency, which is charged with preparing the correctional impact statements, to "develop a protocol for analyzing the impact of the legislation on minorities." *Id.* § 2.56(5).

[431] MAUER & KING, *supra* note 428, at 10.

[432] 2008 Conn. Acts 143 (Reg. Sess.) (codified at CONN. GEN. STAT. ANN. § 2-24b (West 2009)).

[433] Wis. Exec. Order No. 251 (2008), *available at* http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=3360.

[434] *Id.*

[435] NAT'L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 30–31 (2007), *available at* http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf.

Wisconsin's governor established the Commission on Reducing Racial Disparities in the Wisconsin Justice System.[436] The Commission held public hearings throughout Wisconsin, studied reports of similar commissions in other states, and reviewed other data.[437] Based on the Commission's findings and recommendations, the Governor issued the executive order.[438]

Thus, a few jurisdictions in the United States have already recognized the extent to which African Americans and Latinos are disproportionately represented in the criminal justice system and have taken steps to assess the extent to which proposed criminal justice policies will exacerbate these disparities. By requiring such analyses, these states recognize that "policies often have unintended consequences that would be best addressed prior to adoption of new initiatives."[439] However, even in the jurisdictions that have taken the positive step of focusing on the disproportionate impact of criminal justice policies, collateral consequences are often ignored. This trend persists despite the fact that these consequences have dramatically expanded the reach of the criminal justice system and disproportionately impact the same individuals and communities that are disproportionately affected by the criminal system generally.

Similar studies should examine the extent to which people of color are disproportionately impacted by collateral consequences throughout the United States. Federal legislation passed in 2008 required that data on the collateral consequences in all fifty states, "each territory of the United States, and the District of Columbia" be studied and compiled.[440] This will lead to a more complete understanding of these consequences, which are now extraordinarily difficult to quantify.[441] However, fact-finding bodies, such as sentencing commissions or other government agencies, should also be formed to study the disproportionate impact of these consequences. These bodies should be established in each state, with the goal of compiling a

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436 *See* Marc Mauer, *Racial Impact Statements: Changing Policies To Address Disparities*, CRIM. JUST., Winter 2009, at 16, 17–18 (describing history of Wisconsin Executive Order).

437 Wis. Exec. Order No. 251.

438 *Id.*

439 Mauer, *supra* note 436, at 17.

440 Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534. This statute directs the Director of the National Institute of Justice to conduct this study. The Director is required to "identify any provision in the Constitution, statutes or administrative rules of each jurisdiction . . . that imposes collateral sanctions or authorizes the imposition of disqualifications, and any provision that may afford relief from such collateral sanctions and disqualifications." *Id.* § 510.

441 *See supra* note 178 and accompanying text.

thorough state-by-state measure of racial disparities in collateral consequences.

Moreover, racial and ethnic impact statements, similar to those that are now required in Iowa, Connecticut, and Wisconsin, should accompany any proposed expansion of federal or state collateral consequences.[442] The statements would recognize and examine any proposed expansion's racial impact. The analyses set forth in the studies would provide legislators with the information necessary to fully weigh the benefits and costs of any proposed change.

## Conclusion

The record numbers of individuals exiting prisons and jails to return to communities across the United States is the end result of a three-decade-long incarceration boom. As they are in all other segments of the U.S. criminal justice system, African Americans and Latinos are disproportionately represented in the reentering population. Moreover, these individuals are disproportionately returning to poor, urban communities of color.

Public rhetoric in the United States has long embraced the notion that a person who completes his or her sentence for a criminal offense has paid his or her debt to society and is allowed to start anew. However, the collateral consequences described above, as well as the countless others that exist at the federal, state, and local levels, prove that actual practice does not align with this rhetoric. The reality is that it is nearly impossible for individuals convicted of criminal offenses to move past their criminal records because collateral consequences continue to punish them long after the completion of their sentences.

Comparative analyses of collateral consequences should supplement other reform efforts to reduce these penalties. This Article illustrates that individuals with criminal records in the United States, when measured against similarly situated individuals in England, Canada, and South Africa, confront unique legal obstacles. Among the chief lessons gained from comparative analysis is the extent to which the

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442 For an argument that racial and ethnic impact statements should be required for any proposed sentencing legislation, see Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 Ohio St. J. Crim. L. 19 (2007). Mauer also calls for expanding the use of racial impact statements to collateral penalties. *Id.* at 44 ("[E]xpanding the use of racial impact statements to other areas of social policy related to sentencing could help to alleviate the expansion of racial disparities to these collateral penalties.").

In addition, a bill has recently been introduced in Oregon that, if passed, will require that a racial and ethnic impact statement "be prepared for any legislation that may, if enacted, affect the racial and ethnic composition of the criminal offender population." H.B. 2352, 75th Leg. Assem., Reg. Sess. (Or. 2009).

Comparison Countries attempt to preserve the dignity of their citizens, despite their criminal activity. This is most dramatically exemplified by the ability of individuals in Canada and South Africa to vote while serving prison sentences. These dignity-enhancing concepts extend to the post-sentence period, as each of the comparative countries has provisions that pardon or expunge some criminal records after specific time periods have elapsed.

Federal, state, and local decisionmakers in the United States should draw on these comparative perspectives to reshape their approaches to collateral consequences. The overwhelming majority of incarcerated individuals will be released to families and communities,[443] and those who are convicted but not sentenced to incarceration will immediately confront these consequences. Because of these consequences, convicted individuals will face significant—and, compared to the other countries considered in this Article, unusually harsh and permanent—hurdles to reintegration. Federal, state, and local collateral consequences should be retooled to apply only where those consequences directly relate to the individual's underlying criminal conduct. The post-sentence transition period should be redesigned to implement dignity-enhancing measures that provide opportunities for individuals to move past their criminal records and successfully reintegrate into their communities.

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[443] *E.g.*, TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REENTRY TRENDS IN THE UNITED STATES 1 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf (estimating that approximately ninety-five percent of state prisoners will be released).