

# Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies<sup>1</sup>

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“You cannot separate environment from empowerment. Toxic waste dumps are put in communities where people are the poorest, the least organized, the least registered to vote. If you are poor you are a target for toxic waste. If you are unregistered to vote you are a target.”<sup>2</sup>

## I. INTRODUCTION

In late 2004, the environmental strategists, Michael Shellenberger and Ted Nordhaus, set off a firestorm with their polemical essay, *The Death of*

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1. The idea of a typology or taxonomy of environmental values or worldviews originates with John S. Dryzek and James P. Lester, *Alternative Views of the Environmental Problematic*, in ENVIRONMENTAL POLITICS & POLICY: THEORIES AND EVIDENCE 328 (James P. Lester ed., 2d ed. 1995) [hereinafter ENVIRONMENTAL POLITICS & POLICY], and discussed in *infra* Part III.D.

2. PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT 285 (1993) (quoting Jesse L. Jackson, “The Right to Breath Free,” speech prepared for Earth Day tour, March 30–April 3, 1990).

*Environmentalism*, which contends that environmentalism is unprepared to confront many of today's global ecological crises, most importantly, global warming.<sup>3</sup> Because the environmental movement<sup>4</sup> lacks vision, relies too

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3. Michael Shellenberger & Ted Nordhaus, *The Death of Environmentalism*, GRIST MAGAZINE (Jan. 13, 2005), <http://www.grist.org/news/maindish/2005/01/13/doe-reprint/index.html>. For a discussion of the response to *The Death of Environmentalism*, see, e.g., Felicity Barringer, *Paper Sets Off a Debate on Environmentalism's Future*, N.Y. TIMES, Feb. 6, 2005, at 18.

4. According to geography professor Robert Cameron Mitchell and sociology professors Angela G. Mertig and Riley E. Dunlap, "The modern environmental movement includes many different social-movement organizations—local, state, regional, national, and international—that seek to protect the environment." Robert Cameron Mitchell, Angela G. Mertig & Riley E. Dunlap, *Twenty Years of Environmental Mobilization: Trends Among National Environmental Organizations*, in AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT, 1970-1990 11, 12 (Riley E. Dunlap & Angela G. Mertig eds., 1992) [hereinafter AMERICAN ENVIRONMENTALISM]. Shellenberger and Nordhaus do not explicitly define "environmental movement" in their paper. But it is clear that they wish to draw a distinction between the environmentalism of today and that of the 1960s and 1970s, which brought about powerful environmental laws, such as the Endangered Species Act, the Clean Air and Clean Water Acts, and the National Environmental Policy Act.

A number of scholars and practitioners have attempted to flesh out the phrase "environmental movement." Professor Alice Kaswan, for example, uses the phrase to connote the "mainstream 'second wave' of the environmental movement"—environmental groups formed in the late 1960s and early 1970s, such as the Natural Resources Defense Council (NRDC), the Environmental Defense Fund (now known just as "Environmental Defense" or "ED"), and the Sierra Club Legal Defense Fund (later known as the "Earthjustice Legal Defense Fund" and now known just as "Earthjustice")—but not including "the grassroots environmental groups which arose in the 1970s and 1980s, largely in response to toxic contamination issues." Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 261 n.185, 265 n.217 (1997).

Luke Cole, an environmental justice and civil rights lawyer in San Francisco, and director of the Center on Race, Poverty & the Environment, explains that the "first wave" of the environmental movement began at the end of the 19th century, with John Muir, Teddy Roosevelt, and other nature lovers pushing for the preservation of wilderness areas. He claims that the "second wave" began in the 1960s and took form around Earth Day 1970 with the widespread growth of legal-scientific organizations such as NRDC, ED, and Earthjustice—groups that constitute what he refers to as the "mainstream environmental movement"—the groups responsible for much of U.S. environmental law and the groups that dominate the current national environmental scene. Luke W. Cole, *Empowerment As the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 634 (1992). For Cole, the "third wave" emerged from the Love Canal disaster in the late 1970s—grassroots environmentalists who, in contrast to the largely white, middle-class "second wave," are frequently poor, working class people of color. *Id.* at 640.

For a different conception of "second wave" and "third wave" environmentalism, as well as criticism of the "third wave," see SHABECOFF, *supra* note 2, at 251-75; Bill Devall, *Deep Ecology and Radical Environmentalism*, in AMERICAN ENVIRONMENTALISM, *supra*, at 51,

heavily on technical policy solutions, such as pollution controls and higher vehicle mileage standards, and continues to celebrate old victories, such as the passage of the Clean Air Act and Clean Water Act, while ignoring the high cost of health care and the lack of research and development tax credits for and overall competitiveness of the American auto industry, the authors contend that environmentalism must die and be reborn.<sup>5</sup>

This was not the first time that the environmentally conscious had attempted to reform the focus or direction of its movement<sup>6</sup> or to define or redefine the essence and parameters of “the human-nature symbiosis.”<sup>7</sup> In fact, it appears that each generation explores whether the “environment” is “out there”—an entity separate from humans—or whether the “environment” is inclusive of, not distinct from, humans;” it then becomes

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55 (describing third-wave environmentalism as “based on the principle that environmental experts, usually lawyers and scientists, could and should negotiate directly with corporations and government agencies to achieve compromises on pollution controls, energy policies, and other environmental issues, preferably using the ‘market’ mechanism,” and referring to such an approach as “narrowly rational”).

In contrast to the formulation of the “environmental movement” as “waves,” Professor W. Douglas Costain and the late Professor James P. Lester proffer that “[t]he history of environmental politics and policy may be roughly divided into four periods: the ‘conservation-efficiency movement’ from about 1890-1920; the ‘conservation-preservation movement’ from about 1920 to 1960; the ‘environmental movement’ from about 1960 to 1980; and the contemporary period of ‘participatory environmentalism’ starting in the 1980s.” W. Douglas Costain & James P. Lester, *The Evolution of Environmentalism*, in ENVIRONMENTAL POLITICS & POLICY, *supra* note 1, at 15, 22-23. For a discussion of whether a new environmental movement is growing, see Peter Applebome, *Our Towns; Earth’s Fate May Hinge on Alert, Furry Creatures Called People*, N.Y. TIMES, June 4, 2006, § 1, at 37.

When not referring to Shellenberger and Nordhaus’s use of “environmental movement,” and when not explicitly stated otherwise, this Article uses the phrase “environmental movement,” “mainstream environmental movement,” or “mainstream environmental organization(s)” (MEOs) primarily to mean multi-issue environmental law, policy and advocacy organizations with an international, national, or regional focus, i.e., the “second wave.” This Article focuses on MEOs because of their visibility and influence in environmental policy debates. Note, however, that this Article’s comments, criticisms and suggestions may also apply to grassroots environmental organizations—frequently, although not necessarily always, local, issue-specific groups.

5. Shellenberger & Nordhaus, *supra* note 3. For a discussion of this Author’s discomfort with arguments calling for the death and rebirth of abstract ideas and disciplines, see Avi Brisman, *The End of Art*, 47 NAEA NEWS 9 (Dec. 2005) (reviewing DONALD KUSPIT, *THE END OF ART* (2004)).

6. See, e.g., SHABECOFF, *supra* note 2, at 279 (“To achieve the basic reforms necessary to reach its goals, the environmental movement itself will have to evolve. There must be a fourth wave of environmentalism.”).

7. Peter Manus, *Our Environmental Rebels: An Average American Law Professor’s Perspective on Environmental Advocacy and the Law*, 40 NEW ENG. L. REV. 499, 499-500 (2006).

a rite of passage for that generation to promulgate an “environmental” vision, as well as the means of achieving that vision (which may or may not coalesce with the values and methods of the previous generation).<sup>8</sup> As Professor Peter Manus writes in *Our Environmental Rebels: An Average American Law Professor’s Perspective on Environmental Advocacy and the Law*, “[e]very generation discovers for itself that we humans are one with the natural environment. Our parents learned it in the schoolmarm prose of Rachel Carson, and our grandparents learned it in the farmer-philosopher musings of Aldo Leopold or, reaching back further, in the fire and brimstone preaching of John Muir.”<sup>9</sup> Thus, it seems natural to ask whether, given this “deja-vu-all-over-again,”<sup>10</sup> we should place great weight in the assertions of Shellenberger and Nordhaus. But because of our lack of progress under the Clinton and two Bush administrations with respect to federal climate change legislation,<sup>11</sup> the ever-present threats to drilling in the Arctic National Wildlife Refuge,<sup>12</sup> and the recent attempts to

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8. In a recent Op-Ed, New York Times columnist Thomas L. Friedman urges today’s college students to “build the institutions, alliances and programs that will turn back the black tide of climate change and petro-authoritarianism, which, if unchecked, will certainly poison [their] world and [their] future as much as fascism once threatened to do to [their] parents’ world and future.” Thomas L. Friedman, Op-Ed, *The Greenest Generation*, N.Y. TIMES, Apr. 21, 2006, at A25.

9. Manus, *supra* note 7, at 499. See also Manus, *supra* note 7, at 518, 528; cf. TERRE SATTERFIELD, ANATOMY OF A CONFLICT: IDENTITY, KNOWLEDGE, AND EMOTION IN OLD-GROWTH FORESTS 37 (2002) (“Roosevelt-style conservation is closer to what today’s loggers would support than it is to what today’s environmentalists would support. . . . [T]he roots of modern-day environmentalism can be traced most prominently to John Muir’s spirituality, Leopold’s land ethic, and the ecosystem sensibilities articulated by George Perkins Marsh and Rachel Carson.”).

10. Manus, *supra* note 7, at 501.

11. For a discussion of state efforts to reduce emissions of carbon dioxide and an argument that international cooperation, rather than E.P.A. rule-making, is the only way to achieve serious limits on greenhouse gas emissions, see John Tierney, *Environmental Procrastination Agency*, N.Y. TIMES, July 8, 2006, at A13; cf. Michael E. Kraft, *Congress and Environmental Policy*, in ENVIRONMENTAL POLITICS & POLICY, *supra* note 1, at 168, 198 (“Despite the reigning cynicism of the day, it is hard to imagine the United States dealing seriously with climate change, protection of biodiversity, and sustainable development—or even the more prosaic issues of air and water pollution—without extensive involvement of the U.S. Congress.”).

12. See, e.g., Editorial, *Energy Shortage*, N.Y. TIMES, May 30, 2006, at A18 (discussing the House of Representatives’ most recent vote to open the Arctic National Wildlife Refuge to oil drilling); SATTERFIELD, *supra* note 9, at 39 (“[U]nder President George W. Bush, an escalating threat to the environment seems certain as conflicts surface in the western United States over the drilling of oil in Alaska’s wildlife reserves and federal promises to open public lands to more extensive resource extraction.”).

gut the Endangered Species Act,<sup>13</sup> not to mention the ever-increasing soporific public responses to any issue deemed “environmental” (with the exception of rising gasoline prices),<sup>14</sup> the environmental movement could benefit from some new ideas and approaches. Shellenberger and Nordhaus’s essay is by no means a panacea, but its critique of the environmental community’s myopic conception of “environment” is a much-needed and well-justified reminder and provides a springboard for this Article’s exploration of an issue that has gained much attention since the 2000 election<sup>15</sup> but which usually falls outside the province of

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13. Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. (2005). H.R. 3824, sponsored by Rep. Richard W. Pombo (R-CA), passed the House last year but has not passed the Senate. See Felicity Barringer, *Endangered Species Act Faces Broad New Challenges*, N.Y. TIMES, June 26, 2005, § 1, at 20 (discussing the clash between “critical habitat” and development rights and the efforts to reduce the scope of the 1973 Endangered Species Act); Felicity Barringer, *House Votes for New Limits On Endangered Species Act*, N.Y. TIMES, Sept. 30, 2005, at A24 (discussing how the House of Representatives, in a 229 to 193 vote, moved to eliminate the “critical habitat” provision of the Endangered Species Act and to reimburse property owners whose land values are reduced by the law).

For an argument blaming the Washington, D.C.-based non-profit environmental organization, Defenders of Wildlife, for helping to craft and then advocating on behalf of the Pombo-sponsored bill, see Turtle, *Pombo’s Extinction Bill Brought to You by Defenders of Wildlife*, 26 EARTH FIRST! 3 (Nov.-Dec. 2005) (accusing the organization of becoming “an anti-critical habitat machine”). See also Rodger Schlickeisen, President, Defenders of Wildlife, *Defenders of Wildlife and the Endangered Species Act: The Real Story*, 26 EARTH FIRST! 6 (Jan.-Feb. 2006) (in response); Larry J. Schweiger, President, National Wildlife Federation, *Letter to the Editor*, 26 EARTH FIRST! 7 (Jan.-Feb. 2006) (also in response).

14. In surveys conducted in March 2006, the “Environment” tied for tenth (with “Moral and family values”) on the public’s list of most important problems facing the United States. “Gas/heating oil crisis” tied for sixth with “President Bush,” behind “War in Iraq,” “Economy and jobs,” “Immigration,” “Terrorism,” and “Health care.” Andrew C. Revkin, *Yelling ‘Fire’ on a Hot Planet*, N.Y. TIMES, Apr. 23, 2006, at § 4, at 1 (citing CBS News nationwide telephone survey, April 6-9; Gallup nationwide telephone survey, March 13-16). But see James P. Lester, *Introduction to ENVIRONMENTAL POLITICS & POLICY*, *supra* note 1, at 1, 1 (“In the last thirty years environmental protection policy has moved from being a ‘nonissue’ to being one of the most significant issues of our time.”).

For a review of the ebb and flow of public concern with environmental quality in the United States, see Riley E. Dunlap, *Trends in Public Opinion Toward Environmental Issues: 1965-1990 in AMERICAN ENVIRONMENTALISM*, *supra* note 4, at 89, 89.

15. For an overview of post-Election 2000 public and scholarly interest in criminal disenfranchisement, see Alec C. Ewald, “*Civil Death*”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1045 [hereinafter *Civil Death*]; ALEC EWALD, A ‘CRAZY-QUILT’ OF TINY PIECES: STATE AND LOCAL ADMINISTRATION OF AMERICAN CRIMINAL DISENFRANCHISEMENT LAW 1 (Nov. 2005)[hereinafter *CRAZY-QUILT*], <http://www.sentencingproject.org/pdfs/crazyquilt.pdf>; David Hamsher, Comment, *Counted Out Twice—Power, Representation & the ‘Usual*

“environmental”: criminal disenfranchisement (frequently referred to as “felon disenfranchisement”)<sup>16</sup>—the disqualification of individuals convicted of crimes from the voting process. First, however, this Article attempts to flesh out some of Shellenberger and Nordhaus’ major criticisms.

Shellenberger and Nordhaus condemn environmental leaders for assuming that everyone shares the same definition of “environment”<sup>17</sup> and

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*Residence Rule’ in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*, 96 J. CRIM. L. & CRIMINOLOGY 299, 300 (2005); LALEH ISPAHANI, AMERICAN CIVIL LIBERTIES UNION, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 3 (May 2006), [http://www.aclu.org/images/asset\\_upload\\_file825\\_25663.pdf](http://www.aclu.org/images/asset_upload_file825_25663.pdf); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1365 (2003); RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, THE VANISHING BLACK ELECTORATE: FELONY DISENFRANCHISEMENT IN ATLANTA, GA 1 (Sept. 2004) [hereinafter KING & MAUER, THE VANISHING BLACK ELECTORATE], <http://www.sentencingproject.org/pdfs/atlanta-report.pdf>; Brian Pinaire, Milton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1545 (2003); Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1607-08 (2004).

16. The phrase “felon disenfranchisement” is actually a bit of a misnomer because some states bar individuals convicted of certain misdemeanors. See, e.g., Ewald, *Civil Death*, *supra* note 15, at 1057 n.31 (listing states that disenfranchise offenders for “infamous crimes” or those involving “moral turpitude,” which may not be felonies); EWALD, CRAZY-QUILT, *supra* note 15, at 6 (listing states where certain misdemeanants are disenfranchised); Matthew T. Clarke, *Iowa’s Governor Grants Ex-Prisoners Automatic Voting Rights Restoration*, 16 PRISON LEGAL NEWS 23 (2005) (discussing executive order automating the restoration of rights to persons convicted of a felony or aggravated misdemeanor upon completion of sentence). Because disenfranchisement, then, extends beyond felonies to misdemeanors, this Article attempts to refer to the phenomenon by its more inclusive, albeit less familiar, term: “criminal disenfranchisement.” Occasionally, however, this Article will use the term “felon disenfranchisement,” often to maintain consistency with cited passages by other authors. Unless otherwise specified, usage of the term “felon disenfranchisement” is not intended to distinguish disqualification based on felony convictions from convictions for misdemeanors.

17. Exactly what constitutes “environment” has been the subject of much discussion and debate. For a discussion of different conceptions of the word “environment,” see, e.g., Avi Brisman, *The Aesthetics of Wind Energy Systems*, 13 N.Y.U. ENVTL. L.J. 1, 122-32 (2005); ROM HARRE, JENS BROCKMEIER & PETER MUHLHAUSLER, GREENSPEAK: A STUDY OF ENVIRONMENTAL DISCOURSE 12, 185-86 (1999) (noting that the term “environment” refers to both “the whole biosphere” and “the strictly localized surroundings of one’s own life” and stating that “the environment’ . . . is . . . a blurred linguistic construction, a hybrid between nature and culture, manner and humankind, causality and morality, as multifaceted as the world it purports to represent”); DAVID W. ORR, THE NATURE OF DESIGN: ECOLOGY, CULTURE, AND HUMAN INTENTION (2002); Richard Southwood, *The environment: problems and prospects*, in MONITORING THE ENVIRONMENT: THE LINACRE LECTURES 1990-91 5

take the movement as a whole to task for the capricious way in which it defines issues as “environmental”: “If one understands the notion of the ‘environment’ to include humans, then the way the environmental community designates certain problems as environmental and others as not is completely arbitrary.”<sup>18</sup> Why, for example, is raising the standards in Corporate Average Fuel Economy (CAFE) legislation deemed “environmental,” but abolishing tax loopholes for certain classes of (high polluting) trucks not, the authors ask; further, why is global warming deemed an “environmental” problem, but poverty and war not conferred this status, when each results in the widespread destruction of humans and non-human species.<sup>19</sup> By narrowly defining “environmental” problems, Shellenberger and Nordhaus contend, we come up with narrow solutions.<sup>20</sup>

The environmental community’s fondness for promulgating technical policy solutions for everything it regards as “environmental” problems also infuriates Shellenberger and Nordhaus.<sup>21</sup> Why, for example, do environmental leaders call for more efficient appliances and hybrid cars and for tax credits for those hybrid cars, but not for an end to the privatization of health care, which costs the auto industry billions of dollars a year that could be used for research and development, the authors wonder.<sup>22</sup> If the auto industry were relieved of its health care burden—not

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(Bryan Cartledge ed., 1992) [hereinafter THE LINACRE LECTURES] (“Our environment is broadly defined as our surroundings or, as Einstein put it: ‘Everything that isn’t me.’”). For a discussion of the conception of “environment” in “environmental justice,” see Kaswan, *supra* note 4, at 229-30 (reflecting a conception grounded in impact on a community’s well-being, from health risks to socioeconomic consequences of land use).

18. Shellenberger & Nordhaus, *supra* note 3, at Part I.

19. For a discussion of the impact of poverty on the environment, see, e.g., Michael McCloskey, *The Emperor Has No Clothes*, 9 DUKE ENVTL. L. & POL’Y F. 153 (1999). For a discussion of poverty and war as issues integral to sustainable development, see John C. Dernbach, *Synthesis*, in STUMBLING TOWARD SUSTAINABILITY 1, 5 (John C. Dernbach ed., 2002) (“Although poverty and environmental degradation are important in their own right, they also can cause or contribute to wars, starvation, ethnic tensions, and terrorism, which are more likely to get headlines than their underlying causes.”); Michael Heseltine, *The environment: a political view*, in THE LINACRE LECTURES, *supra* note 17, at 42, 47 (“[F]reedom and a good environment are as inextricably bound up with each other as wealth-creation and a good environment are. . . . the areas where the worst environmental degradation in the world is to be found are those where freedom is least and poverty greatest. Reinforcing the democratic impulse in eastern Europe is as important for the environment as it is for national security.”).

20. Shellenberger & Nordhaus, *supra* note 3, at Part I.

21. Shellenberger & Nordhaus, *supra* note 3.

22. *Id.* at Part I (explaining that the American auto industry provides health care for its retired employees, whereas the Japanese auto industry does not because Japan has a national health care system). Cf. Jerry Adler, *The New Greening of America*, NEWSWEEK, July 17, 2006, at 43, 52 (“If the United States became a world leader in developing green

typically regarded as an “environmental” problem—it could better compete with Japanese auto companies (Japan has a system of national health care), not only improving the likelihood that the Big Three (General Motors, Ford and DaimlerChrysler)<sup>23</sup> could produce a more fuel efficient vehicle, but reducing the likelihood that they would need to cut jobs for U.S. auto workers (“labor” is also not considered an “environmental” problem).<sup>24</sup>

Similarly, Shellenberger and Nordhaus excoriate the environmental movement for its insistence on viewing its failures as “essentially tactical.”<sup>25</sup> Why, for example, does the movement perceive its inability to make serious headway on global warming as simply the result of being unsuccessful in advertising, public relations, lobbying, and forging alliances with certain constituencies (such as the religious<sup>26</sup> or Latino communities<sup>27</sup>), the authors inquire.<sup>28</sup> This position reeks of arrogance, Shellenberger and Nordhaus maintain—a point Philip Shabecoff stressed a decade earlier in his seminal book, *A Fierce Green Fire: The American Environmental Movement*:

Most of the environmental organizations have . . . started to take steps to change ‘the whiteness of the green movement,’ but one senses they are doing so basically out of a sense of obligation or in response to criticism. In reality, the environmentalists need the knowledge, talent, street smarts, practical experience, political energy, and militancy of angry outsiders from minority communities more than the minorities need the environmentalists.<sup>29</sup>

Thus, Shellenberger and Nordhaus, like Shabecoff before them, assert that by asking what non-environmental groups can do for environmentalists, rather than what environmentalists can do for non-environmental organizations, environmentalists virtually guarantee tepid responses to their cries for help.

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technology and made it available to other countries, it could make a big difference. For \$100 billion a year, which is at least what we’re spending on Iraq,’ it could be done.” (quoting Marty Hoffert, emeritus professors of physics at New York University)).

23. DaimlerChrysler was formed in 1998 by the merger of Daimler-Benz (Germany) and the Chrysler Corporation (USA). <http://www.daimlerchrysler.com/> (follow “Corporate Profile” hyperlink) (last visited Apr. 15, 2007).

24. Shellenberger & Nordhaus, *supra* note 3, at Part I.

25. *Id.*

26. See, e.g., Dieter T. Hessel, *Sustainability as a Religious and Ethical Concern*, in *STUMBLING TOWARD SUSTAINABILITY*, *supra* note 19, at 593, 593-94 (positing that eco-justice occurs when humans live in harmony with God, each other, and nature).

27. For a discussion of the environmental movement’s attempts to forge alliances with poor and/or minority communities, see *infra* Part III.A.

28. Shellenberger & Nordhaus, *supra* note 3, at Part I.

29. SHABECOFF, *supra* note 2, at 283.



Recognizing the environmental movement's history of self-centered approaches to coalition-building, and acknowledging Shellenberger and Nordhaus' criticism of the environmental movement's myopic and arbitrary conception of "environment" and "environmental" problems — and the limited solutions that such conceptions engender—this Article suggests a measure that environmental groups could take to address these concerns. This Article proposes that mainstream environmental organizations (MEOs) advocate, educate, litigate and push for legislative changes with organizations devoted to facilitating the reentry of former prisoners to the community,<sup>30</sup> lowering their recidivism rates, reconsidering criminal disenfranchisement policies, reducing the criminal justice system's reliance on incarceration, and effecting prison reform. More specifically, this Article urges MEOs to join forces with non-environmental organizations on behalf of the approximately five million Americans—a disproportionate number of whom are African-American men<sup>31</sup>—who are denied the right to vote as a result of laws that prohibit voting by offenders or ex-offenders.<sup>32</sup> Such a partnership would be vital to

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30. Scholars and practitioners vary ever so slightly in their definition and use of the term "reentry." See, e.g., Adam Cohen, *A Community of Ex-Cons Shows How to Bring Prisoners Back Into Society*, N.Y. TIMES, Jan. 2, 2004, at A16 (defining "reentry" as "the moment prisoners rejoin society"); SARAH LAWRENCE ET AL., THE PRACTICE AND PROMISE OF PRISON PROGRAMMING 18 (May 2002), [http://www.urban.org/UploadedPDF/410493\\_PrisonProgramming.pdf](http://www.urban.org/UploadedPDF/410493_PrisonProgramming.pdf) (referring to "reentry" as "the transition of released offenders into communities"); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1069 (2004) ("Reentry pertains to the process by which an ex-offender who has completed the non-community based portion of her sentence, such as incarceration in a jail, prison or juvenile facility, returns to her community."); JAMES P. LYNCH & WILLIAM J. SABOL, PRISONER REENTRY IN PERSPECTIVE 4 (Sept. 2001), [http://www.urban.org/UploadedPDF/410213\\_reentry.PDF](http://www.urban.org/UploadedPDF/410213_reentry.PDF) (defining "reentry" as "the return of inmates back to society").

31. See *infra* note 184 and accompanying text.

32. ISPAHANI, *supra* note 15, at 3 (noting that the United States prevents nearly 5.3 million American citizens from voting on the grounds that they committed a crime). One commentator estimates that disenfranchisement laws have denied voting rights to 6.7 million. Clarke, *supra* note 16.

Some regard the term "ex-offender" as a negative label. See Michael Pinard, *supra* note 30, at 1068 n.8. Part of the discomfort with the term "ex-offender" may stem from the fact that it has been used to describe 1) a person who has just been released from prison; 2) a person under post-incarceration supervision; and 3) a person who is no longer under post-incarceration supervision. See, e.g., LYNCH & SABOL, *supra* note 30, at 5; cf. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 153 n.4 (1999) [hereinafter Demleitner, *Preventing Internal Exile*] (using the term "ex-offender" to "describe a convicted offender who has fully served her sentence"). This Article uses the terms "felon" and "offender" to

MEOs from a tactical standpoint in order to repair or improve relations with other social movements,<sup>33</sup> especially given African-American and Latino organizations' lingering mistrust of mainstream environmental organizations for their support of population control and immigration restrictions in the 1970s—support that generated national and international charges of racism, classicism and xenophobia.<sup>34</sup> But this Article's recommendation of a union is not simply to make amends or to provide MEOs with a "helper's high"<sup>35</sup> or with "narcissistic gratification"—a charge that has been leveled by grassroots groups at lawyers for MEOs on the grounds that they undertake lawsuits to satisfy their own needs, rather than those of their clients.<sup>36</sup> Rather, such an alliance would serve the important goal of ensuring the right to vote—a right that has been referred

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refer to individuals who are either currently incarcerated or who are on parole or probation. This Article uses the terms "prisoner" and "inmate" to refer to individuals who are currently incarcerated, "parolee" to refer to individuals who are not longer incarcerated but still under criminal justice supervision, and "probationer" to refer to individuals under criminal justice supervision who did not receive prison sentences. "Ex-prisoner," "former inmate," "former prisoner," and "released prisoner" refer to both individuals who are no longer incarcerated but who may be on parole, as well as to those who have completed their sentences and are no longer under supervision by the criminal justice system. This Article uses the terms "ex-felon" and "ex-offender" to refer to exclusively to individuals who have completed their sentences and are no longer under supervision by the criminal justice system.

33. See *infra* Part III.A.

34. See *infra* Part III.A; see also ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 253-60 (1993) (discussing the racial and xenophobic implications of some environmental groups' support for population control and immigration controls, and noting some environmental groups' unsuccessful attempts to simultaneously promote *voluntary* sterilization while disassociating themselves from incidents such as the 1973 *involuntary* sterilization of two young African-American women in Montgomery, AL).

Although population control and immigration restrictions have faded from environmental groups' radar screens and although the racial and xenophobic implications of these issues began receding in the 1980s, mainstream environmental organizations' one-time support created a "legacy of conflict" and wounds that remain to this day. GOTTLIEB, *supra* at 259. For recent comments regarding the relationship between population growth and environmental degradation, see SATTERFIELD, *supra* note 9, at 117 ("The position that excessive human mortality is beneficial to ecological health has attracted considerable critical attention. I find, as do many others, the very idea of imposing high mortality rates on disadvantaged populations—under the guise of averting ecological crisis—a form of violent colonization of the first order.").

35. The phrase "helper's high" refers to the "rush of good feelings" that one can experience by engaging in service-oriented acts such as volunteering. See Rachel Kaplan & Stephen Kaplan, *Preference, Restoration, and Meaningful Action in the Context of Nearby Nature*, in URBAN PLACE: RECONNECTING WITH THE NATURAL WORLD 271, 293 (Peggy F. Barlett ed., 2005) [hereinafter URBAN PLACE].

36. Cole, *supra* note 4, at 653.

to as “preservative of all rights,”<sup>37</sup> as well as one that “makes all other political rights significant,”<sup>38</sup> and “a cornerstone of democratic governance and a fundamental element of citizenship in democratic societies.”<sup>39</sup> Most importantly, and as this Article will explain, joint efforts to urge reconsideration of state disenfranchisement policies and to remove obstacles to participation in democratic life could help broaden the electorate,<sup>40</sup> thereby creating a mass of voters with the improved strength to address and alleviate society’s ills (including, but certainly not limited to, environmental wrongs—such as pollution and natural resource depletion).

Part II starts with a précis of the prison expansion of the last three decades. It then provides an overview of the collateral consequences of conviction and imprisonment<sup>41</sup> and the impact of these collateral consequences on reentry. Part II next turns to criminal voting restrictions,

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37. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.”); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . .”); *see also* SASHA ABRAMSKY, CONNED: HOW MILLIONS WENT TO PRISON, LOST THE VOTE, AND HELPED SEND GEORGE W. BUSH TO THE WHITE HOUSE 10-11 (2006) (“The voting issue is the only issue that addresses questions of power and power relationships between prisoners and prison administrators, and communities prisoners come from and the state. It’s *the* key issue. It’s the one right you have to have to protect all your other rights . . . .” (quoting Jazz Hayden, a New York ex-offender)).

38. FRANCES F. PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON’T VOTE: AND WHY POLITICIANS WANT IT THAT WAY 2* (2000); *see also* ISPAHANI, *supra* note 15, at 3 (noting U.S. Supreme Court jurisprudence that the most basic civil rights “are illusory if the right to vote is undermined.” (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964))).

39. Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 777 (2002) [hereinafter Uggen & Manza, *Democratic Contraction*]; *see also* Demleitner, *Preventing Internal Exile*, *supra* note 32, at 157 (stating that “political rights have traditionally ‘confer[red] a minimum of social dignity’ upon their recipient” and observing that the right to vote in a democratic political community constitutes membership in that community); Heather Lardy, *Citizenship and the Right to Vote*, 17 OXFORD J. LEGAL STUD. 74, 86 n.48 (1997)); *see generally* Adam Cohen, *American Elections and the Grand Old Tradition of Disenfranchisement*, N.Y. TIMES, Oct. 8, 2006, at WK 11 (“Disenfranchisement undermines not only American democracy, but also the whole idea of America, by illegitimately excluding some people from their rightful place in it.”).

40. *See generally* ABRAMSKY, *supra* note 37, at 6 (“[M]ass incarceration [is] unraveling the very fabric of democracy, of mass participation in the process of political decision making . . . .”).

41. *See infra* note 109 and accompanying text defining “collateral consequences.”

beginning with a snapshot of different state disenfranchisement provisions,<sup>42</sup> the historical foundations for exclusion, and the constitutional challenges to disenfranchisement laws. Part II then delves into the impact of disenfranchisement on national, state and local elections, as well as its effect on both felons' and ex-felons' home communities and the communities where convicted offenders are incarcerated. In Part II, as in the rest of this Article, the focus is mainly on adult males because men comprise the overwhelming majority of State and Federal inmates and ex-offenders.<sup>43</sup> Where appropriate, this Article will make reference to specific policies or programs that affect or could affect juveniles and women differently.<sup>44</sup>

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42. Although Part II.B discusses the categories of individuals who may be disenfranchised—inmates, parolees, probationers, and ex-offenders—this Article does not discuss how states with disenfranchisement policies compile their felon purge lists, how states' election officials compare individuals with criminal convictions with individuals listed on their voter registration lists before removing them from the rolls, or how states notify individuals that they will be or have been removed from voting lists. For an in-depth analysis of state purge list compilation, the criteria used to determine matches, and state procedures for notification of individuals matched, see LALEH ISPAHANI & NICK WILLIAMS, PURGED!: HOW A PATCHWORK OF FLAWED AND INCONSISTENT VOTING SYSTEMS COULD DEPRIVE MILLIONS OF AMERICANS OF THE RIGHT TO VOTE 1 (Oct. 2004) [hereinafter, ISPAHANI & WILLIAMS, PURGED!], [http://www.aclu.org/FilesPDFs/purged%20-voting\\_report.pdf](http://www.aclu.org/FilesPDFs/purged%20-voting_report.pdf).

43. As of December 31, 2004, women encompassed only seven percent of all inmates. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PRISONERS IN 2004 1 (Oct. 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

The number of female prisoners is rising at a rapid rate, however. During 2004, the number of women under the jurisdiction of State or Federal prison authorities increased four percent, whereas the number of men in prison rose only 1.8%. HARRISON & BECK, *supra* at 4; see also Fox Butterfield, *Women Find a New Arena for Equality: Prison*, N.Y. TIMES, Dec. 29, 2003, at A9 [hereinafter Butterfield, *New Arena for Equality*] (discussing the rapid growth in the number of women who are being arrested, convicted and sentenced to prison, mostly on drug charges); Kate Zernike, *In Minnesota, an Odd Request: Please Don't Fence the Inmates In*, N.Y. TIMES, Dec. 19, 2005, at A1 ("While there are still 13 times as many men as there are women in prison, the women's population is growing faster. Nationally, the number of women grew an average of 4.7 percent a year from 1995 to 2004 . . .").

44. Juveniles: see *infra* notes 172-77 and accompanying text in Part II.A regarding the stigmatization that a juvenile may experience from being tried in adult criminal court, rather than in juvenile court; the significance of and difference for juveniles who are tried and convicted in adult criminal court rather than juvenile court. Women: see *infra* notes 57-58, 69, 162 and accompanying text in Part II.A on the number of women who have been convicted of drug offenses, as well as the number of African American women incarcerated in this country in comparison to other countries; the stigma of a criminal record for African American and Latina women; see also *infra* note 186 and accompanying text in Part II.B discussing African American women who have been disenfranchised.

Part III offers four arguments for why MEOs should consider criminal disenfranchisement to be an “environmental” issue and why they should work with grassroots social justice groups to bring about changes in state criminal disenfranchisement laws and policies. Section A looks at the relationship of mainstream environmental organizations to grassroots social justice groups and argues that public participation (especially in the governmental decision making process) is a core principle of environmental justice, a key component to many existing environmental laws, and integral to the concept of sustainable development. Section B explores the connection between disenfranchisement and recidivism and, more generally, between voting and crime. It next examines both whether crime adversely impacts the environment and whether certain environmental characteristics increase the likelihood of crime. Section B posits that if both exist, then criminal disenfranchisement laws and policies should not lie outside the scope of environmental law. Section C discusses the impact of criminal disenfranchisement on elections, examining presidential appointments to federal agencies and judgeships and the significance of these appointments for the enforcement and interpretation of environmental law. Section D argues that a broader electorate will contribute to a richer understanding of human-environment relations and a more elaborate taxonomy of environmental values and perspectives. Although there is a risk that more voters may lead to more perspectives and greater *disunity* within and between organizations, this Section urges MEOs to take such a risk in order to expand ecological knowledge on both the local and global levels, increase the participation of citizens in environmental decision-making, heighten the publicity and exposure of an environmental problem to a wider audience (including policymakers), and strengthen the tools used to rectify environmental wrongs.

Part IV suggests a series of reforms to state criminal disenfranchisement laws and policies. Section A of this Part begins by reviewing recent studies of public opinion regarding criminal disenfranchisement and then surveys some of the changes that states have undertaken and, in most cases, to liberalize their criminal disenfranchisement laws and policies. Section B stresses legislative reform over litigation, and provides options and recommendations for states to further liberalize their criminal disenfranchisement laws and policies. Section C discusses the importance of educating offenders, ex-offenders, correctional and criminal justice officials, including probation and parole staff, regarding criminal disenfranchisement and the methods for an offender or ex-offender to regain the franchise. Part IV concludes by offering possible ways to rectify the impact of the U.S. Census Bureau’s application of the “usual residence rule” to prisoners, which dilutes the voting power of prisoners’ home communities and rechannels funding and resources away from these needy

urban areas.

## II. LOCKED IN, THEN LOCKED OUT: FROM THE “TINDERBOX”<sup>45</sup> TO THE VOTING BOOTH

“[T]he way a society treats those who have transgressed against it is evidence of the essential character of that society.”<sup>46</sup>

### A. The Prison Addiction and the Scarlet Letter<sup>47</sup> of Collateral Consequences

In October 2005, the Bureau of Justice Statistics reported that the United States incarcerated 2,267,787 persons at yearend 2004,<sup>48</sup> sixty percent of whom are African American or Hispanic.<sup>49</sup> The percentages of African Americans and Hispanics in State and Federal prison stand in stark contrast to both the percentages of African Americans and Hispanics who comprised the United States inmate population in the 1960s and the percentages of African Americans and Hispanics in the total United States population today.<sup>50</sup> With respect to the changing racial composition of

45. KEVIN N. WRIGHT, *THE GREAT AMERICAN CRIME MYTH* 163 (1985) (quoting James Lieber, *The American Prison: A Tinderbox*, N.Y. TIMES, Mar. 8, 1981, § 6 (Magazine), at 26)

46. *Hudson v. Palmer*, 468 U.S. 517, 523-24 (1984). One commentator uses the word “tinderbox” as a metaphor not for prison, but for neighborhoods and communities whose design and management “sponsor[] criminality” and “nurture a ‘tinderbox’ environment.” P.M. Cozens, *Sustainable Urban Development and Crime Prevention Through Environmental Design for the British City: Towards an Effective Urban Environmentalism for the 21st Century*, 19 CITIES 129, 130 (2002).

47. It would be equally appropriate to liken collateral consequences to “the Mark of Cain.” See R. Paul Davis, *The Mark of Cain: Some Subliminal Effects of Criminal Process*, 44 SASKATCHEWAN L. REV. 219 (1980); Webb Hubbell, *The Mark of Cain*, 16 CRIMINAL JUSTICE MAGAZINE (Fall 2001), available at <http://www.abanet.org/crimjust/mo/premium-cr/cjmag/16-3/hubbell.html>.

48. HARRISON & BECK, *supra* note 43, at 1. This total represents individuals held in federal and state prisons, territorial prisons, local jails, facilities operated by or exclusively for the Bureau of Immigration and Customs Enforcement, military facilities, jails in Indian country, and juvenile facilities. *Id.*

49. HARRISON & BECK, *supra* note 43, at 8. African Americans comprised forty-one percent of all State and Federal inmates serving sentences of more than one year; whites represented thirty-four percent and Hispanics nineteen percent. *Id.*; Caroline A. Newman, Note, *Constitutional Problems with Challenging State Felon Disenfranchisement Laws Under the Voting Rights Act of 1965*, 38 CONN. L. REV. 525, 527 (2006).

50. Christopher Uggen, Jeff Manza, and Angela Behrans, *Felon Voting Rights and the Disenfranchisement of African Americans*, 5 SOULS: A CRITICAL JOURNAL OF BLACK POLITICS, CULTURE, AND SOCIETY 47, 47 (2003) [hereinafter Uggen, Manza & Behrans, *Disenfranchisement of African Americans*] (noting “the dramatic overrepresentation of

United States prisons, sociology Professor Loïc Wacquant states:

[S]ince 1989 and for the first time in national history, African Americans make up a majority of those walking through prison gates every year. Indeed, in four short decades, the ethnic composition of the US inmate population has *reversed*, turning over from 70 percent white at the mid-century point to nearly 70 percent black and Latino today, although ethnic patterns of criminal activity have not been fundamentally altered during that period.

... [T]he rate of incarceration for African Americans has soared to astronomical levels unknown in any other society, not even the Soviet Union at the zenith of the Gulag or South Africa during the acme of the violent struggles over apartheid.<sup>51</sup>

With respect to the racial makeup of the entire United States, African Americans constituted approximately twelve percent of the total United States population of 281,421,906, according to the 2000 Census.<sup>52</sup> Hispanics, including, but not limited to, Mexicans, Puerto Ricans, and Cubans, encompassed approximately thirteen percent of the total United States population.<sup>53</sup> Some experts predict that one in three African American males can expect to spend time behind bars and that in some communities, “interaction with the correctional system approaches near inevitability.”<sup>54</sup> In the no-holds-barred words of the Los Angeles hip-hop

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persons of color within the criminal justice system”); *see also* Note, *Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1485 (2000) [hereinafter *Winning the War on Drugs*] (“African-Americans dominate this new prison population.”).

51. Loïc Wacquant, *Deadly Symbiosis: When ghetto and prison meet and mesh*, 3 PUNISHMENT & SOCIETY 95, 96 (Jan. 2001) (citation omitted).

52. *See* U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, U.S. SUMMARY: 2000: CENSUS 2000 PROFILE, at Table DP-1 (July 2002), available at <http://www.census.gov/prod/2002pubs/c2kprof00-us.pdf>.

53. *Id.*

54. KING & MAUER, *THE VANISHING BLACK ELECTORATE*, *supra* note 15, at 2; *see also* ABRAMSKY, *supra* note 37, at 164 (“It’s a rarity for a black male to grow up and *not* be in trouble with the law.” (quoting Tennessee State Representative Larry Turner)); Todd R. Clear, *The Problem with “Addition by Subtraction”: The Prison-Crime Relationship in Low-Income Communities*, in *INVISIBLE PUNISHMENT* 181, 184 (Marc Mauer & Meda Chesney-Lind eds., 2002) (“Incarceration is far more an issue for minority communities than in white communities, especially among men.”); ISPAHANI, *supra* note 15, at 3 (“If current trends continue, black males would have a 1 in 3 chance of going to prison during their lifetimes; Hispanics, 1 in 6, and whites, 1 in 17.”); Ken Silverstein, *Introduction to PRISON NATION: THE WAREHOUSING OF AMERICA’S POOR* 1, 1 (Tara Herivel & Paul Wright eds., 2003) (“Largely because of racially biased sentencing laws, about half of America’s prison population is African-American and one-quarter of all black men are likely to be

ensemble, Jurassic 5, “Got rid of slavery but kept the penitentiary.”<sup>55</sup>

The figure of approximately 2.3 million inmates mentioned in the previous paragraph represents an increase of 2.6 percent from the previous year,<sup>56</sup> six times as many as in 1972,<sup>57</sup> and more than any other country in

imprisoned at some point during their lifetimes.”).

55. Jurassic 5, *Freedom, in* POWER IN NUMBERS (Interscope Records 2002); see also ABRAMSKY, *supra* note 37, at 140 (“It’s a hustle. The biggest coup you could pull is to create the environment that would cause people to respond in a barbaric way, charge them with being barbarous, slap a stamp on them. They do their time, then they come out and can’t get a job, can’t integrate back into society. . . . Today’s lynching is a felony charge. Today’s lynching is incarceration. . . . A felony is a modern way of saying ‘I’m going to hang you up and burn you.’ Once you get that *F*, you’re on fire.”) (quoting a black Muslim preacher in Waterloo, IA)); Ewald, *Civil Death*, *supra* note 15, at 1131-32 (stating that “even for free blacks, incarceration and slavery were virtually indistinguishable for much of American history,” and discussing the connection between slavery and black inmate labor in the context of the post-Civil War convict leasing system); Cassi Feldman, *Unshackling the Vote*, CITY LIMITS WEEKLY, Nov. 3, 2003, <http://www.citylimits.org/content/articles/weeklyView.cfm?articlenumber=1351> (“Being a prisoner puts you in the category of the least powerful people in this country. It’s like slavery.” (quoting Joseph “Jazz” Hayden, New York State parolee)); Wacquant, *supra* note 51, at 98-99 & Table 1 (“[T]he task of *defining, confining, and controlling* [sic] African Americans in the United States has been successively shouldered by four ‘peculiar institutions’: slavery [1619-1865]; the Jim Crow system [South, 1865-1965], the urban ghetto [North, 1915-1968], and the novel organizational compound formed by the vestiges of the ghetto and the expanding carceral system [1968-present] . . .”).

56. HARRISON & BECK, *supra* note 43, at 2.

57. Eric Blumenson & Eva S. Nilsen, *How to Construct and Underclass, Or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 61 (“[W]e now imprison two million people, six times as many as we did in 1972.”) (2002); Hamsher, *supra* note 15, at 312 (observing that the United States had six times the prisoners in 2003 as in 1970); RYAN S. KING, MARC MAUER & MALCOLM C. YOUNG, THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP I (2005), <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf> (“Over the past thirty years the United States has experienced an unprecedented rise in the use of incarceration, with the number of people in prisons and jails increasing from 330,000 in 1972 to 2.1 million today.”). See generally PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 12 (Jan. 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf> (“The State prison population dramatically increased between 1990 and 1997.”); Loïc Wacquant, *A Boom in Private Penitentiaries*, LE MONDE DIPLOMATIQUE, July 1998, <http://mondediplo.com/1998/07/17prison> (discussing “[t]he unprecedented expansion of penal activity in the United States”).

In addition to greatly outpacing other countries with respect to its total prison population, the number of African American women incarcerated in this country also exceeds that of other countries. See Wacquant, *supra* note 51, at 96 (noting that “68,000 black women were locked up [as of mid-1999], a number higher than the *total* carceral population of any one major western European country”).



the world.<sup>58</sup> The last few decades have also borne witness to the tripling of adults under criminal justice supervision, either in the form of parole or probation.<sup>59</sup> This rapid rise in prison population, as well as the swelling numbers of parolees and probationers, has been the subject of much public debate and scholarly research over the last three decades.<sup>60</sup> Although an in-

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58. HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 22 (2003) [hereinafter HUMAN RIGHTS WATCH, OFFENDERS WITH MENTAL ILLNESS], <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>. With five percent of the world's population, the United States accounts for twenty-five percent of its prison population. Jim Holt, *Decarcerate?*, N.Y. TIMES, Aug. 15, 2004, § 6 (Magazine), at 20. About 6.9 million Americans are under the control of the criminal justice system—about 3.2% of the adult population in the United States—which includes people in jail and prison, as well as those on probation and parole. Fox Butterfield, *U.S. 'Correctional Population' Hits New High*, N.Y. TIMES, July 26, 2004, at A10; see also LAUREN E. GLAZE & SARI PALLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2004 1 (Nov. 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus04.pdf>. One of every seventy-five American men live in prison or jail and there are more than 700 inmates (men and women) for every 100,000 U.S. residents. Connie Cass, *1 in 75 Men Were in Prison or Jail in 2003*, BOSTON GLOBE, May 28, 2004, available at [http://www.boston.com/news/nation/articles/2004/05/28/1\\_in\\_75\\_men\\_were\\_in\\_prison\\_or\\_jail\\_in\\_2003/](http://www.boston.com/news/nation/articles/2004/05/28/1_in_75_men_were_in_prison_or_jail_in_2003/); HUMAN RIGHTS WATCH, OFFENDERS WITH MENTAL ILLNESS, *supra*, at 22; HARRISON & BECK, *supra* note 43, at 1. This rate is the highest in the world, compared to 169 per 100,000 residents in Mexico, 116 per 100,000 residents in Canada, and 143 per 100,000 residents in England and Wales. See Cass, *supra*; Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSPECTIVES ON POLITICS 491, 500 (Sept. 2004) [hereinafter Manza & Uggen, *Punishment and Democracy*] (“[The United States] has the highest incarceration and conviction rates in the world, with incarceration rates six to ten times those of the countries that are most similar to us. For example, the 2000 incarceration rate in the United States was 686 per 100,000, compared to rates of 105 in Canada, 95 in Germany, and only 45 in Japan.”).

59. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT, *supra* note 54, at 15, 15; see also ABRAMSKY, *supra* note 37, at 50; Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 460 (1992) (“Because of its high costs, the growth of prison populations has drawn the greatest attention, but probation and parole have increased at a proportionate or faster rate.”).

60. See, e.g., Clear, *supra* note 54, at 184 (“[A]t no time in human history has there been such a sustained, systemic increase in the use of confinement as a tool of social control.”); Feeley & Simon, *supra* note 59, at 449, 454 (“No doubt, a new and more punitive attitude toward the proper role of punishment has emerged in recent years, and it is manifest in a shift in the language of statutes, internal procedures, and academic scholarship.”); Susan B. Tucker & Eric Cadora, *Ideas for an Open Society: Justice Reinvestment*, 3 Open Society Institute 3 (Nov. 2003) [http://www.soros.org/resources/articles\\_publications/publications/ideas\\_20040106/ideas\\_reinvestment.pdf](http://www.soros.org/resources/articles_publications/publications/ideas_20040106/ideas_reinvestment.pdf) (“The war on drugs, three-strikes sentencing schemes, elimination of judicial discretion and parole, and the broad abandonment of rehabilitation have led to an unprecedented level of imprisonment in the U.S.—over 2

depth exploration of this proliferation is outside the scope of this Article, one can be secure in attributing the escalation of incarcerated individuals to a number of products of the “War on Crime,” namely: the replacement of the indeterminate sentencing model with mandatory minimum sentences,<sup>61</sup> the advent of “get-tough” policies such as “Three Strikes and You’re Out” laws<sup>62</sup>—often double time for second felonies and twenty-five-years-to-life for third-time felonies<sup>63</sup>—and truth-in-sentencing laws,<sup>64</sup> and the “War on

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million today compared to 200,000 in 1972.”).

61. Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 265-66 (2004) [hereinafter, Anthony C. Thompson, *Hidden Obstacles to Reentry*] (“State and federal mandatory sentencing guidelines, generally, and for drug offenders, specifically, have caused not only a surge in prison population, but have also been responsible for dramatic increases in the length of sentences imposed and served.”); see also Carla I. Barrett, Note, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 396-97 (2005) (describing the use of sentencing guidelines and mandatory minimum sentences as keeping inmates in prison longer, making prisons “fill without simultaneously emptying”); Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1207 (1998) (“[T]he designation of statutorily-mandated minimum sentences of imprisonment for many offenses led to a dramatic increase in the number of inmates in state and federal prisons.”); Editorial, *Jailhouse Blues*, N.Y. TIMES, Nov. 22, 2004, at A30 (“[M]andatory sentencing policies for drug offenses have driven the prison population across the nation to a staggering 1.4 million.”); Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 Wis. L. Rev. 617, 618 n.3 [hereinafter Pager, *Double Jeopardy*] (explaining that “the chances of receiving a state prison term after being arrested for a drug offense rose by more than 500% between 1980 and 1992” as a result of the adoption of mandatory sentencing laws, which were most often used for drug offenses and which removed discretion from the sentencing judge to consider a range of factors pertaining to both the individual and the offense).

62. WRIGHT, *supra* note 45, at 156-60 (discussing the swelling of prison populations as a result of ‘get tough’ policies in the 1970s); see also Eric Eckholm, *Help for the Hardest Part of Prison: Staying Out*, N.Y. TIMES, Aug. 12, 2006, at A1 (“The 1980’s and 90’s were an era of get-tough, no-frills punishment; inmate populations climbed to record levels while education and training withered.”).

63. See, e.g., Cal. Penal Code §§ 667, 1170.12 (West 1999); Mike Males & Dan Macallair, *Striking Out: The Failure of California’s “Three Strikes and You’re Out,”* 11 STAN. L. & POL’Y REV. 65 (1999); Anthony C. Thompson, *Hidden Obstacles to Reentry*, *supra* note 61, at 263; see also Editorial, *‘Three Strikes’ in California*, N.Y. TIMES, Oct. 30, 2004, at A30.

States differ in how they define the “strike zone” (the type of crimes needed to trigger a Three Strikes sentence), the number of strikes needed to “strikeout,” and the meaning of a “strike out” (the length of time to be served). Some states, such as South Carolina, require only two strikes to “strikeout.” VINCENT SCHIRALDI, JASON COLBURN & ERIC LOTKE, A POLICY BRIEF BY THE JUSTICE POLICY INSTITUTE: THREE STRIKES AND YOU’RE OUT: AN EXAMINATION OF THE IMPACT OF 3-STRIKE LAWS 10 YEARS AFTER THEIR ENACTMENT, at tbl.1 (2003), [http://www.soros.org/initiatives/justice/articles\\_publications/publications/threestrikes\\_20040923/three\\_strikes.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/threestrikes_20040923/three_strikes.pdf). Others, such as Maryland, require

Drugs”<sup>65</sup>—a subset or “twin” of the “War on Crime”<sup>66</sup>—which has dramatically increased the number of arrests and convictions for drug offenses<sup>67</sup>—often offenses for drug use and petty trafficking<sup>68</sup>—and

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four. *Id.* Unlike the federal government and the other states that have since enacted three-strikes laws, California does not require the third-strike offense to be a violent, or even a serious crime, to draw an enhanced sentence of twenty-five years to life. *Id.* at 4.

Note that nearly two-thirds of those sentenced under California’s Three Strikes laws are imprisoned for nonviolent offenses. *See id.* at 4.

For an in-depth history of Three Strikes in California, see JOE DOMANICK, CRUEL JUSTICE: THREE STRIKES AND THE POLITICS OF CRIME IN AMERICA’S GOLDEN STATE (2004). For a brief description of the origins of Three Strikes in California, see Bill Jones, *Why the Three Strikes Law is Working in California*, 11 STAN. L. & POL’Y REV. 23, 23-24 (1999).

64. Truth-in-sentencing laws represent part of the trend that began in the late 1970s and into the 1980s to reduce disparity in sentencing and to toughen penalties for certain crimes. *See* DITTON & WILSON, *supra* note 57, at 2. First enacted in Washington State in 1984, and subsequently by the majority of the states and the District of Columbia, truth-in-sentencing laws require offenders to serve a large portion of their sentence. *Id.* at 1. Although the definition of truth-in-sentencing varies among the States, most reduce the difference between the sentence imposed and actual time served by restricting or eliminating parole eligibility and good-time credits. *Id.* at 1, 3.

Because truth-in-sentencing laws necessarily require offenders to spend more time in prison, state prison populations have exploded. CORRECTIONS PROGRAM OFFICE, U.S. DEP’T OF JUSTICE, VIOLENT OFFENDER INCARCERATION AND TRUTH-IN-SENTENCING INCENTIVE GRANTS: IMPLEMENTATION REPORT, JULY 1, 1999-JUNE 30, 2000 1 (2000), available at <http://www.ojp.usdoj.gov/BJA/grant/voitisImpReport.pdf>; *see also* Nation’s Inmate Population Increased 2.3 Percent Last Year, N.Y. TIMES, Apr. 25, 2005, at A14 (attributing the rising prison population largely to get-tough policies enacted in the 1980s and 1990s, such as Three Strikes provisions and truth-in-sentencing laws).

65. President Ronald Reagan’s speech at the Department of Justice on October 14, 1982 declared “a war against the menace of crime” and an “unshakable” commitment “to do what is necessary to end the drug menace and cripple organized crime.” President Ronald Reagan, Speech at the Department of Justice (Oct. 14, 1982), in *Text of President’s Speech on Drive Against Crime*, N.Y. TIMES, Oct. 15, 1982, at A20. *See generally* Boldt, *supra* note 61, at 1207 (stating that the United States declared a “war on drugs” in the 1980s); John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 943 (2000) (“[T]he federal government declared its ‘War Against Drugs’ during the Reagan and Bush administrations.”); Mark E. Thompson, Comment, *Don’t Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 174 (2002) [hereinafter Mark E. Thompson, *Don’t Do the Crime if You Ever Intend to Vote Again*] (discussing how the race of incarceration has skyrocketed since 1980 due to the combined effect of three-strikes laws and the ‘war on drugs’); Wacquant, *supra* note 51, at 96 (discussing how Ronald Reagan launched the War on Drugs and that the administrations of George Bush and William Jefferson Clinton expanded it).

66. *See* ABRAMSKY, *supra* note 37, at 1.

67. Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. &

consequently the number of persons incarcerated.<sup>69</sup> According to Wacquant, the War on Drugs is single-handedly responsible for the “swift and steady *deepening of the gap* between the imprisonment rates of blacks and whites.”<sup>70</sup> Ryan S. King, Marc Mauer, and Malcolm C. Young of The Sentencing Project contend, more broadly, that “[d]rug offenders have represented the most substantial source of growth in incarceration in recent decades, rising from 40,000 persons in prison and jail in 1980 to 450,000 today.”<sup>71</sup> And in the prophetic words of Governor Brian Schweitzer of Montana, “We’re losing a generation of productive people. My God, at the rate we’re going, we’re going to have more people in jail than out of jail in 20 years.”<sup>72</sup>

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POL’Y 299, 302-03 (2005) (discussing the growth of drug prosecutions and increase in incarceration resulting from the ‘war on drugs’ and ‘get tough’ policies”); JAMES A. INCIARDI, DUANE C. MCBRIDGE & JAMES E. RIVERS, *DRUG CONTROL AND THE COURTS* 64 (1996) (“Without question, the war on drugs had overburdening effects on the criminal justice system.”); HUMAN RIGHTS WATCH, *OFFENDERS WITH MENTAL ILLNESS*, *supra* note 58, at 22 (“Almost one-third of new admissions are nonviolent drug offenders.”).

68. Paul Farmer, *The House of the Dead: Tuberculosis and Incarceration*, in *INVISIBLE PUNISHMENT*, *supra* note 54, at 239, 244; *see also* Feeley & Simon, *supra* note 59, at 461 (“Drug use and its detection and control have become central concerns of the penal system. No one observing the system today can fail to be struck by the increasingly tough laws directed against users and traffickers, well-publicized data that suggest that a majority of arrestees are drug users, and the increasing proportion of drug offenders sent to prison.”).

69. Blumenson & Nilsen, *supra* note 57, at 61 (crediting the rise in prison population to the “drug war that has been waged over those three decades”); KING & MAUER, *THE VANISHING BLACK ELECTORATE*, *supra* note 15, at 21 (“Over the past twenty years, drug policies have been the single most significant factor in contributing to the rise in correctional populations . . .”); *see generally* DOMANICK, *CRUEL JUSTICE*, *supra* note 63, at 213 (“Nationally, about one million Americans are arrested annually on drug charges, 80 percent of them just for marijuana, while the federal government has been spending \$40 billion a year directly on our drug war, 80 percent of *that* targeted to marijuana.”).

70. Wacquant, *supra* note 51, at 96.

71. KING, MAUER & YOUNG, *supra* note 57, at 6. *See also* DITTON & WILSON, *supra* note 57, at 5 (“The likelihood of going to prison upon arrest for drug offenses substantially increased between 1980 and 1990 as the commitment rate soared from 19 per 1,000 arrests to 103 per 1,000.”); Troy Duster, *The New Crisis of Legitimacy in Controls, Prisons, and Legal Structures*, 26 AM. SOCIOLOGIST 20, 21 (1995) (“There is now a near complete consensus among criminologists that drug control strategies account for most of the increase of the U.S. prison population of the last decade.”); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 81 (1995) [hereinafter TONRY, *MALIGN NEGLECT*] (“Drug-offense sentences are the single most important cause of the trebling of the prison population in the United States since 1980.”).

72. Kate Zernicke, *With Scenes of Blood and Pain, Ads Battle Methamphetamine in Montana*, N.Y. TIMES, Feb. 26, 2006, §1, at 17. Note that Gov. Schweitzer’s comment refers to the problem of arrest, conviction and imprisonment for metamphetamine production, use and distribution—a drug that, for the most part, did not exist when the War on Drugs was

Because of the emphasis on drug law enforcement and the popularity of laws requiring incarceration as a penalty and longer periods of incarceration when it is imposed, U.S. prisons have filled without simultaneously emptying, resulting in severe overcrowding.<sup>73</sup> While some commentators contend that Americans possess a fetishistic fixation with violence,<sup>74</sup> U.S. prisons are exceptionally violent places, with inmates frequently assaulting and killing each other and guards,<sup>75</sup> and with guards

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declared. But the attitude that drug addiction is a criminal issue necessitating long periods of incarceration, rather than a public health problem requiring intensive treatment, carries over from the “War on Drugs” (whose initial focus was crack, and to a lesser extent, marijuana and heroin) and has resulted in the lost generation to which Gov. Schweitzer refers.

73. At yearend 2004, twenty-four States and the Federal prison system reported operating at 100% or more of their highest capacity. HARRISON & BECK, *supra* note 43, at 7. To offer a specific example, the California prison system, which has been referred to as “the most troubled in the nation,” has experienced such severe overcrowding that 16,000 inmates have been assigned to cots in hallways and gyms, leading Governor Arnold Schwarzenegger to declare a state of emergency in the prison system. Jennifer Steinhauer, *Bulging, Troubled Prisons Push California Officials to Seek a New Approach*, N.Y. TIMES, Dec. 11, 2006, at A18.

It bears mention that overcrowding in U.S. correctional facilities is not a recent phenomenon. *See, e.g., Rhodes v. Chapman*, 452 U.S. 337, 356 (1981); Goldkamp, *supra* note 65, at 944.

It also bears mention that while the United States incarcerates more individuals than any other country and has subsequently faced problems with overcrowding, other countries have also experienced overcrowding. *See, e.g., Randal C. Archibold, After Prison Horror, Dominican Republic Plans a Study*, N.Y. TIMES, Mar. 9, 2005, at A4; Jean-Michel Caroit, *Gang Fight and Fire in Overcrowded Prison In Dominican Republic Kill 133 Inmates*, N.Y. TIMES, Mar. 8, 2005, at A12.

74. *See* WRIGHT, *supra* note 45, at 49 (“[V]iolence is an integral aspect of our culture. . . . Violence is reinforced by violent sports, television, movies, and even Saturday morning cartoons.”).

75. *Farmer v. Brennan*, 511 U.S. 825, 853 n.\* (1994) (Souter, J.) (observing “[n]umerous court opinions document the pervasive violence among inmates in our state and federal prisons,” listing nine examples); *McGill v. Duckworth*, 944 F.2d 344, 345 (7th Cir. 1991), *overruled on other grounds by Farmer v. Brennan*, 511 U.S. 825 (1994) (“Prisons are dangerous places. Housing the most aggressive among us, they place violent people in close quarters.”); Adam Liptak, *Inmate Was Considered ‘Property’ of Gang, Witness Tells Jury in Prison Rape Lawsuit*, N.Y. TIMES, Sept. 25, 2005, § 1, at 14; Steinhauer, *supra* note 73 (describing how cellblocks in California prisons are “teeming with violence”); Wacquant, *supra* note 51, at 111 (stating that “‘what was once a repressive but comparatively safe ‘Big House’ is now often an unstable and violent social jungle” (quoting ROBERT JOHNSON, *HARD TIME: UNDERSTANDING AND REFORMING THE PRISON* 133 (2d ed. 1996))); National Briefing, *West: California: Inmates Injured in Brawls*, N.Y. TIMES, July 15, 2006, at A11 (reporting a brawl between African American and Hispanic inmates in a Los Angeles County jail).

occasionally initiating and encouraging attacks.<sup>76</sup> According to Professor William C. Sullivan, founder and Co-Director of the interdisciplinary Human-Environment Research Laboratory at the University of Illinois at Urbana-Champaign, whose research is discussed in greater detail in *infra* Part III, “[w]hen animals have been caged or placed in otherwise unfit habitats, they often become aggressive and even violent.”<sup>77</sup> Overcrowding in prisons renders an already unfit habitat worse—it exacerbates existing tensions, increasing the likelihood of violence,<sup>78</sup> including sexual assault and rape.<sup>79</sup> As one commentator remarks, incarceration “does not eliminate

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76. See, e.g., *Hudson v. McMillian*, 503 U.S. 1 (1992) (finding that guards who shackled and handcuffed an inmate and beat him about the face and body, causing minor bruises and swelling, loosened teeth, and a cracked dental plate had acted maliciously and sadistically); *Madrid v. Gomez*, 889 F.Supp. 1146, 1161 (N.D. Cal. 1995) (concluding that the Eighth Amendment’s restraint on using excessive force had been repeatedly violated by guards at Pelican Bay State Prison).

Sometimes prison guards will arrange fights between prisoners for “amusement and blood sport” DOMANICK, *CRUEL JUSTICE*, *supra* note 63, at 66, and use inmates as “tools of punishment.” See, e.g., David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1546 (1992) (stating that some prison officials make homosexual rape easier to commit or do not discourage it, to control inmates); Willie Wisely, *Corcoran: Sex, Lies, and Videotapes*, in PRISON NATION, *supra* note 54, at 245, 245-51 (describing how one inmate beat and raped prisoners in return for favored treatment).

77. William C. Sullivan, *Forest, Savanna, City: Evolutionary Landscapes and Human Functioning*, in URBAN PLACE, *supra* note 35, at 237, 243-44 [hereinafter, Sullivan, *Forest, Savanna, City*] (“When animals are placed in unfit habitats, their social behavior suffers.”).

78. See, e.g., Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209, 2211 (1998) (“[O]vercrowding has . . . increased the instances of violence and the development of infectious and stress-related diseases within confinement facilities.”); Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 1, 25 (2003) (“Studies have found that certain prison conditions can lead to increased violence, such as poor physical conditions, lack of meaningful activities and programs, limited contact with visitors, overcrowding, and poor staffing. These conditions increase violence both during incarceration and after release.”); WRIGHT, *supra* note 45, at 160-63 (1985) (“Crowding in penal institutions may produce the most volatile situation of all. . . . Crowding affects prison life in two ways: control of the prison population is more difficult as individual disciplinary problems and major disturbances increase, and individual deterioration is fostered.”). See generally Frances E. Kuo & William C. Sullivan, *Aggression and Violence in the Inner City: Effects of Environment via Mental Fatigue*, 33:4 ENV’T & BEHAVIOR 543, 543 (2001) [hereinafter Kuo & Sullivan, *Effects of Environment via Mental Fatigue*] (noting the connection between crowding and aggression and violence).

79. Siegal, *supra* note 76, at 1550 (“Abysmal living conditions, tremendous overcrowding, and internal socialization of prisoners create an environment where such activity [sexual assaults and victimization] often becomes commonplace.”); HUMAN RIGHTS

the opportunity to commit criminal acts, it simply displaces it. Criminals are removed from the community, but they are placed in a setting where they can victimize guards and other inmates. Crime in prison is common. Inmates assault, rape, murder, and exploit one another.”<sup>80</sup> To understand prison violence in another way, recently, a trial court judge, recognizing the hostility and aggression characteristic of prison, sentenced a 5’ 1” convicted child molester to ten years’ probation, instead of a substantial prison sentence, because she felt that he was too small to survive incarceration.<sup>81</sup> If crime in prison is common—so much so that some judges are unwilling to rely on it as a form of punishment—then it is no wonder that prisons have been likened to a “tinderbox”<sup>82</sup> and to an incendiary device “all set for an explosion.”<sup>83</sup> Those fortunate enough to survive the violence and hostility must still confront the paralyzing boredom.<sup>84</sup> As one inmate explains, “The isolation and idleness are the

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WATCH, NO ESCAPE: MALE PRISON RAPE IN U.S. PRISONS (2000), <http://www.hrw.org/reports/2001/prison/report.html> (providing an in-depth report on male prisoner-on-prisoner sexual abuse in the United States and describing how the growth of the U.S. prison population and conditions of confinement have led to sexual abuse and harassment); *Anderson v. Redman*, 429 F.Supp. 1105, 1113 (D. Del. 1977) (stating that overcrowding and understaffing leads to “an increase in theft, assault, and homosexual rape”); see also ALLEN J. BECK & TIMOTHY A. HUGHES, BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP’T OF JUSTICE, SPECIAL REPORT: PRISON RAPE ELIMINATION ACT OF 2003: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004 (July 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf>. The Department acknowledges it underrepresents the true nature of sexual violence in prisons and jails. *Id.* at 2 (“Due to fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff, victims [of sexual violence] are often reluctant to report incidents to correctional authorities.”).

80. WRIGHT, *supra* note 45, at 122; see generally *Prison Aryans Are Sentenced To Life Terms*, N.Y. TIMES, Nov. 22, 2006, at A24; Tori Richards, *Aryan Brotherhood Leaders Are Convicted in Murders*, N.Y. TIMES, July 29, 2006, at A11 (on gangs attempting to “rule the nation’s prisons”); John M. Broder, *Trial Begins for Members Of Aryan Prison Gang*, N.Y. TIMES, Mar. 15, 2006, at A17 (on gang members terrorizing the inmate population); Tori Richards, *Murder Trial Yields Sharply Conflicting Portrayals of White Prison Gang*, N.Y. TIMES, July 14, 2005, at A14 (describing the Aryan Brotherhood as a criminal enterprising using murder to keep its members in line).

81. Reuters, *Nebraska Will Appeal Man’s Sentence*, N.Y. TIMES, May 27, 2006, at A9 (discussing the decision of Cheyenne County District Judge Kristine Cecava to sentence Richard W. Thompson to probation rather than prison).

82. WRIGHT, *supra* note 45.

83. *Id.* (quoting Paul A. Gigot, *Life in Prison, part 2*, WALL ST. J., Aug. 20, 1981, at 1).

84. *Anderson v. Redman*, 429 F.Supp. 1105, 1112 (D. Del. 1977) (“Idleness diminishes inmate moral and is directly related to increased violence. Inmates who are idle spend much more time exposed to negative influences, decreasing their desire to engage in activities which might facilitate their ability to return productively to society.”); WRIGHT,

worst. This is really doing hard time.”<sup>85</sup>

Obviously, the frequent use of incarceration as a criminal penalty has adversely impacted the physical, psychological, and emotional well-being of those individuals sentenced to prison.<sup>86</sup> But its effect on the children,<sup>87</sup> families,<sup>88</sup> and the home communities of the prisoners,<sup>89</sup> including the

*supra* note 45, at 167, 169-70 (“The unmitigated absence of anything constructive to do, the forced idleness, is what is so distracting, so frustrating, and often so damaging. . . . People with little to do, much like unnurtured plants, deteriorate, some physically, most emotionally. People with little to do are more likely to resist authority, fight among themselves, and get caught up in the chain reaction of mass disturbance.”).

85. WRIGHT, *supra* note 45, at 169 (quoting Paul A. Gigot, *Life in Prison, part 2*, WALL ST. J., Aug. 20, 1981, at 1).

86. See sources cited *supra* note 84 and accompanying text. See also Garvin McCain et al., *The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment*, 8 ENV'T & BEHAVIOR 283, 283-89 (1976) (discussing the negative effects overpopulation has on prisoner health, specifically high illness complaint rates); WRIGHT, *supra* note 45, at 160-63 (describing the severe physical and psychological effects of crowded penal institutions and the high rates of death, suicide and disciplinary infractions in prisons with populations exceeding their capacities).

87. Clear, *supra* note 54, at 188 (“Children who grow up in areas where substantial amounts of human capital are not easily acquired struggle with inadequate schools, limited leisure time choices, and insufficient formative supports.”); PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (Jeremy Travis & Michelle Waul eds., 2004) [hereinafter PRISONERS ONCE REMOVED]; Zernicke, *supra* note 72 (reporting that in Montana, methamphetamine is responsible for 80 percent of the prison population, 90 percent of female inmates, and about half the children in foster care in Montana as a result); see generally Butterfield, *New Arena for Equality*, *supra* note 43 (“When you arrest a woman, you are also disrupting the lives of her children.” (quoting Ann Jacobs, Executive Director, Women’s Prison Association)).

88. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) 268 (1978) (stating that “the prison indirectly produces delinquents by throwing the inmate’s family into destitution”); Donald Braman, *Families and Incarceration*, in INVISIBLE PUNISHMENT, *supra* note 54, at 117, 117 (finding that “the dramatic increase in the use of incarceration over the last two decades has in many ways missed its mark,” punishing families of prisoners as much or more so than the individual inmate); DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (2004); TONRY, MALIGN NEGLECT, *supra* note 71, at 157 (stating that “[i]ncarceration of an employed father and husband may mean loss of the family’s home and car, . . . [and] perhaps the creation of welfare dependency” in the family members on the outside); PRISONERS ONCE REMOVED, *supra* note 87; see generally Erik Eckholm, *America’s ‘Near Poor’ Are Increasingly at Economic Risk, Experts Say*, N.Y. TIMES, May 8, 2006, at A14 (describing the economic and parenting struggles of Machele Sauer, 34, mother of four, whose husband, because of a prior record, recently received a long prison sentence for theft charges linked to a drug addiction); see generally Isabel Wilkerson, *A Success Story That’s Hard to Duplicate*, N.Y. TIMES, June 12, 2005, at A24 (noting the research finding that supportive relationships, like marriages, are crucial to mobility out of poverty, but that high rates of incarceration among black men makes



public safety of those communities and their ability to address various social problems,<sup>90</sup> as well as on the prison communities—the (frequently rural) communities where the prisons are located<sup>91</sup>—is no less significant and raises many economic,<sup>92</sup> environmental,<sup>93</sup> legal,<sup>94</sup>

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marriage impractical for many poor single mothers).

89. DEMELZA BAER ET AL., URBAN INSTITUTE, JUSTICE POLICY CENTER, UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO, [http://www.urban.org/UploadedPDF/411289\\_reentry\\_portfolio.pdf](http://www.urban.org/UploadedPDF/411289_reentry_portfolio.pdf) (discussing research suggesting that “high rates of incarceration and reentry of community residents through the revolving door of the criminal justice system may . . . destabilize the[] communities [where offenders come from and to which they frequently return]”); LYNCH & SABOL, *supra* note 30, at 3 (“If, as research shows, incarceration is related to lower levels of employment and earnings, then the removal and return of large volumes of ex-prisoners to working-class communities can have potentially negative consequences for these communities.”); Marc Schindler & Joyce A. Arditti, *The Increased Prosecution of Adolescents in the Adult Criminal Justice System: Impacts on Youth, Family, and Community*, 32 MARRIAGE AND FAMILY REVIEW 165, 175 (2001) (arguing that the result of “shockingly high” rates of incarceration for minorities is a “similarly disparate and devastating impact” on the minority communities these inmates come from, including disrupted family relationships and the loss of significant numbers of potential wage earners, leading to a “weakening” of the entire community as “families are fragmented and large segments of the population are marginalized” due to incarceration); PRISONERS ONCE REMOVED, *supra* note 87.

90. Schindler & Arditti, *supra* note 89, at 176 (“[W]hile high incarceration rates may help reduce crime, these high rates may reach a point where so many people in a particular community are going to prison that it begins to destabilize the community and becomes a factor that increases crime.”). See also *infra* Part II.B discussing “informal social control,” as well as *infra* Part III.B discussing Avi Brisman, *Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment*, 28 WM. & MARY ENVTL. L. & POL’Y REV. 423 (2004) [hereinafter Brisman, *Double Whammy*]; see generally BAER ET AL., *supra* note 89, at 16 (discussing how prisoner reentry presents a tremendous public safety dilemma).

91. In addition to the effect of incarceration on the prisoners’ home communities, see sources cited *supra* note 89, incarceration also has an impact on the communities where convicted offenders are incarcerated. See Part II.B.3.b discussing the U.S. Census Bureau’s application of the “usual residence rule” to prisoners and how this impacts (rural) prison communities; Part III.A discussing effect of prisons on water supplies in arid areas.

92. For a discussion of the economic burden of incarceration on the home communities of prisoners—usually urban communities, see *infra* note 411 in Part II.B. For a discussion of the economic effects of prisons on the communities where the prisons are located—usually small towns in rural areas, see *infra* note 414 in Part II.B. For a discussion of the economic burden on states of building and maintaining prisons, see, e.g., Fox Butterfield, *Tight Budgets Force States to Reconsider Crime and Penalties*, N.Y. TIMES, Jan. 21, 2002, at A1 (“After three decades of building more prisons and passing tougher sentencing laws, many states are being forced by budget deficits to close some prisons, lay off guards and consider shortening sentences”); Justice Policy Institute, *What the States are Doing: State by State Summary of Policy Innovations*, <http://justicepolicy.org/>

moral/philosophical,<sup>95</sup> social,<sup>96</sup> and public health concerns.<sup>97</sup> Recently, the

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article.php?id=27 (last visited Apr. 21, 2006) (discussing how various states are closing prisons, scaling back mandatory sentences, and diverting non-violent drug offenders convicted of drug possession from prison into treatment to cut corrections costs).

Consider also the indirect economic effects of incarceration, such as the reduced tax revenues of employees earning lower incomes due to a criminal record, or the blow to government budgets of welfare payments for children of convicts. See JENS SOERING, AN EXPENSIVE WAY TO MAKE BAD PEOPLE WORSE: AN ESSAY ON PRISON REFORM FROM AN INSIDER'S PERSPECTIVE 7-8 (2004).

93. See *infra* Part III.A discussing effect of prisons on water supplies in arid areas.

94. The frequent use of incarceration as a criminal penalty mentioned in the text has resulted in litigation regarding conditions of confinement, such as the challenge made to overcrowded living conditions in *Anderson v. Redman*, 429 F.Supp. 1105 (D. Del. 1977), as well as suits brought regarding some of the sentencing schemes mandating lengthy prison terms. Most constitutional challenges to "Three Strikes and You're Out" legislation have been unsuccessful. See, e.g., Jones, *supra* note 63, at 25 n.24 (listing California appellate court decisions that held that the state's Three Strikes legislation did not violate the Eighth Amendment).

95. See, e.g., Norval Morris, *The Honest Politician's Guide to Sentencing Reform*, in THE SOCIO-ECONOMICS OF CRIME & JUSTICE 303, 310 (Brian Forst ed., 1993) (calling mandatory sentences "political gimmicks").

96. For a discussion of how incarceration bears on race relations, see, e.g., RYAN S. KING & MARC MAUER, AGING BEHIND BARS: "THREE STRIKES" SEVEN YEARS LATER 13 (Aug. 2001), <http://www.sentencingproject.org/pdfs/9087.pdf> ("The racial disparities produced by 'three strikes' largely result from the fact that African-Americans have higher rates of arrest, and therefore prior convictions, than do whites. Whether due to greater involvement in crime or racial bias in the criminal justice system, the result is that minorities become more likely candidates for prosecution under habitual offender laws."); Tracy Huling, *Building a Prison Economy in Rural America*, in INVISIBLE PUNISHMENT, *supra* note 54, at 197, 210-12 (noting that the push to build prisons in predominantly white, rural areas, to hold prisoners who are predominantly people of color, exacerbates, rather than soothes, racial tension); Bruce Western, Becky Pettit, & Josh Guetzkow, *Black Economic Progress in the Era of Mass Imprisonment*, in INVISIBLE PUNISHMENT, *supra* note 54, at 165.

For a discussion of how the prison expansion has diverted funds from social programs, "especially interventions such as early childhood education and family-based therapy-[which] would lead to an across-the-board reduction in crime," see *Winning the War on Drugs*, *supra* note 50, at 1488-89.

97. BAER ET AL., *supra* note 89 (discussing the high rates of communicable diseases for U.S. prisoners); PAUL FARMER, INFECTIONS AND INEQUALITIES: THE MODERN PLAGUES 32, 44, 232 (1999) (discussing deadly outbreaks of multidrug-resistant tuberculosis ("MDRTB") in U.S. hospitals and jails); Brent Staples, *Treat the Epidemic Behind Bars Before It Hits the Streets*, N.Y. TIMES, June 22, 2004, at A18 ("The diseases that incubate behind bars don't just stay there. They come rushing back to the general population—and to the overburdened public health system"); Silja J. A. Talvi, *Hepatitis C: A "Silent Epidemic" Strikes U.S. Prisons*, in PRISON NATION, *supra* note 54, at 181, 181, 186 (stating that "[t]he nation's prison populations are now harboring the highest concentrations of hepatitis C in the country," and asking "Do we want people coming back out sicker than they were when

reentry of newly released prisoners to the community has been added to the mix and has garnered significant public (and bipartisan) attention.<sup>98</sup> For example, in 2000, then-Attorney General Janet Reno proclaimed that “the reentry of offenders from prison back to the communities where the problem started in the first place . . . [is] one of the most pressing problems we face as a nation.”<sup>99</sup> Similarly, in his 2004 State of the Union address, President George W. Bush proclaimed: “We know from long experience that if [ex-prisoners] can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison.”<sup>100</sup> “America is the land of the second chance,” he continued, “and when the gates of the prison open, the path ahead should lead to a better life.”<sup>101</sup> Neither Attorney General Reno’s declaration nor President Bush’s announcement was hyperbolic rhetoric. According to James P. Lynch and William J. Sabol of the Urban Institute, a non-profit non-partisan research institute that examines American cities and urban populations, “[t]he massive increase in incarceration in the United States that occurred during the past 20 years has now turned public attention toward the consequences of releasing large numbers of prisoners back into society.”<sup>102</sup>

To understand the extent of the reentry issue, consider that of the greater

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they went in?”” (quoting Jackie Walker of ACLU’s National Prison Project).

98. See *infra* notes 99-102. See also Dan Richard Beto, *Issues in Reentry*, 68 FED. PROBATION 78 (2004) (“The issue of prisoner reentry, while appreciated as important by criminal justice practitioners and academics, has, until recently, received woefully inadequate attention by policymakers.”). See generally CARL UPCHURCH, CONVICTED IN THE WOMB: ONE MAN’S JOURNEY FROM PRISONER TO PEACEMAKER 107 (1997) (describing a lack of re-entry assistance).

99. Attorney General Janet Reno, Remarks at John Jay College of Criminal Justice on the Reentry Court Initiative (Feb. 10, 2000), available at <http://www.usdoj.gov/archive/ag/speeches/2000/doc2.htm>.

100. President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>. In his 2004 State of the Union address, President Bush proposed a four-year, \$300 million initiative to reduce recidivism. *Id.* See generally Department of Justice, Office of Justice Programs (Reentry), <http://www.reentry.gov> (last visited Mar. 18, 2007).

101. President George W. Bush, *supra* note 100. One researcher takes umbrage with the assertion that the United States is a land of second chances due to the difficulties offenders face in avoiding or mitigating the collateral penalties of a conviction. MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (2005), <http://www.sentencingproject.org/rights-restoration.cfm> (follow “Executive Summary” hyperlink at bottom of page). Love contends that “if rehabilitation of criminal offenders is a desirable social goal, it would be helpful to begin serious discussion of the growing contrary pressures that seem to consign all persons with a criminal record to the margins of society, and to a permanent outcast status in the eyes of the law.” *Id.* at 12.

102. LYNCH & SABOL, *supra* note 30, at 2.

than 2.2 million individuals currently incarcerated, ninety-seven percent of them will eventually be released; approximately 600,000 per year on average.<sup>103</sup> Sixty-seven percent of ex-offenders are rearrested within three years of leaving prison;<sup>104</sup> the highest risk of recidivism is in the first six months after release.<sup>105</sup> (Recently released prisoners are also at a much greater risk of suicide than the general population, especially in the first month after release and continuing throughout the first year after release.)<sup>106</sup> Thirteen million Americans have received felony convictions and served time behind bars<sup>107</sup>—a population larger than that of some countries.<sup>108</sup>

Ex-offenders encounter a number of obstacles to reentry into society—often referred to as the “collateral consequences” of a criminal conviction.<sup>109</sup> Collateral consequences are civil disabilities that attach to, but are legally separate from, the criminal sentence.<sup>110</sup> They affix

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103. Bureau of Justice Statistics, U.S. Dep’t of Justice, Reentry Trends in the U.S.: Highlights, <http://www.ojp.usdoj.gov/bjs/reentry/reentry.htm> (last visited Apr. 01, 2007); Devah Pager, *The Mark of a Criminal Record 2* (June 2002) [hereinafter Pager, *The Mark of a Criminal Record*], available at <http://www.northwestern.edu/ipr/publications/papers/pageraudit.pdf>. “In the year 2000 alone, corrections officials discharged approximately 600,000 individuals, with most returning to core communities from which they came.” Anthony C. Thompson, *Hidden Obstacles to Reentry*, *supra* note 61, at 256.

104. BAER ET AL., *supra* note 89, at 2; Adam Cohen, *supra* note 30; Pager, *Double Jeopardy*, *supra* note 61, at 619 (“Of those recently released, nearly two-thirds will be charged with new crimes, and over 40% will return to prison within three years.”).

105. HUMAN RIGHTS WATCH, OFFENDERS WITH MENTAL ILLNESS, *supra* note 58, at 193.

106. See Daniel Pratt et al., *Suicide in Recently Released Prisoners: A Population-Based Cohort Study*, 368 LANCET 119 (2006); Deborah Harding-Pink, *Mortality Following Release from Prison*, 30 MED SCI LAW 12 (1990); Matti Joukamaa, *The Mortality of Released Finnish Prisoners: a 7 Year Follow-up Study of the WATTU Project*, 96 Forensic Sci Int’l 11 (1998).

107. Brent Staples, *The Federal Government Gets Real About Sex Behind Bars*, N.Y. TIMES, Nov. 27, 2004, at A14; Travis, *supra* note 59, at 18 (noting that the estimated thirteen million felony convictions in the United States represents approximately 6 percent of the adult population).

108. The figure of thirteen million is greater than the population of over 60 countries, including Austria, Bolivia, Denmark, Ecuador, Finland, Greece, Ireland, Laos, New Zealand, Sweden, Switzerland, and United Arab Emirates. World Gazetteer, <http://www.world-gazetteer.com/> (follow “countries/cities” hyperlink in top menu) (last visited Mar 24, 2007).

109. Demleitner, *Preventing Internal Exile*, *supra* note 32, at 153. For examples of how courts have defined “collateral consequences,” see Alicia Werning Truman, Note, *Unexpected Evictions: Why Drug Offenders Should be Warned Others Could Lose Public Housing if They Plead Guilty*, 89 IOWA L. REV. 1753, 1755 n.10 (2004).

110. Pinard, *supra* note 30, at 1078, 1080; see also JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF

“automatically to the conviction or are imposed at the discretion of [both state and federal] governmental or regulatory agencies independent of the criminal justice system.”<sup>111</sup> While collateral consequences usually pertain only to felony convictions, they may also apply to misdemeanor convictions.<sup>112</sup> Frequently, collateral consequences outlive the direct sentences imposed on defendants,<sup>113</sup> leaving one commentator to state: “Ex-offenders remain banished from mainstream society. Even upon expiration of the maximum sentence, collateral sentencing consequences continue to remove the ex-offender from society . . . by bestowing outlaw status upon her and preventing her from regaining full membership rights.”<sup>114</sup> Other commentators regard the continuation of collateral consequences beyond the duration of the sentence as so punitive as to resemble “double jeopardy.”<sup>115</sup> And yet another laments: “In this brave new world, punishment for the original offense is no longer enough; one’s debt to society is never paid.”<sup>116</sup>

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FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES at part II (Oct. 1998), <http://www.hrw.org/reports98/vote/index.html> (noting that collateral consequences are separate from “penal sanctions such as fines or imprisonment”).

111. Pinard, *supra* note 30, at 1080-81; FELLNER & MAUER, *supra* note 110; *see also* Truman, *supra* note 109, at 1755 (“With collateral consequences . . . the punishment is not imposed until some future date (if at all) and usually a different court or administrative body commences the action.”). Because collateral consequences attach automatically to the conviction, one commentator has compared them to mandatory minimum sentences. *See* Demleitner, *Preventing Internal Exile*, *supra* note 32, at 161 (“Like mandatory sentences, [collateral consequences] follow automatically upon conviction of the offense without considering factors such as the offender’s criminal background.”).

112. Pinard, *supra* note 30, at 1078 (explaining that collateral consequences apply to both felony and misdemeanor convictions); ISPAHANI & WILLIAMS, *PURGED!*, *supra* note 42, at 7 (explaining that “some misdemeanors also disqualify individuals from voting in Maryland”); *see also* Ewald, *Civil Death*, *supra* note 15, at 1057 (explaining how the term “felon disenfranchisement” is a misnomer). *See also* sources cited *supra* note 16 and accompanying text.

113. Pinard, *supra* note 30, at 1078 (stating that collateral consequences “often outlast the direct sentences imposed on defendants”).

114. Demleitner, *Preventing Internal Exile*, *supra* note 32, at 159.

115. Pager, *Double Jeopardy*, *supra* note 61, at 617 (describing the “exclusion of ex-offenders from valuable social and economic opportunities” as “akin to the legal concept of double jeopardy: being punished more than once for the same crime”).

116. Travis, *supra* note 59, at 19. As Loïc Wacquant describes:

In other liberal-democratic societies, the status dishonor and civic disabilities of being a prisoner are temporary and limited: they affect offenders while they are being processed by the criminal justice system and typically wear off upon coming out of prison or shortly thereafter; to ensure this, laws and administrative rules set strict conditions and limits to the use and diffusion of criminal justice information. Not so in the United States, where, on the contrary, (1) convicts are

Collateral consequences are creatures of both state and federal law, although state law governs the preponderance of them.<sup>117</sup> For example, a state may impose certain occupational licensing restrictions for ex-felons, which may exclude ex-offenders from gaining employment in hundreds of job categories, including accounting, barbering, beer and liquor distribution, education, dentistry, funeral services (e.g., undertaking and embalming), health care, law, medicine, nursing, physical therapy, plumbing, private security and real estate.<sup>118</sup> Considering that most crimes are committed at young ages—the same years in which individuals are most likely to learn a trade, develop a career, and experience wage increases<sup>119</sup>—individuals who spend their teens, twenties and thirties in

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subjected to ever-longer and broader post-detention forms of social control and symbolic branding that durably set them apart from the rest of the population; (2) the criminal files of individual inmates are readily accessible and actively disseminated by the authorities; (3) a naturalizing discourse suffused with genetic phraseology and animalistic imagery has swamped public representations of crime in the media, politics, and significant segments of scholarship.”

Wacquant, *supra* note 51, at 112-13.

117. Demleitner, *Preventing Internal Exile*, *supra* note 32, at 156 (noting, however, that federal law “governs an increasing number”). For federally-imposed collateral consequences, see OFFICE OF THE PARDON ATTORNEY, UNITED STATES DEPT. OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION. *available at* [http://www.usdoj.gov/pardon/collateral\\_consequences.pdf](http://www.usdoj.gov/pardon/collateral_consequences.pdf).

118. See Brisman, *Double Whammy*, *supra* note 90, at 425-26, 432-35 (discussing state occupational licensing restrictions and how they reduce the employment possibilities for ex-offenders); Demleitner, *Preventing Internal Exile*, *supra* note 32, at 156 (listing examples of employment that require professional licenses which ex-offenders cannot acquire); Finzen, *supra* note 67, at 315-17 (discussing federal and state restrictions on employment); LEGAL ACTION CENTER (LAC), AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 10-11 (2004), [http://www.lac.org/lac/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/lac/upload/lacreport/LAC_PrintReport.pdf) [hereinafter ROADBLOCKS TO REENTRY] (providing a state-by-state description of state licensing restrictions on employment); Saxonhouse, *supra* note 15, at 1610-14 (discussing hurdles to employment for ex-offenders, including bans on public employment and regulations on private employment).

119. See, e.g., BAER ET AL., *supra* note 89, at 4 (noting that during the period of incarceration, an individual loses the opportunity to gain marketable work experience); Bob Herbert, *Locked Out at a Young Age*, N.Y. TIMES, Oct. 20, 2003 (noting “the 16-50-24 age range is typically the time when young people ‘accumulate human capital in the form of formal education attainment or work experience in the labor market.’” (quoting Dr. Neeta P. Fogg, a senior economist at Northeastern University’s Center for Labor Market Studies and co-author of a study on education and the youth labor market in Illinois)).

According to the Bureau of Justice Statistics, in 2004, the highest number of sentenced prisoners were found in the 25-29 age range. HARRISON & BECK, *supra* note 43, at 8. The next highest number were 30-34. *Id.* See also MATTHEW R. DUROSE & CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FACT SHEET: PROFILE OF

prison, rather than in the workforce, face an uphill battle to becoming legitimate members of that workforce upon reentry.<sup>120</sup> Those individuals who have marketable job skills, gained either before<sup>121</sup> or during incarceration,<sup>122</sup> frequently realize upon reentry that the licensing restrictions prevent them from putting those skills to use.<sup>123</sup> Even if licensing restrictions are not an issue, ex-offenders may encounter occupational bars simply because of their criminal records.<sup>124</sup> This is

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NONVIOLENT OFFENDERS EXITING STATE PRISONS 1, 3 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pnoesp.pdf> (“An estimated 9 of 10 nonviolent offenders discharged from [15 state prisons in 1994] were male and about two-thirds were under age 34.”); Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. OF SOC. 717, 724 (Nov. 2001) [hereinafter Quillian & Pager, *Black Neighbors, Higher Crime?*] (noting “the demographic fact that young men commit a disproportionate share of all crime”).

120. See Brisman, *Double Whammy*, *supra* note 90 at 442 n.99 and accompanying text; MERCER L. SULLIVAN, “GETTING PAID”: YOUTH CRIME AND WORK IN THE INNER CITY 58 (1989) (“The age period from the teen years into the early twenties is described as one in which labor market entrants explore various job possibilities, . . . seek[ing] employment that suits their abilities and tastes and decid[ing] whether and how to invest in education and training.”); see generally Herbert, *supra* note 119 (“[Y]oungsters who are left out of [the work experience during the 16-to-24 age range] . . . can face significant barriers to employment success for the rest of their lives.”); Western, Pettit, & Guetzkow, *supra* note 96, at 176 (“[I]ncarceration erodes job skills. At a minimum, time in prison or jail limits the acquisition of work experience that would be obtained on the open labor market. . . . [I]ncarceration [also] undermines social connections to good job opportunities.”).

Note that those who do find work after release do not necessarily find full-time or consistent employment. See BAER ET AL., *supra* note 89.

121. Saxonhouse, *supra* note 15, at 1611 (stating that even those individuals possessing “highly marketable skills prior to their convictions, often face legal barriers to employment”); see also Finzen, *supra* note 67, at 317 (“The inability to gain or improve valuable labor skills while in prison is particularly frustrating since many inmates enter prison without the education that is necessary to succeed in the job market and could greatly benefit from skills training.”).

122. Note that as the number of individuals incarcerated has skyrocketed, educational and vocational programming in prison has been drastically reduced. BRUCE WESTERN, VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, EDUCATION AND INCARCERATION 10 (2003), [http://www.soros.org/initiatives/justice/articles\\_publications/publications/education\\_incarceration\\_20030828/EducationIncarceration1.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/education_incarceration_20030828/EducationIncarceration1.pdf) (“Not only is our use of incarceration highly concentrated among men with little schooling, but corrections systems are doing less and less to ‘correct’ the problem by reducing educational opportunities for the growing number of prisoners.”).

123. Brisman, *Double Whammy*, *supra* note 90, at 423-24.

124. Travis, *supra* note 59, at 22 (“Th[e] expansion of legal barriers has been accompanied by an increase in the ease of checking criminal records . . . . One’s criminal past [has] bec[o]me both more public and more exclusionary, limiting the universe of available work.”); see also ABRAMSKY, *supra* note 37, at 164 (noting how employers in Tennessee weed out job applicants with felony records); see generally Wacquant, *supra*

especially true in states that permit prospective employers to inquire about and rely upon criminal records in making employment decisions.<sup>125</sup> Given the dearth of available unskilled labor positions,<sup>126</sup> it is no wonder that unemployment among ex-prisoners—with estimates ranging between twenty-five and forty percent<sup>127</sup>—frequently contributes to a return to criminal activity.<sup>128</sup>

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note 51, at 113 (discussing how states such as Illinois, Florida, and Texas have put entire inmate data bases on line “making it possible for anyone to delve into the ‘rap sheet’ of prisoners via the World Wide Web, and for employers and landlords to discriminate more broadly against ex-convicts in complete legality”).

125. ROADBLOCKS TO REENTRY, *supra* note 118, at 10-11 (providing a state-by-state description of state hiring policies with respect to individuals with arrest and conviction records); Jennifer Leavitt, Comment, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1286-98 (2002) (discussing the use of arrest and conviction records in employment settings); *see also* Editorial, *A Catch-22 for Ex-Offenders*, N.Y. TIMES, Apr. 6, 2004, at A24 (“Thirty-seven states permit prospective employers and all state licensing agencies to ask about and weigh arrests that *never led to conviction*. In addition, employers in most states can simply fire anyone who is discovered to have a criminal record, regardless of the circumstance.” (emphasis added)).

126. Demleitner, *Preventing Internal Exile*, *supra* note 32, at 156 (describing the “increasingly negative economic impact” of excluding ex-offenders as low-skilled jobs “continue to disappear”); Anthony C. Thompson, *Hidden Obstacles to Reentry*, *supra* note 61, at 269 (noting that “[a] growing number of unskilled labor positions have shifted off shore,” such that the types of jobs ex-offenders used to acquire after their release “have all but disappeared,” resulting in “diminished employment opportunities for those with and without criminal records”).

127. Workforce Investment Act—Demonstration Grants; Solicitation for Grant Applications—Prisoner Re-Entry Initiative, 70 Fed. Reg. 16853 (Apr. 1, 2005); Pager, *Double Jeopardy*, *supra* note 61, at 617 (“Unemployment rates for ex-offenders range from 25% to 40%; only a fraction of ex-offenders are able to find jobs paying a living wage.”).

128. While a number of scholars and commentators have noted the link between employment and reduced rates of recidivism (see below), the phenomenon can be understood with a number of criminological theories, perhaps most compellingly with Robert Merton’s version of “strain theory” and its more recent permutation, “institutional anomie theory” (also known as “American Dream theory”), promulgated by Steven Messner and Richard Rosenfeld. *See* Robert K. Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 672 (1938) (suggesting that if culturally-desired goals are not equally attainable to all social classes through accepted means, then illegitimate methods may be used to realize those goals); STEVEN F. MESSNER & RICHARD ROSENFELD, *CRIME AND THE AMERICAN DREAM* (1994) (suggesting that the American Dream has fostered an intense desire for material success and that if the opportunities for this success are not genuinely open to everyone, then those individuals without legitimate modes of achieving it will turn to crime).

For a discussion of the relation between joblessness and recidivism rates, see, e.g., BAER ET AL., *supra* note 89, at 4 (noting that “employment is associated with lower rates of reoffending, and higher wages are associated with lower rates of criminal activity” and



Although the employment obstacles which ex-offenders face are significant in and of themselves, ex-offenders rarely encounter just one collateral consequence and are frequently not spared the hurdles of multiple, synergistically challenging collateral consequences.<sup>129</sup> Thus, in addition to barriers to employment,<sup>130</sup> ex-offenders may be prohibited from receiving public assistance and food stamps<sup>131</sup> and forbidden from becoming tenants in public housing developments—or forbidden from even visiting friends and relatives (including one’s own children) in public housing developments<sup>132</sup>—which can cause many to revert to

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discussing the reluctance of employers to hire former prisoners); Pager, *The Mark of a Criminal Record*, *supra* note 103, at 2-3 (stating that “incarceration is associated with limited future employment opportunities and earnings potential,” which, in turn, are significant predictors of recidivism); Christopher Uggen & Jeremy Staff, *Work as a Turning Point for Criminal Offenders*, 5 CORRECTIONS MANAGEMENT QUARTERLY 1, 14 (2001) (describing employment as “one of the most important vehicles for hastening offender reintegration and desistance from crime,” but cautioning that the quality of such employment was relevant, describing ex-offenders who obtained high-quality employment as “less likely to be rearrested than those who obtained poor-quality work”).

129. See Finzen, *supra* note 67, at 321 (“In isolation, each collateral consequences law makes rehabilitation challenging for ex-offenders; collectively, these laws make reintegration even more difficult, if not impossible, when they intersect to impact ex-offenders all at once.”); see also ABRAMSKY, *supra* note 37, at 164 (“[T]rapped in poverty, many [black men] turn to crime, and convicted of crime, they then are barred from many walks of life and remain mired in poverty.”).

130. Naturally, “[t]he effect of depriving ex-offenders of certain employment opportunities will depend on that person’s educational and professional background and the state and typology of the current economy.” Demleitner, *Preventing Internal Exile*, *supra* note 32, at 156.

131. 21 U.S.C. § 862a (2000) (denying benefits and assistance for certain drug-related convictions); ROADBLOCKS TO REENTRY, *supra* note 118, at 12-13 (providing a state-by-state description of restrictions on public assistance and food stamps; Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in INVISIBLE PUNISHMENT, *supra* note 54, at 37, 40-43 (discussing welfare and food stamp eligibility for individuals with drug felony convictions); FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION, *supra* note 117, at 10 (explaining that anyone convicted of a felony for conduct “involv[ing] the possession, use, or distribution of drugs is not eligible to receive food stamps or temporary assistance to needy families, and the amount payable to any family or household of which such a person is a member is reduced proportionately”); Wacquant, *supra* note 51, at 119-20 (describing the Work Opportunity and Personal Responsibility Act of 1996 as “banish[ing] most ex-convicts from Medicaid, public housing, Section 8 vouchers, and related forms of assistance”).

132. Rubinstein & Mukamal, *supra* note 131, at 43-46, 48 (providing an overview of federal housing laws that render those with criminal histories ineligible for public housing); Finzen, *supra* note 67, at 312-15 (discussing loss of federally funded public housing); FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION, *supra* note 117, at 10 (explaining that certain public housing benefits may be revoked or limited upon

lawlessness.<sup>133</sup> This denial of federal benefits is troubling in that it is inconsistent with the whole purpose of welfare (and arguably imposes a greater economic burden on federal, state and local governments<sup>134</sup>). As Professor Nora V. Demleitner points out, “[t]he welfare system provides a threshold beyond which no member of society should fall, while at the same time assisting recipients in getting back into the labor market.”<sup>135</sup> The refusal of food stamps and public housing to ex-offenders, however, virtually ensures their free fall. According to Human Rights Watch, the “One Strike and You’re Out” policy of exclusion from federally subsidized housing<sup>136</sup> condemns those possessing criminal records to lives of insecurity and transience fraught with an ever-present lure of crime:

Exclusions based on criminal records ostensibly protect existing tenants. There is no doubt that some prior offenders still pose a risk and

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conviction of a crime); *see also* 42 U.S.C. § 1437f(d)(1)(b)(iii) (2000) (listing manner in which criminal activity may be grounds for terminating tenancy in public housing); 42 U.S.C. § 1437n(f)(1)-(2) (2000) (treating conviction for methamphetamine production as grounds for immediate termination of tenancy and permanent prohibition of occupancy or assistance under § 1437f); 42 U.S.C. § 1437d(q) (2000) (requiring provision of criminal records by law enforcement to public housing agencies upon request); HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 3 (Nov. 2004), <http://hrw.org/reports/2004/usa1104/usa1104.pdf> [hereinafter NO SECOND CHANCE] (discussing the categories of people who are barred under federal law from admission to public housing, as well as the categories of applicants to whom local public housing authorities (PHAs) have discretion to deny admission); ROADBLOCKS TO REENTRY, *supra* note 118, at 16 (providing a state-by-state description of restrictions on public housing); Eckholm, *supra* note 62 (describing how a recently released offender cannot live with his girlfriend and son in public housing because of his conviction); *see generally* BAER ET AL., *supra* note 89 (noting that the process of procuring housing may be complicated by the lack of affordable and available housing, legal barriers and regulations, prejudices against ex-offenders, and stringent eligibility requirements for federally subsidized housing).

133. *See* Brisman, *Double Whammy*, *supra* note 90, at 446-47.

134. Rubinstein & Mukamal, *supra* note 131, at 49 (“Blanket policies that deny decent, safe, and affordable housing to individuals with criminal records and their families for long periods of time create challenges not only for the returning offender and his or her family but for the community that must absorb the criminal justice, shelter, and child welfare costs as well.”).

135. Demleitner, *Preventing Internal Exile*, *supra* note 32, at 158; *see also id.* at 159 (“The U.S. welfare state was built on the premise that the state is socially responsible for those who temporarily fall on hard times.”).

136. President William J. Clinton, State of the Union Address (January 23, 1996), available at <http://www.gpoaccess.gov/sou/index.html> (urging a “one strike and you’re out” rule for public housing. *See* Rubinstein & Mukamal, *supra* note 131, at 47-48 (finding that many public housing authorities “exclude applicants with any kind of criminal background, not just those with drug-related and violent convictions”).

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may be unsuitable neighbors in many of the presently-available public housing facilities. But U.S. housing policies are so arbitrary, overbroad, and unnecessarily harsh that they exclude even people who have turned their lives around and remain law-abiding, as well as others who may never have presented any risk in the first place. . . .

. . . .

[Such exclusions leave people with] no housing options other than those which . . . [are] rife with domestic abuse, violence, crime, and surrounded by harmful drug and alcohol use.

. . . .

Women may be forced to consider returning to an abuser to avoid homelessness . . . . [or] find themselves having to exchange sex for protection, money, or a place to stay.

. . . .

People who are inadequately housed, especially those living on the streets or in homeless shelters, are at higher risk for communicable diseases such as HIV and tuberculosis.<sup>137</sup>

Or, in the words of one commentator, “the federal government’s drug policy with respect to federally subsidized public housing, though well-intentioned, has morphed from a means of ensuring resident safety into a disturbingly effective revolving door in which the poor and underrepresented are fast-tracked into homelessness.”<sup>138</sup>

In addition to exposure to the elements and to disease, those who become homeless and live on the streets are vulnerable to a whole new class of crimes—“quality of life” crimes—penalties for living “private lives in public places,”<sup>139</sup> such as for sleeping on park benches and in doorways and for relieving themselves in alleyways.<sup>140</sup> For ex-offenders saddled with

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137. NO SECOND CHANCE, *supra* note 132, at 1, 40-42; *see also* SOERING, *supra* note 92, at 42 (“All the things they need to get their life started back [are] off limits, and there’s nothing they can do about it.” (quoting Amy Hirsch, author and attorney with Community Legal Service in Philadelphia)).

138. Paul Stinson, *Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally-Subsidized Public Housing to Ensure Due Process, Avoid Inequity, and Combat Crime*, 11 GEO. J. ON POVERTY L. & POL’Y 435, 435 (2004).

139. NO SECOND CHANCE, *supra* note 132, at 40.

140. *See* NAT’L COALITION FOR THE HOMELESS & NAT’L LAW CENTER ON HOMELESSNESS AND POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8-9 (Jan. 2006), <http://www.nationalhomeless.org/publications/>

the additional responsibility of parenthood, the prohibition against receiving food stamps and accessing public housing often prevents them from creating a suitable living environment for their children. This can “disrupt[] a child’s education, emotional development, and sense of well-being.”<sup>141</sup> Thus, this particular collateral consequence for ex-offenders is passed on to their offspring, making it a multi-generational collateral consequence.<sup>142</sup>

To add to their burden, ex-offenders may be stripped of their driver’s licenses,<sup>143</sup> regardless of whether the crimes for which they were convicted involved a vehicle. As a result, ex-offenders may face further impediments to employment and may be unable to participate in addiction treatment, to obtain healthcare, or to receive an education or job training.<sup>144</sup> Those wishing to acquire an education<sup>145</sup> may be barred from receiving federal college loans and grants,<sup>146</sup> which can greatly impede their ability to lead mainstream lives.<sup>147</sup>

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crimreport/report.pdf.

141. NO SECOND CHANCE, *supra* note 132, at 41; *see also* Nora V. Demleitner, “Collateral Damage”: No Re-entry for Drug Offenders, 47 VILL. L. REV. 1027, 1043 (2002) [hereinafter Demleitner, *Collateral Damage*] (noting that transient living can “lead[] to educational difficulties for the children” of ex-offenders).

142. *See* Demleitner, *Preventing Internal Exile*, *supra* note 32, at 158; *see also infra* note 163.

143. Twenty-seven states suspend or revoke licenses for some or all drug offenses as a result of federal legislation, 23 U.S.C. § 159 (1998). ROADBLOCKS TO REENTRY, *supra* note 118, at 17.

144. ROADBLOCKS TO REENTRY, *supra* note 118, at 17; *see also* Finzen, *supra* note 67, at 316 (stating that state laws revoking an ex-offenders driver’s license prohibit them from “accepting any job that involves driving”).

145. The educational level of prisoners is well below the average for the general population. SARAH LAWRENCE ET AL., *supra* note 30, at 3 (“It is well documented that the education level, work experience, and skills of prisoners are well below the averages for the general population.”); Uggen & Staff, *supra* note 128, at 2 (“[E]x-offenders generally reenter the labor market with low education and limited work experience.”).

146. Students convicted of drug-related offenses are ineligible for any grant, loan or work assistance. Higher Education Act of 1998, 20 U.S.C. § 1091(r)(1) (2004). Federal or state inmates are also denied Pell grants, *id.* at § 1070a(b)(8), a ban that was intended to target “students who committed drug crimes while receiving federal loans.” Editorial, *Oiling the Revolving Door*, N.Y. TIMES, Mar. 30, 2004, at A22. For a discussion of barriers to federal assistance for higher education, see Finzen, *supra* note 67, at 318-19.

147. Editorial, *Cutting College Aid, and Fostering Crime*, N.Y. TIMES, July 20, 2005, at A22 (calling the denial of federal education aid to ex-offenders a way to “lock[] [them] out of the new economy”); Herbert, *supra* note 119 (“Among the most obvious and immediate effects of [the] disconnect from both educational experience and the labor market are increased rates of crime, drug use and gang membership.”); *see generally* Wacquant, *supra* note 51, at 119 (describing inmates as “expelled from higher education”).

The effect of the ban on federal financial aid has an especially pronounced and disproportionate impact on poor and minority communities<sup>148</sup>—communities that are already bowing under the stresses of crime and mass incarceration of its male youth,<sup>149</sup> and where, as one commentator contends, “the drug trade is rampant and young men often have run-ins with the law before they get their lives on track.”<sup>150</sup> According to John Hagan and Ronit Dinovitzer, who study the impact of young men’s engagement in criminal activity and subsequent involvement in the criminal justice system, “when young minority males are taken from their communities and imprisoned, they become a novel resource in the investment/disinvestment equation that shifts resources from one location to another, disadvantaging the minority community to the relative advantage of another community, usually in a majority group setting.”<sup>151</sup> If enough individuals in a given community commit crimes and are subsequently removed from the community and sent to prison, then the community will “los[e] the workforce that is necessary to sustain viable labor market activity.”<sup>152</sup> To carry this progression one step further, the community will also lose its ability to control crime through informal means. As Susan B. Tucker and Eric Cadora of the Open Society Institute explain “[t]he ‘coercive mobility’ of cyclical imprisonment disrupts the fragile economic, social, and political bonds that are the basis for informal social control in a community.”<sup>153</sup> Similarly, Professor Todd R. Clear writes:

[V]ery high concentrations of incarceration may well have a negative impact on public safety by leaving communities less capable of sustaining the informal social control that undergirds public safety. This happens not only because incarceration, experienced at high levels, has the inevitable result of removing valuable assets from the community, but also because the concentration of incarceration affects the

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148. *Cutting College Aid, and Fostering Crime*, *supra* note 147 (contending that the federal law barring ex-offenders from education aid has a disproportionate impact on underprivileged minority communities); Diana Jean Schemo, *Aid Is Focus Of Lawsuit By Students*, N.Y. TIMES, Mar. 22, 2006, at B7 (reporting the lawsuit as arguing that the ban disproportionately affects African-Americans).

149. *See supra* note 119 and accompanying text, discussing age of individuals sent to prison.

150. *Cutting College Aid, and Fostering Crime*, *supra* note 147.

151. John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in PRISONS 121, 133 (Michael Tonry & Joan Petersilia eds., 1999).

152. *Id.* at 135.

153. Tucker & Cadora, *supra* note 60, at 3.

community capacity of those who are left behind.<sup>154</sup>

In other words, while low levels of incarceration may well benefit a neighborhood's public safety, Clear contends, high levels may have the reverse effect.<sup>155</sup> As a result, the likelihood that the released prisoner avoids a return to criminal activity and that the juvenile without a criminal record steers clear of delinquency is greatly diminished.<sup>156</sup>

Certainly, one cannot attribute juvenile delinquency, recidivism, and the loss of social control—"the capacity of a group to regulate its members according to desired principles—to realize collective, as opposed to forced, goals"<sup>157</sup>—solely to state and federal collateral consequences. But the combination of some collateral consequences on certain ex-offenders may encumber their reentry, impacting more than just those individuals and raising the question of whether collateral consequences may endanger rather than promote public safety.

In addition to the bans and stumbling blocks mentioned above, ex-offenders may be denied the right to become foster and adoptive parents<sup>158</sup>

154. Clear, *supra* note 54, at 181-82; *see also* WRIGHT, *supra* note 45, at 188 ("Where relational structures were weak and unstable, informal [social] controls also tend to be absent or weak, thus failing to provide for the development of necessary inhibitors to criminality." (citing Robert D. Crutchfield, Michael R. Geerken, & Walter R. Gove, *Crime Rate and Social Integration*, 20 *Criminology* 467 (1982))).

155. *See* Clear, *supra* note 54, at 183, 192-93 ("[H]igh levels of incarceration concentrated in impoverished communities has a destabilizing effect on community life, so that the most basic underpinnings of informal social control are damaged."); *see generally* Robert J. Sampson, *Neighbourhood and Community: Collective Efficacy and Community Safety*, 11 *NEW ECONOMY* 106, 111 (2004), available at [http://www.wjh.harvard.edu/soc/faculty/sampson/2004.7\\_NewEc.pdf](http://www.wjh.harvard.edu/soc/faculty/sampson/2004.7_NewEc.pdf) [hereinafter Sampson, *Collective Efficacy and Community Safety*] (discussing the "profound conflict" residents face when violence rises in their neighborhoods, wanting safe streets but objecting when the price of that safety is having their sons "hailed off" and jailed).

156. *See generally* WRIGHT, *supra* note 45, at 178 ("Various factors are recognized . . . as contributing to and prompting the decision to commit a crime. Some suggest that the choice is influenced by the behavior, opinions, and attitudes of people who are important to the individual. . . . [A] person not exposed to such behavioral patterns will be much less likely to choose such a lifestyle."); sources cited *supra* note 128, and *infra* note 387.

157. Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *Science* 918, 918 (1997).

158. Adoption and Safe Families Act (AFSA) of 1997, 42 U.S.C. § 671(a)(20)(A) (2000) (denying foster or adoptive parenthood to individuals with a felony conviction crimes against children or enumerated violent crimes such as rape, and denying foster or adoptive parenthood to those with a felony conviction for physical assault, battery, or a drug-related offense within the past five years); *see also* Brisman, *Double Whammy*, *supra* note 90, at 426-27 n.27 and accompanying text.

One commentator believes restrictions on adoption and foster care should be viewed differently than other collateral consequences, as the goal of such restrictions "lies

and may be banned from serving on juries<sup>159</sup> as well as prohibited from voting,<sup>160</sup> which this Article will explore in greater detail in *infra* Part II.B. Finally, the stigma of a criminal record, either in concert with these collateral consequences, as in the case of employment and housing,<sup>161</sup> or independently from them, i.e., as simply a blemish affecting social relations, may prove too great a burden for ex-offenders trying to live crime-free.<sup>162</sup>

While the severity and broad impact of the collateral consequences of conviction and imprisonment is troubling, what renders them significantly more unfair<sup>163</sup> is that criminal defendants are usually unaware of the

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outside the criminal justice system and, thus, does not aim to punish or deter ex-offenders.” Demleitner, *Collateral Damage*, *supra* note 141, at 1045.

159. 28 U.S.C. § 1865(b)(5) (2000) (barring from service on grand and petit juries in district court any individual who has a pending charge or conviction (and has not had his civil rights restored) for a crime punishable by more than one year’s imprisonment).

160. See Brisman, *Double Whammy*, *supra* note 90, at 426 n.26 and accompanying text; ROADBLOCKS TO REENTRY, *supra* note 118, at 14 (reporting on the different types of restrictions that states impose on the right to vote for people with felony convictions); LOVE, *supra* note 101, at 6-7 (summarizing voting restrictions on people with felony convictions).

161. See sources cited *supra* note 132. The federal government will award public housing agencies points under the Public Housing Assessment System if they adopt policies to evict individuals who engage in activity considered detrimental to the public housing community. 24 C.F.R. § 966.4(1)(5)(vii). This system makes sense in theory because “it is designed to ensure safety of public housing tenants by empowering officials to remove a current threat.” Anthony C. Thompson, *Hidden Obstacles to Reentry*, *supra* note 61, at 278. In practice, however, officials have imposed this mandate on persons representing no danger, but “happen to have criminal histories.” *Id.*

162. For a general discussion of stigmatization as a barrier to reintegration, see Brisman, *Double Whammy*, *supra* note 90, at 436 n.69 and accompanying text; H.S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963); Roger Boshier and Derek Johnson, *Does Conviction Affect Employment Opportunities?*, 14 BRIT. J. OF CRIMINOLOGY 264 (1974); Wouter Buikhuisen and Fokke P.H. Dijksterhuis, *Delinquency and Stigmatisation*, 11 BRIT. J. OF CRIMINOLOGY 185 (1971)); JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989). See also Pager, *Double Jeopardy*, *supra* note 61, at 620-21 (“Individuals are routinely—and legally—denied access to jobs, housing, educational loans, welfare benefits, political participation, and other key social goods solely on the basis of their criminal background” and explaining further that “[n]egative credentials represent those official markers that restrict access and opportunity rather than enabling them,” of which, a criminal record is “the archetypal example”).

163. Federal law provides for the termination of tenancy for “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control,” 42 U.S.C. § 1437d(l)(6) (2000). As a result, the *entire family* of the offender—parents, grandparents, spouse and children—may be removed from public housing as a result of a guilty plea. See *Dep’t. of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125

collateral cost of a guilty plea and are rarely informed of the civil disabilities that append to a criminal conviction—so much so that collateral consequences have been labeled “secret sentences”<sup>164</sup> or “invisible punishments.”<sup>165</sup> The ignorance on the part of criminal defendants and the failure of defense attorneys and judges to educate defendants about these “extra sanctions” may be due, in part, to the fact that collateral consequences are not statutorily organized—they are scattered throughout federal and state statutes as well as numerous regulations, making a comprehensive list virtually impossible.<sup>166</sup> In addition, defense attorneys are not legally obligated to advise their clients about the various collateral consequences attending their convictions.<sup>167</sup> Trial courts also have no legal obligation to impart to the defendant such information during the plea-bargaining or sentencing phase.<sup>168</sup> But given that federal prosecutors possess an affirmative obligation, under the National Voter Registration

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(2002) (upholding evictions from public housing based on the drug activity of any visitor); Truman, *supra* note 109, at 1757-61 (discussing the impact of the collateral consequences of eviction from public housing on “innocent third parties”).

164. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002).

165. Travis, *supra* note 59, at 16.

166. Finzen, *supra* note 67, at 306 (“[It becomes] extremely difficult for an individual to know which or how many collateral consequences laws apply in any given situation, and even harder for that individual to find those laws if he or she goes looking for them.”). *See also* Demleitner, *Collateral Damage*, *supra* note 141, at 1032 (“[O]f some consequences, even judges, prosecutors and criminal defense attorneys are unaware.”); Anthony C. Thompson, *Hidden Obstacles to Reentry*, *supra* note 61, at 273 (“The diverse areas in which these [collateral] sanctions surface make them difficult to know completely and to resolve in a single forum.”). Some judges and experts argue there are “too many possible collateral consequences” for judges to foresee and warn a criminal defendant of them all. Truman, *supra* note 109, at 1768. *But see* Travis, *supra* note 59, at 34 (“One need not recite in open court *all* collateral sentences—that would be impossible. Yet, judges could be required to ask a defendant whether his counsel has explained to him that there *are* collateral consequences, and perhaps list some that might be pertinent to the defendant’s situation.” (citing *State v. Berkley*, 724 A.2d 558 (Del. 1999) (barring the enforcement of a state law that required a convicted person to surrender his driver’s license in situations where the offender did not know it was a consequence of a guilty plea))).

167. Finzen, *supra* note 67, at 306 (“[M]any attorneys do not know of all the collateral consequences that exist and are currently under no affirmative obligation to inform their clients about them when a client is deciding whether to plead guilty or go to trial.”).

168. Pinard, *supra* note 30, at 1079; *see also* *United States v. Campbell*, 778 F.2d 764, 768 (11th Cir. 1985) (holding that “actual knowledge of the collateral consequences of a guilty plea is not a prerequisite to the entry of a knowing and intelligent plea”); Truman, *supra* note 109, at 1764-66 (discussing how Rule 11 of the Federal Rules of Criminal Procedure requires warning of direct, but not collateral, consequences of conviction before a defendant pleads guilty).



Act,<sup>169</sup> to provide state election officials written notice of convictions,<sup>170</sup> it would hardly seem onerous to require these attorneys to inform criminal defendants of this consequence of a guilty plea.<sup>171</sup>

Finally, it should be noted that when juveniles are tried and convicted in adult criminal court, rather than in juvenile court, not only do they frequently receive longer sentences<sup>172</sup> and ones focused on punishment rather than on rehabilitation,<sup>173</sup> but they often suffer the same long-term legal, political and socioeconomic consequences that the adults do.<sup>174</sup> They may be prohibited from certain categories of employment,<sup>175</sup> and may be required to report their adult conviction on job applications once they are released from prison and old enough to seek employment.<sup>176</sup> An adult

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169. National Voter Registration Act (Motor Voter Law) (NVRA), 42 U.S.C. §§ 1973gg to 1973gg-10 (2000).

170. 42 U.S.C. § 1973gg-6(g)(1) (2000) (“On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official . . . of the State of the person’s residence.”); *see also* ISPAHANI & WILLIAMS, PURGED!, *supra* note 42, at 5 (“The NVRA requires United States attorneys to give written notice of federal felony convictions to chief state elections officials.”).

171. The National Voter Registration Act further provides that the United States attorney shall, upon request, “provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.” 42 U.S.C. § 1973gg-6(g)(3) (2000). Because federal prosecutors must actually assist State election officials in determining the effect of a conviction on an offender’s voting qualifications, the argument that informing a criminal defendant that his guilty plea might result in disenfranchisement carries even less weight.

172. *See, e.g.*, Building Blocks for Youth, Children in Adult Jails: Fact Sheet, <http://www.buildingblocksforyouth.org/issues/adultjails/factsheet.html> (last visited Jan. 5, 2006) (describing research which found that youths tried in criminal court received harsher punishment than those tried in juvenile court).

173. PATRICIA ALLARD & MALCOLM YOUNG, COMMENTARY, PROSECUTING JUVENILES IN ADULT COURT: PERSPECTIVES FOR POLICYMAKERS AND PRACTITIONERS 7 (2002), <http://www.sentencingproject.org/pdfs/2079.pdf> (“Children in adult facilities, particularly in jails, frequently do not receive educational or other services appropriate to their needs.”).

174. ALLARD & YOUNG, *supra* note 173, at 7 (“Whether incarcerated or not, children convicted in criminal court may suffer other long-term legal, political and socioeconomic consequences.”); Sara Rimer, *States Adjust Adult Prisons to Needs of Youth Inmates*, N.Y. TIMES, July 25, 2001, at A1 (“[U]nlike their counterparts in juvenile centers, those who go to adult prisons acquire felony conviction records.”).

175. ALLARD & YOUNG, *supra* note 173, at 7 (“[C]ertain states bar ex-offenders with felony convictions from particular types of jobs, therefore possibly limiting future employment opportunities for youth.”); *see supra* note 123-24 and accompanying text regarding licensing restrictions.

176. ALLARD & YOUNG, *supra* note 173, at 7 (explaining that when children are convicted in adult criminal court, “[t]heir convictions become a matter of public record, and they may be compelled to report their conviction on job applications once they are old

conviction, rather than a juvenile one, may also result in the loss of voting rights to the juvenile even before he or she is old enough to exercise those rights.<sup>177</sup>

This next Section focuses on felony voting restrictions, beginning with a snapshot of different state disenfranchisement provisions.<sup>178</sup> Because the history of the right to vote is rich, a lengthy chronicle is well outside the scope of this Article. Nevertheless, a brief account, appearing in Part II.B.1, of voting exclusions is necessary, followed by a survey of the challenges to felon disenfranchisement laws in Part II.B.2. Part II.B.3 then delves into the impact of disenfranchisement on elections, as well as its effect on both offenders' and ex-offenders' home communities and the communities where convicted offenders are incarcerated.

#### B. Land of the (Civil) Dead: The "Pandemic" of Criminal Disenfranchisement<sup>179</sup>

"I feel like not a whole person in many ways. It makes me feel like there's a caste system and I've become one of the untouchables. It's unbelievable it could happen in America. It's ironic they go overseas and seek to promote democracy in other countries—force it on other countries—but in America they deny the right to vote to so many people."<sup>180</sup>

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enough to seek employment"); *see supra* note 124-25 and accompanying text re reporting criminal records.

177. ABRAMSKY, *supra* note 37, at 206, 29-30 ("[In Mississippi,] [d]efendants as young as sixteen are routinely prosecuted as adults, and, when convicted, deprived of the right to vote before they are old enough ever to have exercised that right in the first place."); *see generally* Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 37 (2002) [hereinafter Fagan, *This Will Hurt Me More Than It Hurts You*] (on economic disenfranchisement as well as loss of the right to vote, serve on juries, or run for office, of a person with an adolescent criminal conviction).

178. As mentioned in *supra* Part I, this Article will not discuss state policies and procedures regarding the compilation, verification and notification of purging individuals from state voting rolls. *See supra* note 42.

179. LAND OF THE DEAD (Universal Studios 2005). For a discussion of "civil death," *see, e.g.*, Ewald, *Civil Death*, *supra* note 15, at 1049 n.13 (defining "civil death" as the loss of all political, civil, and legal rights); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in INVISIBLE PUNISHMENT, *supra* note 54, at 50, 51-52; Heumann & Bilotta, *supra* note 15, at 1524. At least one commentator prefers the term "social death." *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 923 (2004). *See also* ABRAMSKY, *supra* note 37, at 163 (referring to a "pandemic" of disenfranchisement).

180. ABRAMSKY, *supra* note 37, at 5-6 (quoting Jamaica S., a young white woman from Nashville, TN, who has been disenfranchised after serving a fifteen-month period of

Although it is impossible to determine with exact certainty, approximately five million Americans are presently or permanently disenfranchised due to a criminal conviction<sup>181</sup>—a number that has swelled as the number of adults under criminal justice supervision has grown.<sup>182</sup> Many of the criminally disenfranchised committed nonviolent, non-serious crimes and most committed crimes without any connection to the electoral or political process.<sup>183</sup> Of the approximately five million disenfranchised individuals, an estimated 1.4 million are African-American men—one-third of the total disenfranchised population and thirteen percent of the entire African-American population.<sup>184</sup> According to Professor Pamela S. Karlan,

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probation).

181. See FELLNER & MAUER, *supra* note 110. The difficulty in compiling exact data stems from inaccurate record-keeping or misinformation. *Id.*, at part III. “In states that disenfranchise ex-felons, election officials do not always have ready access to felony conviction data, and some ex-felons may vote,” while, elsewhere, ex-felons who are permitted to vote upon release, are not necessarily informed of this right and often incorrectly believe that they can never vote again.” *Id.* Jeff Manza and Christopher Uggen argue the figure is significantly higher, since the figure does not include jail inmates serving sentences for misdemeanor offenses and persons in pretrial detention on the day of an election. Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 495; Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 790 (observing the lack of access to a polling place in such cases).

182. See Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUBLIC OPINION QUARTERLY 275, 276 (2004) (“Because virtually all incarcerated felons, and many nonincarcerated felons as well, are barred from voting, the size of the disenfranchised population has grown in tandem with the general expansion of the criminal justice system.”); Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 491 (referring to the “extraordinary growth” of the felon population in the last thirty years).

183. Ewald, *Civil Death*, *supra* note 15, at 1117 (calling disenfranchisement overinclusive, because so many crimes that cost an offender the vote have nothing to do with elections). See Robin L. Nunn, Comment, *Lock Them Up and Throw Away the Vote*, 5 CHI. J. INT’L L. 763, 769 (2005); see also Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 260-61 (2004) (stating that “the total number of election-related crimes is negligible”); 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, 773 (2000) (“Only a small number of all offenders are convicted of offenses connected to election fraud.”).

184. Marc Mauer & Meda Chesney-Lind, *Introduction to INVISIBLE PUNISHMENT*, *supra* note 54, at 1, 4; see also Pinaire, Heumann & Bilotta, *supra* note 15, at 1520.

The racial impact of disenfranchisement laws is more pronounced in individual states. Approximately twenty-five to thirty percent, double the national rate, of all African-American men are permanently disenfranchised in Alabama, Florida, Iowa, Mississippi, New Mexico, Virginia and Wyoming. FELLNER & MAUER, *supra* note 110, at part III. Delaware, Texas, Minnesota, New Jersey, Rhode Island, and Wisconsin range from

while American democracy has been enlarged during and because of our wars against external enemies, it has been compromised by our war on crime. In 1870, the Fifteenth Amendment safeguarded the opportunity to vote of slightly less than one million black men. Today, felon disenfranchisement statutes deny that opportunity to nearly 1.4 million black men.<sup>185</sup>

Close to 700,000 women are unable to vote and like their male counterparts, a disproportionate number are African-American.<sup>186</sup> The aggregate number of disenfranchised Americans, as well as the percentage of the total U.S. population that has lost the right to vote due to a felony conviction, greatly outpaces that of other countries<sup>187</sup>—so much so that the state laws that strip convicted felons of the right to vote have been labeled “the worst in the world.”<sup>188</sup> According to Wacquant:

[The carceral system in the United States] is not only the preeminent institution for signifying and enforcing blackness, much as slavery was during the first three centuries of US history. Just as bondage effected the ‘social death’ of imported African captives and their descendents on American soil, *mass incarceration also induces the civic death* of those it ensnares by extruding them from the social compact.

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Convicts are banned from *political participation* via ‘criminal disenfranchisement’ practiced on a scale and with a vigor unimagined in any other country.<sup>189</sup>

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seventeen to twenty percent African-American male disenfranchisement. *Id.*

185. Karlan, *supra* note 15, at 1371.

186. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT RATES FOR WOMEN (Aug. 2004), <http://www.sentencingproject.org/pdfs/fvr-women.pdf> (demonstrating the rate of disenfranchisement of African-American women is three times the national average for women).

187. *See, e.g.*, Behrens, *supra* note 183, at 239-40 (“While other countries disfranchise some people convicted of crimes, the United States easily surpasses the international norm both in its rates and duration of disfranchisement.”); FELLNER & MAUER, *supra* note 110, at part I (“No other democratic country in the world denies as many people—in absolute or proportional terms—the right to vote because of felony convictions.”).

188. Editorial, *Denying the Vote*, N.Y. TIMES, Sept. 11, 2006, at A18; Editorial, *Voting Rights Under Siege*, N.Y. TIMES, Feb. 10, 2006, at A24; *see also* Editorial, *Voting Rights, Human Rights*, N.Y. TIMES, Oct. 14, 2005, at A24 (“The United States has the worst record in the democratic world when it comes to stripping convicted felons of the right to vote.”); Ewald, *Civil Death*, *supra* note 15, at 1046 (“The United States is the only democracy that indefinitely bars so many offenders from voting, and it may be the only country with such sweeping disenfranchisement policies.”).

189. Wacquant, *supra* note 51, at 119-20 (citation omitted).

By way of comparison, seventeen countries in Europe permit *all prisoners* to vote<sup>190</sup> and twelve countries prohibit only certain prisoners from voting (usually based on the nature of the offense and almost always pursuant to an explicit order of the sentencing court as an additional component of the term of incarceration);<sup>191</sup> just twelve European countries disenfranchise all prisoners.<sup>192</sup> High courts in other democratic countries, such as Canada, Israel, South Africa, as well as the European Court of Human Rights, have rejected various policies disenfranchising prisoners on a number of criminological, logistical, philosophical, and racial grounds,<sup>193</sup> and a number of international legal instruments (some of which are binding on the United States and others of which are advisory) support either the abolition of criminal disenfranchisement laws or significantly less capacious prohibitions than those in the United States.<sup>194</sup> It bears mention

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190. Austria, Albania, Croatia, Czech Republic, Denmark, Finland, Germany, Iceland, Ireland, Lithuania, Macedonia, Montenegro, Netherlands, Serbia, Slovenia, Sweden, Switzerland. ISPAHANI, *supra* note 15, at 6.

191. Countries that allow some prisoners to vote include: Belgium, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Portugal, and Romania. ISPAHANI, *supra* note 15, at 6-8. Disenfranchisement is uncommon, and based on the severity of the crime and/or length of sentence. *Id.*

192. Belarus, Bulgaria, Estonia, Hungary, Kosovo, Latvia, Moldova, Russia, Slovakia, Spain, and the United Kingdom. ISPAHANI, *supra* note 15, at 8.

For a discussion of U.S. felon disenfranchisement policies in comparison to those of other countries, see, e.g., FELLNER & MAUER, *supra* note 110, at part VI (explaining the conditions under which prisoners may vote in countries such as the Czech Republic, Denmark, France, Israel, Kenya, the Netherlands, Norway, Peru, Poland, Romania, Sweden, and Zimbabwe); Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 500-02 & Table 3 (discussing international differences in criminal voting rights and noting the numerous countries with no restrictions or selective restrictions in comparison to the smaller number with a total ban on inmate voting and the few with post-release restrictions).

193. See discussion *infra* note 336-40 and accompanying text in Part II.B; see also ISPAHANI, *supra* note 15, at 8-21, 33-34 (providing an in-depth discussion of decisions rendered by various democratic countries' constitutional courts regarding criminal disenfranchisement laws); Karlan, *supra* note 15, at 1365-67, 1370 n.155 (discussing decisions by the South African Constitutional Court and the Supreme Court of Canada with respect to criminal disenfranchisement); Nunn, *supra* note 183, at 776-81 (surveying international decisions on offenders' right to vote).

194. For a summary and discussion of U.S. criminal disenfranchisement under international human rights law, see ISPAHANI, *supra* note 15, at 24-25, 33-34 (discussing international instruments protecting voting rights, and concluding that "some of the most significant international treaty bodies have criticized blanket disenfranchisement policies—in one case, directly and specifically rejecting U.S. policies"); see also FELLNER & MAUER, *supra* note 110, at part VIII (discussing Article 25 of the International Covenant on Civil and Political Rights); Nunn, *supra* note 183, at 773-76 (discussing the principles for electoral democracy under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms

that recently, in July 2006, the United Nations Human Rights Committee (the “committee”) held hearings to determine how well the United States was complying with the International Covenant on Civil and Political Rights (the “covenant”), which the United States ratified in 1992. In its report based on the hearings, the committee criticized U.S. policies of blanket criminal disenfranchisement on the grounds that such policies were inconsistent with the covenant, disproportionately impacted minorities, and served no rehabilitative purpose. Although the report is not legally binding on the United States, it urged states to restore the franchise to individuals who have served their sentences or who have been released on parole.<sup>195</sup>

As with the other collateral consequences, states vary with respect to who may participate in the franchise,<sup>196</sup> leading some commentators to describe the different state disenfranchisement laws as a “bewildering patchwork”<sup>197</sup> or a “national crazyquilt,”<sup>198</sup> although a “technicolored

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of Racial Discrimination).

195. See Editorial, *Prisoners and Human Rights*, N.Y. TIMES, July 31, 2006, at A16.

196. The right to vote in federal elections is conferred by Article I, Section 2, of the Constitution. U.S. CONST. art. I, § 2, cl.1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”). But the right to vote is neither absolute, nor governed in full by the Constitution: “the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). See also *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[T]he right of suffrage ‘is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.’” (quoting *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 51 (1959))); see generally Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 160 (2001) (noting that the question of who should be allowed to vote “is generally left to the States, except where the Constitution itself forbids the exclusion of voters on specific grounds”);

In the past several years, Congress has considered a number of bills that would prohibit felon disenfranchisement. See, e.g., Count Every Vote Act of 2005, S. 450, 109th Cong. § 701(d) (2005) (allowing denial of the right to vote of individuals serving or on parole or probation for a felony offense); Voting Restoration Act, H.R. 2830, 107th Cong. § 3(a) (2001) (allowing a state to curtail voting rights of an individual during “any period in which the individual remains under the custody or supervision of the State or local jurisdiction”); Civic Participation Act of 2000, S. 2666, 106th Cong. § 4 (2000) (allowing denial of the right to vote of an individual serving a felony sentence or on parole or probation for a felony offense); Civic Participation and Rehabilitation Act of 1999, H.R. 906, 106th Cong. § 3 (1999) (would allow denial of the right to vote only to those serving a felony sentence).

197. Editorial, *Why Felons Deserve the Right to Vote*, N.Y. TIMES, Feb. 7, 2005, at A20 (“Some five million Americans are barred from the polls by a bewildering patchwork of state laws that strip convicted felons of the right to vote, often temporarily, but sometimes for life.”).

198. FELLNER & MAUER, *supra* note 110, at part II; see also Ewald, *Civil Death*, *supra*

splatter-painting” might be a more appropriate analogy.<sup>199</sup> Essentially, state disenfranchisement laws may be classified under five categories: 1) states with no restriction on voting; 2) states that disenfranchise only convicted felons who are currently incarcerated; 3) states that disenfranchise both inmates and felons released from prison under parole supervision; 4) states that disenfranchise inmates, parolees, and individuals sentenced to terms of probation rather than prison; and 5) states that disenfranchise inmates, parolees, probationers, and some or all individuals who have completed their entire sentences.<sup>200</sup> Thus:

1) Only Maine, Vermont and Puerto Rico permit inmates to vote;<sup>201</sup> forty-eight states and the District of Columbia bar individuals from voting while imprisoned for felony offenses.<sup>202</sup>

2) Thirteen states and the District of Columbia deny the right to vote during the incarceration period, but permit those on parole and on probation to vote.<sup>203</sup>

3) Five states prohibit voting during the prison and parole periods, but allow it during terms of probation.<sup>204</sup>

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note 15, at 1054 (“State disenfranchisement policies vary so widely that the Department of Justice has described current law as ‘a national crazy-quilt of disqualifications and restoration procedures.’”). For Ewald, the metaphor of a “crazy-quilt” applies not just *interstate*, but *intrastate*: “the pieces of th[e] metaphorical crazy-quilt are not just states, but the counties, cities, towns and parishes within them—the governments that actually run our localized suffrage system.” EWALD, *CRAZY-QUILT*, *supra* note 15, at 8.

199. See *infra* note 200 and accompanying text.

200. In actuality, with the exception of Maine and Vermont, which permit everyone, including prisoners, to vote, no two states are identical. Aside from the fact that states that disenfranchise certain categories of ex-offenders differ from each other—category five—*all* states with some form of criminal disenfranchisement law differ from each other. Laleh Ispahani and Nick Williams, of the ACLU and Demos respectively, who have researched state purge list compilation, verification, and notification, have found “inconsistent practices both across and within states, even in states with identical disenfranchisement laws.” ISPAHANI & WILLIAMS, *PURGED!*, *supra* note 42, at 1, 3. See also *id.* at 15-33 (state purge summaries).

201. ME. CONST. art. II, § 1; VT. STAT. ANN. tit. 28, § 807(a) (2000); LOVE, *supra* note 101, at 11.

202. THE SENTENCING PROJECT, *FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* (Nov. 2006), <http://www.sentencingproject.org/pdfs/1046.pdf> [hereinafter *FELONY DISENFRANCHISEMENT LAWS*].

203. Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah. *FELONY DISENFRANCHISEMENT LAWS*, *supra* note 202. For recent changes to disenfranchisement laws in some of the above-referenced states, see *infra* Part IV.

204. California, Colorado, Connecticut, New York and South Dakota. *FELONY DISENFRANCHISEMENT LAWS*, *supra* note 202. For recent changes to and litigation re

4) Thirty states exclude those incarcerated, as well as both probationers and parolees, from voting.<sup>205</sup>

5) Of the thirty states that disenfranchise inmates, parolees, and probationers, twelve states also disenfranchise some or all ex-felons: two states disenfranchise all ex-offenders—even those who have completed their sentences,<sup>206</sup> others disenfranchise certain categories of ex-offenders (such as recidivists)<sup>207</sup> or allow ex-offenders to apply for the restoration of rights after a designated waiting period (usually two-to-five years).<sup>208</sup>

Because of the large number of states that disenfranchise offenders serving any type of sentence—incarceration, probation, or parole—or who disenfranchise individuals who have completed their sentences—the overwhelming majority of disenfranchised individuals—close to three-quarters of the five million—are *not* in prison.<sup>209</sup>

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disenfranchisement laws in Connecticut and Colorado respectively, see *infra* Part IV.

205. Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin and Wyoming. FELONY DISENFRANCHISEMENT LAWS, *supra* note 202. For recent changes to disenfranchisement laws in some of the above-referenced states, see *infra* Part IV.

206. Kentucky and Virginia. FELONY DISENFRANCHISEMENT LAWS, *supra* note 202. For recent changes to disenfranchisement laws in the above-referenced states, see *infra* Part IV.

207. For example, individuals convicted of a second felony in Arizona are subject to indefinite disenfranchisement. Ewald, *Civil Death*, *supra* note 15, at 1054 n.23.

208. Delaware and Wyoming, for example. FELONY DISENFRANCHISEMENT LAWS, *supra* note 202. For recent changes to disenfranchisement laws in the above-referenced states, see *infra* Part IV.

209. Ewald, *Civil Death*, *supra* note 15, at 1054-55 (stating that almost three-quarters of disenfranchised offenders are not in prison). Two commentators estimate that the percentage of legally disenfranchised felons in the United States during the 2000 election who were not in jail or prison at seventy-three percent. See Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 495 fig. 2 and accompanying text. Many have never been in prison at all. See, e.g., ABRAMSKY, *supra* note 37, at 227.



1. Brief History of Voting Exclusions in the United States<sup>210</sup>

The exclusion of felons from participating in the political process has its roots in Greece and Rome and can be traced through Medieval and Renaissance Europe to the English colonists, who brought the concept to North America.<sup>211</sup> Early in the history of the United States, many categories of individuals, aside from convicted felons, were disenfranchised: African-Americans, Native Americans, women, those without property, and the mentally ill.<sup>212</sup> But over time, many of these restrictions fell away.<sup>213</sup> For example, the Fifteenth Amendment, noted above, granted the right to vote regardless of race,<sup>214</sup> the Nineteenth Amendment provided for the right to vote regardless of sex,<sup>215</sup> the Twenty-Fourth Amendment banned poll taxes,<sup>216</sup> and the Twenty-Sixth Amendment lowered the voting age from twenty-one to eighteen.<sup>217</sup>

While these amendments broadened the scope of the electorate, “[t]he practice of denying convicted felons the right to vote remained largely unquestioned until the latter half of the twentieth century.”<sup>218</sup> Part of the

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210. For a discussion of the philosophical and ideological foundations of criminal disenfranchisement law, see, e.g., Ewald, *Civil Death*, *supra* note 15, at 1072-95 (presenting the liberal and republican cases for criminal disenfranchisement); Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1169-73 (1994) (discussing the social policy/theory arguments condemning the practice of felon disenfranchisement); Pinaire, Heumann & Bilotta, *supra* note 15, at 1525-27, 1530-31 (discussing two basic justifications for the disenfranchisement of felons, violation of the social contract, and the civic republican model, which considers crime a demonstration of an inability to behave as a fit member of the community).

211. See, e.g., Nunn, *supra* note 183, at 765; Ewald, *Civil Death*, *supra* note 15, at 1059-1066 (tracing the history of felon disenfranchisement from ancient Greece and Rome to the Renaissance to colonial America and through the Civil War).

212. Nunn, *supra* note 183, at 765.

213. Clegg, *supra* note 196, at 160 (noting that “the trend generally in this country has been toward excluding fewer and fewer people from the franchise”); Ewald, *Civil Death*, *supra* note 15, at 1045 (“In the United States, only one major restriction of the voting rights of adult citizens survives—the disenfranchisement of criminal offenders.”); cf. Karlan, *supra* note 15, at 1346 (“The history of [the] right to vote in America is one of expansion and contraction, of punctuated equilibria, rather than gradual evolution. . . . [V]irtually every major expansion in the right to vote [has been] connected intimately to war.”).

214. U.S. CONST. amend XV, § 1.

215. U.S. CONST. amend XIX.

216. U.S. CONST. amend XXIV, § 1.

217. U.S. CONST. amend XXVI, § 1.

218. Developments in the Law, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1939 n.2 (2002) [hereinafter *One Person, No Vote*].

reason for this denial can be attributed to the fact that during the pubescent years of this country, “[l]osing the right to vote . . . was limited to few crimes and imposed only by judicial mandate,”<sup>219</sup> and that the punishment for felonies—a category of crimes far more limited than today<sup>220</sup>—was often death. Thus, “worrying about convicted felons’ voting rights was almost nonsensical.”<sup>221</sup> Later, with the addition of the Fourteenth and Fifteenth Amendments, many states began passing laws barring larger groups of convicted offenders from voting, primarily as a means of blocking African-Americans’ access to the polls.<sup>222</sup> As the political scientist Alec C. Ewald explains, this post-Reconstruction era following the Civil War marked the “causal nexus” between racism and criminal disenfranchisement.<sup>223</sup> Marc Mauer, Assistant Director of The Sentencing Project, notes that during this period,

[t]he newly enfranchised black population in the South was quickly met with resistance from the white establishment. In many states this took the form of the poll tax and literacy requirements being adopted, along with a number of states tailoring their existing disenfranchisement policies with the specific intent of excluding black voters.<sup>224</sup>

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219. Behrens, *supra* note 183, at 236. For examples of the types of acts resulting in disenfranchisement, see *id.* According to one commentator:

Originally, the removal of criminals from the suffrage had a visible, public dimension; its purposes were articulated in the law; and it was a discrete element in punishment which required the deliberation of courts to implement. . . . Modern disenfranchisement laws—automatic, invisible in the criminal justice process, considered ‘collateral’ rather than explicitly punitive, and applied to broad categories of crimes with little or no common character—do not share any of these characteristics.

Ewald, *Civil Death*, *supra* note 15, at 1062.

220. See generally Behrens, *supra* note 183, at 238.

221. *One Person, No Vote*, *supra* note 218, at 1939. For a discussion of how criminal disenfranchisement laws, in addition to literacy and property tests, poll taxes, understanding clauses and grandfather clauses, contributed to reducing black participation in the electoral process, see Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 537-38 (1993) (“Criminal disenfranchisement . . . was the most subtle method of excluding blacks from the franchise.”).

222. Behrens, *supra* note 183, at 246 (“The first wave of changes in felon disenfranchisement laws occurred soon after the Civil War, . . . and much of the discourse of the era evidences the clear and conscious intent to disfranchise minorities in this manner.”). For a chart displaying changes in state disenfranchisement law from the 1840s-2002, see Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 493 fig. 1.

223. Ewald, *Civil Death*, *supra* note 15, at 1089.

224. Mauer, *Mass Imprisonment and the Disappearing Voters*, *supra* note 179, at 51. See also Ewald, *Civil Death*, *supra* note 15, at 1090 (“Southern whites used a variety of

And journalist Sasha Abramsky, Senior Fellow at the public policy organization, Demos, writes in his recent book, *Conned: How Millions Went to Prison, Lost the Vote, and Helped Send George W. Bush to the White House*:

While America's felony disenfranchisement laws didn't originate in the post-Civil War South, it was in the South that the felony codes were first dramatically expanded with the specific *intent* of casting a wide net within which to snare freed blacks. It was in Dixie, in other words, that felony codes were first politicized—used as a pragmatic tool to achieve ends not related to the arena of criminal justice—so as to remove a group of people from the electoral process.<sup>225</sup>

Thus, for example, in Mississippi, an 1869 constitutional provision disenfranchised those guilty of “any crime;” the 1890 constitutional convention narrowed the definition of “any crime” to exclude those convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy—crimes for which African Americans were more likely to be convicted than whites—but omitted robbery and murder—crimes for which whites were as likely or more likely to be convicted than African Americans.<sup>226</sup> Similarly, in 1895, South Carolina disenfranchised offenders convicted of housebreaking, receiving stolen goods, fornication, sodomy, miscegenation, and larceny, but permitted embezzlers and murderers to vote.<sup>227</sup> Several states “made it an infamous crime [one which barred an individual from the political process] to steal a pig or break into an outhouse, but neglected to declare murder—or, for that matter, voter fraud—infamous.”<sup>228</sup> Bigamy and vagrancy, as well as scores of other petty crimes, were especially popular disenfranchisable offenses in post-Civil War South because of the displacement of African Americans wrought by slavery and Reconstruction.<sup>229</sup>

Although the racist motives behind the South's disenfranchising laws are

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schemes to take voting rights away from blacks after the end of military Reconstruction—grandfather clauses, literacy tests, poll taxes, white primaries—restrictions which effectively gutted the Fifteenth Amendment.” (internal quotation marks omitted).

225. ABRAMSKY, *supra* note 37, at 146.

226. Ewald, *Civil Death*, *supra* note 15, at 1091-92. For a review of Mississippi's constitutional and statutory disenfranchisement provisions, see *McLaughlin v. City of Canton*, 947 F. Supp. 954, 969-71 (S.D. Miss. 1995).

227. Ewald, *Civil Death*, *supra* note 15, at 1092. Between 1895 and 1902, South Carolina, Louisiana, Alabama and Virginia all “disenfranchised criminals selectively with the intent of disqualifying a disproportionate number of blacks.” Shapiro, *supra* note 221, at 541-42.

228. ABRAMSKY, *supra* note 37, at 146.

229. Ewald, *Civil Death*, *supra* note 15, at 1092.

today well-acknowledged<sup>230</sup> and may seem quite obvious, one commentator, writing in the early 1990s, describes criminal disenfranchisement as still

the most subtle method of excluding blacks from the franchise. Narrower in scope than literacy tests or poll taxes and easier to justify than understanding or grandfather clauses, criminal disenfranchisement laws provided the Southern states with “insurance if courts struck down more blatantly unconstitutional clauses.” The insurance has paid off: A century after the disenfranchising conventions, criminal disenfranchisement is the only substantial voting restriction of the era that remains in effect.<sup>231</sup>

In other words, because of the comparative subtlety of criminal disenfranchisement laws and because of they possess some non-discriminatory ancestry (e.g., ancient Greece and Rome, Renaissance Europe),<sup>232</sup> only gradually (and belatedly) did felon disenfranchisement laws reach the judicial radar screen.<sup>233</sup>

## 2. Challenges to Felon Disenfranchisement Laws

Felon disenfranchisement laws have been challenged on a number of grounds, most commonly as a violation of the Equal Protection Clause of the Fourteenth Amendment and more recently as a violation of the Voting Rights Act,<sup>234</sup> although litigants have also relied on the Eighth Amendment<sup>235</sup> and state constitutional provisions in making their

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230. See Shapiro, *supra* note 221, at 542.

231. *Id.* at 538 (footnote omitted).

232. See generally sources cited *supra* note 211 and accompanying text.

233. See Ewald, *Civil Death*, *supra* note 15, at 1065 & n.75 (noting a “long silence” between the post-Reconstruction criminal disenfranchisement provisions and challenges to such provisions under the Fourteenth Amendment in the 1960s).

234. For a review of challenges to voting restrictions under the Equal Protection Clause of the Fourteenth Amendment, see, e.g., Saxonhouse, *supra* note 15, at 1623-32. For a review of challenges under the Voting Rights Act, see *One Person, No Vote*, *supra* note 218, at 1952-57; Shapiro, *supra* note 221, at 549-66.

235. See, e.g., *Green v. Bd. of Elections of the City of New York*, 380 F.2d 445, 450 (2d Cir. 1967) (rejecting a claim based on the Eighth and Fourteenth Amendments); *Kronlund v. Honstein*, 327 F. Supp. 71, 74 (N.D. Ga. 1971) (rejecting a claim based on the Eighth, Fourteenth, and First Amendments). For claims under the Eighth Amendment, see also Karlan, *supra* note 15, at 1368-71 (arguing the Supreme Court’s Eighth Amendment jurisprudence supports the view that disenfranchisement, particularly lifetime disqualification after completion of an individual’s sentence, is not a “constitutionally appropriate” punishment for an offense). Mark E. Thompson, *Don’t Do the Crime if You Ever Intend to Vote Again*, *supra* note 65 (arguing that criminal disenfranchisement is a violation of the Eighth Amendment).

claims.<sup>236</sup> Only a handful of these cases have returned favorable results for the disenfranchised challengers.<sup>237</sup>

In *Richardson v. Ramirez*, the first Supreme Court case to address criminal offenders' right to vote, three California ex-felons who had completed their respective prison sentences and paroles, challenged a California state law under which election officials had refused to let them register to vote.<sup>238</sup> The California Supreme Court concluded that the Equal Protection Clause of the Fourteenth Amendment prohibited excluding from the franchise convicted felons who had completed their sentences and paroles; the Supreme Court reversed.<sup>239</sup> Writing for the majority, then-Associate Supreme Court Justice Rehnquist stated that Section 1's prohibition against state denial of equal protection of the laws<sup>240</sup> had to be read in conjunction with the "less familiar" Section 2 of the Fourteenth Amendment,<sup>241</sup> which permits states to disenfranchise those convicted of "rebellion, or other crime" without sacrificing congressional representation.<sup>242</sup> The Court then reasoned that "the exclusion of felons

236. See, e.g., *Otsuka v. Hite*, 414 P.2d 412, 414, 421 (1966) (holding that the California constitutional provision denying the right to vote to any person convicted of an "infamous" crime did not apply to Otsuka, who was convicted for refusing to serve in the armed forces during World War II, because only crimes of "moral corruption and dishonesty" warranted permanent disenfranchisement).

237. See Behrens, *supra* note 183, at 251 & n.104 (noting the few successful challenges to felon disenfranchisement laws).

238. 418 U.S. 24 (1974).

239. *Id.* at 33-34, 55-56.

240. Section 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1.

241. 418 U.S. at 42.

242. Section 2 reads:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such

from the vote has an affirmative sanction in Section 2.”<sup>243</sup>

In *Hunter v. Underwood*, the Supreme Court considered a provision of the Alabama Constitution of 1901 providing for the disenfranchisement of persons convicted of “any crime . . . involving moral turpitude.”<sup>244</sup> Justice Rehnquist, again writing for the majority, noted that various minor non-felony offenses, such as presenting a worthless check – the misdemeanors for which Underwood and his co-plaintiff were convicted, fell within the purview of the disenfranchising provision, whereas a number of more serious non-felony crimes were not considered crimes of moral turpitude, such as second-degree manslaughter, assault on a police officer, and mailing pornography.<sup>245</sup> Concluding that “its original enactment was motivated by a desire to discriminate against blacks on account of race and [that] the section continues to this day to have that effect,” the Court held that the provision violated the Fourteenth Amendment.<sup>246</sup>

Although technically a victory for opponents of felon disenfranchisement laws, *Hunter* affirmed the conclusion in *Richardson* that Section 2 grants “implicit authorization” to states to disenfranchise offenders,<sup>247</sup> limiting its holding to the somewhat insipid declaration that Section 2 “was not designed to permit the purposeful racial discrimination . . . which otherwise violates § 1 of the Fourteenth Amendment.”<sup>248</sup> As a result, *Richardson* “is generally recognized as having closed the door on the equal protection argument in a challenge to state statutory voting disqualifications for conviction of crime.”<sup>249</sup> Similarly, many commentators regard the decision as having “placed a significant hurdle in front of subsequent legal challenges” to criminal disenfranchisement under the Fourteenth Amendment,<sup>250</sup> and as having

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male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend XIV, § 2. The Twenty-Sixth Amendment changed the voting age from twenty-one to eighteen. U.S. CONST. amend XXVI, § 1.

243. 418 U.S. at 54.

244. 471 U.S. 222-23 (1985) (quoting ALA. CONST., art. VIII, § 182, *repealed by* ALA. CONST. amend. 579).

245. *Id.* at 226-27.

246. *Id.* at 233.

247. *Id.*

248. *Id.*

249. *Allen v. Ellisor*, 664 F.2d 391, 395 (4th Cir. 1981).

250. Ewald, *Civil Death*, *supra* note 15, at 1066. *See also* Mark E. Thompson, *Don't Do the Crime if You Ever Intend to Vote Again*, *supra* note 65, at 184 (“[*Richardson v. Ramirez*] virtually foreclosed a challenge of disenfranchisement under the most logical and able avenue of attack—equal protection.”).

effectively rendered Section 2 a “dead letter.”<sup>251</sup>

Two other equal protection cases merit mention at this juncture. In *Hobson v. Pow*,<sup>252</sup> the United States District Court for the Northern District of Alabama considered the claims of a class of men who had been disenfranchised under the Alabama Constitution for “assault and battery on the wife.”<sup>253</sup> The State Constitution did not contain a similar provision for women who are convicted of assault and battery against their husbands.<sup>254</sup> After emphasizing that the case did *not* involve the issue of “whether a State may constitutionally exclude some or all convicted felons from the franchise,”<sup>255</sup> the District Court held unconstitutional the “assault and battery on the wife” clause of the Alabama Constitution because it treated one sex differently from the other.<sup>256</sup>

In *McLaughlin v. City of Canton*,<sup>257</sup> the United States District Court for the Southern District of Mississippi applied the strict scrutiny standard of *Dunn v. Blumstein*,<sup>258</sup> rather than the rational basis standard of *Richardson*, to conclude that Mississippi had not provided a “substantial and compelling reason” for its disenfranchisement of the plaintiff for a misdemeanor false pretenses conviction under Section 241 of the Mississippi Constitution.<sup>259</sup> Section 241 denies the right of suffrage to anyone who has been “convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy.”<sup>260</sup> Although the District Court found that the plaintiff’s equal protection rights were violated, it stopped short of holding that Section 241—the section under which plaintiff had originally been disenfranchised—was enacted with the discriminatory purpose of disenfranchising Mississippi’s African American population.<sup>261</sup>

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251. Ewald, *Civil Death*, *supra* note 15, at 1070. For additional criticism of *Richardson v. Ramirez*, see, e.g., Behrens, *supra* note 183, at 255-58; Shapiro, *supra* note 221, at 545-47.

252. 434 F. Supp. 362 (N.D. Ala. 1977).

253. *Id.* at 364 (quoting ALA. CONST., art. VIII, § 182, *repealed by* ALA. CONST. amend. 579).

254. *Id.* at 366.

255. *Id.* at 366-67 (quoting *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974)).

256. *Id.* at 367. See also Ewald, *Civil Death*, *supra* note 15, at 1093 n.198 (contending that the district court struck down Alabama’s constitutional provision disenfranchising those convicted of wife-beating “not because of the racist intent of the provision,” but due to gender).

257. 947 F. Supp. 954 (S.D. Miss. 1995).

258. *Id.* at 976 (citing *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972)).

259. *Id.* at 976.

260. MISS. CONST. art. XII, § 241.

261. 947 F. Supp. at 978.

Although both *Hobson* and *McLaughlin*, like *Hunter*, resulted in victory for the disenfranchised offender-plaintiffs, their place in criminal disenfranchisement jurisprudence is moderated by the reaffirmation of *Richardson*, in the case of *Hunter*, and the reluctance to address the racial animus of the Alabama and Mississippi state constitutions in *Hobson* and *McLaughlin* respectively. Perhaps because of these limited gains via the equal protection route, disenfranchised litigants have turned to challenges under the Voting Rights Act (the “Act”).<sup>262</sup>

Passed by Congress in 1965 with the intention of “buttress[ing] the Fifteenth Amendment”<sup>263</sup> and “rid[ding] the country of racial discrimination in voting,”<sup>264</sup> the Voting Rights Act prohibits any voting law or scheme that results in minority groups having less of an opportunity to participate in the electoral process than other groups.<sup>265</sup> Over the years, it has been amended numerous times<sup>266</sup>—often in response to court decisions denying or diluting the minority vote.<sup>267</sup> For example, in *City of Mobile v. Bolden*, the Supreme Court held that a plaintiff must provide proof of discriminatory intent to show a violation of the Voting Rights Act.<sup>268</sup> Congress responded by amending the Act in 1982 with a “results test” that lifted the plaintiffs’ responsibility of demonstrating discriminatory intent.<sup>269</sup> In its current form, Section 2 provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or

262. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

263. Shapiro, *supra* note 221, at 549; *see also* Newman, *supra* note 49, at 532 (“Congress enacted the [Voting Rights Act] . . . to address in practice what the Fifteenth Amendment already addressed in theory.”).

264. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

265. 42 U.S.C. § 1973; *see generally* Manza, Brooks & Uggan, *supra* note 182, at 275 (“Since passage of the Voting Rights Act of 1965, debates about suffrage in the United States have largely shifted from questions about formal individual rights to participation to questions of fairness in the policy implementation of those rights.”).

266. *See infra* notes 267-69. In 1970, Congress reauthorized the Act for five more years and for an additional seven years in 1975. Rick Lyman, *Extension of Voting Act is Likely Despite Criticism*, N.Y. TIMES, March 29, 2006, at A14. Section 203 was added in 1975, requiring language assistance to encourage voting by citizens with limited English abilities. In 1982, portions of the Act were reauthorized for another twenty-five years. *Id.* The House and Senate approved renewal of the Act in July 2006. *See* Carl Hulse, *By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES, July 21, 2006, at A16.

267. For a discussion of vote denial and vote dilution claims under the Voting Rights Act, *see* Shapiro, *supra* note 221, at 553-60.

268. 446 U.S. 55, 62-64 (1980).

269. *See Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986).



abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .<sup>270</sup>

In *Wesley v. Collins*, the first federal case challenging criminal disenfranchisement under the Voting Rights Act, plaintiffs alleged that Tennessee's disenfranchisement statute violated Section 2.<sup>271</sup> Presenting statistical evidence of the disproportionate representation of African Americans in the Tennessee criminal justice system, the plaintiffs argued that the disenfranchisement statute would "progressively dilute the black vote thereby impeding the equal opportunity of blacks to participate in the political process and to elect candidates of their choice."<sup>272</sup> The United States District Court for the Middle District of Tennessee was not persuaded. Reasoning that "[t]he underlying premise of the result test's 'totality of the circumstances' analysis is that a *causal connection* must be established between the indicia of historically-rooted discrimination and the Tennessee statute disenfranchising felons,"<sup>273</sup> the District Court found that "the nexus between discriminatory exclusion of blacks from the political process and disenfranchisement of felons simply cannot be drawn."<sup>274</sup> Holding that the Act did not require invalidation of Tennessee's disenfranchisement statute, the District Court dismissed the plaintiffs' complaint:

the operation of the challenged provision of the Tennessee Voting

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270. 42 U.S.C. § 1973 (2000). As one commentator explains:

Recognizing that the intent standard used in American constitutional claims was virtually impossible to satisfy for plaintiffs in voting rights cases, the United States Congress formally enacted a results test where plaintiffs do not need to demonstrate that the challenged election law was designed for a discriminatory purpose. Under the results test, an election law violates the Voting Rights Act if under the 'totality of the circumstances,' the law results in a protected minority group having less opportunity to participate in the political process.

Nunn, *supra* note 183, at 772.

271. 605 F. Supp. 802, 803-04 (M.D. Tenn. 1985).

272. *Id.* at 804.

273. *Id.* at 812.

274. *Id.*

Rights Act does not deny any citizen, *ab initio*, the equal opportunity to participate in the political process and to elect candidates of their choice. Rather, it is the commission of preascertained, proscribed acts that warrant the state to extinguish certain individuals' rights to exercise their opportunity to participate.

Felons are not disenfranchised based on any immutable characteristic, such as race, but on their conscious decision to commit an act for which they assume the risks of detection and punishment.<sup>275</sup>

On appeal, the Sixth Circuit adopted much of the District Court's reasoning and affirmed.<sup>276</sup>

Since *Wesley*, courts and commentators have debated whether Congress intended the Voting Rights Act to apply to criminal disenfranchisement laws,<sup>277</sup> and, if so, whether Congress possesses the authority to do so.<sup>278</sup> In *Baker v. Pataki*, the Second Circuit divided evenly (5-5) over whether the "results" test of Section 2 of the Voting Rights Act could be applied to New York's felon disenfranchisement statute.<sup>279</sup> Because the Second Circuit split evenly on its disposition, the opinions in *Baker* had no precedential effect on *Muntaqim v. Coombe*,<sup>280</sup> where the Second Circuit

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275. *Id.* at 813.

276. *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

277. Compare *Newman*, *supra* note 49, at 562-63 (arguing that Congress did not intend for Section 2 of the Voting Rights Act to apply to state felon disenfranchisement laws), and *One Person, No Vote*, *supra* note 218, at 1954-57 (noting that the Supreme Court has narrowed Congressional enforcement power and encouraging litigants to "instead focus on legislative amendments to combat the disproportionate effects of felon disenfranchisement"), with *Shapiro*, *supra* note 221, at 553 (acknowledging that "[t]he sponsors of the 1982 amendment to the Voting Rights Act may not have foreseen challenges to criminal disenfranchisement based on the results test in section 2 of the Act," but asserting that "the results test was meant to apply to all conceivable voting regulations including, of course, absolute disqualification from the electorate").

278. *Newman*, *supra* note 49, at 539 (discussing whether the Voting Rights Act is a "congruent and proportional" remedy to the constitutional problem of state criminal disenfranchisement laws).

279. Judge Mahoney, relying on the legislative history of the Voting Rights Act, wrote for five judges that felon disenfranchisement laws are not covered by the Act, and that subjecting such disenfranchisement laws to analysis under the Act would alter the balance between the States and the Federal Government. 85 F.3d 919, 921-22 (2d Cir. 1996). Judge Feinberg and four other judges reached the opposite conclusion, contending that the Fourteenth and Fifteenth Amendments were designed to disrupt the constitutional balance, that any legislation passed pursuant to those amendments would subsequently also disrupt the balance, and that the Voting Rights Act applies to "any citizen," including felons. *Id.* at 938, 940.

280. *Muntaqim v. Coombe (Muntaqim II)*, 366 F.3d 102, 107-08 (2d Cir. 2004). Because the judges were evenly divided on *Baker*, the result was to uphold the decision of

was again asked to address whether the Voting Rights Act is applicable to the New York State statute that disenfranchises currently incarcerated felons and parolees.<sup>281</sup> In *Muntaqim I*, an unpublished opinion, the United States District Court for the Northern District of New York concluded that the Voting Rights Act was inapplicable to New York's felon disenfranchisement statute and subsequently dismissed the *pro se* complaint of the plaintiff, a convicted felon serving a life sentence of imprisonment.<sup>282</sup> Agreeing with the District Court, the Second Circuit, in *Muntaqim II*, concluded that because the Act was silent on the topic of state felon disenfranchisement statutes, it could not be used to question the validity of New York's disenfranchisement statute.<sup>283</sup> The Supreme Court denied plaintiff's petition for writ of certiorari,<sup>284</sup> but the Second Circuit agreed to hear the case *en banc*.<sup>285</sup>

In May 2006, the Second Circuit consolidated *Muntaqim* with *Hayden v. Pataki*, which had raised substantially similar claims.<sup>286</sup> The Second Circuit then de-consolidated the *Muntaqim* and *Hayden* cases for the purposes of dismissing *Muntaqim* for lack of standing<sup>287</sup> and concluded that New York State's disenfranchisement of currently imprisoned felons and parolees did not constitute unlawful vote denial in violation of Section 2.<sup>288</sup> The Second Circuit did, however, remand *Hayden* to the District Court to determine whether New York's apportionment process "which counts incarcerated prisoners as residents of the communities in which they are incarcerated . . . has the alleged effect of increasing upstate New York regions' populations at the expense of New York City's,"<sup>289</sup> resulting in the dilution of the voting power of minority groups in urban districts—an issue that this Article will address in *infra* Part II.B.3.b.

Other jurisdictions have reached conflicting results, with no apparent resolution in sight.<sup>290</sup> In *Farrakhan v. Washington (Farrakhan III)*,<sup>291</sup> the

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the district court, which had dismissed the plaintiffs' claims under Fed.R.Civ.P. 12(b)(6). See *Baker*, 85 F.3d at 920.

281. *Muntaqim II*, at 103-04.

282. *Id.* at 104.

283. *Id.*

284. *Muntaqim v. Coombe (Muntaqim III)*, 543 U.S. 978 (2004).

285. *Muntaqim v. Coombe (Muntaqim IV)*, 396 F.3d 95 (2d Cir. 2004). The Second Circuit heard the case in June 2005. *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (*en banc*).

286. *Hayden v. Pataki*, 449 F.3d 305, 309 (2d Cir. 2006).

287. *Id.* at 309-10.

288. *Id.* at 329.

289. *Id.* at 328-29, 371.

290. See Linda Greenhouse, *Burden of Proof Now on Parents in School Cases*, N.Y. TIMES, Nov. 15, 2005, at A1 (discussing the Supreme Court's most recent rejection of a

Ninth Circuit reasoned that although Congress did not specifically delineate racial bias in the criminal justice system as a relevant factor in identifying a violation under Section 2,<sup>292</sup> Congress did not intend to exclude such bias from the “totality of the circumstances” analysis.<sup>293</sup> Concluding that the “causal connection” standard does not require the plaintiffs to show that racial bias “by itself” caused the discriminatory result—something that would effectively read the intent requirement back into the Voting Rights Act and something that Congress wished to eliminate in 1982—the Ninth Circuit remanded the case to determine whether, under the totality of the circumstances, Washington state’s felon disenfranchisement scheme constitutes improper race-based vote denial in violation of Section 2 of the Voting Rights Act.<sup>294</sup> Both defendants’ petition for panel rehearing and petition for rehearing *en banc* were denied by the Ninth Circuit (*Farrakhan IV*),<sup>295</sup> as was the petition for writ of certiorari to the United States Supreme Court.<sup>296</sup> On July 7, 2006, the United States District Court for the Eastern District of Washington granted summary judgment in favor of the State of Washington.<sup>297</sup> Finding that although “there is discrimination in Washington’s criminal justice system on account of race,”<sup>298</sup> and that this discrimination “interacts with its felon disenfranchisement law in a meaningful way,”<sup>299</sup> “clearly hinder[ing] the ability of racial minorities to

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petition to hear a felon disenfranchisement claim under the Voting Rights Act); Newman, *supra* note 49, at 529 (noting that none of the current cases challenging state felon disenfranchisement statutes under the Voting Rights Act have gone to trial).

291. *Farrakhan v. Washington (Farrakhan III)*, 338 F.3d 1009 (9th Cir. 2003). For an overview of the *Farrakhan* litigation, see ABRAMSKY, *supra* note 37, at 35-36.

292. *Farrakhan III*, 338 F.3d at 1015 (listing the “typical factors” in the Senate Report that may be relevant in analyzing a Section 2 violation).

293. *Id.* at 1020. In *Farrakhan I*, the United States District Court for the Eastern District of Washington concluded that the Voting Rights Act could apply to felon disenfranchisement laws and rejected the defendants’ motion to dismiss. *Farrakhan v. Locke (Farrakhan I)*, 987 F. Supp. 1304 (E.D. Wash. 1997). But in *Farrakhan II*, the same District Court granted the defendants’ motion for summary judgment, finding that although the state of Washington disenfranchises a disproportionate number of minorities, the cause is “external” to the voting qualifications and that plaintiff failed to show a causal connection between the challenged voting scheme and the discriminatory result. *Farrakhan v. Locke (Farrakhan II)*, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212, \*3 (E.D. Wash. Dec. 1, 2000).

294. *Farrakhan III*, 338 F.3d at 1020.

295. *Farrakhan v. Washington (Farrakhan IV)*, 359 F.3d 1116 (9th Cir. 2004).

296. *Locke v. Farrakhan*, 543 U.S. 984 (2004).

297. *Farrakhan v. Gregoire (Farrakhan V)*, No. CV-96-076-RHW, 2006 U.S. Dist. LEXIS 45987, at \*2 (E.D. Wash. July 7, 2006).

298. *Id.* at \*18.

299. *Id.* at \*20.

participate effectively in the political process, as disenfranchisement is automatic,”<sup>300</sup> the District Court nevertheless determined that there was no “history of official discrimination” in the state<sup>301</sup> and that the Plaintiffs had failed to show, under the totality of the circumstances, a violation of Section 2.<sup>302</sup> The District Court concluded that Washington’s felon disenfranchisement law did not result in racial discrimination in the state’s electoral process, observing that factors such as the lack of history of racial bias in Washington’s electoral process, as well as in the state’s decision to adopt felon disenfranchisement provisions, balance against “the contemporary discriminatory effects that result from the day-to-day functioning of Washington’s criminal justice system.”<sup>303</sup>

Reaching a different result than the Ninth Circuit in *Farrakhan III*, an *en banc* panel of the Eleventh Circuit held in *Johnson v. Governor of Fla. (Johnson IV)* that Florida’s state felon disenfranchisement law could not be challenged under the Voting Rights Act.<sup>304</sup> Similarly, the Fourth Circuit, in an unpublished opinion, affirmed a District Court’s dismissal of a challenge to Virginia’s disenfranchisement based on the Act, concluding that under the Act, a plaintiff must establish that a state intended to, or its scheme had the effect of, abridging or denying the right to vote based on race.<sup>305</sup> Because Virginia’s disenfranchisement of felons pre-dated the inclusion of African-Americans in the franchise, and because the plaintiff had failed to plead a nexus between the exclusion of felons and race, the Fourth Circuit, citing *Wesley*, concluded that the District Court had properly dismissed the plaintiff’s claim.<sup>306</sup>

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300. *Id.* at \*18 (quoting *Farrakhan I*, 338 F.3d at 1020).

301. *Id.* at \*20.

302. *Id.* at \*26, \*28-29.

303. *Id.* at \*29.

304. 405 F.3d 1214, 1234-35 (11th Cir. 2005) (*en banc*), *cert. denied*, *Johnson v. Bush*, 126 S.Ct. 650, 651 (2005). In *Johnson I*, the District Court for the Southern District of Florida found that “it [wa]s not racial discrimination that deprive[d] felons, black or white, of their right to vote but their own decision to commit an act for which they assume[d] the risks of detection and punishment,” and granted the defendant’s motion to dismiss. *Johnson v. Bush (Johnson I)*, 214 F. Supp. 2d 1333, 1341, 1343-44 (S.D. Fla. 2002). The Eleventh Circuit reversed the District Court, noting the decision of the Ninth Circuit in *Farrakhan III* and concluding that the interaction of racial bias in the criminal justice system and voter disqualifications may create the type of obstacles to political participation on account of race that Section 2 prohibits. *Johnson v. Governor of Fla. (Johnson II)*, 353 F.3d 1287, 1305-06 (11th Cir. 2003). The Eleventh Circuit then granted a rehearing. *Johnson v. Governor of Fla. (Johnson III)*, 377 F.3d 1163, 1164 (11th Cir. 2004) (*en banc*).

305. *Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000) (table), 2000 U.S. App. LEXIS 7816, \*1 (per curiam) (unpublished).

306. *Id.*

### 3. Impact of Criminal Disenfranchisement Laws

In *Washington v. State*,<sup>307</sup> one of the earliest cases addressing the question of criminal disenfranchisement, the Supreme Court of Alabama reasoned:

It is quite common . . . to deny the right of suffrage, in the various American States, to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny. The evil infection of the one is not more fatal than that of the other. The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship. It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself, at least in close political contests. The exclusion must for this reason be adjudged a mere disqualification, imposed for protection, and not for punishment—withholding an honorable privilege, and not denying a personal right or attribute of personal liberty.<sup>308</sup>

Although the United States Supreme Court has since made clear that “fencing out” a segment of the population because of the way it votes or may vote is unconstitutional,<sup>309</sup> much of the rationale set forth in *Washington* underlies contemporary justifications for disenfranchisement. Thus, exclusion continues to be defended as a way to protect the “purity of the ballot box,”<sup>310</sup> as a means of safeguarding a state’s interests or shielding a state from anti-democratic subversive voters,<sup>311</sup> as a method of

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307. 75 Ala. 582 (1884).

308. *Id.*

309. *Carrington v. Rash*, 380 U.S. 89, 94 (1965); *see also Cipriano v. City of Houma*, 395 U.S. 701, 705 (1969) (holding that “differences of opinion cannot justify excluding” a group of individuals from the franchise).

310. *See, e.g., Demleitner, Preventing Internal Exile, supra* note 32, at 157 (“Justifications for this exclusion have changed over time, but today many states defend the disenfranchisement of ex-offenders with a ‘purity of the ballot box’ argument.”); Behrens, *supra* note 183, at 261-63 (dissecting the argument’s flaws).

311. *See, e.g., Behrens, supra* note 183, at 263-65 (discussing how felon disenfranchisement laws have been defended as a way to protect a state’s interests); Clegg, *supra* note 196, at 172, 177 (calling voting a “privilege” reserved for “trustworthy, good citizens,” and arguing that “[i]f these laws did not exist there would be a real danger of creating an anti-law enforcement voting bloc in municipal elections, which is hardly in the interests of a neighborhood’s law-abiding citizens”). As Behrens notes, however, an

preventing election fraud<sup>312</sup> (despite evidence that voting fraud is rare<sup>313</sup>), and as a general deterrent—a mode of deterring future crime<sup>314</sup> (despite the fact that criminal disenfranchisement is hardly a known collateral consequence in this country<sup>315</sup>).

In Part I, this Article noted how voting has been considered “a cornerstone of democratic governance and a fundamental element of citizenship in democratic societies.”<sup>316</sup> While there are certainly some offenders who place little value on the right to vote,<sup>317</sup> to many, voting is

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argument based on an “assumption that commission of a crime indicates a desire to subvert the state is flawed,” because “[a] felony conviction is not dispositive of one’s political views.” Behrens, *supra* note 183, at 263. The likelihood that an individual will vote a “pro-crime” ticket is unlikely. *Id.*

312. See, e.g., Behrens, *supra* note 183, at 260-61 (discussing how felon disenfranchisement laws have been defended as a way to prevent election fraud and arguing that “[p]revious commission of a felony does not logically lead to future commission of electoral fraud, nor does previous non-commission of a felony rule out the possibility of future electoral fraud”); cf. Clegg, *supra* note 196, at 163 (reasoning that “the easier it is to register to vote, the greater the possibility of fraud”).

313. See Mark E. Thompson, *Don’t Do the Crime if You Ever Intend to Vote Again*, *supra* note 65, at 190-94 (“Another reason disenfranchisement is not necessary to protect against voter fraud is the sheer number of laws that the states have at their disposal to combat voter misconduct. . . . possession of the right to vote is not required to commit the majority of election offenses.”).

314. See, e.g., Behrens, *supra* note 183, at 265-66 (discussing how felon disenfranchisement laws have been defended as a method of deterring future crime and noting that “[t]he claimed deterrent effect of disenfranchisement hinged primarily on the public nature of the loss of rights,” which no longer exists today); cf. Clegg, *supra* note 196, at 177 (“[C]onsider that not allowing criminals to vote is one form of punishment and a method of stigmatization that tells criminals that committing a serious crime puts them outside the circle of responsible citizens.”).

315. See sources cited *supra* notes 166-68 in Part II.A and accompanying text. See also Demleitner, *Preventing Internal Exile*, *supra* note 32, at 161, 160 (“[T]he relatively low visibility of collateral consequences makes them unlikely deterrents to crime.”). In contrast, most European countries that do bar some prisoners from voting “make clear that the disqualification is, in fact, designed and delivered as a form of punishment,” one “publicly imposed” by a judge, “based on the nature of the offense and the offender.” ISPAHANI, *supra* note 15, at 5.

316. See Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 777.

317. See, e.g., ABRAMSKY, *supra* note 37, at 134 (“Voting rights is the least of those rights they are concerned about for reinstatement.” (quoting Republican Lance Horbach, chair of the Justice Systems Committee in the Iowa House)); see also *id.* at 115-16 (“The younger people don’t vote—many of them because they’re on parole or probation or have been told doing time disenfranchises them and they don’t make the effort to find out otherwise.” (quoting Henry Rodriguez, a Latino organizer in Texas, who had served time in prison for the murder of a white supremacist back in the 1970s before ultimately being pardoned.)).

“the coin of the realm.”<sup>318</sup> As David Sadler, one-time drug felon and current voting rights activist in Alabama, explains:

Before I realized I was disenfranchised . . . I didn't vote because I didn't think it mattered. Once I knew it was taken away from me, it became my mission to vote. It's a right the poorest person in the country has and the richest person in the country has. Once they take it away from you, that's when you want it most.<sup>319</sup>

Similarly, Jimmy Ellis, a former drug offender in Tennessee who served one year in prison and three years on parole and who now works for Change Outreach Ministry helping young adults reenter the community from prison, describes:

If I could vote, it would probably make me feel more better to myself [sic], or better to society. If I was to picture a moment of voting—I'd probably panic, or ask someone to come in and tell me what to do. I've never had the opportunity to vote, because I was convicted [as a teenager]. I'd probably stand there freezing. I'd stand in awe in the booth all day long.<sup>320</sup>

For individuals such as David Sadler and Jimmy Ellis, disenfranchisement has been particularly hurtful, but the hope of re-enfranchisement has become, if not a *raison d'être*, then, at least, a motivating force to abide by the law. But other individuals may not share their optimism. Disenfranchisement may have branded them with a “permanent stigma,”<sup>321</sup> condemned them to “internal exile,”<sup>322</sup> relegated them “to the lowest form of citizenship,”<sup>323</sup> banished them to “second-class”<sup>324</sup> or “sub-citizen” status<sup>325</sup>—effectively placing them in a form of “political quarantine.”<sup>326</sup>

318. ABRAMSKY, *supra* note 37, at 10 (quoting Jazz Hayden, a New York ex-offender)).

319. *Id.* at 217.

320. *Id.* at 163; see also Sasha Abramsky, *Speakout: Most ex-felons deserve right to vote*, ROCKY MOUNTAIN NEWS, Aug. 4, 2006, at <http://www.demos.org/pubs/Speakout%20Rocky%20Mountain%20Times%208.4.06.pdf> [hereinafter Abramsky, *Speakout*] (reporting one disenfranchised individual's description of how being able to vote would engender him with a sense of “awe”).

321. Karlan, *supra* note 15, at 1369.

322. Ewald, *Civil Death*, *supra* note 15, at 1114.

323. *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995) (“[T]he disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family.”).

324. Behrens, *supra* note 183, at 241.

325. Mark E. Thompson, *Don't Do the Crime if You Ever Intend to Vote Again*, *supra* note 65, at 177.

326. Ewald, *Civil Death*, *supra* note 15, at 1084.



For some of these individuals, who undoubtedly also feel the sting of the other collateral consequences discussed above, disenfranchisement has made them feel like “marginalized people,”<sup>327</sup> “nonexistent things,”<sup>328</sup> “partial citizens,”<sup>329</sup> “politically insignificant beings,”<sup>330</sup> “political outcasts,”<sup>331</sup> and “throwaway persons,”<sup>332</sup> to name some of the degrading monikers. Rather than serving as a specific deterrent to future crime, the denial of the right to vote can have such a stigmatizing effect<sup>333</sup> as to encumber the reentry process to the point where the individual recidivates. As Justice Thurgood Marshall quoted in his dissent in *Richardson v. Ramirez*,

[ex-offenders] are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.<sup>334</sup>

Justice Marshall’s position in *Richardson* regarding the potential rehabilitative effects of enfranchisement has been echoed by high courts in peer democracies (as noted above), European correctional officials, and numerous commentators. For example, in *Sauvé v. Canada*, a Canadian prisoner challenged the legality of Canada’s disenfranchisement of prisoners serving sentences of two or more years.<sup>335</sup> In finding for the

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327. ABRAMSKY, *supra* note 37, at 203.

328. Mark E. Thompson, *Don’t Do the Crime if You Ever Intend to Vote Again*, *supra* note 65, at 176-77.

329. KING & MAUER, THE VANISHING BLACK ELECTORATE, *supra* note 15, at 17.

330. Mark E. Thompson, *Don’t Do the Crime if You Ever Intend to Vote Again*, *supra* note 65, at 176. For a general discussion of the effect of disenfranchisement on the individual, see *id.* at 176-78.

331. Editorial, *America’s Political Outcasts*, ST. PETERSBURG TIMES, Nov. 16, 1998, at 10A.

332. Interview with Anthony R. Sanchez, MSW, Georgia Justice Project, in Atlanta, GA (June 15, 2006).

333. KING & MAUER, THE VANISHING BLACK ELECTORATE, *supra* note 15, at 16 (“The policy of disenfranchisement, declaring that one’s voting rights have been revoked, is one of a number of stigmatizing processes in place that serve to augment the challenges faced by persons with a felony conviction.”). Ewald, *Civil Death*, *supra* note 15, at 1107 (“[G]lariously absent from the historical and legal literature on disenfranchising offenders . . . is the claim that imposing the sanction reduces crime.”).

334. 418 U.S. 24, 78-79 (1974) (quoting Memorandum of the Secretary of State of California in Opposition to Certiorari, in *Class of County Clerks and Registrars of Voters of California v. Ramirez*, No. 73-324.)).

335. *Sauvé v. Canada* (Chief Electoral Officer), [2002] S.C.R. 519 (*Sauvé No. 2*),

plaintiff, the Supreme Court of Canada stated:

Depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility.

...

Denying prisoners the right to vote imposes negative costs on prisoners and on the penal system. It removes a route to social development and undermines correctional law and policy directed towards rehabilitation and integration.<sup>336</sup>

The Constitutional Court of South Africa and the Supreme Court of Israel reached similar conclusions on similar grounds<sup>337</sup>—decisions that are especially noteworthy given, in the instance of South Africa, the country's history of apartheid, and in the case of Israel, the fact that the litigation surrounded the franchise of Yigal Amir, the law student convicted of assassinating Prime Minister Yitzhak Rabin.<sup>338</sup> Likewise, in Europe, where, as noted above, criminal disenfranchisement is much less common, correctional officials have contended that permitting inmates to vote “is good policy—because it may increase public safety by enhancing the formative, rehabilitative effects of incarceration,”<sup>339</sup> as well as “prepare prisoners for resettlement.”<sup>340</sup>

Finally, the political scientist Alec C. Ewald remarks that “denying offenders the vote impedes their reintegration into society by stigmatizing them as second-class citizens,” because voting “constitutes precisely the

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available at <http://scc.lexum.umontreal.ca/en/2002/2002scc68/2002scc68.pdf>. In *Sauvé v. Canada* (Attorney General), [1993] S.C.R. 438 (*Sauvé No. 1*), available at <http://scc.lexum.umontreal.ca/en/1993/1993rcs2-438/1993rcs2-438.pdf>, Rick Sauvé, a Canadian prisoner, challenged Canada's blanket prohibition on prisoner voting. After the Supreme Court of Canada ruled for Sauvé, the Canadian Parliament amended the Canada Elections Act, extending the franchise to prisoners serving sentences of two years or less. Canada Elections Act, 2000 S.C., ch. 9, § 4, (Can.). Because Sauvé remained disenfranchised even after this change, he commenced his second litigation.

For an overview of the Sauvé litigation, see ISPAHANI, *supra* note 15, at 11-13. For a discussion of the Canadian law that spurred *Sauvé No. 2* see Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law*, 11 CAN. J. L. & JURISPRUDENCE 23 (1998).

336. *Sauvé No. 2*, at ¶ 38, 59.

337. ISPAHANI, *supra* note 15, at 13-18.

338. *Id.*, at 11, 13-15, 17-18.

339. *Id.* at 5.

340. *Id.*

kind of activity which can help criminals become law-abiding members of the polity.”<sup>341</sup> And a recent study by the sociologists Christopher Uggen and Jeff Manza has concluded that among those individuals who have been arrested, those who vote are only half as likely to recidivate as non-voters: “Taken as a whole . . . our statistical analysis suggests that a relationship between voting and subsequent crime and arrest is not only plausible, but also supported by empirical evidence. We find consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior.”<sup>342</sup> Although Uggen and Manza express reservations about attributing law-abiding behavior solely to participation in the franchise,<sup>343</sup> they do maintain that “[a]t a minimum, our multivariate analysis suggests that the political participation effect is not entirely attributable to preexisting differences between voters and non-voters in criminal history, class, race, or gender.”<sup>344</sup>

While Uggen and Manza’s statistical findings may help bolster the anecdotal evidence and philosophical/penological theories asserting connections between (re-)enfranchisement and rehabilitation, and between disenfranchisement and crime-inducing societal detachment, the impact of criminal disenfranchisement extends well beyond recidivism. As the casualties of the War on Crime and the War on Drugs have risen, so too have the numbers of disenfranchised (minority) individuals—prisoners, parolees, probationers, and those who, as mentioned earlier in this Section, have fully completed their sentences. As one commentator notes, if the total incarcerated population of the United States (never mind the total disenfranchised population) were a state of its own, it would qualify for five Electoral College votes.<sup>345</sup> Even without such a concentration, criminal disenfranchisement has reached the point of altering national, state and, to a lesser extent, local elections.<sup>346</sup>

*a. Impact of Criminal Disenfranchisement on Elections*

It is, of course, impossible to determine with complete certainty the

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341. Ewald, *Civil Death*, *supra* note 15, at 1113-15.

342. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 212-13 (2004).

343. *Id.* at 213 (“[The] act of casting a ballot is unlikely to be the sole factor that turns felons’ lives around . . .”).

344. *Id.*

345. Hamsher, *supra* note 15, at 299.

346. See Mauer, *Mass Imprisonment and the Disappearing Voters*, *supra* note 179, at 53 (asserting that the “the historic levels” of criminal disenfranchisement in the United States are “likely to have a profound impact on actual electoral results”); see generally ABRAMSKY, *supra* note 37, at 2 (“[T]he prison system [has] spiraled so out of control that it [is] ripping millions of people away helter-skelter from the body politic.”).

extent of voter participation and the nature of electoral choice had offenders and ex-offenders been permitted to vote in previous elections. But Manza and Uggen, examining census and election study data,<sup>347</sup> have concluded that as many as seven U.S. Senate elections and one presidential election in the years spanning 1972 to 2000 might have hinged on the disenfranchisement of some or all offenders and ex-offenders.<sup>348</sup> (Manza and Uggen began their analysis with the 1972 presidential election because it was the first presidential election for which they could sketch the socio-demography of incarcerated felons and, more significantly, because it was the election that immediately preceded the dramatic rise in incarceration rates mentioned at the beginning of this Part.)<sup>349</sup>

In the 2000 presidential election, Democratic candidate Al Gore won a plurality of the popular vote but lost narrowly in the Electoral College to Republican George W. Bush.<sup>350</sup> Manza and Uggen estimated that not only would Gore's margin of victory in the popular vote have increased had disenfranchised offenders and ex-offenders been allowed to vote, but that the exclusion of these individuals from the franchise in *Florida alone* would have tipped the electoral votes and subsequently the election in Gore's favor.<sup>351</sup> Because Florida (at the time) disenfranchised ex-felons, in addition to incarcerated felons and those on probation and parole, Manza and Uggen also considered whether ex-felon disenfranchisement in Florida alone influenced the 2000 election. They concluded that if only this subset of disenfranchised individuals had been permitted to vote, the results of the 2000 election would have been reversed.<sup>352</sup>

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347. Jeff Manza and Christopher Uggen used data from the Voter Supplement File of the Current Population Survey (CPS)—a monthly survey of individuals conducted by the U.S. Census Bureau that includes questions about political participation—to estimate disenfranchised population participation. Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 783-84. They used the National Election Study (NES) to predict vote choice for disenfranchised offenders, while correcting for typical over-reporting of turnout, Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 496, and taking into account both the likelihood that offenders and ex-offenders would vote at lower rates than the rest of the general public and the probability that they would vote Democratic. Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 783-84, 786.

348. Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 794; *see also* Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 497.

349. *See* Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 784.

350. *See id.* at 792.

351. *Id.* (“Although the outcome of the extraordinarily close 2000 presidential election could have been altered by a large number of factors, it would almost certainly have been reversed had voting rights been extended to any category of disenfranchised felons.”)

352. Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 497-99 (“Had [Florida's approximately 614,000 ex-felons] been allowed to vote, we estimate that some 27.2 percent would have turned out, and that 68.9 percent would have chosen the Democrat,

While the 2000 presidential election was certainly historic for its razor-thin electoral vote margin (not to mention the Supreme Court's peculiar reasoning in stopping the ballot recount in certain Florida counties<sup>353</sup>), it was not anomalous as a close election that would have had a different result if ex-offenders alone had been permitted to vote. According to Manza and Uggen, three Senate elections would have likely been reversed with solely ex-offender participation: Virginia in 1978 (John Warner (R) over Andrew Miller (D)); Kentucky in 1984 (Mitch McConnell (R) over Walter Huddleston (D)); Kentucky in 1998 (Jim Bunning (R) over Scotty Baesler (D)).<sup>354</sup> Had prisoners remained disenfranchised, but other offenders (probationers and parolees) and ex-offenders been permitted to vote, as is the practice in some states and many countries,<sup>355</sup> Manza and Uggen have concluded that additional Senate elections might have been reversed during the 1972 to 2000 period.<sup>356</sup>

Since 1978—the year in which the Virginia Republican John Warner defeated Democratic candidate Andrew Miller for a seat in the U.S. Senate—there have been over 400 Senate elections.<sup>357</sup> Given the small percentage of Senate elections that might have been reversed had some or all offenders and ex-offenders been permitted to vote, one must ask whether the potentially different outcomes would have had any real impact (aside from the obvious effect on the winners and losers of those elections). In other words, one must query whether Manza and Uggen's research is

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Gore. This would have resulted in a net Democratic gain of 63,079 votes, and a final Gore victory margin of 62,542.”)

353. See, e.g., *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

354. Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 497; Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 787-90.

355. See *supra* note 203 and accompanying text discussing states that permit probationers and parolees to vote; see sources cited *supra* notes 190-192 and accompanying text discussing countries that permit nonincarcerated individuals to vote.

356. Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 497-99. They observe,

The impact of disenfranchisement has been greatest in narrow Republican victories in states with restrictive felon disenfranchisement rules that apply not only to former felons, but to probationers, parolees, and former felons as well. These tend to be states with large African American electorates. If we look . . . at the seven states where U.S. Senate elections have gone to Republicans in part because of felon disenfranchisement—i.e., in Florida, Georgia, Texas, Virginia, Wyoming, and twice in Kentucky—all except Wyoming are southern states with relatively large Black or minority populations.

Uggen, Manza & Behrans, *Disenfranchisement of African Americans*, *supra* note 50, at 53.

357. See Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 789.

nothing more than academically interesting.

While it might be tempting to dismiss their findings regarding Senate elections as without significant national impact, Manza and Uggen assert, and this Author would agree, that “even this small number might have shifted the balance of power in the Senate, which has been fairly evenly divided between the two major parties over this period.”<sup>358</sup> More specifically:

Assuming that Democrats who might have been elected in the absence of felon disenfranchisement had held their seats as long as the Republicans who narrowly defeated them . . . the Democratic Party would have gained parity in 1984 and held majority control of the U.S. Senate from 1986 to the present. Changing partisan control of the Senate would have had a number of important policy consequences: In particular, it might have enabled the Clinton administration to gain approval for a much higher proportion of its federal judicial nominees, and key Senate committees would have shifted from Republican to Democratic control.<sup>359</sup>

Manza and Uggen do not venture so far as to suggest specific legislation that might have reached more favorable results with Democratic control of Senate committees or that might have been passed or been defeated with Democratic parity and/or majority control of the entire Senate. Nor are they willing to speculate in detail how the disenfranchisement of some or all offenders and ex-offenders would have affected local, state legislative, and House elections.<sup>360</sup> They do suggest, however, that “given the heavy concentration of felony convictions in urban areas . . . focusing on state-level or presidential elections understates the full electoral impact of felon disenfranchisement.”<sup>361</sup> They also warn:

Disenfranchised felons and ex-felons currently make up 2.28 percent of the voting-age population, a figure that we project may rise to 3 percent within 10 years. Because the margin of victory in 3 of the last 10 presidential elections has been 1.1 percent of the voting-age population

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358. *See id.*

359. *Id.* at 794. It bears mention that while incumbency by no means guarantees seat retention, the likelihood is great and the advantages significant. *See id.* at 789.

360. Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 499 (“[B]ecause of the lack of systematic information about the precise neighborhoods and legislative districts where disenfranchised felons originate, we cannot easily estimate the political impact of disenfranchisement below the state level.”).

361. *Id.* *See also* Uggen, Manza & Behrans, *Disenfranchisement of African Americans*, *supra* note 50, at 53 (“Given the concentration of convicted felons and former felons in urban areas . . . it is quite likely that the electoral impact is even more significant at local and municipal levels.”).

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or less, felon disenfranchisement could be a decisive factor in future presidential races.

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Unless disenfranchisement laws change, the political impact is likely to intensify in the future.<sup>362</sup>

While Manza and Uggen recommend changes in criminal disenfranchisement laws as a means of expanding the electorate, they also suggest that “high rates of criminal punishment, rather than new [disenfranchisement] laws, account for the political impact of felon disenfranchisement.”<sup>363</sup> Thus, an alternative or additional method for reducing the political impact of criminal disenfranchisement would be to decrease the reliance on punishment that results in disenfranchisement, which would include reforming the harsh sentencing policies mentioned at the beginning of this Part.<sup>364</sup>

Obviously, a discussion of the merits and political feasibility of lessening or repealing mandatory minimum sentences, “Three Strikes and You’re Out” laws, and truth-in-sentencing policies is well beyond the scope of this Article. But it does bear mention that the public has now begun to reject these previously popular punishments and sentencing policies. According to recent research conducted by Peter D. Hart Research Associates, Inc. for The Open Society Institute, using focus groups in diverse geographic locations (Columbus, OH, Philadelphia, PA, and Atlanta, GA, each consisting of sessions with white swing voters, political professionals, and criminal justice professionals), as well as a nationwide telephone survey of a representative cross section of adults, a majority now favor judicial discretion over Three Strikes policies and other mandatory sentencing laws.<sup>365</sup> While the public has not reached a solid consensus on

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362. Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 794, 796 (citations omitted).

363. *Id.* at 795.

364. See FELLNER & MAUER, *supra* note 110, at part IV (“[T]he proportion of the population that is disenfranchised has been exacerbated in recent years by the advent of harsh sentencing policies such as mandatory minimum sentences, ‘three strikes’ laws and truth-in-sentencing laws.”); Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 795 (“As the number of disenfranchised felons expands, the electorate contracts. Because the contracted electorate now produces different political outcomes than a fully enfranchised one, mass incarceration and felon disenfranchisement have clearly impeded, and perhaps reversed, the historic extension of voting rights.” (emphasis added)).

365. PETER D. HART RESEARCH ASSOCIATES, INC., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM: SUMMARY OF FINDINGS 12-13, 18-20 (Feb. 2002), [http://www.soros.org/initiatives/justice/articles\\_publications/publications/hartpoll\\_20020201/Hart-Poll.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/hartpoll_20020201/Hart-Poll.pdf) (discussing the “public’s growing doubts about the ‘lock ‘em up’ approach

mandatory minimum sentences, which, as mentioned above, have led to more people being sent to prison and being required to serve longer terms, support for such provisions has eroded dramatically.<sup>366</sup>

Although Manza and Uggen have expressed reservations about estimating the impact of disenfranchisement on local and state legislative elections, apart from the broad statements quoted above, at least one commentator has pointed to specific elections below the state level affected by criminal disenfranchisement. Abramsky, while agreeing that elections with a diverse socio-economic electorate are more likely to be influenced by criminal disenfranchisement,<sup>367</sup> points to one state legislative election and one U.S. House of Representatives election that likely turned on criminal disenfranchisement: Republican Lance Horbach's November 1997 election to the Iowa House of Representatives for District 40, Tama and Grundy Counties, and Republican George Felix Allen's November 1991 victory in a special election to fill the seat in the U.S. House of Representatives for Virginia's 7th District.<sup>368</sup> Horbach, who is in his fourth term in the Iowa House and currently serves as the Chairman of the Justice Appropriations Subcommittee and on the Commerce, Regulation and Labor, Public Safety, Environmental Protection, and Appropriations Standing Committees, won the November 1997 election by "a mere two votes," to use his own language<sup>369</sup>—a number that was increased to nine after three recounts.<sup>370</sup> According to Abramsky, "[w]hile it would be impossible to prove from this distance, it's certainly not unlikely that had some of his poorer constituents been able to vote after serving out their felonies, Horbach would never have won the election and risen to become one of his state's most influential political figures."<sup>371</sup> Indeed, Horbach

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to crime" and finding that fifty-six percent of adults, including majorities of Republicans, independents, and Democrats, all favor elimination of three strikes laws).

366. *Id.*, at 12-13; Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003 ("In the past year, about 25 states have passed laws eliminating some of the lengthy mandatory minimum sentences [formerly] so popular . . ."); see also Brent Staples, *Why Some Politicians Need Their Prisons to Stay Full*, N.Y. TIMES, Dec. 27, 2004 at A20 (discussing mandatory sentencing policies and stating that "polls have shown growing support for drug law reform").

367. ABRAMSKY, *supra* note 37, at 129 ("[O]n the whole, it is elections for the country's president, Senate, and congressional districts, which incorporate a large number of disparate communities, for governors, and for citywide mayors' positions that are most concretely impacted by disenfranchisement.").

368. *Id.* at 133-34, 178-79.

369. See <http://www.lancehorbach.com/> (follow "About Lance" hyperlink)(last visited April 8, 2007); see also ABRAMSKY, *supra* note 37, at 133.

370. See <http://www.lancehorbach.com/> (follow "About Lance" hyperlink)(last visited April 8, 2007); see also ABRAMSKY, *supra* note 37, at 133.

371. ABRAMSKY, *supra* note 37, at 133-34.



wields considerable power as Chairman of the Justice Appropriations Subcommittee, a committee that controls the third largest budget in the state of Iowa and which allocates money to the courts, prisons and several state agencies including the Department of Public Safety and the Iowa State Patrol<sup>372</sup>—institutions and agencies with which many of his poorer residents come into contact.<sup>373</sup>

Allen, similarly, also won an election early in his career by a small margin, albeit one a bit larger than Horbach's.<sup>374</sup> According to Abramsky, Allen, who ran as a staunch law-and-order conservative, would not have won without a boost from Virginia's restrictive criminal disenfranchisement laws.<sup>375</sup> Although Allen was forced to leave Congress in 1993 as a result of redistricting pursuant to the Voting Rights Act that eliminated his district, he was elected governor in 1993. After serving one term—Virginia's Constitution limits governors to one four-year term in office<sup>376</sup>—he was elected to the U.S. Senate in 2000, defeating the Democratic incumbent, Chuck Robb. He served on the Commerce, Science and Transportation Committee, the Small Business and Entrepreneurship Committee, the Foreign Relations Committee and the Energy and Natural Resources Committee, and previously served as Chairman of the National Republican Senatorial Committee, overseeing the Republican gain of four seats in the 2004 Senate elections. While there is, of course, no way of knowing whether Allen would have reached such political heights had the 1991 U.S. congressional election been reversed, his support for Virginia's truth-in-sentencing law in the early-to-mid-1990s and his spearheading of the Commonwealth's massive prison expansion, as well as his veto of bills to create full-time public defenders' offices in cities like Charlottesville, are all well-known and have undoubtedly contributed to a growing disenfranchised population in the state.<sup>377</sup>

*b. Impact of Criminal Disenfranchisement on Neighborhoods and Communities*

The influence of disenfranchisement on presidential elections (and to a

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372. See <http://www.lancehorbach.com/> (last visited April 8, 2007).

373. See ABRAMSKY, *supra* note 37, at 133.

374. *Id.* at 178. Allen lost in his first political race in 1979, but won a seat in the Virginia House of Delegates in 1983, where he served until 1991. David Holman, *The Jeffersonian*, THE AMERICAN SPECTATOR, July 18, 2006, available at [http://www.americanprowler.org/dsp\\_article.asp?art\\_id=10100](http://www.americanprowler.org/dsp_article.asp?art_id=10100).

375. *Id.*

376. VA. CONST. art. V, § 1.

377. See ABRAMSKY, *supra* note 37, at 179 (noting how Virginia ranks towards the top of the list of states in raw numbers of prisoners and total percentage of population incarcerated).

slightly lesser extent, U.S. Senate elections) touches everyone simply by virtue of who wins and who loses;<sup>378</sup> neighborhoods and communities are similarly, yet more specifically, impacted by local elections that hinge on the exclusion of convicted offenders. But criminal disenfranchisement has additional bearing on offenders' and ex-offenders' home communities, especially low-income African-American communities,<sup>379</sup> whose residents, as mentioned earlier in this Part, are disproportionately represented in jails and prisons and disproportionately disenfranchised.<sup>380</sup> According to Ryan S. King and Marc Mauer of The Sentencing Project:

[P]rohibiting persons from voting due to a felony conviction has significance at the community level . . . particularly in areas of high concentration of disenfranchisement. . . .

. . . .

Whereas felony disenfranchisement has its primary impact on individuals, it also exerts a vote dilution impact on particular communities. Given the concentration of felony disenfranchisement in primarily African American communities, persons who have not been convicted of a felony are affected through the diminished strength of their political voice. . . .

This disenfranchisement effect contributes to a vicious cycle within public policy development that further disadvantages low-income communities of color. The first means by which this occurs is through decisions on resource allocation. In citywide decisionmaking regarding spending for schools or social services, residents of certain neighborhoods will have considerably more political influence than others, solely because "one person, one vote" is distorted through the loss of voting rights.

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378. Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 497 ("[F]elon disenfranchisement has provided a small but clear advantage to Republican candidates in every presidential and senatorial election from 1972 to 2000."); *see* Pinaire, Heumann & Bilotta, *supra* note 15, at 1545-46 ("Democrats are expected to be the beneficiaries of such an extension of the franchise.")

379. Finzen, *supra* note 67, at 322 ("As long as collateral consequences laws remain on the books and operate as broadly as they do today, they will continue to have destabilizing and devastating effects on Black communities."); Harvey, *supra* note 210, at 1147 ("[D]ue to the disproportionate percentage of black convicted felons removed from the already limited pool of eligible black voters, ex-felon disenfranchisement negatively impacts the black vote."); Mark E. Thompson, *Don't Do the Crime if You Ever Intend to Vote Again*, *supra* note 65, at 177 ("Disenfranchisement has had the most severe impact on the African-American community.")

380. *See supra* notes 184, 185 and accompanying text.

At a state level, beleaguered communities are affected through a diminished impact on public policy.<sup>381</sup>

In other words, neighborhoods and communities with significant numbers of criminally disenfranchised individuals (or, in the case of Tama and Grundy counties in Iowa, a handful of disenfranchised parolees, probationers, and ex-offenders) may find that they are less able to push candidates of their choice to victory, pressure elected officials with the threat of withdrawal of support to bring positive change to their localities, and express their displeasure at the ballot box.<sup>382</sup> As Peggy M. Shepard, Executive Director and Co-Founder of West Harlem Environmental Action, Inc. (WE ACT), explains in the context of environmental injustice, discussed in greater detail in *infra* Part III.A:

Communities and grassroots organizations must plan and act to gain political and legal authority over planning, land use, and zoning decisions in their neighborhoods to ensure community representation and input in privately-developed and tax-aided projects. Communities must plan to achieve positions on community task forces, government advisory boards, commissions, and relevant non-profit boards to influence the public policy agenda. Communities must educate local, state, and federal legislators on their issues and concerns and monitor their actions, or lack of action, to ensure their accountability to the community.<sup>383</sup>

But communities burdened by disenfranchisement, she continues, suffer in that they “rarely have advocacy systems to substantively and effectively affect policy development.”<sup>384</sup> This is true because of the legal criminal disenfranchisement of a portion of an electorate in and of itself, but also because the legal criminal disenfranchisement of a portion of an electorate

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381. KING & MAUER, *THE VANISHING BLACK ELECTORATE*, *supra* note 15, at 1, 15; *see generally* Wacquant, *supra* note 51, at 119 (“By entombing poor blacks in the concrete walls of the prison, then, the penal state has effectively smothered and silenced subproletarian revolt.”).

382. Marc Mauer, *TrendLetter: Political Report: Disenfranchising Felons Hurts Entire Communities*, Joint Center for Political and Economic Studies, FOCUS 6 (May/June 2004), <http://www.sentencingproject.org/pdfs/focus-mayjune04.pdf> [hereinafter Mauer, *Disenfranchising Felons Hurts Entire Communities*] (“Communities with high rates of people with felony convictions have fewer votes to cast. All residents of these neighborhoods, not just those with a felony conviction, becomes less influential than residents of more affluent neighborhoods.”); *see also* ABRAMSKY, *supra* note 37, at 135 (discussing Iowa felons “wanting to be able to vote for the school boards that ran the schools to which they sent their children”).

383. Peggy M. Shepard, *Issues of Community Empowerment*, 21 *FORDHAM URB. L.J.* 739, 750-51 (1994).

384. *Id.* at 750.

can function as a *de facto* form of disenfranchisement for those able and willing to cast their votes.<sup>385</sup> Such voting-eligible individuals watch helplessly as their franchise is weakened when candidates for political office spend less time in their neighborhoods and communities because there are fewer voters to win over.<sup>386</sup> With politicians focusing their attention away from neighborhoods and communities with high rates of disenfranchisement, these communities subsequently start receiving fewer appropriations for schools and social services, as mentioned above, which can be devastating given that these are the communities that often need the most help. The diminished allocation of resources further catalyzes the communities' slide into despair and disrepair—incubating conditions for crime (and subsequently further disenfranchisement).<sup>387</sup> According to one commentator, if a community's political influence diminishes too much, the very existence of the community can be threatened: "a community is a geographically defined area whose residents feel a sense of political solidarity and effectiveness vis-a-vis local government. Without a minimum amount of political power, whole neighborhoods can entirely disappear through abandonment, gentrification, or displacement."<sup>388</sup>

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385. Anthony C. Thompson, *Hidden Obstacles to Reentry*, *supra* note 61, at 282-83 ("The loss of voting power has ramifications not only for the individual ex-offender, but also for the communities to which ex-offenders return, which will then include growing numbers of residents without a recognized political voice.").

386. KING & MAUER, *THE VANISHING BLACK ELECTORATE*, *supra* note 15, at 16 ("In the calculated economics of electoral campaigning, candidates spend time in areas perceived to have the highest concentration of potential voters.").

387. See generally Robert Agnew, *A Revised Strain Theory of Delinquency*, 64 *SOCIAL FORCES* 151, 156 (1985) (arguing that strain, and subsequently frustration, anger and delinquency, may result not only from the failure to achieve positively valued goals, such as education and occupation goals, but also from the inability to escape legally from painful situations—adolescents "lack power and are often compelled to remain in situations which they find aversive. . . . (Certain adults, unable to take advantage of these legal escape routes due to economic hardship or other factors, may resemble adolescents in their lack of power.)"); Robert Agnew, *Foundation for a General Strain Theory of Crime*, 30 *CRIMINOLOGY* 47, 58-59 (1992) (discussing how a wide range of "noxious stimuli," such as negative relations with parents, peers, and teachers, as well as an array of stressful life events, unpleasant odors, disgusting scenes, noise, heat, air pollution, personal space violations, and high density, may all lead to delinquency and aggression); Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 *AM. SOC. REV.* 664, 667 (1957) ("[T]he delinquent approaches a 'billiard ball' conception of himself in which he sees himself as helplessly propelled into new situations. . . . By learning to view himself as more acted upon than acting, the delinquent prepares the way for deviance from the dominant normative system without the necessity of a frontal assault on the norms themselves.").

388. Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 *J. GENDER RACE & JUST.* 1, 35 (1997).

Another way in which criminal disenfranchisement exerts a “vote dilution impact” on certain neighborhoods and communities, to use King and Mauer’s phrase, is through the U.S. Census Bureau’s “usual residence rule”—the approach used by the Bureau to determine where to count people in its constitutionally mandated decennial census.<sup>389</sup> An individual’s “usual residence,” according to the Census Bureau, is “the place where the person lives and sleeps most of the time. This place is not necessarily the same as the person’s voting residence or legal residence.”<sup>390</sup> Often, determining an individual’s usual residence does not present much of a problem for the Census Bureau; his home is his usual residence. But for people without housing, live-in nannies, military personnel, migrant workers, workers who commute, snowbirds, college students, children in joint custody, and other individuals with multiple residences, ascertaining an individual’s usual residence can present difficulties.<sup>391</sup> As U.S. society has become more mobile with more workers commuting and residing in multiple places, and more young adults attending college away from home and often out-of-state, discovering an individual’s usual residence has become even more challenging. Nevertheless, the “usual residence rule”—which has been in place since the first census in 1790<sup>392</sup>—has worked fairly well and has not been the source of much controversy.<sup>393</sup> But as the U.S. prison population has grown,<sup>394</sup> the application of the “usual residence rule” to prisoners, who are counted at the locus of their correctional institutions (including prisons, jails, detention centers, or halfway houses),<sup>395</sup> rather than at their home addresses, has become the subject of much debate and consternation.<sup>396</sup>

To understand why the application of the “usual residence rule” to prisoners is troublesome, consider that most prisoners are legal residents of

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389. U.S. CENSUS BUREAU, PLANS AND RULES FOR TAKING THE CENSUS: RESIDENCE RULES: FACTS ABOUT CENSUS 2000 RESIDENCE RULES (1999), [http://www.census.gov/population/www/censusdata/resid\\_rules.html#usual](http://www.census.gov/population/www/censusdata/resid_rules.html#usual) [hereinafter CENSUS 2000 RESIDENCE RULES]. The U.S. Census Bureau undertakes the counting of people in each State to apportion the seats in the U.S. House of Representatives among the States. See U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

390. CENSUS 2000 RESIDENCE RULES, *supra* note 389.

391. *Id.*

392. *Id.*

393. See Hamsher, *supra* note 15, at 301.

394. See sources cited *supra* notes 56, 57 and accompanying text; see also Hamsher, *supra* note 15, at 302 (“[S]ince 1970, the U.S. prison population has grown more than 600%, and continues its torrid growth.”).

395. CENSUS 2000 RESIDENCE RULES, *supra* note 389.

396. See Hamsher, *supra* note 15, at 300 & n.7.

urban areas.<sup>397</sup> Under the Census Bureau's method of counting, which "comes neither from the U.S. Constitution nor from a federal statute, but rather from an administrative determination that such a rule would be an effective means of enumeration,"<sup>398</sup> prisoners become "residents" of the correctional institution in which they eat and sleep during the (usually short) period of their incarceration<sup>399</sup>—frequently a prison located in a rural area.<sup>400</sup> For example, in New York State, the majority of all state prisoners legally reside in one of the five boroughs of New York City, but only a small fraction—less than ten percent—are incarcerated there.<sup>401</sup> Consequently, "prisoner-exporting communities [such as those in New York City] experience a dilution of their relative voting power, while prisoner-importing communities [such as those in upstate New York] experience a corresponding strengthening of their relative voting power."<sup>402</sup> As Professor Karlan explains:

[T]he interaction of incarceration and disenfranchisement can skew the balance of political power within a state. The Census Bureau counts inmates where they are incarcerated. The population figures the Bureau provides are used by states to draw legislative districts. Because every state but Maine and Vermont disenfranchises individuals while they are

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397. *Id.* at 302. According to Wacquant, "in the wake of the 'urban riots' of the 1960s, which in truth were uprisings against intersecting caste and class subordination, 'urban' and black became near-synonymous in policy making as well as everyday parlance." Wacquant, *supra* note 51, at 117.

Note that legal residency is determined at the state level and differs from state to state. *See, e.g.*, Hamsher, *supra* note 15, at 305.

398. Hamsher, *supra* note 15, at 301.

399. *Id.* at 301-02; CENSUS 2000 RESIDENCE RULES, *supra* note 389; *see also* Editorial, *Phantom Constituents Behind Bars*, N.Y. TIMES, May 2, 2006, at A24 ("Counting the inmates at prison inflates the prison community's population and political influence, while draining political clout from the communities where inmates actually live.").

400. Hamsher, *supra* note 15, at 302 ("Much of the growth in prison facilities has been in rural areas, while the majority of inmates come from urban areas."); *see also* Huling, *supra* note 96, at 210 ("The near-doubling of the prison population and the rural prison boom during the 1990s portends a substantial transfer of dollars from urban to rural America because prison inmates are counted in the populations of the towns and counties in which they are incarcerated and not in their . . . [urban] neighborhoods.").

401. Editorial, *Prison-Based Gerrymandering*, N.Y. TIMES, May 20, 2006, at A12; Hamsher, *supra* note 15, at 302-03.

402. Hamsher, *supra* note 15, at 302; *see also* *Prison-Based Gerrymandering*, *supra* note 401 (describing state legislatures as "typically count[ing] the inmates as "residents" to pad state legislative districts that sometimes contain too few residents to be legal under federal voting rights law," thereby exaggerating the political power of the rural areas where prisons are built while "diminish[ing] the power of the mainly urban districts where inmates come from and where they inevitably return").

incarcerated, people in prison serve as essentially inert ballast in the redistricting process. Especially given the prevalent practice of building prisons far away from the cities where most inmates lived before they were sent to prison, the practices increase the power of officials who have no reason to represent these only notional ‘constituents.’ At the same time, incarceration reduces the population of the communities from which inmates come, and to which most of them return, thereby diminishing those communities’ entitlement to legislative seats and legislative clout.<sup>403</sup>

While the deflation of voting power of low-income urban minority communities and the simultaneous strengthening of rural prison communities’ political muscle due to the “usual residence rule” is itself troubling, what makes the Census Bureau’s method of enumeration as applied to prisoners and the subsequent data generated especially disconcerting is that these data are frequently used to distribute billions of dollars of federal funding to state and local government agencies.<sup>404</sup> As Professor Anthony C. Thompson explains:

The twin circumstances of high incarceration rates of individuals from low-income urban communities and the Census Bureau’s decision to count prisoners as residents of the communities in which prisons [a]re located mean[s] that low-income communities los[e] numbers for

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403. Karlan, *supra* note 15, at 1364-65 (footnote omitted); *see also Phantom Constituents in the Census*, N.Y. TIMES, Sept. 26, 2005, at A16 (describing this “padding of electoral districts’ population figures” as shifting political power from urban areas to those rural areas where prisons are sited, and noting, “legislators from the rural prison counties often use this purloined power to vote against the interests of [those] urban communities”); Huling, *supra* note 96, at 212 (“[I]f prisoners are allowed to be counted in the region of their imprisonment for the purposes of political representation, then their votes are effectively given to those who happen to live near a prison, thus diluting the voting power of the predominantly black, Hispanic, and urban prison population and giving it to mostly white, rural regions.”); Sam Roberts, *Panel Recommends Change in Census Prisoner Count*, N.Y. TIMES, Sept. 15, 2006, at B7 (“The impact of counting inmates where they are incarcerated is magnified in New York, where most inmates come from downstate and are held in prisons upstate.”).

404. Hamsheer, *supra* note 15, at 306-07; ROSE HEYER & PETER WAGNER, PRISON POLICY INITIATIVE, PRISONERS OF THE CENSUS: TOO BIG TO IGNORE: HOW COUNTING PEOPLE IN PRISONS DISTORTED CENSUS 2000 (April 2004), <http://www.prisonersofthecensus.org/toobig/toobig.html> (“Counting large external populations of prisoners as local residents leads to misleading conclusions about the size and growth of communities.”); Editorial, *Counting Noses in Prison*, N.Y. TIMES, Apr. 18, 2006, at A26 (criticizing the Census Bureau’s method of counting prison inmates as residents of prison districts rather than as residents of their home communities because it “causes some prison districts to collect more than a fair share of federal dollars earmarked for the poor”).

purposes of the Census. Financial resources in the form of state and federal aid are tied, in part, to census figures. States such as Arizona, Illinois, and Wyoming use census figures to distribute state tax revenue and other funds. One hundred and eight-five billion dollars a year in federal aid are distributed on the basis of census figures. Federal programs based at least partially on census data include job training, school funding, national school lunch programs, Medicaid, and community development programs. The loss of population numbers can diminish the financial health of communities that rely on such programs. Indeed, as urban communities los[e] out, some rural communities st[an]d to gain. Towns located close to prisons [a]re able to include prisoners' low incomes in their per capita income figures. Thus, the towns appear[] poorer and bec[o]me eligible for more poverty-related grants.<sup>405</sup>

To illustrate, consider the town of Florence, Arizona, which, according to 2000 Census Bureau data, contains a population of 17,054 individuals.<sup>406</sup> But the “institutionalized population” of Florence numbers 11,830—69.4 percent—due in part to the presence of Arizona State Prison Complex - Florence, or Florence State Prison (FSP).<sup>407</sup> Thus, while the incarcerated population inflates the total population, it deflates the per capita income (total personal income/total population),<sup>408</sup> as evidenced by the figure of \$11,278 (measured in 1999 dollars) for Florence.<sup>409</sup> As a result, and as Professor Thompson indicates above, the town of Florence is able to reap the financial benefits of its prison population<sup>410</sup> to the exclusion of both the

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405. Anthony C. Thompson, *Hidden Obstacles to Reentry*, *supra* note 61, at 286 (footnotes omitted); *see also* Hamsher, *supra* note 15, at 301 (“Today, Census Bureau data is used extensively, not only to apportion population to both state and federal legislative districts, but also for the annual allocation of more than \$140 billion in formula-based federal grants to state and local jurisdictions.”).

406. U.S. CENSUS BUREAU, CENSUS 2000, TABLE DP-1. PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000: GEOGRAPHIC AREA: FLORENCE TOWN, ARIZONA, available at <http://www.town.florence.az.us/> [click on “About Florence”; then click on “Town of Florence Census Information”] (last visited Apr. 21, 2007).

407. *Id.*; *see also* Sasha Abramsky, *Incarceration, Inc.*, THE NATION, July 19, 2004, available at <http://www.thenation.com/doc/20040719/abramsky>.

408. *See Phantom Voters, Thanks to the Census*, N.Y. TIMES, Dec. 27, 2005, at A22 (“Since inmates are jobless, their presence . . . allows prison districts to lower their per capita incomes, unfairly increasing their share of federal funds earmarked for the poor.”).

409. U.S. CENSUS BUREAU, FACT SHEET: FLORENCE TOWN, ARIZONA: CENSUS 2000 DEMOGRAPHIC PROFILE HIGHLIGHTS, at <http://factfinder.census.gov/> [enter Florence, and select “Arizona” in the “Get a Fact Sheet for your Community” form].

410. According to Marc Mauer of The Sentencing Project:

In sparsely populated areas, large prison facilities can result in significant distortions of the local population. In Florence, Arizona, for example, two-thirds



prisoners' pre-incarceration home communities—communities already suffering from economic blight<sup>411</sup> and the very communities that would have received the funding and services from the federal and state governments had these individuals not been incarcerated<sup>412</sup>—and the prisoners themselves (because most of the funding a prison-town receives does not go to improving prison programming or the conditions of incarceration).<sup>413</sup>

Because rural prison communities garner federal dollars as a result of their prison populations, elected officials from these communities are unlikely to propose measures to eradicate this unfair phenomenon.<sup>414</sup> But

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of the town's 16,000 residents are people in prison. Since the census count is used to determine political apportionment and funding streams, such towns have a population that is artificially inflated for these purposes. One study estimates that each prisoner brings in between \$50 to \$250 annually to the local government in which he or she is housed. Thus, a new 500-bed prison may yield about \$50,000 in new revenue.

Marc Mauer, *Thinking About Prison and Its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607, 617 (2005) [hereinafter Mauer, *Thinking About Prison*].

411. Huling, *supra* note 96, at 211 (“[T]hese neighborhoods . . . have already sustained years of economic and social crises and losses . . .”).

For a discussion of the economic burden of incarceration in general on the home communities of prisoners—usually urban communities, see, e.g., Paul Street, *Color Blind: Prisons and the New American Racism*, in PRISON NATION, *supra* note 54, at 30, 35 (“[M]ass incarceration cost[s] black communities untold millions of dollars in potential economic development, worsening an [already crippled] inner-city political economy . . .”); see also Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1552-53 (2003) (“High rates of incarceration can adversely affect the ability of returning prisoners to re-enter labor markets, and thus aggravate social and economic disadvantages within areas where former inmates are concentrated.”).

412. See *supra* notes 398-99 and accompanying text.

413. Hamsher, *supra* note 15, at 315-16 (“While prisoners do not generally receive any benefit from the funding that goes to the community just beyond the barbed wire fences, prisoners add to the population rolls, and therefore the hosting community receives population-based funding from state and federal governments for their name, but not for their benefit.”); Ben Trachtenberg, Note, *State Sentencing Policy and New Prison Admissions*, 38 U. MICH. J.L. REVORM 479, 526 (2005) (“[M]any government programs dole out cash based on population, meaning that prisoners bring extra money—money taken away from their home communities—without enjoying any services from their hosts.”).

414. See *supra* note 404 and accompanying text. See also, Judith A. Greene, *Entrepreneurial Corrections: Incarceration As a Business Opportunity*, in INVISIBLE PUNISHMENT, *supra* note 54, at 95, 95-113 (“[T]he [1980s-era] collapse of rural economies and a lack of jobs paying a living wage set the stage for public officials and private entrepreneurs alike to begin pushing prison construction and operation as a leading rural growth industry.”); Mauer, *Disenfranchising Felons Hurts Entire Communities*, *supra* note 382, at 6 (“Communities hard hit by the loss of manufacturing jobs and the decline of family

because the urban communities lose the political voice of the prisoners who are exported to the rural prison towns, it is also unlikely that the voting-eligible residents of the prisoners' home communities will be able to effectively advocate for change<sup>415</sup>—a situation that is unlikely to improve and may well get worse unless the Census Bureau modifies its method of enumeration or states reconsider and rework their use of Census Bureau data to craft state legislative district maps within their respective states.<sup>416</sup> While constitutional challenges to the Census Bureau's application of the "usual residence rule" have not been met with success,<sup>417</sup> earlier this year, Congress took the small step of asking the Census Bureau to study the practice as applied to prisoners and to consider remedies.<sup>418</sup> Although the Census Bureau voiced its reservations about changing its methods,<sup>419</sup> the issue is at least now on the radar screens of both Congress and the public.<sup>420</sup>

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farms have come to view prisons—often incorrectly, it turns out—as a recession-proof means of providing jobs.”); SOERING, *supra* note 92, at 77 (“A full 60% of prisons are now built in rural counties as local leaders compete for these secure, though low-paying jobs.”).

415. See Trachtenberg, *supra* note 413, at 525-26 (“The shift in political power from (mostly poor) home communities to (more wealthy) host communities decreases the likelihood of any reforms on this issue.”).

416. According to one commentator:

Communities suffering from declines in farming, mining, timberwork, and manufacturing are now begging for prisons to be built in their backyards. . . . Hundreds of small rural towns and several whole regions have become dependent on an industry that itself is dependent on the continuation of crime-producing conditions.

. . . .

[T]he rural prison boom during the decade of the 1990s occurred at a time of falling crime rates, and experience shows that the federal and state governments are reluctant to pull the plug on the many interests that now lobby for and feed off prisons. *Allowed to continue, this cycle will have catastrophic consequences for the health and welfare of individuals, families, and communities in urban and rural areas, and indeed for the nation.*

Huling, *supra* note 96, at 197, 213 (emphasis added).

417. Hamsher, *supra* note 15, at 321 (citing *Borough of Bethel Park v. Stans*, 449 F.2d 575 (3d Cir. 1971)); cf. *Prison-Based Gerrymandering*, *supra* note 401 (discussing a recent ruling by the Second Circuit calling the practice into question).

418. *Counting Noses in Prison*, *supra* note 404. For a review of legislation introduced into state assemblies to modify U.S. Census Bureau data that would reallocate prisoners to their last home address prior to incarceration for the purpose of redistricting of all state political subdivisions, see Hamsher, *supra* note 15, at 324-25 & n.194.

419. See *Counting Noses in Prison*, *supra* note 404.

420. See, e.g., Roberts, *supra* note 403.

In the spirit of Jurassic 5, *supra* note 55, some commentators have likened the application of

In addition to vote dilution and the channeling of funding and resources away from urban communities, either as a result of vote dilution, the application of the “usual residence rule” to prisoners, or both, criminal disenfranchisement can affect voting-eligible individuals and low-income urban minority communities with high rates of incarceration and/or concentrated disenfranchisement in another way. As Mauer explains:

While an estimated two percent of the national population is disenfranchised, the rate for African American men is thirteen percent, and in some states is well over twenty percent. These high rates affect this population directly, of course, but they spill over into political influence of black communities generally. When such high numbers of black men in many urban neighborhoods are unable to vote, the voting power of that whole community is impacted in relation to neighborhoods with relatively low rates of incarceration.

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[I]n the most restrictive states voter turnouts are lower, particularly among African Americans, *even among persons who are not themselves disenfranchised as a result of a felony conviction*. It will take further investigation to determine why this is the case, but it may be related to the communal nature of voting. Voting as a civic duty is a task we engage in with our families and communities. Family members often talk of electoral prospects at home, drive to the polls together, and see their neighbors there. *But when substantial numbers of people in a community are legally unable to participate in this process, it is likely to dampen enthusiasm and attention among others as well.*<sup>421</sup>

Essentially, voting is a contagious activity—people who are less politically inclined or even politically apathetic are often drawn into the electoral

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the “usual residence rule” to prisoners to the Constitution’s treatment of slaves as three-fifths of a person. *See, e.g., Phantom Voters, Thanks to the Census, supra* note 408 (“The first Constitution took for granted that enslaved people could not vote, but counted each slave as three-fifths of a person for the purpose of apportioning representation in Congress. . . . inflat[ing] the voting power of slaveholders . . .”); Staples, *Why Some Politicians Need Their Prisons to Stay Full, supra* note 366 (“The idea of counting inmates as voters in the counties that imprison them is particularly repulsive given that inmates are nearly always stripped of the right to vote. The practice recalls the early United States under slavery . . .”).

421. Mauer, *Thinking About Prison, supra* note 410, at 615-16 (emphasis added); *see also* Uggen & Manza, *Democratic Contraction, supra* note 39, at 783 (noting that voter registration and turnout rates are lower in states with “strict felon disenfranchisement laws”); *see generally* KING & MAUER, *THE VANISHING BLACK ELECTORATE, supra* note 15, at 1 (discussing the reduced likelihood of “a political culture” emerging in communities of concentrated disenfranchisement).

process by virtue of the conversation and excitement surrounding an election. But the reverse is also true: without the discourse surrounding an election—the exchange of opinions about candidates and ideas about issues—voting-eligible individuals may well lose their enthusiasm for participation.

While this is troubling enough, what is potentially more devastating is the lost intergenerational communal experience—the missed opportunity for families and neighbors to interact and converse about issues relating to their shared locality. As a result, the social cohesiveness among residents of a community may either cease to form or break down, destroying the informal social control, discussed above in Part II.A, that may be vital to a community's safety and ability to ward off crime. As Robert J. Sampson, Stephen W. Raudenbush, and Felton Earls have found:

At the neighborhood level . . . the willingness of local residents to intervene for the common good depends in large part on conditions of mutual trust and solidarity among neighbors. Indeed, one is unlikely to intervene in a neighborhood context in which the rules are unclear and people mistrust or fear one another. It follows that socially cohesive neighborhoods will prove the most fertile contexts for the realization of informal social control. In sum, it is the linkage of mutual trust and the willingness to intervene for the common good that defines the neighborhood context of collective efficacy. . . . [T]he collective efficacy of residents is a critical means by which urban neighborhoods inhibit the occurrence of personal violence, without regard to the demographic composition of the population.<sup>422</sup>

Wacquant paints an even grimmer picture of what can and has transpired in some segments of urban society:

The depacification of everyday life, shrinking of networks, and

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422. Sampson, Raudenbush & Earls, *supra* note 157, at 918-24. *See also* Sampson, *Collective Efficacy and Community Safety*, *supra* note 155, at 108 (“The concept of neighbourhood *collective efficacy* captures the link between cohesion . . . and shared expectations for action.”); *see generally* Chrisna du Plessis, *The Links Between Crime Prevention and Sustainable Development*, 24 OPEN HOUSE INTERNATIONAL 33, 35, 36 (1999) (describing those who have “invested time and money and effort in their environment” as “more likely to intervene in crime incidents because of stronger communal ties and feelings of ownership”); John H. Schweitzer, June Woo Kim & Juliette R. Mackin, *The Impact of the Built Environment on Crime and Fear of Crime in Urban Neighborhoods*, 6 JOURNAL OF URBAN TECHNOLOGY 66, 68 (1999) (finding that neighborhood “[b]locks with a strong sense of community had significantly less fear of crime than those without it,” and describing fear of crime as “more strongly related to a low sense of community than to actual crime”).

informalization of survival strategies have combined to give social relations in the hyperghetto a distinct carceral cast: fear and danger pervade public space; interpersonal relations are riven with suspicion and distrust, feeding mutual avoidance and retraction into one's private defended space; resort to violence is the prevalent means for upholding respect, regulating encounters, and controlling [sic] territory; and relations with official authorities are suffused with animosity and diffidence—patterns familiar to students of social order in the contemporary US prison.<sup>423</sup>

While fear, mistrust, avoidance and violence can certainly grow from a number of sources—sources which may not be overcome through the communal experience of voting—it is not too great a stretch to suggest that concentrated disenfranchisement can limit the positive contact between neighbors that helps build the foundation for informal social control. And without a doubt, concentrated disenfranchisement may prevent the voting fever from spreading to future generations. Teenagers on the cusp of eligibility, witnessing dampened interest by the voting-eligible, may never catch the fever and may subsequently come to view voting as a meaningless act, a civic chore, or an antiquated method of bringing about change. As Chris Giunchigliani, a Nevada Democratic assemblywoman and former teacher remarks,

If you want people to come back into society, let them earn their rights back so they can participate in society. As a teacher, [I know that] you teach something, you reenforce [sic] it. If you have a family member who's disenfranchised, the spouse says 'You can't vote. I'm pissed off. I'm not going to vote either.' The kids see this. We're losing another generation.<sup>424</sup>

To conclude this subsection on the impact of criminal disenfranchisement on neighborhoods and communities, when an offender leaves his community for prison, his community loses a potential voter and a person for census purposes and subsequently loses funding for many desperately needed social services. When the offender returns to his community after prison—and not only are most prisoners eventually released,<sup>425</sup> but eventually return to their home communities<sup>426</sup>—the

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423. Wacquant, *supra* note 51, at 107 (citations omitted).

424. ABRAMSKY, *supra* note 37, at 57-58.

425. See sources cited *supra* note 103 and accompanying text.

426. Hamsher, *supra* note 15, at 316 (“The vast majority of released inmates return to their home county after incarceration.”); Tucker & Cadora, *supra* note 60, at 2 (“When they return—disproportionately to low-income neighborhoods of color—they will find neighborhoods weakened by their absence and burdened by their return.”); see also Wacquant, *supra* note 51, at 114 (“Today’s prison further resembles the ghetto for the

community regains the individual for census purposes, but he still cannot help his community affect change through its political voice. Disenfranchised, disillusioned and detached, he may be unlikely to encourage his family, friends and neighbors who can vote from participating in the electoral process, thereby further diminishing the political power of the community. Arguably, this loss of political voice inhibits the community from pushing for and influencing socio-economic policies (such as a living wage),<sup>427</sup> not to mention other criminal justice laws and policies,<sup>428</sup> including those governing released prisoners,<sup>429</sup> which could make offending and re-offending less of an appealing and seemingly necessary option.<sup>430</sup> Furthermore, and from an environmental perspective (which this Article now turns to in Part III), criminal disenfranchisement prevents poor and minority communities—groups often affected by environmental degradation—indeed, groups that disproportionately bear environmental burdens—“from working within their political process to secure the level of environmental protection necessary to protect their health and well-being.”<sup>431</sup>

### III. FOUR ARGUMENTS FOR CRIMINAL DISENFRANCHISEMENT AS AN “ENVIRONMENTAL” ISSUE

“In both the columns of statistics and everyday experience, there is inescapable evidence that the massive national effort to restore the

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simple reason that an overwhelming majority of its occupants originate from the racialized core of the country’s major cities, and returns there upon release.”).

427. See generally Jon Gertner, *What Is a Living Wage?*, N.Y. TIMES, Jan. 15, 2006, §6 (Magazine), at 38 (discussing how a living wage can reduce the need for temporary assistance).

428. As Ryan S. King and Marc Mauer of The Sentencing Project state:

Nationally, the vast increase in incarcerated drug offenders, fueled in large part by a heavy emphasis on law enforcement patterns and punitive sentencing policies, has had a highly skewed impact on communities of color. Many political leaders in these communities are concerned about the problem of drug abuse, but have called for a more balanced approach that emphasizes prevention and treatment. Yet, because there are fewer voting residents in these neighborhoods—due in significant part to drug policies—these voices have increasingly less political influence.

KING & MAUER, *THE VANISHING BLACK ELECTORATE*, *supra* note 15, at 15.

429. Fagan, *This Will Hurt Me More Than It Hurts You*, *supra* note 177, at 38 (“Not only does disenfranchisement disproportionately affect young African American males, it severely reduces their ability to influence these policies.”).

430. See sources cited *supra* notes 128, 387.

431. DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1281 (2d ed. 2002).

quality of the environment has failed.”<sup>432</sup>

In the winter of 1990, a group of non-Anglo activists and representatives of community-based groups sent a letter to each of the ten largest national environmental organizations (known as the “Group of Ten”)<sup>433</sup> decrying the “racism and the ‘whiteness’ of the environmental movement.”<sup>434</sup> The activists charged the mainstream environmental organizations (MEOs) with discrimination in their hiring and promoting practices and asserted that the mainstream groups had turned a blind eye to the concerns of poor and/or minority communities—communities that were frequently and disproportionately affected by environmental hazards and negative land uses.<sup>435</sup> Many of the MEOs acknowledged these criticisms. Frederic D. Krupp, President of the Environmental Defense Fund commented: “The truth is that environmental groups have done a miserable job of reaching out to minorities,”<sup>436</sup> although he also attempted to shift part of the burden to “cause oriented” members of minorities, whom he claimed tended to be attracted to issues such as discrimination and poverty, rather than environmental issues.<sup>437</sup> The late Jay D. Hair, then-President of the National Wildlife Federation proclaimed: “I don’t think anybody is as aware of the whiteness of the green movement as those of us who are

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432. SHABECOFF, *supra* note 2, at 267 (quoting BARRY COMMONER, *MAKING PEACE WITH THE PLANET* 38 (1990)).

433. GOTTLIEB, *supra* note 34, at 260. The “Group of Ten” has sometimes been referred to more pejoratively as the “Big Ten.” See Helen M. Ingram, David H. Colnic & Dean E. Mann, *Interest Groups and Environmental Policy*, in *ENVIRONMENTAL POLITICS & POLICY*, *supra* note 1, at 115, 127; JAMES P. LESTER, DAVID W. ALLEN & KELLY M. HILL, *ENVIRONMENTAL INJUSTICE IN THE UNITED STATES: MYTHS AND REALITIES* 44-45 (2001). Regardless of the preferred moniker, the ten organizations were: the Environmental Defense Fund, Environmental Policy Institute, Friends of the Earth, Izaak Walton League, National Audubon Society, National Parks Conservation Association, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, and the Wilderness Society. Carolyn Merchant, *RADICAL ECOLOGY: THE SEARCH FOR A LIVABLE WORLD* 159-60 (1992).

434. GOTTLIEB, *supra* note 34, at 260.

435. *Id.*; see also Nicholas Freudenberg & Carol Steinsapir, *Not in Our Backyards: The Grassroots Environmental Movement*, in *AMERICAN ENVIRONMENTALISM*, *supra* note 4, at 27, 32 (“The primary constituency of the national organizations is white, middle-class Americans; their leaders and staff are almost exclusively white.”); Philip Shabecoff, *Environmental Groups Told They Are Racists in Hiring*, *N.Y. TIMES*, Feb. 1, 1990, at A20.

A second letter, signed by more than 100 activists and representatives of community-based groups, was sent two months later, in March 1990, further detailing the ways in which the MEOs had neglected the poor and minority communities. See GOTTLIEB, *supra* note 34, at 260; LESTER ET AL., *supra* note 433, at 44-45.

436. Shabecoff, *supra* note 435 (quoting Frederic D. Krupp, Executive Director, Environmental Defense Fund).

437. *Id.*

trying to do something about it.”<sup>438</sup>

Much has changed in the last sixteen years. Recognition of the disproportionate impact of environmental problems on poor and minority neighborhoods has grown and many MEOs have attempted to integrate environmental justice issues into their organizations’ agendas.<sup>439</sup> But while the divide between mainstream environmentalism and environmental justice’s struggle for environmental equity and civil rights in minority communities may have lessened,<sup>440</sup> the “white green movement,” as

438. *Id.* (quoting Jay D. Hair, then-President of the National Wildlife Federation); see also Robert D. Bullard & Beverly H. Wright, *The Quest for Environmental Equity: Mobilizing the African-American Community for Social Change*, in AMERICAN ENVIRONMENTALISM, *supra* note 4, at 39, 42 (“Mainstream environmental organizations . . . have not had much success in attracting poor and working-class persons or the large urban underclass (which is burdened with both pollution and poverty) in the nation’s central cities or the rural southern blackbelt.” (citations omitted)).

439. See, e.g., Kaswan, *supra* note 4, at 264-65 (“Many mainstream environmental groups are now actively considering the environmental justice implications of their environmental advocacy and assisting communities of color in their challenges to adverse environmental conditions. . .”).

Numerous definitions and descriptions have been offered for the concept “environmental justice.” A specific characterization is not necessary for the purposes of this Article, nor is a thorough examination of the different meanings. For purely illustrative purposes, consider the following academic explanations of the concept: Lester, et al., distinguish between “environmental equity,” “environmental racism,” and “environmental justice.” For these authors, “[e]nvironmental equity” refers to the idea that potential pollution sources, such as LULUs [locally unwanted land uses], and their related health effects should not be disproportionately distributed among specific segments of the population, namely, the poor and minorities.” LESTER ET AL., *supra* note 433, at 21. “Environmental racism,” on the other hand, “is a broader label used for any policy, practice, or directive that differentially affects the environment of individuals, groups, or communities based on race.” *Id.* “Environmental justice,” encompasses both. *Id.* Kaswan, *supra* note 4, at 228 n.21-22, offers another set of definitions for “environmental equity,” “environmental racism,” “environmental discrimination,” and “environmental justice.”

440. See generally Kaswan, *supra* note 4, at 265 (noting the “sea change” regarding the interaction of MEOs and grassroots groups, but claiming that “the distance between the mainstream environmental establishment and the grassroots civil rights community has not yet been bridged”); Michael McCloskey, *Twenty Years of Change in the Environmental Movement: An Insider’s View*, in AMERICAN ENVIRONMENTALISM, *supra* note 4, at 77, 85 (observing that “[a]s the 1980s closed, even the long-troubled relations between the environmental movement and the Civil Rights movement began to show signs of changing for the better,” but bemoaning “the absence of healthy interaction between the more radical groups and the mainstream groups, or even between the pragmatic reformers and the accommodators”); *cf.* Email from Peggy M. Shepard, Executive Director, West Harlem Environmental Action, Inc., to author (July 24, 2006, 17:24:27 EST) (on file with author) (noting the difference in budgets between environmental justice groups and mainstream environmental organizations and observing that “[t]he gap has not narrowed but there are



Shellenberger and Nordhaus bemoan, continues to place primacy on a narrowly defined class of environmental issues and to elevate a similarly limited assortment of solutions to those problems.<sup>441</sup> While this stagnancy should be reason for mainstream environmental groups to step up their efforts to truly make civil rights and environmental rights “different links in the same movement,”<sup>442</sup> with academic claims that environmental law and policy is already muddled<sup>443</sup> and the environmental movement’s projections of catastrophe for the future of the planet,<sup>444</sup> one must ask whether adding the issue of criminal disenfranchisement to the “environmental” agenda is either prudent or plausible. As Dan Becker, Global Warming Director of the Sierra Club has stated, “We need to remember that we’re the environmental movement and that our job is to protect the environment. If we stray from that, we risk losing our focus, and there’s no one else to protect the environment if we don’t do it. We’re not a union or the Labor Department. Our job is to protect the environment, not to create an industrial policy for the United States. That doesn’t mean we don’t care about protecting workers.”<sup>445</sup> One can readily imagine Becker asserting, “The environmental movement’s job is to protect the environment, not create criminal justice policy, sentencing policy, or election law for the United States. That doesn’t mean we don’t care about protecting (the rights of) offenders and ex-offenders.”

This Part asserts that despite Becker’s concerns, with global warming moving to the top of the environmental problem list,<sup>446</sup> this is actually an

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slightly larger EJ groups than in the past”).

441. Shellenberger & Nordhaus, *supra* note 3.

442. GOTTLIEB, *supra* note 34, at 267 (quoting Cora Tucker, an Africa-American civil rights and environmental justice advocate).

443. See, e.g., David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 621 (1994) (calling American environmental law “complex, messy, and disorganized”).

444. According to the political scientists John S. Dryzek and James P. Lester, “models of doom” and “dystopia of ecological collapse” tend to move in cycles. They claim that such prognostications were both popular and plausible in the 1970s, but much more remote in the 1990s. Dryzek & Lester, *supra* note 1 at 343. As we venture into a new century, it would seem that predictions of environmental collapse are again en vogue.

445. Shellenberger & Nordhaus, *supra* note 3. Note, however, that in June 2006, the United Steelworkers and the Sierra Club announced the formation of an alliance, entitled the “Blue/Green Alliance,” to promote energy independence and fight global warming and toxic pollutants. See Steven Greenhouse, *National Briefing: Labor: Steelworkers and Sierra Club Unite*, N.Y. TIMES, June 8, 2006, at A21. For a thorough discussion of the relationship between labor and the environmental movement, see BRIAN K. OBACH, *LABOR AND THE ENVIRONMENTAL MOVEMENT: THE QUEST FOR COMMON GROUND* (2004).

446. See Shellenberger & Nordhaus, *supra* note 3 (calling global warming “the world’s most serious ecological crisis”); see generally John C. Derbach, *National Governance*, in

ideal time for MEOs to join forces with social justice groups interested in the issue of criminal disenfranchisement. This Part presents four arguments in support of this union. First, Section A takes a deeper look at the relationship of MEOs to grassroots social justice groups and argues that public participation is a core principle of environmental justice, a key component to many existing environmental laws, and integral to the concept of sustainable development. Next, Section B returns to the notion expressed in Part II.B that disenfranchisement affects recidivism, and, more generally, that voting affects crime. It then explores both whether crime adversely impacts the environment and whether certain environmental characteristics increase the likelihood of crime. Section B posits that if both exist, then criminal disenfranchisement laws and policies should not lie outside the scope of environmental law. Section C revisits the discussion in Part II.B regarding the impact of criminal disenfranchisement on elections, examining presidential appointments to federal agencies and judgeships and the significance of these appointments for the enforcement and interpretation of environmental law. Finally, Section D argues that a broader electorate will contribute to a richer sense of human-environment relations a more elaborate typology of environmental values and worldviews. While there is an inherent risk in such a proposition, i.e., that more voters will lead to greater divisiveness within and between organizations, this Section urges MEOs to take such a risk. Doing so will expand ecological knowledge on both the local and global levels, increase the participation of citizens, increase the publicity and exposure of an environmental problem to a wider audience (including policymakers), and help reduce environmental wrongs by adding to the formulation of solutions, as well as to the means and methods of implementing them.<sup>447</sup>

#### A. Environmental Movements, Groups and Coalitions and the Role of Public Participation in Environmental Decision-Making

To better understand the context of Becker's comments and the degree to which they may or may not be supported by other members of the mainstream environmental movement, this Section begins with an

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STUMBLING TOWARD SUSTAINABILITY, *supra* note 19, at 723, 740 (stating that if the United States were to "identify those areas involving the greatest risks to the country from unsustainable development[,] [c]limate change and loss of biodiversity would likely be priorities under that approach").

447. See Heseltine, *supra* note 19, at 44 ("At the heart of the environmental challenge on a great range of issues—whether they are global, national, or local—is not so much the identification of solutions as the finding of ways to implement them."); see also Costain & Lester, *supra* note 4, at 15 ("[T]he emphasis in environmental policy making has evolved from a concern about adding environmental issues to the agenda to environmental policy implementation and evaluation.").

overview of the relationship between the environmental movement and other social justice movements, such as the civil rights and anti-Vietnam War movements. It next turns to the relationship between the mainstream environmental movement and the environmental justice movement, highlighting both their points of agreement and disagreement. This Section then emphasizes the shared value of participation in the environmental decision-making process and notes the close alignment between environmental justice groups and other social justice groups. It concludes by urging acceptance of criminal disenfranchisement as an environmental issue and recommends the formation of a coalition between MEOs and social justice groups working on the issue of disenfranchisement in order to better foster participation in the (environmental) political process.

As noted in Part I, the “first wave” of the environmental movement began at the end of the 19th century, where the focus was on the conservation and preservation of pristine areas.<sup>448</sup> In the 1960s, with the publication of Rachel Carson’s *Silent Spring*, as well as writings by Barry Commoner and Paul R. Ehrlich,<sup>449</sup> the “second wave” of the environmental movement emerged, with pollution joining natural resource protection on the agenda.<sup>450</sup> The 1960s might have seemed like a perfect time for the environmental movement to embrace social justice issues as part of its mission, given the popularity of the anti-establishment ethos of the civil rights and anti-war movements.<sup>451</sup> But the environmental movement neither adopted a broader agenda (beyond pollution prevention and control) nor expressed much interest in joint ventures with the social justice movements of the time.<sup>452</sup> The burden, however, does not fall entirely on the shoulders of the environmental movement. As Professor Alice Kaswan explains, civil rights and other social justice groups did not reach out to the

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448. See sources cited *supra* note 4.

449. See, e.g., BARRY COMMONER, *SCIENCE AND SURVIVAL* (1970); BARRY COMMONER, *THE CLOSING CIRCLE* (1972); PAUL R. EHRLICH, *THE POPULATION BOMB* (2d ed. 1971); see also CHARLES REICH, *THE GREENING OF AMERICA* (1970); STEWART UDALL, *THE QUIET CRISIS* (1963).

450. Riley E. Dunlap & Angela G. Mertig, *The Evolution of the U.S. Environmental Movement from 1970 to 1990: An Overview*, in *AMERICAN ENVIRONMENTALISM*, *supra* note 4, at 1, 2; Riley E. Dunlap, *Public Opinion and Environmental Policy*, in *ENVIRONMENTAL POLITICS & POLICY*, *supra* note 1, at 63, 71; Freudenberg & Steinsapir, *supra* note 435, at 28; Kaswan, *supra* note 4, at 259.

451. See Cole, *supra* note 4, at 635 n.46; Kaswan, *supra* note 4, at 259.

452. Kaswan, *supra* note 4, at 259-60. Note, however, that in the 1980s, a number of grassroots activists drew from the civil rights, anti-Vietnam, and women’s movements to “explore[] various forms of direct action—civil disobedience, guerilla theater, monkey-wrenching, nonviolent demonstrations, and anarchism—in their efforts to open the minds and hearts of their fellow citizens to the plight of the planet under the domination of industrial society.” Devall, *supra* note 4, at 56.

environmental movement either:

Many civil rights leaders remained skeptical of the new environmental activists. . . . [They] were concerned that the burst of attention to the environment would distract the nation from the pressing problems of poverty that had just begun to receive attention through the War on Poverty. They feared that the impetus to address environmental problems might shift the nation's priorities—and resources—away from social justice.

Environmentalists did little to allay the civil rights leaders' concerns. Some environmentalists contributed to the skepticism by arguing that the environment was the most pressing public cause, thereby suggesting that other public issues, such as poverty, had a lower priority.<sup>453</sup>

Aside from the respective concerns over prioritization, the movements soon differed on strategical grounds, with the civil rights and anti-war movements favoring broad mobilization and the environmental movement opting for the trident of "litigation, lobbying, and technical evaluation."<sup>454</sup> With the passage of most of the major federal environmental laws in the 1970s, of which the mainstream environmental movement played a crucial role, the environmental movement became even less enthused about incorporating either the tools<sup>455</sup> or causes of civil rights and social justice groups.<sup>456</sup>

In the early 1980s, the environmental justice movement burst onto the scene with the mobilization of the predominantly African American

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453. *Kaswan*, *supra* note 4, at 259-60 (citations omitted); *see generally* Dunlap & Mertig, *supra* note 450, at 6 (describing the emergence of grassroots environmentalism in minority communities in the 1980s and 1990s as particularly important, since those communities "traditionally have been wary of the environmental movement, fearing that it deflects attention from social justice concerns").

454. Cole, *supra* note 4, at 635 n.46. This is not to suggest that all MEOs opt for these tools and reject all others, such as lobbying, electioneering, coalition building, and public mobilization. *See* Ingram, Colnic & Mann, *supra* note 433, at 126-27; *see also* Dryzek & Lester, *supra* note 1 at 328-29 (comparing the "environmentalist center," such as the Sierra Club and NRDC, which favor "conventional channels of political action," with more radical groups such as Earth First! and Greenpeace, which prefer direct action).

455. As Cole, writing in the early 1990s, explains: "Having designed and helped implement most of the nation's environmental laws, the second wave has spent the past twenty-five years in court litigating. Lawsuits are now the primary, and sometimes only, strategy employed by mainstream groups." Cole, *supra* note 4, at 636.

456. *See* GOTTLIEB, *supra* note 34, at 253-60 (discussing the mainstream environmental movement's detachment from social justice themes and people-of-color movements, and providing an overview of environmental groups' attitudes towards population and immigration in the 1970s).

Warren County, North Carolina against the selection of the county as the burial site for soil contaminated with toxic PCBs.<sup>457</sup> Although some trace the environmental justice movement as far back as the late 1960s,<sup>458</sup> the Warren County protest constituted “[a] formal melding of the civil rights movement and its earlier, inner-city environmental movement,”<sup>459</sup> and the first time that law and policymakers across the country took notice.<sup>460</sup> For example, in 1990, the Environmental Protection Agency created the Environmental Equity Workgroup, charged with the duty of studying the distributional issues raised by environmental hazards and governmental policies.<sup>461</sup> In February 1994, President Clinton issued Executive Order 12,898, instructing all federal agencies to conduct their programs, policies, and activities in a way that addresses the human health and environmental effects on minority and low-income populations and promotes environmental justice.<sup>462</sup>

This acceptance of environmental justice on the national policy agenda was not met with whole-hearted acceptance by mainstream environmental groups, however, as evidenced by the letters from the grassroots

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457. Alison E. Hickey, Note, *Shifting the Burden: Potential Applicability of Bush v. Gore to Hazardous Waste Facility Siting*, 33 B.C. ENVTL. AFF. L. REV. 661, 664 (2006); see also R. Bullard & B. Wright, *supra* note 438, at 41 (“Although the protests were unsuccessful in halting the landfill construction, they marked the first time that blacks mobilized a nationally broad-based group to protest environmental inequities and the first time that demonstrators had been sent to jail for protesting against a hazardous waste landfill.” (citations omitted)).

458. See, e.g., LESTER ET AL., *supra* note 433, at 25 (treating protests against the siting of a city-owned garbage dump in a largely African-American community in Houston in 1967 and the Martin Luther King Jr.-assisted protest by Memphis garbage workers against unequal pay and unsafe working conditions as “early stages of the environmental justice movement”).

For an historical perspective on the merging of environmentalism and civil rights activism, see generally ROBERT D. BULLARD, *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* (1993); ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY* (3d ed. 2000); *THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION* (Robert D. Bullard ed., 2005); LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* (2001); Walter Willard, *Environmental Racism: The Merging of Civil Rights and Environmental Activism*, 19 S.U. L. REV. 77 (1992).

459. LESTER ET AL., *supra* note 433, at 27. Prior to the Warren County protest, the “inner-city environmental movement” focused on getting the larger environmental movement to address human health concerns. *Id.* at 51.

460. *Id.* at 51. For a discussion of recommended or introduced environmental justice legislation by the 102nd and 103rd Congresses, see *id.* at 36-40.

461. Kaswan, *supra* note 4, at 226. For criticism by environmental groups of EPA’s efforts to address environmental justice, see LESTER ET AL., *supra* note 433, at 45-47.

462. See LESTER ET AL., *supra* note 433, at 40-41.

environmental organizations to the Group of Ten, discussed above. Although the schism between MEOs and grassroots environmental justice groups may have narrowed in the years since the letters, a significant gap, as also noted above, still remains. A number of commentators have speculated on the reasons for this phenomenon. For example, for political scientists James P. Lester, David W. Allen, and Kelly M. Hill writing in early 2000:

The political climate in Congress . . . presents a barrier to the advancement of environmental justice concerns. The conservative tone of Congress harkens back to the decentralizing agenda of the Reagan era. State power is increasing while federal budgets are decreasing. As seen during the Reagan era, this led to a polarization by the civil rights and environmental movements in order to protect their policy bargaining positions and retain past policy gains. During the 1980s, this led to a disappearance of environmental justice from the policy stream; it may do the same thing, at the federal level, after 2000.<sup>463</sup>

Although the federal deficit has swelled since President George W. Bush has taken office, this growth has not been accompanied by an increase in social service spending. Coupled with the conservative tone of Congress that the authors speak of, this Author would contend that the retreat-and-protect prediction has indeed come true.<sup>464</sup>

Political climate aside, other commentators seem to suggest that this might be as close as they get. For example, Luke Cole, writing in the early 1990s, maintains that three characteristics—motives, background and perspective—separated the MEOs from the grassroots environmental justice groups. With respect to the first—motives—Cole asserts that “mainstream environmentalists are generally motivated by aesthetic, recreational and biological considerations (or, even, by concern for career opportunities or organizational stability)”<sup>465</sup>—an idea discussed in the previous paragraph and explored in greater detail below. Grassroots activists, on the other hand:

[A]re often fighting for their health and homes. [They] have an immediate and material stake in solving the environmental problems they confront: the hazards they face affect the communities where they *live*, and may be sickening or even killing them or their children. Because grassroots activists have such a personal stake in the outcome of particular environmental battles, they are often willing to explore a

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463. LESTER ET AL., *supra* note 433, at 51.

464. For a broader discussion of the tendency of organizations to protect policy bargaining positions and retain past policy gains in trying political times, see *infra* Part III.C.

465. Cole, *supra* note 4, at 639 (footnotes omitted).

wider range of strategies than mainstream environmentalists.<sup>466</sup>

With respect to the second and third characteristics—background and perspective—Cole contrasts the grassroots environmental justice groups, which are frequently comprised of poor or people of color,<sup>467</sup> with the mainstream environmental movement, which is “overwhelmingly white and middle class in its staff, membership, and perspective.”<sup>468</sup> As Professor Kaswan adds,

[T]he mainstream environmental movement has become highly professionalized. Most of the work of the movement is accomplished by specialists, be they lawyers or scientists. Environmentalists frequently interact with government agencies, or handle technically complicated litigation. The primary purpose of the membership is to raise funds and generate broad political support for the environmental groups’ initiatives.<sup>469</sup>

Whereas the mainstream environmental movement often seeks to remedy environmental wrongs in court,<sup>470</sup> low-income people of color may have had negative experiences with the legal system and thus seek to achieve their goals through other means.<sup>471</sup> As Cole explicates:

Mainstream environmentalists see pollution as the *failure* of government and industry—if the environmentalists could only shape up the few bad apples, our environment would be protected. But grassroots activists come to view pollution as the *success* of government and industry, success at industry’s primary objective: maximizing profits by externalizing environmental costs. Pollution of our air, land, and water that is literally killing people is often not in violation of environmental

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466. *Id.* at 639-40 (footnotes omitted).

467. *Id.* at 640; see also Dunlap & Mertig, *supra* note 450, at 6 (noting that local grassroots organizations are often able to draw members from blue-collar and minorities).

For a discussion of the difference between “environmental racism”—the disproportionate siting of environmental hazards in minority communities—and “environmental classicism”—the disproportionate siting of environmental hazards in low-income communities that may or may not be communities of color, see LESTER ET AL., *supra* note 433, at 1, 9-10.

468. Cole, *supra* note 4, at 640 (citations omitted); Kaswan, *supra* note 4, at 266 (“The typical member of the environmental movement is described as white, well-educated, and middle- to upper-class. The same is true of the leadership of most mainstream environmental groups.”).

469. Kaswan, *supra* note 4, at 267.

470. See sources cited *supra* note 454 and accompanying text; see also Ingram, Colnic & Mann, *supra* note 433, at 119 (noting the “second wave’s” use of litigation as an instrument of choice).

471. Cole, *supra* note 4, at 640-41.

laws. Grassroots environmentalists, realizing this, have a far more radical and systemic view of the changes needed to eliminate pollution.

These widely divergent perceptions lead to the inevitable tension between the [MEOs and the grassroots environmental justice groups]: mainstream environmentalists are uncomfortable with [grassroots] environmentalists' challenge to the [mainstream's] system while grassroots environmentalists are distrustful of mainstream groups' comfort in working within the system, a system which grassroots environmentalists recognize as responsible for the degradation of their communities.<sup>472</sup>

Looking more broadly, political scientists Helen M. Ingram, David H. Colnic, and Dean E. Mann suggest that

[T]he relationships among environmental interest groups have failed to coalesce into a unified environmental movement or, perhaps, environmentalism has devolved from such a movement in that it "is no longer a single, identifiable entity." Rather than comprising a tightly knit environmental movement, the term "environmental community" better describes the diverse collection of interest groups loosely connected to one another by virtue of their concern for some aspect of environmental protection.<sup>473</sup>

Although this Author would certainly agree that the "environmental community" encompasses a "diverse collection of interest groups," just as this Author questions Shellenberger and Nordhaus' assertion that "environmentalism" needs to die and be reborn, this Author takes umbrage with the negative implications of "failure to coalesce," the tepid connotation of "diversity," and the gloomy description of environmentalism as having "devolved." Instead, one should be both troubled by the pervasive environmental problems that have required the formation of such diverse groups and pleased that such groups have emerged to combat these problems—a point which Ingram, Colnic and Mann themselves acknowledge:

Th[e] lack of cohesion within the environmental community has both negative and positive consequences. On the negative side, without a clear agenda and unified lobbying force the ability to influence Congress and the design of legislation may be somewhat diminished. Likewise, a more unified movement would probably have a better chance to improve implementation of environmental laws. On the other hand, the diversity within the environmental community increases the ability of citizens to involve themselves in groups dedicated to issues

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472. Cole, *supra* note 4, at 643-44 (citations omitted).

473. Ingram, Colnic & Mann, *supra* note 433, at 117 (citation omitted).



important to themselves. Fragmentation and diversity allow for several items to be placed on the environmental agenda at once. Given the potentially destructive capabilities of unaddressed environmental threats, focusing on multiple issues simultaneously may be extremely important.<sup>474</sup>

This Article will explore the issue of diversity in greater detail in Part III.D. For now, it is sufficient to propose that the materialization of diverse groups is a positive development—indeed, many environmental problems need to be addressed on the local, state, and regional level, rather than on the national stage,<sup>475</sup> and require significant numbers of engaged citizens. But there is also room for greater cohesiveness within both the MEOs and grassroots environmental groups and between them – especially with respect to the design and implementation of environmental laws. Greater cohesiveness does not mean that all the players adopt the same set of priorities or agree upon the same methods of achieving their goals. But neither should we accept Cole’s suggestion that motives, background, and perspective will perpetually separate the MEOs from the grassroots environmental justice groups.

As to the issue of “motives,” MEOs and grassroots environmental groups have frequently differed with respect to both their prioritization of environmental issues and their reasons for such prioritization. The problem of global warming, however, may well help narrow this gap.<sup>476</sup> While MEOs may view global warming as a threat for “aesthetic, recreational and biological” reasons, and grassroots environmental groups may have concern for global warming’s potentially devastating effect on human health,<sup>477</sup> global warming is an environmental problem that affects all

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474. Ingram, Colnic & Mann, *supra* note 433, at 140.

475. See, e.g., Gerald B. Thomas, *The Politics of Hope: An Eclectic Vision of the Future*, in ENVIRONMENTAL POLITICS & POLICY, *supra* note 1, at 347, 354 [hereinafter Thomas, *The Politics of Hope*] (“Politics, as it is currently practiced in most modern societies, is too centralized to be responsive to the needs of specific places. . . . The general idea, then, is to transfer decision making to a level where the special needs of specific areas will be considered.”).

476. Cole notes that “pollution will not be stopped by people who are not being polluted. If environmental degradation is stopped, it will be stopped by its victims. They can only stop it if they work at it together.” Cole, *supra* note 4, at 649. If Cole is correct, or even partially correct, then global warming’s indiscriminate impact may result in potential union of groups with different motives, backgrounds, and perspectives. See, e.g., Claudia H. Deutsch, *The New Black: Companies and Critics Try Collaboration*, N.Y. TIMES, May 17, 2006, at G1 (“The slow pace of regulatory change has actually helped foster partnerships. . . . Environmentalists say they . . . no longer expect Washington to tackle global warming, for example, and they know they cannot sue companies for violating laws that do not exist. So they have to become more cooperative.”).

477. See Brisman, *The Aesthetics of Wind Energy Systems*, *supra* note 17, at 15-21.

people, regardless of race, class, gender, or educational attainment.<sup>478</sup> This is not to suggest that everyone will be affected in the same way by global warming, since different regions will experience different changes than others, but it is a unique problem in that it crosses geographical, social and economic boundaries.<sup>479</sup>

With respect to “background and perspective,” this Author would agree with Cole’s analysis and would note that the divergent perceptions of the cause and method for addressing numerous environmental problems are unfortunate for many reasons. Most notably, the mainstream environmental movement’s failure to see connections between environmental degradation and poverty, crime, and joblessness, discussed further in Part III.B, has resulted in the narrow conceptions of “environment,” “environmental issues,” and “environmental problems,” and the similarly limited solutions that Shellenberger and Nordhaus assert are hindering real progress on many ecological crises. This tunnel vision or “group think,”<sup>480</sup> does not afflict grassroots activists. Because grassroots activists literally have their lives at stake, “they are often willing to explore a wider range of strategies than mainstream environmentalists.”<sup>481</sup> Their distrust of the legal system, on the other hand, while understandable and even justified at times, is no less unfortunate than the faults attributed to the MEOs. As this Article discussed in depth in Part II and as Cole also notes:

Poor people and people of color . . . have a deeper skepticism [than wealthier white people] about the law’s potential, because in the United States the law has historically been used to systematically oppress people of color and poor people: the law has stripped people of their land, denied them the right to vote, and rejected their very personhood. Thus, poor people and people of color generally do not trust the law, even when they use its institutions.<sup>482</sup>

This lack of faith in the legal system is regrettable: political participation is

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478. *Id.* at 16 n.30.

479. *Id.*; see generally Cole, *supra* note 4, at 633 (“While environmental problems disproportionately burden poor people and people of color, they cut across race and class boundaries, and thus create the potential for building multi-racial, multi-class and multicultural movements to address structural problems in society.”). Note that not every region will experience global warming equally either. For example, while wealthier countries may account for higher greenhouse gas emissions than poorer countries, Brisman, *The Aesthetics of Wind Energy Systems*, *supra* note 17, at 19 n.38, and while both rich and poor countries and individuals may feel the impact of global warming, the poor may be less prepared and less able to adapt and thus more likely to suffer from a hotter climate than the rich. See *id.* at 16 n.30.

480. Shellenberger and Nordhaus, *supra* note 3.

481. Cole, *supra* note 4, at 640.

482. *Id.* at 647-48 (footnotes omitted).

a core principle of environmental justice and a key component to many existing environmental laws, as well as integral to the concept of sustainable development. In fact, Ingram, Colnic, and Mann assert that with the exception of organizations that engage in direct action, such as Earth First!, “the strategies of most environmental groups can best be understood as attempts to gain access to governmental decision making.”<sup>483</sup>

To illustrate, the First National People of Color Environmental Leadership Summit in October 1991—one of the defining moments in the struggle to bring the inequitable distribution of environmental hazards to a broader audience—leaders of African American, Latino American, Asian Pacific American and Native American communities convened and adopted a resolution setting forth seventeen Principles of Environmental Justice.<sup>484</sup> The fifth principle states: “Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.”<sup>485</sup> The seventh principle states: “Environmental justice demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement and evaluation.”<sup>486</sup> Yet despite these core principles, African American, Hispanic, and poorer communities remain grossly under-represented in the political process—a point upon which many agree. Jeremy Travis, Senior Fellow at the Urban Institute, proclaims that “[p]oor people, minorities, young people, and felons are not well represented in the legislative branches of government that have historically reflected majoritarian wishes.”<sup>487</sup> Cole attributes poor and/or minority communities’ disproportionate exposure to environmental hazards to a political process that has historically excluded them.<sup>488</sup> Lester and his colleagues link the lack of advocates and lobbyists from low-income and/or

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483. Ingram, Colnic & Mann, *supra* note 433, at 126. For fluctuations in degree of access by nongovernmental environmental organizations to governmental decision-making, see sources cited *infra* notes 616-618, 636 and accompanying text.

484. Willard, *supra* note 458, at 88 n.49.

485. *Id.* See also LESTER ET AL., *supra* note 433, at 31-32.

486. Willard, *supra* note 458, at 88 n.49. See generally Scott Kuhn, *Expanding Public Participation Is Essential to Environmental Justice and the Democratic Decisionmaking Process*, 25 *ECOLOGY L.Q.* 647, 658 (1999) (“Increasing public participation is a key to achieving environmental justice. Environmental justice necessarily includes active and meaningful public participation. . . . To ensure and expand the role of the public in environmental decisionmaking, environmental justice advocates and supporters will have to increase their public education, community organizing, and legal advocacy.”).

487. Travis, *supra* note 59, at 32-33.

488. Cole, *supra* note 4, at 646; see generally Kuhn, *supra* note 486, at 649-50 (discussing the historic and systematic exclusion of women and people of color from participation in decisionmaking, arguing that “[e]nsuring meaningful public participation must begin with an understanding of past alienation, discrimination, and exclusion”).

communities of color at the national level to the siting of noxious facilities.<sup>489</sup>

Public access and participation is likewise a fundamental component of a number of U.S. environmental laws, with many such statutes leaving a great deal of discretion to agencies in both setting standards and in enforcing them, and with environmentalists, citizens' groups, and other interested parties having been granted standing to participate in administrative proceedings.<sup>490</sup> For example, the National Environmental Policy Act (NEPA) requires agencies to involve the public throughout the implementation of NEPA procedures.<sup>491</sup> This includes participation in the preparation of an environmental assessment (EA) and in the determination of whether an environmental impact statement (EIS) is necessary, as well as opportunities to comment on draft EIS and underlying comments.<sup>492</sup> Agencies must then take these comments into consideration in issuing a final EIS and must respond to them; failure to do so may constitute reversible error and invalidate the final EIS.<sup>493</sup> The Resource Conservation

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489. LESTER ET AL., *supra* note 433, at 4-5; *cf.* Mitchell, Mertig & Dunlap, *supra* note 4, at 20 (describing national environmental organizations as generally preferring lobbying over direct action, and stating, "[l]obbyists play a crucial role in pressuring Congress and the various government agencies involved with environmental issues to enact new laws and implement the existing ones").

490. Mitchell, Mertig & Dunlap, *supra* note 4, at 20; *see generally* Cole, *supra* note 4, at 646 ("The importance of the political process is heightened by the procedural emphasis of many environmental laws."). For a discussion of other U.S. legislation (although not strictly environmental legislation) that provides for public participation and access to information, see Francis Irwin & Carl Bruch, *Public Access to Information, Participation, and Justice*, in STUMBLING TOWARD SUSTAINABILITY, *supra* note 19, at 511, 513-19 (summarizing the access to information and public participation provisions of the Administrative Procedure Act (APA), Freedom of Information Act (FOIA), Government in the Sunshine Act, and the Emergency Planning and Community Right-to-Know Act (EPCRA)).

491. National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (2000). For a discussion of the formulation of NEPA, see LYNTON K. CALDWELL, SCIENCE AND THE NATIONAL ENVIRONMENTAL POLICY ACT: REDIRECTING POLICY THROUGH PROCEDURAL REFORM (1982). Caldwell attributes part of the ability of environmentalism to gain force in the United States to the right of citizen review of EISs under NEPA. Lynton K. Caldwell, *Globalizing Environmentalism: Threshold of a New Phase in International Relations*, in AMERICAN ENVIRONMENTALISM, *supra* note 4, at 63, 66 [hereinafter Caldwell, *Globalizing Environmentalism*].

492. 42 U.S.C. § 4332(2)(C). For a discussion of how low-income and people of color can use NEPA to educate community members about the negative environmental impacts of proposed projects or existing hazards that should be removed from the community, see Browne C. Lewis, *What You Don't Know Can Hurt You: The Importance of Information in the Battle Against Environmental Class and Racial Discrimination*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 327 (2005).

493. *See* 42 U.S.C. § 4332(2)(C).

and Recovery Act (RCRA) encourages the public to report to the EPA exposure to hazardous waste at treatment, storage, and disposal facilities.<sup>494</sup> RCRA also requires the EPA to facilitate public comment on any settlement that it negotiates with facilities found to pose immediate and substantial threats to the environment and human health before such settlements are finalized.<sup>495</sup> Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the EPA must provide notice and analysis of a proposed plan to clean up a contaminated site, provide opportunity for the submission of written and oral comments on the proposed plan, and provide notice of the final plan, along with a discussion of any changes in the proposed plan, before commencement of any clean-up action.<sup>496</sup> The Bureau of Land Management (BLM), pursuant to the Federal Land Policy and Management Act (FLPMA), must develop, maintain and, when appropriate, revise land use plans with public involvement.<sup>497</sup> Similarly, the National Forest Management Act (NFMA) requires the Secretary of Agriculture to “provide for public participation in the development, review, and revision of [national forest] land management plans.”<sup>498</sup> The Coastal Zone Management Act (CZMA) requires public hearings in the development of state CZMA management plans.<sup>499</sup> In addition to notice-and-comment and public hearing requirements, as well as the distribution of information to communities and citizen groups pertaining to environmental policy,<sup>500</sup> many of the major environmental statutes permit ordinary citizens or public interest groups to act as “private attorneys general” and seek civil penalties against a private party for

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494. Resource Conservation and Recovery Act, 42 U.S.C. § 6939a(c) (2000).

495. *Id.* § 6973(d).

496. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9617(a)-(b) (2000). For a discussion of how the grassroots environmental movement helped to expand the rights of citizens to participate in clean-up and response activities, including participation in enforcement settlements and consent decrees in the Superfund Amendments and Reauthorization Act of 1986 (SARA), see Freudenberg & Steinsapir, *supra* note 435, at 34.

497. Federal Land Policy and Management Act, 43 U.S.C. § 1712(a) (2000); *see also id.* § 1712(f) (requiring the BLM to establish procedures, including public hearings, to give the public “adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands”).

498. National Forest Management Act, 16 U.S.C. § 1604(d) (2000).

499. Coastal Zone Management Act, 16 U.S.C. § 1455(d)(3) (2000).

500. For an overview of the development of administrative law from before the 1960s to the current system of interest representation, as well as a summary of the ways in which the environmental lobby may press for strong environmental standards and strict enforcement of environmental statutes and regulations, see Mitchell, Mertig & Dunlap, *supra* note 4, at 20.

violations of the act or against the EPA for failure to enforce the act.<sup>501</sup>

Sustainable development—the multi-definitional and somewhat elusive concept, approach or process that attempts to balance or integrate economic development, social development/equity, and environmental protection—is also pertinent to this Section’s inquiry.<sup>502</sup> Although crime impedes social sustainability<sup>503</sup> and may impact a community’s efforts at both economic and environmental sustainability,<sup>504</sup> sustainable development’s relevance here is to its emphasis on the importance of public involvement. Principle 10 of the Rio Declaration—the consensus statement of principles adopted at the 1992 Earth Summit in Rio de Janeiro—proclaims that “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level.”<sup>505</sup> Agenda 21—the blueprint for

501. See, e.g., Clean Air Act, 42 U.S.C. § 7604 (2000); Clean Water Act, 33 U.S.C. § 1365 (2000); Endangered Species Act, 16 U.S.C. § 1540(g) (2000).

502. Although many definitions of “sustainable development” have been offered, the most widely recognized definition comes from the 1987 World Commission on Environment and Development (more commonly known as the Brundtland Commission), which promulgated the idea of “sustainable development” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” U.N. ENV’T. PROGRAMME, World Comm’n on Env’t and Dev., *Our Common Future*, ch. 2 ¶ 1, U.N. Doc. A/42/427 (Aug. 4, 1987).

For other definitions, see, e.g., Peggy F. Barlett, *Introduction* to URBAN PLACE, *supra* note 35, at 1, 6 [hereinafter Barlett, *Introduction*, URBAN PLACE] (explaining that “sustainability seeks . . . a productive and viable intersection among economic, environmental, and social domains of life” (citations omitted)); Cozens, *supra* note 46, at 130 (casting the concept as involving three strands: environmental, social, and economic); Julian Agyeman & Tom Evans, *Toward Just Sustainability: Building Equity Rights with Sustainable Solutions*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 35, 36 (2003) (employing a working definition based on ensuring a better quality of life within the limits of supporting ecosystems).

Because sustainable development eludes the confines of a singular definition it has received its share of criticism. See, e.g., Barlett, *Introduction*, URBAN PLACE, *supra*, at 7 (“Some . . . criticize sustainability objectives as vague, impractical, or easily co-opted by powerful groups. Sustainability rhetoric can also leave aside consideration of institutions that created the current crisis.” (citations omitted)). But a singular definition is neither necessary to implement it nor to work towards it. See, e.g., Nancy J. King & Brian J. King, *Creating Incentives for Sustainable Buildings: A Comparative Approach Featuring the United States and the European Union*, 23 VA. ENVTL. L.J. 397, 400-01 (2005) (treating sustainable development as a process, and arguing “it is not necessary to agree on a precise meaning in order to pursue or promote sustainable development”).

503. Brisman, *Double Whammy*, *supra* note 90, at 430 (describing crime as an “impediment to a sustainable community”); see also du Plessis, *supra* note 422, at 33 (“No city can call itself sustainable if the citizens of that city fear for their personal safety and the safety of their livelihood.”).

504. See *infra* Part III.B.

505. U.N. Conference on Environment & Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, Principle 10, U.N. Doc

implementing sustainable development that was also adopted at the Earth Summit and which has influenced the activities of the United Nations Environment Program<sup>506</sup>—stresses the importance of public participation in developing, implementing, and enforcing laws and policies related to and necessary for sustainable development. Chapter 23 of Agenda 21, entitled “Strengthening the Role of Major Groups,” is devoted entirely to broadening and strengthening the role of traditionally under-represented social groups in decision-making processes.<sup>507</sup> It begins by observing that “the commitment and genuine involvement of all social groups” is “[c]ritical to the effective implementation of the objectives, policies and mechanisms agreed to by Governments in all programme areas of Agenda 21.”<sup>508</sup> It continues, using language that echoes the Principles of Environmental Justice discussed above, as well as the participatory components of what is characterized as U.S. environmental law:

One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, *the need for new forms of participation has emerged*. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly *those which potentially affect the communities in which they live and work*. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.<sup>509</sup>

Chapter 27 fleshes out the role of non-governmental organizations (NGOs), emphasizing the importance of both the more established organizations and grassroots groups, and stressing the significance of dialogue and interaction within the NGO universe, as well as between NGOs as a whole and governmental entities:

Non-governmental organizations play a vital role in the shaping and

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A/CONF.151/5/Rev.1 (June 13, 1992), *reprinted in* 31 I.L.M. 874, 878 (1992).

506. See Irwin & Bruch, *supra* note 490, at 512.

507. U.N. Conference on Environment & Development, Rio de Janeiro, Braz., June 3-14, 1992, *Agenda 21*, ch. 23, U.N. Doc. A/CONF.151/26 (June 14, 1992).

508. *Id.* ¶ 23.1.

509. *Id.* ¶ 23.2 (emphasis added); see also Willard, *supra* note 458, at 88 n.49. One could argue that broadening the electorate in the United States by liberalizing criminal disenfranchisement laws and policies creates the “new form of participation” by individuals likely to be affected by development in the “communities in which they live and work.”

implementation of participatory democracy. Their credibility lies in the responsible and constructive role they play in society. Formal and informal organizations, as well as grass-roots movements, should be recognized as partners in the implementation of Agenda 21. The nature of the independent role played by non-governmental organizations within a society calls for real participation; therefore, independence is a major attribute of non-governmental organizations and is the precondition of real participation.

One of the major challenges facing the world community as it seeks to replace unsustainable development patterns with environmentally sound and sustainable development is the need to activate a sense of common purpose on behalf of all sectors of society. The chances of forging such a sense of purpose will depend on the willingness of all sectors to participate in genuine social partnership and dialogue, while recognizing the independent roles, responsibilities and special capacities of each.<sup>510</sup>

Although Chapter 27 speaks in broad terms, its relevance to this Article is no less significant, specifically with respect to the necessity of NGOs of all shades to communicate with each other, rather than competing for governmental attention or limiting their conversations to like-minded NGOs—something explored in greater detail in Sections C and D of this Part. Chapter 27 also attempts to balance the need for different sectors of society to recognize commonalities—vital for addressing worldwide environmental problems that present locally with different symptoms (e.g., global warming)—and the need for groups to flaunt their colors, maintain their independence, and recognize their peculiar abilities—vital for U.S. grassroots environmental and social justice organizations that may be fearful of the power of the mainstream environmental movement.

Although public participation is integral to environmental justice, numerous environmental laws, and to sustainable development, there is a distinction between involvement in the environmental decision-making process and voting. One can speak at a public hearing and submit comments on draft environmental impact statements and proposed land use plans, as well as bring a citizen suit, without possessing the franchise<sup>511</sup> (although given disenfranchised individuals' feelings of alienation from the political system, their participation in hearings and their submission of

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510. *Id.* ¶¶ 27.1-27.2.

511. Riley E. Dunlap, *Public Opinion and Environmental Policy*, *supra* note 450, at 108 (“[V]oting is only one of many political actions that people take. . . . Contributing money, distributing campaign literature, making phone calls, and so on, can be of immense value. . . . Such political behaviors. . . are all ways in which the American public can support environmental protection.”).



comments is likely to be limited, especially if they cannot voice their displeasure at the polls). Similarly, because fairly few environmental issues are subject to referenda,<sup>512</sup> one can vote consistently and conscientiously and still remain isolated and detached from the environmental decision-making process. Thus, there is not a direct link between broadening the electorate by scaling back or repealing criminal disenfranchisement laws and greater participation in the environmental decision-making process (and presumably greater environmental protection). But several commentators have noted that public participation in environmental policy “promote[s] a sense of civic involvement, civic responsibility, and a more involved citizenry.”<sup>513</sup> Such civic involvement and responsibility is not only vital as a means of protecting the environment—especially where government has not acted—but also in creating the type of cohesion and informal social control necessary to prevent and reduce crime—an idea noted in Part II.B.3.b and explored in greater detail in Section B of this Part. While voting can also advance civic involvement and responsibility, disenfranchisement can promote civic detachment, undercutting the power and efficacy of the public participation components in environmental policy.

Along these lines, Lester, Allen and Hill, citing numerous studies examining the linkage between political mobilization and environmental hazards, note that high levels of political mobilization, as measured by voter turnout at the state and county level, play a role in diminishing levels of environmental hazards.<sup>514</sup> The key here is the measurement of voter turnout. As Lester and his colleagues conclude: “increased political mobilization should have the effect of minimizing environmental harms, because policymakers are likely to pay attention to problems articulated by this type of community.”<sup>515</sup> In other words, communities with high levels of political mobilization (i.e., high voter turnout) are communities that attract the interest of politicians, who must then protect and satisfy their constituents. In light of Part II.B.3.b’s discussion of how politicians focus their attention away from neighborhoods and communities with high rates

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512. *But see infra* Section C (discussing the environmental impact of prisons—often built pursuant to voter-approved county-issued bonds).

513. Evan J. Ringquist, *Evaluating Environmental Policy Outcomes*, in ENVIRONMENTAL POLITICS & POLICY, *supra* note 1, at 303, 304 (citing JOHN S. DRYZEK, DISCURSIVE DEMOCRACY: POLITICS, POLICY, AND POLITICAL SCIENCE (1990); PUBLIC POLICY FOR DEMOCRACY (Helen Ingram & Steven Rathgeb Smith, eds., 1993)).

514. LESTER ET AL., *supra* note 433, at 60-61. Note, however, that because local elections are held at different times throughout the state and no agency systematically collects these election results, city mobilization cannot be not measured by using voter turnout. *Id.* at 61.

515. *Id.* at 60.

of disenfranchisement, as well as this Section's comments regarding poor or minority communities' lack of political power, it follows that political mobilization, measured by an indicator of voter turnout, would result in lower levels of environmental harm. Criminal disenfranchisement, then, frustrates efforts to achieve environmental justice, sustainable development and the type of public participation that environmental law holds dear.

Admittedly, there is also a distinction between grassroots environmental justice groups and social justice groups working on issues of criminal justice and prison reform, reentry and disenfranchisement. Although environmental justice groups may be closely aligned with other grassroots social justice groups<sup>516</sup> and although grassroots social justice groups may share the same background and perspective as grassroots environmental justice groups, they are not synonymous.<sup>517</sup> While environmental justice groups have had success forming coalitions with other social justice groups<sup>518</sup>—indeed, the environmental justice movement is the offspring of the civil rights movement and inner-city environmentalism—the mainstream environmental movement does not share this achievement. As Ingram, Colnic and Mann point out, “[i]f coalitions among environmental organizations are difficult to form, alliances between environmental and nonenvironmental groups are even harder to establish and maintain.”<sup>519</sup> Thus, one might argue that MEOs may well regard joint efforts to combat disenfranchisement laws and policies as an arduous task ill worth their time and efforts. Although coalition building of any nature is difficult,<sup>520</sup> there are a number of reasons to think that a coalition between the mainstream

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516. Ingram, Colnic & Mann, *supra* note 433, at 121 (describing alignment of environmental justice groups with civil rights and church-based community organizations).

517. This does not mean there are no instances of overlap. For example, the prison reform group Critical Resistance's objections to rural prisons are based on environmental grounds. *Infra* note 531 and accompanying text. In addition, the non-profit Tennessee grassroots organization Save Our Cumberland Mountains (SOCM), which works on economic, environmental and social issues (sustainable forestry, clear cutting, strip mining, mountain top removal, aerial spraying, and tax reform), adopted the issue of criminal disenfranchisement to its broad agenda in 2003. *Infra* note 523 and accompanying text.

518. Ingram, Colnic & Mann, *supra* note 433, at 134 (“[G]rassroots activists have been particularly adept at forming coalitions outside of traditional environmentalism. Environmental equity groups established important linkages with public health, civil rights, and social justice advocates.”).

519. *Id.* at 133.

520. See, e.g., Adam Cohen, *Bloggers at the Gates: What Was Good for EBay Should Be Good for Politics*, N.Y. TIMES, Mar. 12, 2006, §4, 11 (“After the disastrous 2004 election, prominent Democrats gathered in Monterey, Calif., to discuss what to do next. The organizers scheduled a session on coalition building, but each special interest complained that its issue was being slighted. In the end, the coalition-building session broke up into five separate groups, each focusing on its own issue.”).

environmental movement and social justice groups could succeed in working together on disenfranchisement issues.

First, Ingram and her colleagues support their assertion by citing the example of attempted unions between the mainstream environmental movement and labor: “Policy goals are often portrayed as zero-sum trade-offs between environmental protection on one side and jobs and economic growth on the other, thus alienating the environmental community from labor and industry.”<sup>521</sup> This Article’s proposed alliance would not present such zero-sum trade-offs. Allowing offenders and ex-offenders to vote does not sacrifice environmental protection for job security or economic growth. While disagreements between MEOs and social justice groups may take place farther down the road once a critical mass of individuals become empowered with the franchise, the “environment,” as defined by MEOs, will not suffer as a result of this Article’s proposed union. In fact, a more expansive electorate may well lead to broader and richer solutions to environmental problems and more effective means and methods of implementing them.

Second, Ingram, Colnic and Mann note, mainstream and grassroots groups “are often divided on policy and cannot form coalitions” because the local or grassroots groups fear the mainstream groups’ willingness to compromise will result in a “bargain[ing] away [of] their collective interest.”<sup>522</sup>

It is true that environmental justice groups and MEOs have often spoken different languages—the former using charged, emotional language to describe the human health impacts of an environmental hazard, the latter employing cold, detached scientific terminology and legal jargon. It is also correct that MEOs have occasionally compromised on points or issues that grassroots environmental groups have been unwilling to cede. But criminal disenfranchisement is not couched in scientific terms nor is its language particularly arcane. There are also a limited range of options regarding offender and ex-offender voting, as noted earlier in Part II.B—from no ban to bans on various classes of offenders and ex-offenders. Obviously, members of a coalition might disagree on which proposals might be more legislatively feasible or which legal strategies might be more successful in court. But the extent of fracture within a coalition of MEOs and social justice groups on the issue of disenfranchisement may well be less than the degree of division between mainstream environmental groups and grassroots environmental justice organizations on a traditionally

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521. Ingram, Colnic & Mann, *supra* note 433, at 133.

522. Ingram, Colnic & Mann, *supra* note 433, at 132 (“The characteristic willingness to compromise by the mainstream groups compared to the general steadfastness of local groups has made coalition formation and maintenance problematic.”).

environmental issue because of the limited scope of (dis)enfranchisement possibilities. In addition, whereas a less than ideal land use plan or siting decision may still have long-term adverse ecosystem and human health impacts, a less than complete victory with respect to criminal disenfranchisement still broadens the electorate.

Finally, only one environmental organization to date—Save Our Cumberland Mountains (SOCM)—the non-profit Tennessee-based grassroots organization working on state-wide economic, environmental, and social justice issues—is currently working with other grassroots groups to restore voting rights to disenfranchised Tennessee citizens.<sup>523</sup> Although neither the environmental movement nor the grassroots community has voiced specific support for a larger coalition built around the issue of criminal disenfranchisement, both sides have called for unions addressing broader political, social, and economic disparities, which could well include criminal disenfranchisement.<sup>524</sup> For example, Shabecoff argues that in order

[t]o make the political breakthrough necessary to achieve their goals, the environmentalists *must* make common cause with other sectors of our society that have a stake in changing the political and economic status quo. Potential allies include the poor, minorities, women, industrial workers, and other vulnerable groups whose vital interests demand significant social change.<sup>525</sup>

Bemoaning the environmental movement's rejection of its social justice heritage, as noted earlier in this Section, Shabecoff continues:

The great failure of much of the national movement in recent years, in my opinion, has been its unwillingness or inability to take up the causes of social justice in the United States. This failure is all the more dismaying because one of the deepest roots of contemporary

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523. Save Our Cumberland Mountains, Social Progress Committee: Dismantling Racism, Voter Rights, <http://www.socm.org/racism.html> (last visited April 22, 2007) (proposing and supporting legislation to return voting rights automatically to people “on probation or parole and to those who had served their jail or prison sentences”).

524. Cf. Demleitner, *Preventing Internal Exile*, *supra* note 32, at 159 (“[E]x-offenders generally do not benefit from the support of other groups unless their plight can be tied into other societal or group concerns, such as the disproportionate denial of voting rights to African-Americans.”); Shapiro, *supra* note 221, at 564 n.145 (“Society’s continued disdain for criminal offenders may . . . explain why criminal disenfranchisement is rarely challenged. Members of minority-advocacy groups like the NAACP, for example, may be too preoccupied with trying to protect the rights of law-abiding citizens . . . [to expend resources fighting for] those who have committed crimes.”).

525. SHABECOFF, *supra* note 2, at 281; *see generally* Cozens, *supra* note 46, at 130 (“[E]nvironmentalists need to shift their emphasis towards embracing more energetically ‘social’ aspects of the environment and the urgent problems of the inner city.”).

environmentalism lies, as we have seen, in the activist civil rights/peace/women's tradition of the 1960s.<sup>526</sup>

This point is echoed by Cole, who notes that “[o]ne of the central lessons that can be drawn from the political organizing in the 1960’s is the need for such a mass base for a movement to be successful.”<sup>527</sup> And Peggy M. Shepard, the Executive Director and Co-Founder of West Harlem Environmental Action, Inc. (WE ACT), regards coalitions between MEOs and grassroots organizations as vital to rectifying the MEOs’ previous disregard for issues peculiar to low-income communities of color and to combating systematic economic and social problems and injustices<sup>528</sup>—the types of troubles that can be both a cause and a system of crime. This Article now turns from the relationship between MEOs and grassroots organizations to the impact of crime on the environment and the effect of different physical environments on crime.

#### B. The Impact of Crime on the Environment and Environment on Crime

As mentioned in Part II.B.3, courts in this country and abroad, as well as correctional officials and other commentators, have asserted a connection between disenfranchisement and recidivism and, more generally, between voting and crime. This Section explores first whether crime adversely impacts the environment and posits that if such a relationship does exist, then disenfranchisement laws and policies should be well within the purview of *environmental* law and policy and on the agenda of environmental activists like Becker. This Section then explores the reverse proposition—whether certain environmental characteristics positively or negatively affect the conditions ripe for crime. It next proposes that if the presence, rather than the absence, of nature (specifically, nearby urban nature) diminishes the likelihood of crime, then a two-pronged crime-reducing approach is in order—increasing urban nature *and* increasing political participation.

The evidence and theories supporting the adverse impact of crime on the

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526. SHABECOFF, *supra* note 2, at 281.

527. Cole, *supra* note 4, at 633 n.38.

528. Shepard, *supra* note 383, at 751. *See also* email from Peggy M. Shepard, *supra* note 440. Shepard writes,

I still believe that there need to be coalitional efforts that bring in diverse voices if we are to make progress and build constituencies around a number of issues. . . . [Y]ou must work in coalition . . . if you are to change policy at the city, state or national levels. I do not believe you can change the conditions in poor or communities of color without changing policy, legislation and the political will.

*Id.*

environment can be placed into several different, although by no means exhaustive or exclusive, categories: 1) crime's effect on the environment of prisoner-importing communities; 2) crime's effect on the environment of offenders' home communities; 3) crime's broader environmental impact (neighborhoods, communities, and localities adjacent to prison-exporting communities, but not themselves prison-importing communities, as well as to states and counties as a whole).<sup>529</sup> For an example of the first, the combination of increased reliance on prison as a form of punishment and lengthy prison sentences, as alluded to in Part II, has led to the rural prison-building proliferation. According to Abramsky, when federal and state prisons and immigration holding facilities are built (usually with junk bonds or county-issued revenue bonds) in impoverished, sparsely populated, and parched desert counties, such as Sierra Blanca in Hudspeth County, Texas, east of El Paso, and La Salle County, in South Texas, they frequently "tap out the counties' meager water reserves and make it all but impossible for other businesses to come in."<sup>530</sup> Similarly, Critical Resistance, a national grassroots organization that seeks alternatives to incarceration, contends that prisons are not 'clean industries':

They suck up scarce local resources such as water; they require towns to pay for roads, sewers [and] utilities; they generate tens of thousands of miles of commuting pollution, often in the most polluted parts of the state; they take irreplaceable land out of any productive use, wasting valuable public resources for nothing but holding people in cages.<sup>531</sup>

While certainly some rural prisons are built on spec, crippling counties forced to service bond debts if they cannot fill prison beds,<sup>532</sup> one could make the fairly plausible argument that a decrease in crime might retard the prison-building frenzy. Reforming criminal disenfranchisement laws and policies would not single-handedly reduce recidivism or create the collective efficacy that Sampson, Raudenbush, and Earls argue is necessary for neighborhoods to exert the type of informal social control necessary to limit crime. But if there is a link between disenfranchisement and crime and if there is a link between crime and environmentally destructive prison projects—the type of projects that the environmental movement would

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529. For an example of a measure that affects *both* crime and the environment, see, e.g., DAVID PRERAU, *SEIZE THE DAYLIGHT: THE CURIOUS AND CONTENTIOUS STORY OF DAYLIGHT SAVING TIME* (2005) (discussing how daylight saving time curbs energy consumption, reduces traffic fatalities, and results in decreased crime).

530. ABRAMSKY, *supra* note 37, at 107.

531. CRITICAL RESISTANCE, *PRISONS: NEW FORMS OF ENVIRONMENTAL RACISM* (2002), [http://www.criticalresistance.org/index.php?name=environmental\\_racism](http://www.criticalresistance.org/index.php?name=environmental_racism).

532. See generally Sasha Abramsky, *Incarceration, Inc.*, *supra* note 407 (discussing a facility built in Reeves County, Western Texas).

consider to be an “environmental” battle worth undertaking—then it would be reasonable to suggest that the environmental community consider criminal disenfranchisement an environmental issue.

To provide an example of crime’s effect on the environment of offenders’ home communities, as well as its broader environmental impact, consider that when a community is faced with the problem of crime, it may be unable to devote its time and resources, which may already be overburdened, to environmental problems.<sup>533</sup> In addition, recall that in Part II.A this Article cited the research of Hagan and Dinovitzer and asserted that when individuals are taken from their communities and imprisoned, their communities lose potential members of the legitimate workforce, increasing the likelihood that businesses might relocate to the suburbs in order to find a more consistent and reliable workforce.<sup>534</sup> The exodus of both young men to prisons and businesses to the suburbs, this Author argued in *Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment*, may contribute to the adverse environmental problems of sprawl (e.g., poor air quality, water quality, loss of open space, and loss of biodiversity).<sup>535</sup> This departure of businesses further reduces the employment opportunities of ex-prisoners, as well as the job prospects for the remaining young adults in those communities, increasing the odds of recidivism in the former and the beginning of a criminal career in the latter, and subsequently increasing the chance that the remaining businesses will also leave, creating a vicious cycle.<sup>536</sup> *Double Whammy* also contended that crime and the fear of crime

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533. Brisman, *Double Whammy*, *supra* note 90 at 430 (“A community with significant social problems, such as crime, will be unable to address other key issues, such as environmental problems, because it will focus on social problems.”); *see generally* HUNTER, SALZMAN & ZAELKE, *supra* note 431, at 1281 (“The failure to protect and promote human rights prevents progress towards environmental protection and sustainable development.”); *see also* sources cited *supra* note 90 and accompanying text; *infra* note 562-69 and accompanying text.

534. *See supra* notes 151-52; *see also* Brisman, *Double Whammy*, *supra* note 90, at 430, 449-53.

535. Brisman, *Double Whammy*, *supra* note 90, at 431, 456-59. While there are countless sources discussing the adverse environmental and human health impacts of sprawl, for a good overview, see William Buzbee, *Sprawl’s Political-Economy and the Case for a Metropolitan Green Space Initiative*, 32 URB. LAW. 368-69, 372-73 (Summer 2000) (“[S]prawling growth often leaves behind increasingly impoverished central urban areas, destroys green space, converts agricultural land to residential or business use, and contributes to deteriorating air pollution as residents must drive increased distances to jobs and to obtain basic amenities.”); Howard Frumkin, *The Health of Places, the Wealth of Evidence*, in URBAN PLACE, *supra* note 35, at 253, 262-64 (describing the features of sprawling communities and subsequent health implications).

536. *See* Brisman, *Double Whammy*, *supra* note 90, at 455; LYNCH & SABOL, *supra*

leads to the unlimited outward extension of cities<sup>537</sup>—the “flight from blight”<sup>538</sup>—and to the unsustainable practice of driving sports utility vehicles (SUVs),<sup>539</sup> which purposefully appeal to fear of violence and crime.<sup>540</sup> Because the collateral consequences of conviction and imprisonment contribute to recidivism—because an assortment of laws encumbering offenders’ and ex-offenders’ abilities to secure employment, housing and benefits, thereby increasing the likelihood that they will commit crimes that they might not have otherwise—and because crime and the fear of crime hampers a community’s ability to address environmental problems and may result in sprawl and SUV-driving, *Double Whammy* maintained that many of the collateral consequences should be re-examined and that environmental organizations should join forces with organizations devoted to bringing about changes in these laws. While *Double Whammy* focused on the difficulties that offenders and ex-offenders face with respect to employment, housing and benefits, some of the same reasoning and conclusions apply here: crime, regardless of its genesis, may hamper a community’s ability to address its own environmental problems and issues,

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note 30, at 3 (observing that limited access to jobs in metropolitan areas “may impose further constraints on the capacity of communities to reintegrate ex-prisoners”); WESLEY G. SKOGAN, *DISORDER & DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 65 (1990) (“[T]he stigmatizing effect of disorder discourages outside investors, and makes it more difficult for local businesses to attract customers from outside.”).

537. Brisman, *Double Whammy*, *supra* note 90, at 431, 460-62. *See generally* Buzbee, *supra* note 535, at 372 (“Unlike more dense urban forms where residents use mass transit and do much of their travel and shopping on foot, suburban living leads to fewer random interactions with strangers and neighbors. This greater predictability and insularity of suburban living is, of course, part of suburbia’s attraction for many citizens.”).

538. PIETRO S. NIVOLA, *LAWS OF THE LANDSCAPE: HOW POLICIES SHAPE CITIES IN EUROPE AND AMERICA* 91 (1999). *See also* Julie Berry Cullen & Steven D. Levitt, *Crime, Urban Flight, and the Consequences for Cities*, 81 *REV. ECON. AND STATISTICS* 159, 159-60 (May 1999) (examining the relationship between crime and urban flight across three different data sets and concluding that (1) for every reported central city crime there is a net decline of approximately one city resident; (2) almost all of the crime-related impact on falling city population is the result of individuals leaving the city (out-migration) rather than a decline in new arrivals (in-migration); and (3) highly educated households and households with children are most responsive to crime; there is little difference between blacks and whites); SKOGAN, *supra* note 536, at 18-20 (concluding based on studies of forty neighborhoods in eight cities that crime rates affect individuals’ attitudes towards their neighborhoods and their decisions to move). For a recent study of the connection between crime and population change in central cities and their suburbs, see Joong-Hwan Oh, *A Dynamic Approach to Population Change in Central Cities and Their Suburbs, 1980-1990*, 64 *AM. J. ECON. SOC.* 663 (Apr. 2005).

539. Brisman, *Double Whammy*, *supra* note 90, at 462-71.

540. *Id.* at 465.



and may spur some of the unsustainable demographic shifts and driving behaviors requiring the unified efforts of environmental and social justice organizations.

In further support of the crime-environment relationship (i.e., the broad impact of crime on the environment), Gareth Newham, Project Manager in the Criminal Justice Programme at the Centre for the Study of Violence and Reconciliation in South Africa, notes that “[i]n South Africa the high level of crime has overburdened the police service, the courts and the judiciary. Such a situation substantially challenges the ability of the state to monitor and enforce environmental laws and regulations.”<sup>541</sup> To illustrate, he points to the devastating degree of illegal poaching of perlemoen—a popular, but endangered ocean mollusk.<sup>542</sup> With less crime, Newham explains, law enforcement could better curtail the illegal trade in endangered species and could better investigate and prosecute those who operate in defiance of environmental standards.<sup>543</sup> Newham also cites white-collar crime and government corruption as similarly encumbering governmental efforts and attention to directly and indirectly address environmental issues<sup>544</sup>—directly, via enforcement of existing environmental laws, indirectly, by rectifying some of the social inequities that result in environmental degradation. More specifically, Newham asserts:

The effect of corruption can . . . have a significant effect on the environment. . . . [W]hen the poor are forced into survival strategies due to underdevelopment, it can have a significant destructive impact on the environment. There are a number of examples of this in South Africa. Where there is no electrification, huge amounts of wood and coal will be burned which in turn promotes deforestation and air pollution. Corruption may mean that money that could be spent on uplifting the poor to ensure that they can live without negatively effecting the environment is not available.<sup>545</sup>

While there is no reason to doubt the existence of the environmental problems that Newham discusses or to question the correlation between

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541. GARETH NEWHAM, CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION, THE RELEVANCE OF THE NATIONAL CRIME PREVENTION STRATEGY FOR SUSTAINABLE DEVELOPMENT IN SOUTH AFRICA (June 1999), <http://www.csvr.org.za/papers/papncps2.htm>.

542. *See id.*

543. *Id.*

544. *Id.*

545. *Id.* *See also* du Plessis, *supra* note 422, at 35 (“Poverty . . . is one of the great stumbling blocks to sustainable development. . . . Poor rural and urban communities have to prioritise survival and therefore ignore the consequences of the over-utilisation of resources, while governments in developing countries are often tempted to embrace ecologically unsound development strategies in order to achieve short term economic growth.”).

these problems and crime, it is unlikely that crime in South Africa results from disenfranchisement given that South African prisoners now vote.<sup>546</sup> In addition, the connection between crime and environmental degradation that Newham explores is unlikely to exist in the United States. First, violent crime in the United States is substantially lower than in South Africa. South Africa, with a population of about 40 million people, suffers about 25,000 murders per year.<sup>547</sup> According to the Federal Bureau of Investigation's Uniform Crime Reporting (UCR) Program,<sup>548</sup> there have been between 13,230 and 14,860 murders per year in the years 2000-2005 in the United States,<sup>549</sup> which has a population seven times that of South Africa.<sup>550</sup> Second, while South African courts and law enforcement are chronically underfunded,<sup>551</sup> the opposite is true in the United States with the post-9/11 Congressionally-encouraged paramilitarization of local police

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546. See ISPAHANI, *supra* note 15, at 22.

547. See Sasha Abramsky, *One Nation, Under Siege*, AMERICAN PROSPECT, Apr. 1, 2005, available at <http://www.prospect.org/web/printfriendly-view.wv?id=9365>.

548. The U.S. Department of Justice administers two different statistical programs to measure the magnitude, nature, and impact of crime in the United States: the Federal Bureau of Investigation's (FBI) Uniform Crime Reporting (UCR) Program and the Bureau of Justice Statistics' National Crime Victimization Survey (NCVS). The UCR Program and NCVS employ different methodologies, but measure a similar subset of serious crimes (rape, robbery, aggravated assault, burglary, theft, and motor vehicle theft) and were designed to complement each other. The UCR Program provides a nationwide view of crime based on the voluntary submission of statistics by city, county, state, tribal, and federal law enforcement agencies throughout the country (representing over ninety percent of the total population). The NCVS is a biannual survey of approximately 42,000 households (about 75,000 people) conducted by the U.S. Census Bureau and providing a detailed picture about crime incidents (time and place of occurrence, use of weapons, nature of injury, and economic consequences), victims (age, sex, race, ethnicity, marital status, income, and educational level), and offenders (sex, race, estimated age, victim-offender relationship). In contrast to the UCR program, which includes only those crimes reported to the police, the NCVS collects information on crimes suffered by individuals and households, regardless of whether those crimes were reported to law enforcement. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, THE NATION'S TWO CRIME MEASURES (Oct. 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ntcm.pdf>.

549. There were 13,230 murders in 2000; 14,061 in 2001 (excluding homicides as a result of the events of September 11, 2001); 14,263 in 2002; 14,465 in 2003; 14,210 in 2004; and 14,860 in 2005. See U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME REPORTED IN THE UNITED STATES: 2005: OFFENSES REPORTED: VIOLENT CRIME: MURDER, available at [http://www.fbi.gov/ucr/05cius/offenses/violent\\_crime/murder\\_homicide.html](http://www.fbi.gov/ucr/05cius/offenses/violent_crime/murder_homicide.html); U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME REPORTED IN THE UNITED STATES: 2004: OFFENSES REPORTED: VIOLENT CRIME: MURDER, available at [http://www.fbi.gov/ucr/cius\\_04/offenses\\_reported/violent\\_crime/murder.html](http://www.fbi.gov/ucr/cius_04/offenses_reported/violent_crime/murder.html).

550. See *supra* note 52 and accompanying text.

551. Abramsky, *One Nation, Under Siege*, *supra* note 547.

departments.<sup>552</sup> While some environmental organizations in the United States would claim that the Environmental Protection Agency has failed to monitor and enforce various environmental laws,<sup>553</sup> this alleged neglect is likely due to governmental policy decisions, rather than an overburdened police force, and certainly has not resulted in the illegal poaching and trading of endangered species, as in South Africa. Furthermore, while white-collar crime and government corruption has generated headlines in the United States (e.g., the Enron and Jack Abramoff scandals<sup>554</sup>—the former having been referred to as “the greatest corporate scandal in American history”<sup>555</sup>), it would be difficult to argue that this kind of economic crime has affected the U.S. government’s ability to direct revenue to projects that benefit the poor and the environment, as Newham has suggested to be the case in South Africa.<sup>556</sup> Finally, while South Africa’s poor gravitate to rural provinces,<sup>557</sup> the poverty-stricken in the United States tend to live in urban areas.<sup>558</sup> Though rural America is not without its share of poor towns and communities, individuals residing there usually have electricity and are fortunate not to have to resort to the type of wood-burning that results in deforestation and air pollution that Newham describes in South Africa.<sup>559</sup> Thus, Newham’s research and conclusions may well show a link between crime and environmental degradation, but

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552. See John Tierney, *The SWAT Syndrome*, N.Y. TIMES, June 20, 2006, at A17 (discussing how the police forces in the United States are better armed and trained than ever before and now have assault rifles, flash grenades, battering rams, armed personnel carriers and helicopters at their disposal).

553. See *infra* Part III.C.

554. See, e.g., Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts*, WASHINGTON POST, Jan. 4, 2006, at A1.

555. Kurt Eichenwald, *An Enron Chapter Closes: The Overview; Enron Founder, Awaiting Prison, Dies in Colorado*, N.Y. TIMES, July 6, 2006, at A1.

556. NEWHAM, *supra* note 541.

557. *Id.*

558. See generally Elizabeth Barham, David Lind & Lewis Jett, *The Missouri Regional Cuisines Project: Connecting to Place in the Restaurant*, in URBAN PLACE, *supra* note 35, at 141, 141 (“Physical distance separates most of us from agricultural land because the majority of the world’s population lives in urban areas, a trend toward human concentration in cities that is expected to continue globally for the foreseeable future.”). Cf. Timothy Egan, *Amid Dying Towns of Rural Plains, One Makes a Stand*, N.Y. TIMES, Dec. 1, 2003, at A1 (“During the greatest economic boom in modern American history, the late 1990’s, the income gap between city and rural workers opened wider than ever. People in rural counties of the Great Plains make 48 percent of what their metro-area counterparts make.”).

559. National parks in the United States are not exempt from crime. See, e.g., *Thieves Steal Tree Bark For Thriving Herbal Market*, N.Y. TIMES, Aug. 13, 2006, § 1, at 22 (discussing the theft of bark from elm trees in Daniel Boone National Forest, KY and quoting John Garrison, National Park Service spokesperson, for the proposition that “[v]irtually everything on public lands has a market”).

not all of the links he makes are applicable U.S. causes of crime or sources of environmental problems.

While Newham's suggestion that white-collar crime and governmental corruption may affect a government's ability to direct revenue to projects that benefit the poor and the environment may not pertain to the United States on the federal level, his proposition that "the relative savings resulting from crime prevention strategies could free up significant resources that could be used to promote the sustainability of development" enjoys merit in the United States on the local level.<sup>560</sup> As noted above, the frequent use of incarceration as a penalty may well affect the public safety of the "prisoner-exporting" communities and their ability to address various social problems.<sup>561</sup> For example, Eric Cadora of the Open Society Institute's Criminal Justice Initiative and fellow researcher Charles Schwartz have used sophisticated Geographic Information Systems (GIS) equipment to map both the amount of money being spent on individual prisoners according to their home addresses and the amount of money being spent in those neighborhoods for social programming.<sup>562</sup> Their research has revealed a troubling inverse correlation between funding for incarceration and funding for social programming: neighborhoods with high dollar amounts for incarceration have also displayed low dollar amounts for the very infrastructure that they believe lies at the core of crime prevention—after-school care, job counseling, addiction recovery programs, reentry programming, including job training and transitional housing.<sup>563</sup> In other words, far from reducing the conditions that bring about crime, huge spending on incarceration<sup>564</sup> has actually sacrificed public safety.<sup>565</sup> Fortunately, their research has spurred some localities to engage in "justice reinvestment"—what Cadora and Tucker (another co-researcher of Cadora's, mentioned in Part II) term the reallocation of dollars from incarceration to rebuilding the human resources and physical

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560. NEWHAM, *supra* note 541 (noting a home visitation program in Hawaii that led to a decrease in child abuse and a savings of \$1.3 million).

561. See sources cited *supra* note 90 and accompanying text; see also sources cited *supra* notes 535-540 and accompanying text.

562. Courtney E. Martin, *Seeing With New Eyes: Mapping Justice With Eric Cadora*, 36 CLAMOR, 47, 47 (Spring 2006).

563. *Id.* at 47-49.

564. See Martin, *supra* note 562 at 47 (stating that in 2003, the federal government spent \$25,327 per inmate/per year, and that California spends \$3.6 billion per year on prison operations and \$500 million per year on new prison construction); Tucker & Cadora, *supra* note 60, at 2 (discussing an area of New Haven, CT in which \$20 million/year is spent annually on prison for 387 people, and citing the overall cost of incarceration in this country at \$54 billion/year).

565. Tucker & Cadora, *supra* note 60, at 2.

infrastructure of neighborhoods with high rates of imprisonment.<sup>566</sup> According to Cadora and Tucker, “[i]dentifying unproductive spending in correction budgets is the first step in the justice reinvestment process; the second step is the segregation and protection of a portion of these funds, and the third step is to reinvest the money into the public safety of high incarceration neighborhoods.”<sup>567</sup> Connecticut, for example, which used to have one of the fastest growing prison populations, has now become a state with one of the fastest dropping prison populations because of the type of multimillion dollar set-asides from the prison budget and subsequent reinvestment<sup>568</sup> that Cadora and Tucker advocate – reinvestment in schools and healthcare facilities, as well as parks and other public open spaces.<sup>569</sup>

Although better schools and healthcare facilities, as well as the availability of afterschool care, job counseling, addiction recovery programs, and reentry programming, including job training and transitional housing, may seem paramount to ensure a safe and crime-free community, parks and open spaces may seem to be more of a luxury<sup>570</sup> and may also appear to present more of an opportunity for crime-related activities to transpire.<sup>571</sup> But a number of environmental psychologists and environmental designers have found differently, supporting the proposition that certain environmental characteristics may promote or diminish the conditions ripe for crime.

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566. Martin, *supra* note 562, at 48 (defining “justice reinvestment” as the effort “to invest in public safety by reallocating justice dollars to refinance education, housing, healthcare, and jobs.” (quoting Eric Cadora)); Tucker & Cadora, *supra* note 60, at 4 (“A basic principle of justice reinvestment is to redefine the notion of public safety. Research proves that public safety is not assured by imprisonment alone.”).

567. Tucker & Cadora, *supra* note 60, at 3.

568. Martin, *supra* note 562, at 48-49.

569. Tucker & Cadora, *supra* note 60, at 2.

570. See Rebekah Levine Coley, Frances E. Kuo, and William C. Sullivan, *Where Does Community Grow?: The Social Context Created by Nature in Urban Public Housing*, 29 ENV'T. & BEHAVIOR 468 (July 1997) [hereinafter Coley, Kuo & Sullivan, *Where Does Community Grow?*] (“Many may believe that attractive landscaping, trees, grass, and flower beds are ‘extras’ that cannot be expected in subsidized housing.”); Stephen Kaplan & Rachel Kaplan, *Health, Supportive Environments, and the Reasonable Person Model*, 93 AM. J. OF PUB. HEALTH 1484, 1488 (Sept. 2003) (describing the planning perspective that treats environmental changes as amenities, not necessities).

571. According to Kuo and Sullivan, “dense vegetation provides potential cover for criminal activities, possibly increasing the likelihood of crime and certainly increasing the fear of crime. Large shrubs, underbrush, and dense woods all substantially diminish visibility and therefore are capable of supporting criminal activity.” Frances E. Kuo & William C. Sullivan, *Environment and Crime in the Inner City: Does Vegetation Reduce Crime?*, 33 ENV'T & BEHAVIOR 343, 345 (May 2001) [hereinafter Kuo & Sullivan, *Does Vegetation Reduce Crime?*]. Not all vegetation blocks views, however. *Id.* (describing grassy areas and high-canopy trees as “unlikely to provide cover” for crime).

Because a significant number of researchers have examined the effects of outdoor green common spaces on human behavior and functioning,<sup>572</sup> a comprehensive review of their findings is outside the scope of this Article. In the interests of brevity, this Article highlights the findings of some of the studies conducted by researchers at the Human-Environment Research Laboratory at the University of Illinois at Urbana-Champaign. Such studies useful are for this Article's inquiry because of the locus of their research site—two Chicago public housing developments (Robert Taylor Homes and Ida B. Wells)<sup>573</sup>—both of whose residents are overwhelmingly African

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572. For example, researchers have explored the positive, and even restorative, impact of nearby nature on communities, office workers, school children, and hospital patients. See generally Maureen E. Austin, *Partnership Opportunities in Neighborhood Tree Planting Initiatives: Building from Local Knowledge*, 28 J. ARBORICULTURE 178 (July 2002) (finding that tree planting projects on vacant lots in urban areas enhanced community identity and connectedness, and participation in community improvement); RICHARD LOUV, *LAST CHILD IN THE WOODS: SAVING OUR CHILDREN FROM NATURE-DEFICIT DISORDER* (2005) (showing how direct exposure to nature is vital for the physical and emotion health of children and adults); Andrea Faber Taylor, France E. Kuo and William C. Sullivan, *Views of Nature and Self-Discipline: Evidence from Inner City Children*, 22 J. OF ENV'T'L. PSYCH. 49 (2002) (finding that contact with nature fosters greater self-discipline and improves inner-city girls' ability to concentrate); Roger S. Ulrich, *View Through a Window May Influence Recovery from Surgery*, 224 SCIENCE 420 (1984) (finding that in a sample of patients undergoing similar surgical procedures, those who had views of trees experienced shorter post-operative hospital stays and took fewer analgesic doses); see also Frumkin, *supra* note 535, at 256-57, 259 (discussing Ulrich's research and listing the empirical support for the benefits of nature contact, from cognitive development in children to decreased mortality among senior citizens).

For a discussion of the therapeutic benefits of gardening, especially in urban environments, see, e.g., Rachel Kaplan, *Some Psychological Benefits of Gardening*, 5 ENV'T. & BEHAVIOR 145, 145-52 (1973); Rachel Kaplan & Stephen Kaplan, *Preference, Restoration, and Meaningful Action*, *supra* note 35, at 288-90; RACHEL KAPLAN & STEPHEN KAPLAN, *THE EXPERIENCE OF NATURE: A PSYCHOLOGICAL PERSPECTIVE* (1989); Barbara Deutsch Lynch & Rima Brusi, *Nature, Memory, and Nation: New York's Latino Gardens and Casitas*, in *URBAN PLACE*, *supra* note 35, at 191, 192-94 (noting the therapeutic effects of cultivation, in general, and to the New York City Latino population, in particular); Catherine McGuinn & Paula Diane Relf, *A Profile of Juvenile Offenders in a Vocational Horticulture Curriculum*, 11 HORTTECHNOLOGY 427, 430, 433 (July-Sept. 2001) (noting the success of horticulture rehabilitation-vocational training programs); Susan M. Stuart, *Lifting Spirits: Creating Gardens in California Domestic Violence Shelters*, in *URBAN PLACE*, *supra* note 35, at 61, 85 (describing the psychosocial and therapeutic benefits of gardening to residents and staff of grassroots domestic violence shelters in California); Malve von Hassell, *Community Gardens in New York City: Place, Community, and Individuality*, in *URBAN PLACE*, *supra* note 35, at 91, 92 (describing community gardens as not only green space but as providing opportunities for community life, education, and political action).

573. Public housing developments provide a number of internal controls on the issues surrounding selection. For example, residents of public housing developments usually

American and are among the nation's most impoverished with unemployment rates hovering at 93-96.5%.<sup>574</sup> While there is always a danger in extrapolation or generalization,<sup>575</sup> and while none of the researchers inquired about the residents' encounters with the collateral consequences of conviction and imprisonment, in general, and with levels of disenfranchisement and voting frequency and patterns, in particular, these urban public housing developments represent the types of neighborhoods and communities likely to experience high concentrations of disenfranchisement.

In one study, Rebekah Levine Coley, Frances E. Kuo, and William C. Sullivan determined that

Trees are an important variable in creating sociopetal outdoor spaces – spaces that attract people to them. The presence of trees in the two

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possess rather homogenous characteristics, especially those that have shown to increase vulnerability to crime, such as income and education. Second, while people who enjoy nature are likely to choose to live in an area with lots of vegetation and trees, the vast majority of public housing residents have little choice regarding both the neighborhood in which they live and the apartment to which they are assigned (although those assigned to a particular apartment do have the right to accept or reject the placement). Thus, the presence of green areas does not weigh heavily, if at all, in an individual's decision to live in public housing and a particular apartment within the development. Finally, residents play almost no role in the decision to add or remove trees. Kuo & Sullivan, *Does Vegetation Reduce Crime?*, *supra* note 571, at 351-52 (discussing the homogeneity of the resident population and the apartment assignment procedures, "there [a]re no a priori reasons to expect a relationship between the level of vegetation outside an apartment building and the characteristics of its inhabitants"); Byoung-Suk Kweon, William C. Sullivan, and Angela R. Wiley, *Green Common Spaces and the Social Integration of Inner-City Older Adults*, 30 ENV'T & BEHAVIOR 832, 839-40, 848 (Nov. 1998) (discussing assignment procedures, age distribution of residents, and dearth of opportunities to create or maintain greenery in common spaces).

574. See Frances E. Kuo, William C. Sullivan, Rebekah Levine Coley, and Liesette Brunson, *Fertile Ground for Community: Inner-City Neighborhood Common Spaces*, 26 AM. J. OF COMMUNITY PSYCHOL. 823, 832-33, 845 (1998) [hereinafter Kuo et al., *Fertile Ground for Community*] (noting the average annual household income of residents of Robert Taylor Homes, as well as the mean age and percentage of male-female, percentage African American, and percentage unemployed); Kuo & Sullivan, *Does Vegetation Reduce Crime?*, *supra* note 571, at 350.

575. Kuo and Sullivan note that "[e]ligibility requirements for public housing and some other forms of public aid favor single mothers. This creates a pressure for families not to list adult males as official residents (and for these unofficial residents not to participate in studies about life at [Robert Taylor Homes].” Kuo & Sullivan, *Effects of Environment via Mental Fatigue*, *supra* note 78, at 552 n.2. For an additional discussion of the external validity of studies conducted at Robert Taylor Homes, see Kuo et al., *Fertile Ground for Community*, *supra* note 574, at 844-46 (discussing the generalizability of their findings and noting the ways in which Robert Taylor Homes differs from and resembles other communities in terms of its physical features and resident population).

public housing developments under study consistently predicted greater use of outdoor spaces by all people, young and older, as well as groupings of people consisting of both youth and adults together.<sup>576</sup>

Aside from simply being pleasurable, Colely, Kuo, and Sullivan determined that treed spaces could make outdoor areas much safer:

By using and spending time in a specific [outdoor] space, people develop a sense of territoriality and ownership over the area. They learn who belongs there and who does not, they are more likely to enforce codes of conduct, and these behaviors in turn help to decrease the use of space for criminal activity.<sup>577</sup>

Perhaps most significantly, they discovered that:

the presence of people outdoors is expected to greatly increase the surveillance of and control over the outdoor spaces in these areas.

The surveillance of people and activities in poor urban neighborhoods is important not only in relation to preventing crime, but also in respect to positive social interactions, especially for children. . . . [T]he social structures of poor neighborhoods in large urban areas are becoming increasingly battered and weakened. The historical structures of respect “old heads”—adults in the neighborhood who watched out for, disciplined, and befriended children—are largely absent in today’s urban ghettos, while the prevalence of single-parent families and absent and unemployed male figures has contributed to lower levels of child supervision and concomitant increases in delinquent and destructive behaviors. Thus, the supervision of children in such areas is especially desirable. The results of this study indicate that trees draw mixed groups of children and adults outdoors together. It is likely that the presence of adults both increases the children’s supervision and also

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576. Coley, Kuo & Sullivan, *Where Does Community Grow?*, *supra* note 570, at 486; see also Kuo et al., *Fertile Ground for Community*, *supra* note 574, at 848 (“Greener common spaces appear to attract people outdoors, increasing opportunities for casual social encounters among neighbors and fostering the development of neighborhood social ties.”).

577. Coley, Kuo & Sullivan, *Where Does Community Grow?*, *supra* note 570, at 489. Kuo and Sullivan, in a study of just Ida B. Wells, found that “in poor inner-city neighborhoods, vegetation can inhibit crime through the following two mechanisms: by increasing surveillance and by mitigating some of the psychological precursors to violence.” Kuo & Sullivan, *Does Vegetation Reduce Crime?*, *supra* note 571, at 346.

Environmental criminologists and proponents of Crime Prevention Through Environmental Design (CPTED) assert that “the physical environment can assist in the creation of perceived zones of territorial influence, which can foster a sense of ‘ownership’ and therefore proprietary concern in residents. . . . [E]nvironmental design can be utilised to provide surveillance opportunities for residents and their agents.” Cozens, *supra* note 46, at 132.



increases their opportunities to interact personally with adults in their neighborhood.<sup>578</sup>

Similarly, in a separate study of just Robert Taylor Homes, Kuo, Sullivan, and Coley, along with Liesette Brunson, found a correlation between the amount of vegetation in a common space, and neighborhood social ties near that space, observing that “compared to residents living adjacent to relatively barren spaces, individuals living adjacent to greener common spaces had more social activities . . . knew more of their neighbors . . . and had stronger feelings of belonging.”<sup>579</sup> The notion that “unspectacular, everyday nearby nature”<sup>580</sup>—high-canopy trees, low shrubs, and grassy areas—may be sufficient to attract people outside, thereby increasing social encounters among neighbors and subsequently fostering higher levels of social cohesion in the community,<sup>581</sup> underscores the importance of

578. Coley, Kuo & Sullivan, *Where Does Community Grow?*, *supra* note 570, at 490 (citations omitted); *see also* Rachel Kaplan & Stephen Kaplan, *supra* note 570, at 1487 (“[C]ommunity and trust require places where neighbors can meet to become acquainted and where surveillance is easily possible.”); Sullivan, *Forest, Savanna, City*, *supra* note 77, at 244 (“[B]y increasing the opportunities for residents to meet and interact, greener neighborhood spaces facilitate the development and maintenance of neighborhood social ties.”).

579. Kuo et al., *Fertile Ground for Community*, *supra* note 574, at 843.

580. Rachel Kaplan & Stephen Kaplan, *Preference, Restoration, and Meaningful Action*, *supra* note 35, at 274-75; *see also* Frances E. Kuo, *Coping with Poverty: Impacts of Environment and Attention in the Inner City*, 33 ENV'T & BEHAVIOR 5, 8 (Jan. 2001) [hereinafter Kuo, *Coping with Poverty*] (“[T]he rejuvenating effect of nature extends to far less ‘pure’ forms of nature than wilderness and . . . it results in systematically greater effectiveness on a wide variety of tasks.”); Kuo et al., *Fertile Ground for Community*, *supra* note 574, at 827-28 (noting that “‘nature,’ ranging from wilderness to a view of trees and grass in an urban setting, has . . . systematic, positive effects on individuals,” including reduction in mental fatigue (characterized by difficulty paying attention and irritability), relief from feelings of stress, and better moods); Jules Pretty and Peggy F. Barlett, *Concluding Remarks: Nature and Health in the Urban Environment*, in URBAN PLACE, *supra* note 35, at 299, 301 (noting that “everyday, often unspectacular” nature—parks, street trees, backyard gardens—may help reduce mental fatigue and stress).

Proximity of vegetation to residences appears to be significant. *See* Kuo et al., *Fertile Ground for Community*, *supra* note 574, at 827, 839 (“[T]he more vegetation associated with a resident’s apartment and building, the more she socialized with neighbors, the more familiar with nearby neighbors she was, and the greater her sense of community.”).

581. *See* Kuo & Sullivan, *Effects of Environment via Mental Fatigue*, *supra* note 78, at 566 (describing it as seemingly implausible, yet a “low dose” of vegetation “has been shown to have far-reaching and positive effects on a number of . . . important outcomes, including residents’ management of major life issues and neighborhood social ties” (citations omitted)); *see generally* du Plessis, *supra* note 422, at 34 (“A key element of a sustainable settlement is its ability to foster social cohesion and provide security for all who live in it.”).

vegetation both large and small in low-income urban communities<sup>582</sup> and supports Cadora and Tucker's assertions that reallocating funds from prison budgets to provide this type of physical infrastructure is money well-spent.<sup>583</sup> This finding that treed and grassy areas promote higher levels of social cohesion in the community, also helps address Professor William Julius Wilson's concern that in some housing projects and inner-city neighborhoods, "residents have difficulty identifying their neighbors. They are, therefore, less likely to engage in reciprocal guardian behavior. Events in one part of the block or neighborhood tend to be of little concern to those residing in other parts."<sup>584</sup>

In fact, not only is reinvestment of prison budget funds in urban nature not a luxury or an inappropriate use of resources, but Byoung-Suk Kweon, William C. Sullivan and Angela R. Wiley, in another study of just residents of Robert Taylor Homes—this one involving interviews with older adults between the ages of 64 and 91<sup>585</sup>—found that the presence of green areas

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582. According to Kuo and Sullivan, there is a difference between "unspectacular, everyday nearby nature" and large public parks. In their study on the effects of nearby nature on attentional functioning, they conclude that "geographic distribution of natural areas matters. Although large central or regional parks are clearly important components of urban design . . . a few major parks are not enough," and concluding, "cities should be designed with nature at every doorstep." Kuo & Sullivan, *Effects of Environment via Mental Fatigue*, *supra* note 78, at 566-67.

583. See generally Kweon, Sullivan & Wiley, *supra* note 573, at 852-53 (stating that planting trees in outdoor common spaces in public housing developments is a relatively inexpensive way to improve social interaction, and concluding that "[a]lthough creating [outdoor common spaces with trees] will surely cost more in the short term than not providing trees, grass, and places to sit, the benefits resulting from such designs will certainly outweigh the costs").

584. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 38 (1987).

585. Kweon, Sullivan and Wiley focused solely on older residents at Robert Taylor Homes. As their method of data collection, they conducted structured interviews, each lasting from 60 to 90 minutes. Kweon, Sullivan & Wiley, *supra* note 573, at 838-41. In comparison, Coley, Kuo and Sullivan's data collection occurred on multiple days in June—a month amenable to outdoor activities—during the most popular times to be outdoors according to residents and resident managers. The data collection method they employed is known as "observational walk-bys"—walking through the housing developments and recording information on the presence of people and trees in outdoor spaces. Coley, Kuo & Sullivan, *Where Does Community Grow?*, *supra* note 570, 477-78. Kuo et al. interviewed 145 residents of Robert Taylor Homes during the summer and early fall months. Each resident was interviewed for two forty-five minute sessions with the two parts of the interviews conducted within two weeks of each other. Kuo et al., *Fertile Ground for Community*, *supra* note 574, at 832-33; Sullivan, *Forest, Savanna, City*, *supra* note 77, at 243-44. This same research method was utilized by Kuo and Sullivan in Kuo & Sullivan, *Effects of Environment via Mental Fatigue*, *supra* note 78, at 552. Two other studies conducted by the Human-Environment Research Laboratory involved structured interviews

and the subsequent social interaction between neighbors could actually decrease the burden on public social agencies.<sup>586</sup> Similarly, Professors Jules Pretty and Peggy F. Barlett have noted that “[d]eath rates for individuals with low levels of social integration are higher when facing a stroke or coronary disease.”<sup>587</sup> The effect of green areas on the health of older individuals and subsequently public social agencies is true not only for older adults, as Kweon, Sullivan and Wiley, as well as Pretty and Barlett, conclude, but for younger individuals too. For as Helen Epstein<sup>588</sup> writes in her New York Times Magazine article, *Enough to Make You Sick*, “[p]oor parents, terrified that their kids will be killed on the street, tend to keep them inside, with the windows shut and the TV on, where they are constantly exposed to contaminants in indoor air, which some researchers believe can be as damaging as industrial pollution.”<sup>589</sup> Aside from the exposure to indoor air pollution, which is dangerous in and of itself, keeping kids inside also promoted a sedentary lifestyle, which can carry with it a whole slew of other health problems. Epstein contends: “Not only are sedentary, overweight kids more at risk for asthma, but kids with severe

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and attentional capacity tests of residents during summer and fall months, and Chicago Police Department reports for each address at Ida B. Wells in comparison with density of vegetation. Kuo, *Coping with Poverty*, *supra* note 580, at 10, 12-13; Kuo & Sullivan, *Does Vegetation Reduce Crime?*, *supra* note 571, at 352-53.

586. Kweon, Sullivan, & Wiley, *supra* note 573, at 854 (concluding that “Supportive interaction among neighbors seems to reduce the burden on public social agencies,” observing, “[i]f green outdoor common spaces facilitate supportive relationships among neighbors in a community, then perhaps public housing managers should provide more green common spaces or turn vacant lots into livable public spaces. Doing so could help improve older inner-city residents’ social support and reduce the burden on public social service agencies.” (citation omitted)); *see also* Kuo, *Coping with Poverty*, *supra* note 580, at 30 (“[G]reening is a low cost intervention in comparison with most social service programs.”).

587. Pretty & Barlett, *supra* note 580, at 303.

588. Helen Epstein, who writes frequently about public health, is not a member of the Human-Environment Research Laboratory.

589. Helen Epstein, *Ghetto Miasma; Enough to Make You Sick?*, N.Y. TIMES, Oct. 12, 2003, § 6 (Magazine), at 75 ; *see generally* Kuo et al., *Fertile Ground for Community*, *supra* note 574, at 826 (“High-crime settings are associated with neighbors staying home and avoiding local social contact” (citations omitted)). According to Epstein, the stress from living in a high crime area also has serious health repercussions:

Chronic stress also signals the body to accumulate abdominal fat around the waistline, which is more dangerous than fat that lies under the skin, or subcutaneous fat. Abdominal fat worsens many chronic health problems, including diabetes and heart disease, whereas subcutaneous fat does not. It’s as if stress hormones were like lye, powerful stuff that in small amounts is useful for cleaning the stove, but that in large amounts will eat right through the floor.

Epstein, *supra*.

asthma tend to exercise less and are thus prone to obesity. Mothers trying to protect their kids from crime may not realize they are putting their future health at risk.”<sup>590</sup> While such health problems are troubling in and of themselves, many individuals in poor, crime-ridden urban communities lack health insurance or access to health care facilities to assist them in managing their diseases.<sup>591</sup> Without primary care physicians, such individuals frequently turn to emergency rooms as hospitals for care, which can further burden both the poor families and the financially-strapped public hospitals. As Kuo and Sullivan note regarding the attentional demand of poverty: “Underinsured and having no financial cushion against setbacks, even a minor temporary trauma such as a child’s illness can have far-reaching effects, eventually necessitating major readjustments in life, family, and work domains.”<sup>592</sup> All of this is not to suggest that green areas are a panacea and could replace the need for health care facilities in low-income urban neighborhoods.<sup>593</sup> But neither should one conclude that green spaces are merely an “extra” and that “justice reinvestment” be confined to schools, healthcare facilities, and the type of programming and training discussed above. Indeed, as Pretty and Barlett assert, “green spaces and nearby nature should be seen as a *fundamental health source*.”<sup>594</sup>

To recap: the conclusions of the Human-Environment Research Laboratory researchers and others mentioned in this Section stress the importance of urban nature in fostering social cohesion in the community (as well as in reducing aggressive and violent behavior, and in lowering levels of crime).<sup>595</sup> The research of Sampson, Raudenbush, and Earls in

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590. Epstein, *supra* note 589.

591. See Cole, *supra* note 4, at 630 (“[W]hile they live with the greatest dangers, poor people and people of color have the least access to health care and often can not get it at all.”).

592. Kuo & Sullivan, *Effects of Environment via Mental Fatigue*, *supra* note 78, at 548. According to Kuo and Sullivan, crime, the lack of adequate space and facilities in public housing, and the lack of natural settings may create its own health issue—chronic high levels of mental fatigue. See *id.*

593. See generally Kuo & Sullivan, *Does Vegetation Reduce Crime?*, *supra* note 571, at 363 (“Ultimately, the largest reductions in crime will come from strategies that address the factors underlying crime (e.g., intense poverty and the availability of guns.”).

594. Pretty & Barlett, *supra* note 580, at 305 (emphasis added).

595. Kuo and Sullivan note that children of violent families are more likely to grow up to be violent than children from nonviolent families, and that this is true both for child-victims of abuse and children who witnessed abuse. Thus, they conclude, “identifying possible avenues to reducing domestic violence may pay benefits for generations to come.” Kuo & Sullivan, *Effects of Environment via Mental Fatigue*, *supra* note 78, at 564; see also NEWHAM, *supra* note 541 (“Crime and violence are often products of environments where competition and a lack of caring dominate. People who have grown up as children in environmental contexts free from crime and violent [sic] are more likely to be amenable to

Part II.B.3.b emphasized how the collective efficacy of neighborhood residents is a crucial way in which urban neighborhoods reduce instances of crime and violence. Combining these findings, one may wonder whether the key lies in the presence of urban nature alone. In other words, if outdoor green common spaces fosters social cohesion and reduces crime and violence, then why should environmental organizations devote their attention to fighting criminal disenfranchisement policies? Granted, these laws and policies have been linked to recidivism and crime and subsequently to environmental ills, but if there are “green” ways of reducing recidivism and crime, should not the environmental organizations confine their efforts to those “green” ways (if they are going to consider and enter the realm of social and criminal justice at all)? And when one considers the positive psychological impact of nature and Professors Rachel and Stephen Kaplan’s assertions that “[i]f people are less frustrated, they are more likely to be civil with each other, to be cooperative and helpful, and perhaps even *to take care* of their environment,”<sup>596</sup> the argument in favor of environmental groups jumping into the battle against criminal disenfranchisement may appear even less compelling.

Although this Author would certainly endorse efforts by both governmental and non-profit organizations to create more urban spaces with trees, grass and shrubbery, these efforts are insufficient by themselves. In a separate article, Sampson writes that “social networks foster the conditions under which collective efficacy may flourish, but they are not sufficient for the exercise of control.”<sup>597</sup> According to Sampson, the social “networks have to be *activated* to be ultimately meaningful.”<sup>598</sup> While there are likely a number of ways to trigger these social networks, recall Mauer’s remarks on the communal nature of voting: “Voting as a civic duty is a task we engage in with our families and communities. Family members often talk of electoral prospects at home, drive to the polls

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altruism than those who view the world with mistrust and fear.”); *see generally* John C. Dernbach, *Sustainable Development: Now More Than Ever*, in *STUMBLING TOWARD SUSTAINABILITY*, *supra* note 19, at 45, 47 (“Social and economic development are impossible in the absence of peace.”).

596. Rachel Kaplan & Stephen Kaplan, *Preference, Restoration, and Meaningful Action*, *supra* note 35, at 272 (emphasis added); *see also* Jodi Kushins & Avi Brisman, *Learning from Our Learning Spaces: A Portrait of 695 Park Avenue*, 58 *ART EDUCATION* 33, 34 (Jan. 2005) (arguing that “the extent to which one is aware of and interacts with one’s surroundings impacts the degree to which one respects that environment”); *see generally* Pretty & Barlett, *supra* note 580, at 308 (“People seek to make a social contribution and in doing so come to discover a new relationship with place. For others, attachment to the place or type of nature comes first, and efforts to defend them come later.”).

597. Sampson, *Collective Efficacy and Community Safety*, *supra* note 155, at 108 (emphasis added).

598. *Id.*

together, and see their neighbors there.”<sup>599</sup> With Sampson’s and Mauer’s ideas in mind, then, this Author proposes that if (another) socially cohesive and crime-reducing activity—voting—were in place, there might be (an) *even greater* (likelihood for) informal social control than with just an increase in urban nature. Greater (opportunities for) public participation *and* an increase in urban nature might result in less crime<sup>600</sup> and fewer of the negative environmental impacts described above.

Given the comments throughout Part II regarding the frustration disenfranchisement may bring to an offender or ex-offender,<sup>601</sup> efforts to re-enfranchise the disenfranchised or to scale back disenfranchisement policies prospectively may also help create the civility and cooperation that the Kaplans claim may result in ownership, responsibility, and stewardship of one’s environment. Taken one step further, the union of Cadora and Tucker’s justice reinvestment efforts to formulate some of the social and physical infrastructure needed in blighted neighborhoods with endeavors to remove the collateral consequence of criminal disenfranchisement could result in a scenario in which crime decreases to the point where public

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599. See Mauer, *Thinking About Prison*, *supra* note 410, at 616.

600. Note that Kweon et al considered whether they had “conceptualized backward the relationship between exposure to green common spaces and social integration,” i.e., whether high levels of social integration lead to greater use of and exposure to outdoor green areas because such individuals are drawn to these places to converse and interact with their friends, rather than the other way around. Kweon, Sullivan & Wiley, *supra* note 573, at 847. Although they could not definitively determine the direction of the relationship, they speculated that the lack of indoor meeting places in public housing developments leads to meeting in outdoor spaces. *Id.* at 848. They also noted previous research that has found that “[t]he mere presence of common spaces seems not enough to promote social ties. In inner-city settings, outdoor common spaces are too often urban deserts—barren, uninviting, and uncomfortable.” *Id.* at 836 (citations omitted). The presence of trees and grass, however, “is related to residents’ preference for outdoor common spaces, and their preference is one predictor of the use of outdoor common spaces.” *Id.* This Author contends that by increasing both the availability of outdoor green areas *and* creating another means of interaction (voting) and subject of conversation (elections and politics), then social cohesion and informal social control will increase.

Kuo and Sullivan found that vegetation is significantly and negatively related to each of the measures of crime, i.e., the greener a building’s surroundings are, the fewer total crimes (including both property and violent crimes). Kuo & Sullivan, *Does Vegetation Reduce Crime?*, *supra* note 571, at 354. They then contemplated whether vegetation might simply displace crime, i.e., that vegetation in one part of an inner-city neighborhood might simply increase crime in another part of that neighborhood. *Id.* at 362-63. Although they left open this question for further study, they speculated that vegetation might inhibit impulsive violent crimes associated with the irritability and cognitive deficits characteristic of mental fatigue without displacing this kind of crime to other areas, but that vegetation might shift premeditated property crimes, such as burglary, to more vulnerable areas. *Id.* at 363.

601. See *supra* discussion Part II.3.

funds are available for *initial investment*, not justice *reinvestment*.

### C. Disenfranchisement's Effect on Elections, Appointments and the Environment

The previous Section has attempted to highlight how the crime-environment connection is a two-way street: crime and the fear of crime may have an adverse impact on the environment (because of rural prison growth, sprawl and the diversion of attention and funds away from environmental issues), but the lack of urban nature may also create some of the conditions that help make crime a more common occurrence. Despite this relationship and the negative correlation between voting and crime, environmental advocates and organizations may still be wary of devoting their time, energy and resources to this kind of social justice issue. First, MEOs may fear alienating their donors (both corporate and individuals) who have less awareness, understanding or sympathy for the plight of disenfranchised offenders and ex-offenders.<sup>602</sup> As Philip Shabecoff writes:

Today's environmentalists are not indifferent to injustices such as poverty and racism. Many have a deep personal concern. But involved in the pressing, sometimes overwhelming task of dealing with environmental crises, they push aside the issues of social and economic equity as someone else's immediate business. At least some of the organizations hold back from broader social activism because they fear it would jeopardize their funding from corporations or government sources or alienate their more conservative constituencies.

. . . .

Widening their agenda in this way will be difficult for the national environmental organizations. Many of them draw much of their membership and financial support from the more well-to-do people or from corporations, where support for social activism tends to be thin or negative.<sup>603</sup>

Such concerns are understandable. With the broad-scale proliferation of non-profit organizations, even the more established ones must enter the

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602. MEOs may also fear alienating their allies and friends in government. *See generally* Freudenberg & Steinsapir, *supra* note 435, at 33 ("Unlike grassroots activists, these professionals [lawyers and scientists at MEOs] have a stake in preserving their credibility with other experts and with government decision makers.").

603. SHABECOFF, *supra* note 2, at 284-85; *see also* Brisman, *Double Whammy*, *supra* note 90, at 474-75 ("[E]nvironmental organizations might fear that if they promote changes in the laws governing ex-offenders, they will lose the financial support of people who couple their environmental advocacy with a tough-on-crime approach.").

competition for grants and funding.<sup>604</sup> Thus, many organizations must walk the fine line of distinguishing themselves from other organizations so as to attract financial support,<sup>605</sup> but not rocking the boat or muddying the waters too much that they lose the support necessary for their continued existence.

Similarly, organizations in general and non-profit organizations in particular have a strong sense of self-preservation. To illustrate, if non-profit organization A (“A”) veers from its original objective and crosses into the domain of non-profit organization B (“B”), B may feel that its efficacy is being questioned and that its existence is being threatened and thus might avoid joint efforts at combating the same cause.<sup>606</sup> Alternatively, A might wish to leave its realm or area of specialty for any number of reasons—importance of a more distantly related issue, growth in number of similarly-oriented organizations<sup>607</sup>—but may choose not to in order to avoid appearing irrelevant<sup>608</sup> or to avoid conveying the message

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604. See Low, *supra* note 78, at 48 (noting that, as a rule, “[n]onprofits compete with each other for donations of time and money”).

605. See generally SHABECOFF, *supra* note 2, at 262 (“[N]ational environmental groups are too concerned about publicizing themselves to raise money and membership to be able to cooperate in major legislative campaigns.”).

606. See WRIGHT, *supra* note 45, at 96 (“Organizational self-interest intensifies as an organization is threatened in some way.”). The reverse may also occur, where B feels sufficiently threatened, to the point where it feels its only options are to join forces or risk collapse. See Peter M. Blau and W. Richard Scott, *Organizational Development, in* COMPLEX ORGANIZATIONS AND THEIR ENVIRONMENTS 167, 173 (Merlin B. Brinkerhoff & Phillip R. Kunz, eds., 1972) (“A crucial factor seems to be the organization’s relation to its environment. As long as its very survival is threatened by a hostile environment, its officers will seek to strengthen the organization by building up its administrative machinery and searching for external sources of support.”).

607. Cf. Costain & Lester, *supra* note 4, at 30 (“The universe of environmental groups has grown to encompass a vast range of organizations from the sedate real estate brokers in the Nature Conservancy to the theatrical rhetoric of Earth First!”); Dunlap & Mertig, *supra* note 450, at 6 (“A fundamental change in environmentalism since 1970 has been the rapid increase in the number and prominence of local grassroots organizations.”).

608. See, e.g., DAVE FOREMAN, CONFESSIONS OF AN ECO-WARRIOR 204-06 (1991) (bemoaning the fact that MEOs often become more interested in ensuring their viability than in following through with their environmental missions—“[a]s organizational maintenance becomes the primary goal of a group, it begins to compete with allied groups for recognition, money, and status,” and noting, “[i]nstead of trying to truly win a battle, the group merely wants to get credit for a victory, no matter how hollow it may be”); Mitchell, Mertig & Dunlap, *supra* note 4, at 23 (“There has been a clear trend toward increased professionalization among the leaders and staff of the national environmental organizations over the past two decades. . . . Increased professionalization also carries with it the dangers of routinization in advocacy, careerism on the part of staff members, and passivity on the part of volunteers, all of which have been detected in the national organizations.”).



that its original objective is no longer a pressing concern.<sup>609</sup> A may also opt not to expand its goals if the political climate, as mentioned in Part III.A, is such that the organization feels it must protect its political achievements.

While it may be difficult for organizations to buck their self-preservation tendencies, especially if they believe that the current political climate requires that they “protect their policy bargaining positions and retain past policy gains,” it is *because* the political climate is so susceptible to change<sup>610</sup> and influence that MEOs should consider broadening their agendas to include issues of criminal disenfranchisement.<sup>611</sup> As discussed in Part II.B.3.a, had disenfranchised offenders and ex-offenders been permitted to vote in the 2000 presidential election—or even just those in Florida—“Ozone Man”<sup>612</sup> (Al Gore) would have defeated “Oil Boy”<sup>613</sup> (George Bush). Apart from the monikers and Gore’s research and writing on environmental issues,<sup>614</sup> the question is whether a Gore presidency would have had a positive environmental impact and, if so, to what extent. In other words, aside from the level of personal interest in environmental issues, the question is whether the president can significantly contribute to environmental degradation or protection.

While there is obviously no way to quantify the difference between a Gore presidency and a Bush presidency, perhaps the best way to ascertain

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609. See generally Riley E. Dunlap, *Public Opinion and Environmental Policy*, *supra* note 450, at 90 (describing a decline in the public’s attention to an issue in part “from the sense that government is taking care of the problem and there is no longer any need to worry about it”).

610. See generally SATTERFIELD, *supra* note 9, at 64 (discussing how “advantage in politics is invariably fleeting”).

611. With the exception of the Sierra Club, “[l]arge-membership environmental groups have been slow[] to make electoral endorsements.” Ingram, Colnic & Mann, *supra* note 433, at 134-35. This Article does not take a position as to whether environmental organizations should endorse particular candidates. This Article simply suggests that liberalizing criminal disenfranchisement policies will more often than not result in electoral victories for candidates that environmental organizations may prefer.

612. In the 1992 presidential campaign, President George H.W. Bush called then-Vice Presidential candidate, Al Gore, “Ozone Man,” in reference to his devotion to environmental causes. See, e.g., Riley E. Dunlap, *Public Opinion and Environmental Policy*, *supra* note 450, at 107.

613. Although this Author is unaware of the public use of the nickname “Oil Boy” by a politician to refer to President George W. Bush, a number of online sources and blogs have referred to him as such. See, e.g., Posting of “feckless” to The Huffington Post: The Blog, [http://www.huffingtonpost.com/norman-horowitz/duh\\_b\\_19759.html](http://www.huffingtonpost.com/norman-horowitz/duh_b_19759.html) (Apr. 25, 2006, 12:38pm); “mojo,” Ballot: If Bush Were a Super-Hero in a Movie, What Name Would He Have?, <http://www.bestandworst.com/v/?id=86595> (Apr. 25, 2006).

614. See ALBERT GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992); ALBERT GORE, *AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT* (2006).

the impact of George W. Bush's presidency on the environment is to examine the extent and significance of previous administrations' environmental sympathies. Michael McCloskey, former Chairman of the Sierra Club, describes the ebb and flow of the relationship between environmentalists and past administrations:

Despite initial skepticism, environmentalists came to accept progress under the Nixon and Ford administrations as normal, and they were elated by the strong commitment they perceived in the Carter administration (though this changed in the end). However, the strong hostility of the Reagan administration, which persisted for 8 years (although the hard edge was taken off at the end of the first term), stunned the movement. Not only did the federal government no longer propose new initiatives, it no longer even tried to maintain the programs of the past. . . . Normal diplomatic relations with administration figures virtually ceased.<sup>615</sup>

Ingram, Colnic and Mann further explain that under the Carter administration, environmental groups gained "inside access to the executive and legislative branches. The appointment of a number of environmentalists in the Environmental Protection Agency, the Department of the Interior, the Justice Department provided groups with built-in access."<sup>616</sup> With President Ronald Reagan's inauguration, however, this period of inside access that President Carter had afforded ended.<sup>617</sup> As rural sociologist Riley E. Dunlap explicates:

The federal government's orientation toward environmental protection changed considerably when Ronald Reagan took office in 1980. Environmentalists were wary of President Reagan because of his general emphasis on "deregulating" the economy, and because of his tendency to view environmental regulations in particular as hampering economic growth and as largely unnecessary. The Reagan administration quickly fanned the fears of environmentalists, changing course after a decade of generally bipartisan commitment to federal environmental protection. The Council on Environmental Quality was virtually dismantled, the budget of the Environmental Protection Agency was severely cut, and the enforcement of existing environmental regulations was curtailed by administrative review, budgetary restrictions, and staff changes. It was the latter that received the most attention, as the appointment of Anne Gorsuch as director of

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615. McCloskey, *supra* note 440, at 81.

616. Ingram, Colnic & Mann, *supra* note 433, at 128-29. Costain and Lester point "to the late 1960s and early 1970s as the time when old and new environmentalists were able to break into the closed circles of policy making." Costain & Lester, *supra* note 4, at 31.

617. Ingram, Colnic & Mann, *supra* note 433, at 129.

the EPA and James Watt as secretary of the Department of Interior symbolized the administration's commitment to changing the thrust of environmental policy, with Gorsuch easing the burden of environmental regulations on industry and Watt opening up public lands to increased resource development.<sup>618</sup>

In addition to budget cuts, which limited the ability of enforcement agencies to bring new cases and enact new rules, and the appointment of administrators with anti-regulatory philosophies,<sup>619</sup> both President Reagan and the first President Bush (albeit with slightly less zeal) appointed federal judges who shared their deregulatory ideologies.<sup>620</sup>

In an early 1990s study seeking to determine the influence that President Reagan's judicial appointments to the courts of appeals have had on environmental policymaking, current Federal Trade Commissioner William E. Kovacic, then a professor at George Mason University School of Law, examined the voting patterns of the appointees of Presidents Carter and Reagan (and to a slightly lesser extent, the appointees of President George H.W. Bush) on the federal courts of appeals in Clean Air Act and Clean Water Act cases.<sup>621</sup> In 241 Clean Air Act and Clean Water Act cases decided between January 1977 and November 1990, Kovacic found that: 1) in all votes cast by Carter and Reagan appointees, a higher percentage of Carter appointees supported positions with burden-increasing consequences for entities whose emission and discharge activities are governed by the Clean Air Act and Clean Water Act, whereas a higher percentage of Reagan appointees endorsed outcomes with burden-reducing effects;<sup>622</sup> and 2) in opinions authored by Carter or Reagan appointees, a higher

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618. Riley E. Dunlap, *Public Opinion and Environmental Policy*, *supra* note 450, at 87-88 (citations omitted); *see also* Mitchell, Mertig & Dunlap, *supra* note 4, at 20 ("During the Reagan era, the role that environmental organizations traditionally played in administrative decision making was almost completely circumvented."); William E. Kovacic, *The Reagan Judiciary and Environmental Policy: The Impact of Appointments to the Federal Courts of Appeals*, 18 B.C. ENVTL. AFF. L. REV. 669, 674 (1991) ("The Reagan administration immediately focused upon federal environmental protection policy in its regulatory reform efforts."); *see generally* ENVTL. LAW INST., ENDANGERED ENVTL. LAWS PROGRAM, BACKGROUND PAPER 3 (2003), [http://www.endangeredlaws.org/pdf/Background\\_paper.pdf](http://www.endangeredlaws.org/pdf/Background_paper.pdf) (discussing Reagan-appointed EPA Administrators Anne Gorsuch and William Ruckelshaus, as well as Secretary of the Interior James Watt, and President H.W. Bush's EPA Administrator, William Reilly).

619. Kovacic, *supra* note 618, at 712.

620. *See id.* at 675-76 (noting that presidents have often used judicial appointments in the hopes of achieving certain policy goals, but highlighting the fervor with which President Reagan attempted to alter the judiciary and craft ideological uniformity).

621. For a discussion of the methodology used to select and examine environmental law cases in which Carter- and Reagan-appointed judges participated, *see id.* at 680-95.

622. *Id.* at 697.

percentage of Carter appointees' majority opinions endorsed positions with burden-increasing consequences, whereas a higher percentage of Reagan appointees' majority opinions endorsed positions with burden-reducing effects.<sup>623</sup>

Because, as mentioned in Part III.A, the Clean Air Act and the Clean Water Act encourages private parties to monitor compliance with emission and discharge requirements and to bring suit when governmental agencies neglect their statutory and regulatory obligations to punish violations of pollution abatement requirements, Kovacic also examined how Carter- and Reagan-appointed judges interpreted statutory provisions regarding standing, remedies, and reimbursement for attorneys' fees.<sup>624</sup> Noting that "the treatment of standing and remedial issues in evaluating suits by private parties can be as important as the choice of liability standards in establishing the impact of a specific regulatory system,"<sup>625</sup> he found that Reagan appointees are more inclined "to use procedural and remedial screens involving standing, damages, and attorneys' fees to reduce compliance burdens."<sup>626</sup> Private parties, then, have and likely will continue to encounter "greater restrictions, such as harsher standing and jurisdictional tests, on their ability to raise and sustain Clean Air Act and Clean Water Act challenges. At the same time, the attractiveness of bringing suits will decline as prospective plaintiffs encounter additional difficulty in establishing entitlements to damages and in demonstrating eligibility to obtain attorneys' fees."<sup>627</sup> Thus, it is entirely possible that individuals who have suffered from Clean Air or Clean Water Act violations have either chosen not to bring suit or have been unable to secure representation out of concern that their claims will not be adjudicated fairly.

Kovacic's study of the voting differences between Carter and Reagan or Bush appointees reveals an even greater and more disturbing ideological divide in the context of twenty-six Resource Conservation and Recovery Act cases involving thirty-six votes in the United States Court of Appeals for the District of Columbia Circuit—often considered the second most

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623. *Id.* at 697-98. Kovacic also examined Clean Air Act and Clean Water Act cases in which Carter and Reagan appointees sat on the same panel. *Id.* at 698-99. He found that Carter and Reagan judges cast identical votes in 87.5% of the cases in which appointees of both Presidents sat on the same panel, and suggested that this could be due to underlying similarity of perspectives, the persuasive influence of specific judges in reaching certain results, a desire for consensus, or some combination thereof. *Id.* at 699.

624. *Id.* at 705-06.

625. *Id.* at 706.

626. *Id.* at 700.

627. *Id.* at 708.

important court in the country<sup>628</sup> because of its exclusive or concurrent jurisdiction under many environmental statutes.<sup>629</sup> Kovacic found that Carter-appointed judges supported burden-increasing outcomes in twenty-seven instances (75%) and voted in support of burden-reducing results only nine times (25%).<sup>630</sup> Reagan or Bush appointees, on the other hand, endorsed burden-increasing positions in only twelve instances (33.3%) and burden-reducing outcomes twenty-four times (66.6%).<sup>631</sup> Thus, these RCRA cases, in addition to the Clean Air and Clean Water Act cases, suggest that the Reagan appointees to the federal courts of appeals have a greater tendency than Carter appointees to adopt positions that would reduce the burden of compliance with environmental statutes.<sup>632</sup> Because federal appointments are for life, many of these judges have continued to vote either directly or indirectly (e.g., with high hurdles for standing) in favor of reduced governmental regulation in Clean Air and Clean Water Act cases, as well as in RCRA litigation. Finally, while judges frequently contend that they interpret the law irrespective of the judicial philosophies of the presidents who appointed them or of their fellow judges—and, indeed, many do succeed in doing so—judges are not above influence and are often swayed by their colleagues. As Professor Cass R. Sunstein argues:

If accompanied by two other judges appointed by a Republican president, a Republican-appointed judge is especially likely to vote according to conservative stereotypes—to invalidate environmental regulations, to strike down affirmative action programs or campaign finance laws, and to reject claims of discrimination made by women and handicapped people. The same pattern holds for Democrat-appointed judges, who are far more likely to vote according to liberal stereotypes if accompanied by two other Democratic appointees. In this way, group influences create *ideological amplification*, so that a judge's ideological inclinations are magnified by sitting with two other judges appointed by a president of the same political party.<sup>633</sup>

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628. See, e.g., Editorial, *An Unqualified Judicial Nominee*, N.Y. TIMES, May 3, 2006, at A24; CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 169 (2003).

629. For example, the D.C. Circuit has exclusive jurisdiction over the Resource Conservation and Recovery Act (42 U.S.C. § 6976(a)(1)); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) (42 U.S.C. § 9613(a)); the Clean Air Act (42 U.S.C. § 7607(b)(1)); as well as national primary drinking water regulations (42 U.S.C. § 300j-7(a)(1)). The D.C. Court also hears many of the cases challenging environmental rulings and regulations issued by the E.P.A., the Department of the Interior, and other executive branch agencies.

630. Kovacic, *supra* note 618, at 703.

631. *Id.*

632. *Id.* at 713.

633. SUNSTEIN, *supra* note 628, at 4

But, as Sunstein further contends, another form of social influence occurs:

Sitting with two judges from a different party, judges show ideological dampening. Sitting with two Democrats, an individual Republican is often far less likely to vote in the stereotypically conservative fashion than an individual Republican who sits with one Republican and one Democrat. This is a conformity effect. The same is true for Democratic judges, whose ideological tendencies are significantly dampened when sitting with two Republicans. . . . [A] Democrat sitting with two Republicans often tends to vote like the median Republican, whereas a Republican sitting with two Democrats often tends to vote like the median Democrat.<sup>634</sup>

This is not to bemoan Carter's loss in the 1980 presidential election, Democratic candidate Walter F. Mondale's loss in the 1984 election, or Democratic candidate Michael Dukakis's loss in the 1988 election, nor is it to suggest that the United States as a whole and the environment in particular would be in a better position with a unanimously environmentally conscious federal judiciary. As Sunstein contends and as this Author would strongly agree, "[o]rganizations and nations are far more likely to prosper if they welcome dissent and promote openness. Well-functioning societies benefit from a wide range of views; their citizens do not live in gated communities or echo chambers."<sup>635</sup> The point here is simply that the degree to which a president holds environmental sensibilities may impact his choice of federal judges. Such choices are relevant not only in terms of the tendency to vote in favor of burden-enhancing or burden-reducing compliance with environmental statutes, but in terms of influence over or by other judges on the same panel. In other words, if an administration holds environmentally friendly viewpoints, the effect will likely "trickle down," to use a Reagan phrase, or permeate, the judiciary long after the president has left office.

With President George H.W. Bush's loss to William Jefferson Clinton in the 1992 election, presidential attitudes towards environmental regulation changed again, resembling those of the Carter Administration. As Ingram, Colnic and Mann observed at the beginning of the Clinton Administration:

The Clinton administration, under the stewardship of avowed environmentalists such as Vice President Al Gore and Secretary of the Interior Bruce Babbitt, changed access once again. To illustrate the improved built-in access of environmental groups, the success of the NRDC [(National Resources Defense Council)] in garnering administration appointments is instructive. Former NRDC staff

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634. *Id.* at 167.

635. *Id.* at 210-11.

members are now serving in the Energy Department, National Security Council, EPA, and the Agency for International Development.<sup>636</sup>

A Gore presidency would likely have perpetuated this access of environmental groups. One could also safely wager that a Gore administration would not have cut funds for the E.P.A. or for the open-space program, the Land and Water Conservation Fund, as the 2006 appropriations bill for the Interior Department and E.P.A. has done.<sup>637</sup> Nor would Gore have stripped the Tongass National Forest of protection against clear-cutting<sup>638</sup> or incurred criticisms from federal agency employees for allowing politics or industry pressure to trump science on issues of climate change, stem cell research and the use of toxic chemicals in agricultural pesticides.<sup>639</sup> In addition, because, as conservative columnist George F. Will remarks, “‘all presidents, at least since John Adams,’ have rewarded friends and handicapped adversaries,”<sup>640</sup> it is unlikely that Gore would have appointed virulently anti-regulatory administrators, such as Gale A. Norton, a pupil of James Watt, who served as President George W. Bush’s interior secretary for five years, and Michael O. Leavitt, the former Governor of Utah, who served as Administrator of the EPA after Christine Todd Whitman’s resignation and before President Bush tapped him to succeed Tommy Thompson as Secretary of Health and Human Services.<sup>641</sup> Norton drew criticism for her close ties to the oil, natural gas and mining industries, her support of drilling in the Arctic National Wildlife Refuge, her administration of the Endangered Species Act, her handling of trust money for Native American tribes, and her overall philosophy towards national parks—one which favored recreational use over conservation and one which resulted in the return of snowmobiles to Yellowstone National

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636. Ingram, Colnic & Mann, *supra* note 433, at 130.

637. See Editorial, *Environmental Battles*, N.Y. TIMES, May 17, 2006, at A22 (noting how the appropriations bill would cut funds to the Land and Water Conservation Fund to \$26.8 million—a far cry from the \$900 million/year that President Bush once promised).

638. *Id.*

639. Michael Janofsky, *Union Leaders Say E.P.A. Bends to Political Pressure*, N.Y. TIMES, Aug. 2, 2006, at A13 (reporting that thousands of staff scientists at the E.P.A. have alleged that E.P.A. management has ignored the environmental and human health risks of organophosphates and carbamates in agricultural pesticides).

640. George F. Will, *An Analysis of Roveology*, NEWSWEEK, July 17, 2006, at 70 (quoting Tom Hamburger and Peter Wallsten of the Los Angeles Times).

641. See, e.g., Editorial, *Gale Norton Resigns*, N.Y. TIMES, Mar. 12, 2006, § 4, at 11; Editorial, *Lands Worth Leaving Alone*, N.Y. TIMES, Nov. 14, 2003, at A28; Jennifer 8. Lee, *Democrats End Effort to Block Bush’s Choice To Lead E.P.A.*, N.Y. TIMES, Oct. 28, 2003, at A23; Matthew L. Wald, *Key Player For President Is Resigning At Interior*, N.Y. TIMES, Mar. 11, 2006, at A16.

Park.<sup>642</sup> During her tenure, Norton renounced her statutory authority to recommend lands for wilderness protection and, in a secret deal with then-Governor Leavitt, removed from federal protection 2.6 million acres of land in Utah that Babbitt had designated as wilderness and thus off-limits to commercial development.<sup>643</sup>

The judicial landscape would also have been different with a Gore presidency. Most notably, Gore likely would have appointed individuals other than John G. Roberts, Jr. and Samuel A. Alito, Jr. to serve as Chief Justice and Associate Justice respectively of the United States Supreme Court,<sup>644</sup> although one could make a plausible argument that Sandra Day O'Connor might not have retired had a Democrat been in power in 2005. Predicting how justices will vote is an obviously risky endeavor. Conservatives, for example, still cry "No more Souters" in expression of their disappointment with President George H.W. Bush's appointment of Justice David H. Souter, who has adopted a far less conservative approach since his appointment to the nation's highest bench.<sup>645</sup> Thus, while there is no guarantee whom Gore would have appointed had the same vacancies been available to him and how those individuals would have voted, one could speculate that Gore appointees might not have voiced quite the same level of agreement with the Court's most right-leaning members. For example, Chief Justice Roberts and Justice Alito frequently regard cases in the same light as Justices Scalia and Thomas, voting in agreement with them between 77.5 and 84% of the time, voting together 88% of the time, and displaying "the highest agreement rate of any two justices in the court's nonunanimous cases."<sup>646</sup>

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642. See Wald, *supra* note 641; see also Gale Norton Resigns, *supra* note 641.

643. See Wald, *supra* note 641; see also Gale Norton Resigns, *supra* note 641; *Lands Worth Leaving Alone*, *supra* note 641. In the three years since this deal, the Bureau of Land Management has sold oil and gas leases on some of these lands as part of an energy policy built on aggressive exploration and drilling. But in August 2006, a federal district court in Utah ruled that leases on sixteen parcels had violated environmental law. See Editorial, *A Reprieve For Public Lands*, N.Y. TIMES, Aug. 8, 2006, at A16.

644. For a discussion of the individuals whom Senator John Kerry (D-MA) might have nominated had he defeated George W. Bush in the 2004 presidential election, see Neil A. Lewis, *Mixed Results for Bush in Battles Over Judges*, N.Y. TIMES, Oct. 22, 2004, at A1; see also Neil A. Lewis, *Guessing Begins On Judgeships in a Kerry Term*, N.Y. TIMES, Oct. 22, 2004, at A16.

645. Lewis, *Mixed Results for Bush in Battles Over Judges*, *supra* note 644.

646. Linda Greenhouse, *Roberts Is at Court's Helm, But He Isn't Yet in Control*, N.Y. TIMES, July 2, 2006, § 1, at 1. Chief Justice Roberts agreed with Justice Antonin Scalia in 77.5% of the nonunanimous cases in the 2005-06 term and with Justice John Paul Stevens, "arguably the [C]ourt's most liberal member," 35% of the time. *Id.* Justice Alito voted with Justice Thomas in 84% of the Court's nonunanimous decisions and with Justice Scalia in 78% of such cases; only 13% of the time did Justice Alito and Justice Stevens agree.



In the most notable environmental case during the 2005-06 term, *Rapanos v. United States*, the Supreme Court considered the extent to which the Army Corps of Engineers can regulate wetlands under the Clean Water Act.<sup>647</sup> In a fractured decision that failed to resolve the matter, Chief Justice Roberts and Justice Alito joined Justices Scalia and Thomas urging a narrow definition of the term—one which would permit the federal government to regulate only land that is adjacent to a “relatively permanent bod[y] of water” and that has a “continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”<sup>648</sup> In contrast, Justices Stevens, Souter, Ginsburg and Breyer would have preserved the broad and long-standing judgment of the Army Corps of Engineers that its reach extends to wetlands adjacent to “all identifiable tributaries that ultimately drain into large bodies of water,” which would include “water beds that are periodically dry” and manmade berms or ditches separating wetlands from adjacent tributaries.<sup>649</sup> It is possible, although by no means certain, that Gore-appointed judges would have sided with Justice Stevens over Justice Scalia (or with Justice Kennedy, whose middle-ground concurring opinion stated that remote tributaries must have a “significant nexus” to a navigable waterway in order to fall under governmental regulation, but rejected Justice Scalia’s position that only permanent bodies of water are subject to Army Corps jurisdiction<sup>650</sup>).

Although Supreme Court nominees generate more attention and publicity than appointments to lower courts, the extent to which a president can reshape the federal judiciary and achieve certain (environmental) policy goals lies in his choice of judges to seats at the federal district court- and circuit courts of appeals-levels.<sup>651</sup> To illustrate, because, as noted above, many federal environmental statutes find their constitutional linchpin in the Commerce Clause,<sup>652</sup> a number of MEOs have opposed

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Editorial, *The Fragile Kennedy Court*, N.Y. TIMES, July 7, 2006, at A16.

647. 126 S. Ct. 2208 (2006). For a sketch of the 4-4 split in *Rapanos* and its companion case, *Carabell v. United States Army Corps of Engineers*, see Linda Greenhouse, *Justices Divided On Protections Over Wetlands*, N.Y. TIMES, June 20, 2006, at A1.

648. 126 S. Ct. at 2222, 2227. For criticism of the Scalia opinion as judicial activism, see, e.g., Editorial, *Clean Water at Risk*, N.Y. TIMES, June 20, 2006, at A16.

649. 126 S. Ct. at 2259-60, 2262, (Stevens, J., dissenting).

650. *Id.* at 2236, 2242-43 (Kennedy, J., concurring in the judgment).

651. Appointments to federal district courts are, perhaps, of greater importance to environmental organizations than to other social justice groups because “[l]ower courts follow one another, especially in highly technical areas [such as environmental law], and hence judicial mistakes may be self-perpetuating.” SUNSTEIN, *supra* note 628, at 10 (citing Andrew F. Daugherty and Jennifer F. Reinganum, *Stampede to Judgment*, 1 AM. L. ECON. REV. 158 (1999)).

652. U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have the Power . . . [t]o regulate

appointments by President George W. Bush—individuals who might limit the authority of Congress under the Commerce Clause to enact environmental safeguards, as well as those who might place procedural hurdles before individuals wishing to sue polluters under “citizen suit” provisions of various environmental laws. For example, a broad coalition of non-governmental organizations has opposed the nomination of Peter D. Keisler to the U.S. Court of Appeals for the D.C. Circuit.<sup>653</sup> Earthjustice, in conjunction with Community Rights Counsel, has resisted the nomination of Department of Defense General Counsel William James Haynes II to a seat on the U.S. Court of Appeals for the Fourth Circuit because of his efforts to exempt the military from compliance with the CAA, RCRA, CERCLA, ESA and the Marine Mammal Protection Act (MMPA).<sup>654</sup> President Bush’s nomination of William G. Myers III, former Solicitor of the Interior, to the Ninth Circuit Court of Appeals has encountered strong resistance from environmental, tribal, labor, civil rights, disability, women’s and other organizations, including some groups that have never before opposed a judicial nominee.<sup>655</sup> Of particular concern to environmental groups is Myers’ strong support for property rights, his criticism of governmental management of public lands, his expressed desire to deter citizen enforcement of environmental laws, and his view of the Endangered Species Act and Clean Water Act’s wetlands protections as examples of “regulatory excesses.”<sup>656</sup> Earthjustice also balked at the

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Commerce with foreign Nations, and among the several States, and with the Indian tribes.”); see ENVTL. LAW INST., *supra* note 618, at 6 (explaining how Congress enacts socioeconomic legislation via the Constitution’s Commerce Clause).

653. See Letter from Coalition for a Fair and Independent Judiciary to The Honorable Arlen Specter, Chairman, Senate Committee on the Judiciary, United States Senate (July 31, 2006), available at <http://www.judgingtheenvironment.org/assets/pdf/Keisler-GroupLetter-07-31-06.pdf>.

654. Letter from Doug Kendall, Executive Director, Community Rights Counsel, and Glenn Sugameli, Senior Judicial Counsel, Earthjustice, to The Honorable Arlen Specter, Chairman, Senate Committee on the Judiciary, United States Senate, and The Honorable Patrick J. Leahy, Ranking Member, Senate Committee on the Judiciary, United States Senate (July 10, 2006), available at <http://www.judgingtheenvironment.org/assets/pdf/Haynes-Environmental-Concern-Letter.pdf>.

655. See, e.g., PEOPLE FOR THE AMERICAN WAY, PEOPLE FOR THE AMERICAN WAY IN OPPOSITION TO THE CONFIRMATION OF WILLIAM G. MYERS III TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (2004), [http://preview.pfaw.org/pfaw/dfiles/file\\_269.pdf](http://preview.pfaw.org/pfaw/dfiles/file_269.pdf).

656. William G. Myers III, *Environmental Command and Control: the Snake in the Public Lands Grass*, in FARMERS, RANCHERS AND ENVIRONMENTAL LAW 191, 208 (Roger Clegg ed., 1995); PEOPLE FOR THE AMERICAN WAY, *supra* note 655, at 14; EARTHJUSTICE, WILLIAM MYERS’ VIEWS ON ACCESS TO THE COURTS VIOLATE NINTH CIRCUIT PRECEDENT AND WOULD EFFECTIVELY BAR MANY VITAL ENVIRONMENTAL AND PUBLIC INTEREST CLAIMS, [http://www.judgingtheenvironment.org/assets/pdf/Myers\\_Access\\_Courts.pdf](http://www.judgingtheenvironment.org/assets/pdf/Myers_Access_Courts.pdf) (last

nomination of Brett Kavanaugh, former Associate Counsel and Senior Associate Counsel in the Office of White House Counsel, to the United States Court of Appeals for the District of the Columbia Circuit.<sup>657</sup> After a more than two-year fight and much to their chagrin, Kavanaugh was confirmed by a 57-36 Senate vote on May 26, 2006.

While a Gore presidency could have resulted in appointments of individuals more inclined to find broad governmental regulatory power under the Commerce Clause, (and thus, more likely to vote in favor of decisions with burden-increasing consequences for emitting and discharging entities), all presidents, regardless of their political ideology, judicial philosophy and degree of environmental consciousness, must still rely on the Senate to confirm their nominees.<sup>658</sup> Thus, one might argue that treating criminal disenfranchisement as an environmental issue for the simple hope of altering the outcome of presidential elections is a misallocation of resources, especially if an unresponsive Congress encumbers judicial appointments. But, as noted in Part II.B.3.a, criminal disenfranchisement may affect Congressional races in addition to presidential ones, thereby bolstering, not undercutting, the argument that environmental organizations should devote attention to criminal disenfranchisement laws and policies. Perhaps more significantly, “[Congress’s] historical role in the formation of environmental policy has been both highly influential and unquestionably responsive to the American public’s concern over environmental degradation.”<sup>659</sup> While this has been true for both parties, Democrats tend to be more supportive of pollution control measures,<sup>660</sup> whereas Republican are more inclined to favor “rapid and unencumbered economic growth.”<sup>661</sup> As political science professor

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visited Apr. 29, 2007).

657. Letter from Glenn P. Sugameli, Senior Legislative Counsel, Earthjustice, to The Honorable Orrin Hatch Chairman, Senate Committee on the Judiciary, United States Senate, and The Honorable Patrick Leahy, Ranking Member, Senate Committee on the Judiciary, United States Senate (Apr. 26, 2004), *available at* [http://www.judgingtheenvironment.org/assets/pdf/Kavanaugh\\_Earthjustice\\_Letter.pdf](http://www.judgingtheenvironment.org/assets/pdf/Kavanaugh_Earthjustice_Letter.pdf). Earthjustice was not alone in its opposition to Kavanaugh’s appointment. *See, e.g.*, Editorial, *An Unqualified Judicial Nominee*, *supra* note 628.

658. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .”).

659. Kraft, *supra* note 11, at 170 (citations omitted); *see also* Sheldon Kamieniecki, *Political Parties and Environmental Policy*, in ENVIRONMENTAL POLITICS & POLICY, *supra* note 1, at 146, 150 (“Congress and state legislatures have a major impact on environmental policy-making.”).

660. Kamieniecki, *supra* note 659, at 148 (“Republicans are generally less in favor of pollution control measures than Democrats.”).

661. *Id.*

Sheldon Kamieniecki notes “since 1860 the Democratic Party, on the whole, has placed greater emphasis on natural resource questions in its platforms than the Republican Party. Republicans, in contrast, have expressed more concern with states’ rights and private development of natural resources and have been especially critical of Democratic policies involving federal control of resources.”<sup>662</sup> Examining data for Republicans and Democrats in the U.S. House of Representatives and U.S. Senate between 1973 and 1992, Kamieniecki observes that Democrats are “more likely than Republicans to vote in favor of environmental legislation in both houses over the nineteen years. The differences are especially large during the Reagan and Bush administrations, where in some years support for environmental legislation [was] twice as high among Democrats than among Republicans.”<sup>663</sup>

What makes Kamieniecki’s conclusions regarding political parties and environmental policy significant for the present discussion is that the party that tends to favor stronger federal environmental protections also tends to express greater support for fewer restrictions on offender and ex-offender voting. A survey conducted by Brian Pinaire, Milton Heumann, and Laura Bilotta found that Republicans demonstrated greater support for lifetime disenfranchisement, while Democrats seemed more receptive to liberalizing state disenfranchisement laws.<sup>664</sup> Returning to the concern expressed at the beginning of this Section that MEOs may fear alienating their donors (both corporate and individuals) who have less awareness,

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662. *Id.* at 149-50. Kamieniecki also points out that “Republicans more than Democrats depend upon the continued financial backing of large corporations and polluting firms in their election campaigns,” and thus are less likely to support environmental measures than Democrats. *Id.* at 164; *see also* Ingram, Colnic & Mann, *supra* note 433, at 135 (“As long as money remains so important in elections and environmental groups stay poor relative to industry and trade lobbies, electoral campaigns will continue to be of limited use to environmental groups.”). While money continues to play an important role in elections, the last two presidential elections were decided by exceptionally close margins—gaps so small that a handful of votes, rather than larger campaign coffers, distinguished the victor from the loser.

663. Kamieniecki, *supra* note 659, at 156. *See also* Kraft, *supra* note 11, at 173 (“Proenvironmental voting . . . is more likely among liberals, Democrats, and members from urban and suburban districts and districts in the East than among conservatives, Republicans, and members from rural districts and the South.”).

664. Pinaire, Heumann & Bilotta, *supra* note 15, at 1540 n.75, 1547. Democratic support for reenfranchising disenfranchised offenders and ex-offenders may be due, in part, to the fact that African Americans, who are disproportionately represented in jails and prisons, and among the population of criminally disenfranchised individuals, often tend to vote for Democratic candidates. *See, e.g.*, Adam Nagourney, *Republicans Coming Up Short in Effort to Reach Out to African-American Voters*, N.Y. TIMES, July 18, 2006, at A16 (“It took the Republican Party 40 years, since 1964, to get 8 percent of the vote.” (quoting Ken Mehlman, chairman of the Republican National Committee)).

understanding or sympathy for the plight of disenfranchised offenders and ex-offenders, this Author suggests that such fears are unfounded because robust environmental policy falls on the same side of the partisan divide as liberal disenfranchisement policy. In other words, the donors and members of environmental organizations, as well as the elected officials sympathetic to environmental causes, are less likely to withdraw their support if environmental organizations adopted criminal disenfranchisement as an issue than if such organizations embraced a pro-life position.

In fact, Pinaire and his colleagues found that only a quarter of Republicans surveyed supported permanent disenfranchisement and only 38.1% supported disenfranchisement during incarceration, parole or probation,<sup>665</sup> leading to the conclusion that removing hurdles to voting for offenders and ex-offenders enjoys greater bipartisan backing than natural resource protection and stringent pollution controls.<sup>666</sup> Why reenfranchisement enjoys support across party lines is subject to debate, but Abramsky posits that “disenfranchisement affects people of all political persuasions and raises questions of fundamental fairness that transcend party-political allegiances.”<sup>667</sup> Ewald comments that given the complexity of disqualification and restoration procedures, “it should come as no surprise that many voters are ignorant of their voting status, a fact that is likely to have resulted in hundreds of persons with a felony conviction registering and voting illegally in recent years.”<sup>668</sup> For Abramsky, then, disenfranchisement transcends the partisan divide because voting affects all parties (even though Democrats tend to be more concerned with issues of fairness and access than Republicans). For Ewald, Republicans, who usually adopt harsher tough-on-crime platforms, may express concern for disenfranchisement because of the risk that confusing laws may lead to improper voting. Either way, environmental organizations should not avoid the injustices of criminal disenfranchisement for fear of jeopardizing funding sources or alienating constituencies.

Finally, despite the success of federal environmental policy<sup>669</sup> and the need for additional legislation with teeth, especially with respect to climate change, much environmental policy now occurs at the state and local

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665. Pinaire, Heumann & Bilotta, *supra* note 15, at 1540 n.75.

666. Pinaire and his colleagues noted, however, that “[a]s the effects of disenfranchisement policies receive greater publicity and as the laws are reevaluated . . . we expect the debate over these issues to become increasingly partisan, especially as Democrats are expected to be the beneficiaries of such an extension of the franchise.” *Id.* at 1545-46.

667. ABRAMSKY, *supra* note 37, at 121.

668. EWALD, CRAZY-QUILT, *supra* note 15, at iii.

669. For an overview of the literature concerning congressional performance on environmental policy issues, see Kraft, *supra* note 11, at 196-97.

levels.<sup>670</sup> But, as with Congressional races discussed above and as noted in Part II.B.3.a, criminal disenfranchisement may affect local elections, further reinforcing this Article's recommendation that environmental organizations should devote attention to criminal disenfranchisement laws and policies. Nevertheless, one might still argue that given that MEOs tend to draw members from across the country and tend to focus on national and international issues<sup>671</sup> (albeit ones that may manifest themselves differently on regional or local levels), criminal disenfranchisement might have limited appeal to such organizations because of the limited potential for reenfranchised offenders and ex-offenders to impact elections relevant to significant numbers in their membership rolls (i.e., Presidential and Senate races). But as Scott Kuhn, Staff Attorney for Communities for a Better Environment in San Francisco, CA contends:

Unless the people and communities who have to live with environmental pollution policies are actively and meaningfully involved in the decisionmaking process, it is irrelevant whether environmental regulatory control is located at the federal, state, or local level. For too long, the public's voice in environmental regulation, which is an essential part of democracy, has been tokenized, stifled, drowned out by industry, or otherwise ignored. With increasing privatization, marketization, and decentralization of environmental decisionmaking, increased public participation is essential to achieving environmental justice. True public participation and environmental justice cannot be realized until the communities that are impacted by environmental regulations have a voice in the process equal to that of regulated industry.<sup>672</sup>

Along these lines, grassroots environmental organizations are often more interested in access to local officials and change at this level than to federal officials and change at the national level.<sup>673</sup> While MEOs could interpret the growth of environmental policy on the state and local level and the concerns of grassroots organizations about access to state and local elected officials as a reason *not* to support the repeal or liberalization of criminal disenfranchisement policies, they could just as easily support the repeal or liberalization of criminal disenfranchisement policies in hopes of achieving a stronger and deeper army of environmental advocates and activists. In other words, because environmental problems and solutions range from the

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670. Costain & Lester, *supra* note 4, at 15.

671. See sources cited *supra* note 4 and accompanying text.

672. Kuhn, *supra* note 486, at 647-48.

673. Ingram, Colnic & Mann, *supra* note 433, at 131 ("Local groups seek community solutions to community problems. While they often work with federal administrators such as EPA officials on Superfund sites, their primary interest is change at the local level.").

international to the local and because disenfranchisement can affect elections from the presidential to the local, broadening the electorate brings with it the real possibility of widespread change. As Shabecoff contends:

For much of this century, the [environmental] movement has been functioning as an ecological emergency squad, responding to crises and seeking to plug a leaking statute here or fill a regulatory gap there. In the future, instead of simply lecturing, or lobbying, or demonstrating, or haggling, or litigating to protect public health and natural resources, the environmentalism activists almost certainly must move forward to acquire the *power* necessary to achieve fundamental change. To do so they will have to tap the latent support that is repeatedly demonstrated by the opinion polls to build an effective political base—a base strong enough to counter the financial power wielded by those interests that oppose environmental reform. Political leaders must be presented with a clear choice between addressing our environmental ills and being replaced.<sup>674</sup>

Reenfranchising the criminally disenfranchised could potentially result in both a more responsive and effective ecological emergency squad and in the political base powerful enough to confront opponents of environmental reform.

#### D. Diversity, Local Knowledge, and Environmental Values

In Part I and Part III.A, this Article noted the growth and development of environmental concern in this country and the corresponding phases or movements, marked by an expanding agenda of issues and a broader set of tools to achieve desired goals.<sup>675</sup> As political scientists W. Douglas Costain and James P. Lester state, “[w]e have observed a number of policy changes (e.g., from the ‘wise use’ of natural resources to pollution prevention and waste minimization); patterns of participation have evolved from largely an elitist style in the late 1890s to ‘participatory democracy’ in the 1990s.”<sup>676</sup> Similarly, sociologist Bill Devall, an early proponent of *deep ecology*—a philosophy developed in the 1970s that rejects an anthropocentric worldview in which humans dominate nature, regard its resources as unlimited, and privilege economic growth at the expense of everything else, in favor of an ecocentric or biocentric perspective in which humans are part of the “web of life” and “equal with the many other aspects of

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674. SHABECOFF, *supra* note 2, at 279.

675. *See supra* Part I, III.A.

676. Costain & Lester, *supra* note 4, at 15; *see also id.* at 36 (“[T]he patterns described . . . over the past one hundred years suggest an expansion of the environmental movement from elitism to participatory democracy.”).

creation,”<sup>677</sup> writes:

The U.S. conservation and environmental movement is one of the most enduring and vital social movements of the past century. Since the founding of the Sierra Club by John Muir and his associates in 1892, the movement has persisted in various versions, despite continual differences between its conservation and preservation wings.<sup>678</sup>

These “continual differences” within the environmental movement as a whole have at times been troublesome. Indeed, charges of racism levied against the MEOs, discussed earlier in this Article, show that efforts to protect the environment have often been quite divisive. Recognizing that “people concerned with environmental affairs value different things,”<sup>679</sup> Dryzek and Lester propose a typology of environmental worldviews as a heuristic device to flesh out different conceptions of the human-environment relationship (and the major actors who hold these ideas), as an instrument to chart shifts in perspectives over time, as a tool to evaluate and criticize environmental thought, and as a means for crafting scenarios of the “environmental future.”<sup>680</sup> While an in-depth analysis of their typology is outside the scope of this Article, it is worthwhile highlighting the structure of their six-cell typology and some of the beliefs contained therein.

Across the x-axis of their grid, which they entitle “Locus of Value,” Dryzek and Lester distinguish between thinkers who focus on the individual (such as free-market conservatives) and those who focus on the community—a group that can be further divided into an anthropocentric strain (such as socialist and marxist environmentalists, social ecologists, and eco-anarchists, who all regard capitalism as antiecological and the root of natural resource destruction) and a biocentric strain (such as the deep ecologists mentioned above).<sup>681</sup> Across the y-axis of their grid, which they entitle “Locus of Solutions,” Dryzek and Lester distinguish between thinkers who favor centralized solutions (i.e., ones that involve a major role for governmental institutions) and thinkers who prefer decentralized solutions to environmental problems (i.e., ones that involve limited governmental action—communal cooperation or competition).<sup>682</sup>

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677. Devall, *supra* note 4, at 52; BILL DEVALL & GEORGE SESSIONS, *DEEP ECOLOGY* (1985); Dryzek & Lester, *supra* note 1, at 337-38.

678. Devall, *supra* note 4, at 51.

679. Dryzek & Lester, *supra* note 1, at 330.

680. Dryzek & Lester, *supra* note 1, at 338-39, 343. Dryzek and Lester assert, rather pompously and, this Author would argue, incorrectly, “[i]f a thinker is not readily located in one cell, we should look out for potentially fatal inconsistencies.” *Id.* at 339.

681. *Id.* at 331.

682. *Id.*



Several of these “cells” bear mention. *Structural reformers*, located within the “individual-centralized” cell, have faith in the existing political system, believe that “continued tinkering with decision-making processes will suffice,”<sup>683</sup> and generally advocate for administrative centralization with more laws to regulate polluters and more funds for enforcement.<sup>684</sup> *Reform ecologists*, whom Dryzek and Lester claim populate the mainstream of American environmentalism, are situated in the “community-biocentric-centralized” cell (although different organizations balance anthropentric and biocentric concerns in different ways). Reform ecologists tend to “give ecological values a voice in the higher (central) levels of the existing political system”—values that may include wetland preservation and pollution control.<sup>685</sup> Dryzek and Lester draw similarities between *ecofeminists*, who regard patriarchy as the root of all evil in society and what makes domination of nature possible, and *social ecologists*, placing them in the “community-anthropocentric-decentralized” cell.<sup>686</sup> And *cornucopians*—a type of free-market conservative and thus located in the “individual-decentralized” cell—subscribe to a worldview in which “no resource can ever run out if a competitive market order exists to stimulate the development of substitutes.”<sup>687</sup> According to cornucopian free marketers, population growth is not a problem because “more people means more problem solvers.”<sup>688</sup>

Regardless of where one situates oneself within Dryzek and Lester’s typology, this Article argues that an expanded electorate achieved by liberalizing criminal disenfranchisement laws and policies may result in more individuals sharing and promoting one’s worldview. For example, an expanded electorate should be appealing to *structural reformers* because more voters can push for more stringent environmental laws to regulate polluters. *Reform ecologists* may look at a broader electorate as an opportunity to “give ecological values a voice in the higher (central) levels of the existing political system.” To understand how criminal disenfranchisement might be an issue of concern for *social ecologists*, consider political scientist Gerald B. Thomas’s assertion:

[I]f the activities and institutions of society are not allowed to precipitate from a diverse and nonhomogeneous set of environments,

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683. *Id.* at 332.

684. *Id.* at 331-32 (citations omitted).

685. *Id.* at 333-34.

686. *Id.* at 337 (describing ecofeminists as considering it “foolish to talk of better environmental policy, or more harmonious, less exploitative relationships with the natural world, unless one first attacks patriarchy”).

687. *Id.* at 335.

688. *Id.*

then society will not evolve in any real sense but will instead become both socially and ecologically unsustainable.

. . . .

The greatest service that we can do for society, therefore, is to transform ourselves into people who will be capable of helping others in the coming years; the greatest service we can do for ourselves is to become empowered and self-realized. The general population must come to realize that society needs to be recreated so that each and every individual is allowed to fully develop his or her uniqueness, competence, and creativity. This, according to the social ecologists and the vision I propose, is a necessary prerequisite for solving the environmental crisis.<sup>689</sup>

An empowered, self-realized and diverse population, the social ecologist might argue, can stem the tide of homogenization and centralization that they fear is contributing to environmental crises and work in decentralized context to social, economic and ecological sustainability. Addressing criminal disenfranchisement, which disproportionately bars African Americans and African American *women* from the polls, should also be of interest to the *ecofeminist* strain of social ecology, which might well regard this form of domination as an evil on par with patriarchy—an evil that must be eradicated before harmonious relationships can be established with the natural world. Liberalizing criminal disenfranchisement laws and policies is even consistent with the *cornucopian* worldview: more voters means more problem solvers (and hence a reason not to worry about allegedly “finite” resources). Finally, and as this Article argues, most significantly, an expanded electorate may bring about the formation of an entirely new set of environmental values—which could either add to or subdivide Dryzek and Lester’s six-cell typology.

One might question why we would benefit from a more elaborate environmental typology. As these examples illustrate, the breadth of environmental worldviews often results in disagreement over the source and extent of and solutions to environmental problems, as well as how to prioritize these problems. With diverging environmental perspectives leading to the divisiveness that Devall described and the diversity of environmental groups and organizations that gave Ingram, Colnic and Mann cause for concern in Part III.A, should not our efforts be geared towards bridging differences and contracting Dryzek and Lester’s typology?

Although there is a certain safety and security in the known, this Article

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689. Thomas, *The Politics of Hope*, *supra* note 475, at 353, 360.

argues in favor of liberalizing criminal disenfranchisement policies in order to generate the very diversity that elicited such mixed reactions for Ingram, Colnic and Mann, but which Dunlap and Mertig regard with much greater favor:

Although environmentalism has clearly endured over the past two decades, with unintentional aid from its opposition, it nonetheless has changed substantially. The major change appears to be its vastly increased diversity. As Gottlieb noted, "By the end of the 1980s . . . environmentalism meant many different things to different groups and movements." Although this diversity may lead to fragmentation, which Mauss sees as a precursor to the demise of a movement, we believe that it may prove to be an important strength of contemporary environmentalism.

. . . .

[D]espite all of their differences, the various types of environmentalists share a recognition of the deteriorating state of the environment, a desire to halt such deterioration, and an opposition to those who foster it. What differentiates them are their diagnoses of the causes of the problems and their prescriptions for solving them. These are vast, indeed, and at times the resulting differences in strategies, tactics, and goals will no doubt be counterproductive. In the long run, however, we see this diversity as potentially enhancing the movement, providing it with more resources and personnel, and virtually guaranteeing that there will be a thirtieth Earth Day!<sup>690</sup>

For Dunlap and Mertig, then, because the *environment itself* is diverse, it follows that different peoples will interact with different environments (and even the same environments) in different ways. This idea resonates with Maureen Austin, who describes how the Forest Trust, in Santa Fe, New Mexico, relies on the knowledge of rural communities in developing management plans for local forest resources, and who contends that forestry professionals have much to gain from understanding urban forestry through the eyes of local residents because "local people know their local environment and community and care about this area in ways that outsiders never could"<sup>691</sup>—an idea vital to Agenda 21, discussed earlier in Part III.A.<sup>692</sup> Similarly, environmental policy analyst Francis Irwin and

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690. Dunlap & Mertig, *supra* note 450, at 5, 8 (quoting R. Gottlieb, *An odd assortment of allies: American environmentalism in the 1990s*, 4 GANNETT CENTER JOURNAL, 37-47 (1990))(citations omitted).

691. Austin, *supra* note 572, at 180; *see also* Cole, *supra* note 4, at 640 ("Grassroots activists bring different life experiences and cultural histories to the table . . .").

692. *See supra* Part III.A. Austin's assertion regarding how local people know and care

environmental attorney Carl Bruch write: “Involving citizens, nongovernmental organizations (NGOs), and businesses expands the knowledge base and resources for developing laws and policies, as well as improving compliance and enforcement.”<sup>693</sup> By the same token, while local understanding and an expanded knowledge base better helps to ensure the protection of local environments, linguists Rom Harre, Jens Brockmeier, and Peter Muhlhausler argue that enhanced ecological knowledge can contribute to the protection of larger environments: “the global nature of many environmental issues makes a global exchange of perspectives—rather than a one-way selection of useful perspectives . . .—one of the fundamental tasks . . . .”<sup>694</sup>

Essentially, there are instances in which unity is necessary but diversity leads to fragmentation (as already expressed in Part III.A), stagnation, in-fighting and regression. But there are also instances in which diversity can increase the participation of citizens, increase the publicity and exposure of an environmental problem to a wider audience (including policymakers), and can broaden the tools and create new ones for remedying the problem (which may include environmental law and policy, but also individual and collective behavior irrespective of legal sticks and carrots). If “[a] hallmark of democracy is that the state is constantly re-inventing itself through the input of voters,”<sup>695</sup> then this Article would suggest that a broadened electorate may well make for a more elaborate environmental typology and a subsequently better, reinvented state—one that is socially, economically and *ecologically* sustainable.

#### IV. RECOMMENDATIONS FOR EXPANDING THE ELECTORATE (AND POTENTIALLY INCREASING AND IMPROVING ENVIRONMENTAL PROTECTION)

“No political movement in the United States can assume the status of being both national and progressive unless and until it examines the impact of cultural diversity, i.e., ‘race’ in American society.”<sup>696</sup>

“If we want former felons to become good citizens, we must give them

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about their local environment in special ways relates not only to Chapters 23 and 27 of Agenda 21, quoted earlier, but also Chapter 26.1, on indigenous peoples and their knowledge of and relationship with their lands. Agenda 21, *supra* note 507.

693. Irwin & Bruch, *supra* note 490, at 511 (footnote omitted).

694. HARRE, BROCKMEIER & MUHLHAUSLER, *supra* note 17 at 159.

695. Demleitner, *supra* note 183, at 772 (citing George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1906 (1999) (“Voting is [] about expressing biases, loyalties, commitments, and personal values.”)).

696. Willard, *supra* note 458, at 77.

rights as well as responsibilities, and there is no greater responsibility than voting.”<sup>697</sup>

Few organizations like to advocate for positions, policy proposals, or legislation that have little chance of acceptance or passage. Environmental organizations are no different. When David Yarnold, Executive Vice President of Environmental Defense was asked why his group had not promulgated a creative and bold global warming plan with teeth, he replied: ““Why would you want to lobby for something that can’t get done?””<sup>698</sup> But attempting to scale back or repeal state criminal disenfranchisement laws and to encourage greater participation in voting is neither an unpopular effort (that could alienate members, donors and political allies), nor is it a doomed undertaking with little chance of success.<sup>699</sup> Studies show broad public support for some degree of change in the area of criminal disenfranchisement. Policy reform, which usually lags behind public opinion, has also started taking place, with a number of states within the last ten years liberalizing their criminal disenfranchisement laws.

This Part begins by briefly reviewing two recent studies of public opinion regarding criminal disenfranchisement. It then provides an overview of some of the changes that states have undertaken to their disenfranchisement laws over the past decade. With this background, this Part then offers a menu of reforms to state criminal disenfranchisement policies which environmental organizations could support depending on their desired level of involvement and progressiveness.<sup>700</sup> In addition, this Part also makes suggestions for educating offenders, ex-offenders, correctional and criminal justice officials, including probation and parole staff, as well as state election officials about the loss of voting rights and the procedures for franchise restoration. This Part concludes by noting several recommendations for how to correct the inequities created by the Census Bureau’s application of the “usual residence rule” to prisoners.

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697. Mauer, *Disenfranchising Felons Hurts Entire Communities*, *supra* note 382, at 6 (quoting Congressman John Conyers (D-MI)).

698. Katherine Ellison, *Turned Off by Global Warming*, N.Y. TIMES, May 20, 2006, at A13 (quoting David Yarnold, Executive Vice President, Environmental Defense).

699. Although nonprofit organizations risk losing their tax exempt status if they campaign for candidates, they may take stands on issues and pass out voter guides. Efforts to scale back or eliminate state criminal disenfranchisement laws are unlikely to threaten environmental organizations’ tax exempt status. *See generally* Stephanie Strom, *Anti-Abortion Group Loses Tax Exemption*, N.Y. TIMES, Sept. 15, 2006, at A16.

700. For recently-considered Congressional bills that would prohibit felon disenfranchisement, see sources cited *supra* note 196. For a discussion of whether Congress should enact legislation to restore voting rights in federal elections to citizens convicted of a felony, thereby ensuring that federal elections are not subject to disparate state laws, see, e.g., FELLNER & MAUER, *supra* note 110, at part IX.

A. Public Opinion of and Recent Changes to State Criminal  
Disenfranchisement Laws and Policies

“Social movements are spearheaded by activists and organizations, but their success or failure is often heavily influenced by the degree of support they receive from the broader public.”<sup>701</sup>

In Part III.C, this Article noted the research of Pinaire, Heumann and Bilotta, which found that while Republicans demonstrate greater support for lifetime disenfranchisement and Democrats appear more receptive to liberalizing state disenfranchisement laws,<sup>702</sup> only a quarter of Republicans surveyed supported permanent disenfranchisement and only thirty-eight percent supported disenfranchisement during incarceration, parole or probation,<sup>703</sup> leading to this Author’s conclusion that removing hurdles to voting for offenders and ex-offenders enjoys bipartisan backing. Almost eighty-two percent of the participants in the same Spring 2001 survey felt that, at some point, the right to vote should be restored to convicted felons; only about sixteen percent supported permanent disenfranchisement.<sup>704</sup> While survey respondents overwhelmingly agreed that convicted felons should eventually regain their right to vote, they lacked consensus as to when the right to vote should be returned:<sup>705</sup> About ten percent felt that felons should never lose the right to vote; approximately thirty-two percent responded that felons should lose the right to vote only while incarcerated; five percent answered that felons should lose the right to vote only while on parole or probation; and roughly thirty-five percent believed that felons should lose the right to vote only while incarcerated, or on parole or probation.<sup>706</sup> Based on these results, Pinaire and his colleagues concluded that “the majority of Americans are somewhere in the middle. Relatively few favor a policy that *never* punishes felons with a temporary deprivation of their right to vote, and only slightly more favor a policy that *permanently* punishes felons with a deprivation of their right to vote.”<sup>707</sup> While the Pinaire-Heumann-Bilotta survey suggested that the public favors policies in tune with the thirty-some states (and the District of Columbia) that restrict the right to vote during incarceration and/or parole or

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701. Riley E. Dunlap, *Trends in Public Opinion Toward Environmental Issues: 1965-1990*, *supra* note 14, at 89.

702. See sources cited *supra* note 664 and accompanying text.

703. See *supra* note 665 and accompanying text.

704. Pinaire, Heumann & Bilotta, *supra* note 15, at 1540, 1545. Note that none of the African-Americans surveyed supported lifetime disenfranchisement. *Id.* at 1540 n.75, 1546.

705. *Id.* at 1540, 1545.

706. *Id.* at 1540.

707. *Id.* at 1545.

probation, the authors of the study surmised that “[a]s public awareness of these laws increases—especially owing to the impact of the Florida law on the election of 2000 and the increase in scholarly attention—[there will likely be] even more rigorous scrutiny of state legislation that permanently revokes the voting rights of convicted felons.”<sup>708</sup>

A second survey conducted in late Spring 2002 by Uggen and Manza, along with political sociologist Clem Brooks, also found little support for the assumption that the American public consistently supports the disenfranchisement of felons and ex-felons who are not currently incarcerated.<sup>709</sup> While only thirty-one percent of respondents supported enfranchisement of prisoners, between sixty and sixty-eight percent supported enfranchisement of probationers—sixty percent when the question’s wording implied that probationers have not been imprisoned; sixty-eight percent when the question’s wording explicitly specified that probationers have not been imprisoned.<sup>710</sup> These numbers are noteworthy because felony probationers make up twenty-five percent of the disenfranchised felon population.<sup>711</sup> Survey participants also expressed strong support for enfranchisement of parolees, with sixty percent expressing their belief that parolees should not be denied the right to vote.<sup>712</sup> Manza, Brooks and Uggen also queried participants about their opinions regarding enfranchisement for different categories of ex-felons. When asked about voting rights for ex-felons, with no reference to the type of crime committed, eighty percent endorsed enfranchisement.<sup>713</sup> Support decreased, however, when the type of crime was specified—sixty-six percent endorsed enfranchisement of ex-felons convicted of a violent offense, sixty-three percent endorsed the enfranchisement of white-collar ex-felons, and fifty-two percent endorsed the enfranchisement of sex offenders.<sup>714</sup> The authors speculated that sex offenders elicited the least support for the extension of voting rights because of the “special stigma or perceived threat associated with sex offenders.”<sup>715</sup> They noted, however, that sex offenders constitute a modest proportion of current prisoners and ex-felons.<sup>716</sup> Based on these numbers, they then concluded that “a civil liberties view prevails over a punitive view that would deny political rights

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708. *Id.*

709. Manza, Brooks & Uggen, *supra* note 182, at 283.

710. *Id.* at 280.

711. *Id.* at 283.

712. *Id.* at 280.

713. *Id.* at 281.

714. *Id.*

715. *Id.*

716. *Id.*

to nonincarcerated felons.”<sup>717</sup>

Public discomfort with criminal disenfranchisement is both reflected by and reflective of recent changes to criminal disenfranchisement laws. From the late 1960s to the late 1990s, more than fifteen states eliminated provisions banning felons from voting for life.<sup>718</sup> In the past decade and in bipartisan fashion, about ten states have scaled back or repealed components of their disenfranchisement laws.<sup>719</sup> While some states have adopted *more restrictive* criminal disenfranchisement laws during this time period<sup>720</sup>—for example, until 1998, Massachusetts and Utah permitted individuals behind bars to vote<sup>721</sup>—the more recent trend, especially in the aftermath of the 2000 presidential election, appears to be in the direction of enfranchisement. As Abramsky illustrates:

Going into the 2000 election, thirteen states permanently disenfranchised felons. Going into the 2004 election, only seven states continued to have blanket disenfranchisement laws. In the intervening four years, political pressure resulted in reform in Delaware, Maryland, New Mexico, Nevada, Washington, and Wyoming. Even Florida and Alabama, the two states most affected by felon disenfranchisement going into the 2000 election, eventually passed provisions making it somewhat easier for ex-felons to apply for a pardon from the governor and, by extension, to have their names put back on the electoral rolls. In the months following the 2004 election, Nebraska and Iowa also eased restrictions on ex-cons’ ability to vote.<sup>722</sup>

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717. *Id.* at 283. For additional research by Uggen and Manza regarding public opinion of criminal disenfranchisement laws and policies, see Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 500 (discussing how public support for felon voting rights does not extend to those in prison); Uggen, Manza & Behrens, *Disenfranchisement of African Americans*, *supra* note 50, at 54 (discussing how most Americans favor re-enfranchisement).

718. Saxonhouse, *supra* note 15, at 1636.

719. Behrens, *supra* note 183, at 254, 269-72; *see also* Editorial, *Playing Games With Voting Rights*, N.Y. TIMES, Sept. 14, 2005, at A28 (“[T]he American Correctional Association, which represents prison officials, recently called on states everywhere to stop barring ex-offenders from the polls because that practice was inconsistent with the goal of rehabilitation.”).

720. Manza & Uggen, *Punishment and Democracy*, *supra* note 58, at 499 (“Since 1975, 13 states have liberalized their laws, 11 states have passed further limitations on felons, and three states have passed both types of laws.”).

721. *See, e.g.*, sources cited *supra* notes 200-08 and accompanying text; ABRAMSKY, *supra* note 37, at 67-78 (discussing Massachusetts’ and Utah’s decisions to remove the franchise from prisoners).

722. ABRAMSKY, *supra* note 37, at 12-13; *see also* *One Person, No Vote*, *supra* note 218, at 1946-49, 1958 (discussing modifications to disenfranchisement policies in Nevada, Kentucky, Tennessee, Washington, New Mexico, Texas and Connecticut); Erik Eckholm,



More recently, in June 2006, Tennessee created a single restoration process for eligible persons who have completed their sentences (including parole and probation), paid all outstanding fines, and are current on any child support payments.<sup>723</sup> Previously, individuals convicted of felonies in Tennessee prior to 1973 lost their voting rights if the conviction was for one of eight categories of crimes. For convictions between 1973-1981, individuals lost their voting rights while serving their sentences, but could regain them after completion of their sentences. Individuals convicted after 1981 for any felony offense permanently lost their right to vote. Under the new statute, those with felony convictions who meet all of the requirements may apply for and receive a certificate of voting rights restoration.<sup>724</sup> Later that same year, Rhode Island voted to restore the right to vote for persons with felony convictions after they leave prison.<sup>725</sup> Most recently, the Maryland Legislature voted to return the franchise to all ex-offenders who have completed their sentences and finished parole and probation (with the exception of individuals convicted of election fraud)<sup>726</sup> and in Florida, the Office of Executive Clemency, at the urging of Governor Charlie Crist (R), voted to amend the state's voting rights restoration procedure to automatically approve the reinstatement of rights for many persons who have been convicted of non-violent offenses.<sup>727</sup>

#### B. Options and Recommendations for Liberalizing State Criminal Disenfranchisement Laws and Policies

Interest groups intent on significantly affecting criminal disenfranchisement might consider pushing for modifications in some of the state criminal *sentencing* laws, such as those discussed in Part II.A. As

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*States Are Growing More Lenient In Allowing Felons to Vote*, N.Y. TIMES, Oct. 12, 2006, at A18 (noting Iowa, Nebraska and New Mexico's recent repeals of lifetime bans on voting by people who have been convicted of felonies).

723. Press Release, American Civil Liberties Union, Tennessee Legislature Simplifies Voting Restoration for Ex-Felons (May 17, 2006), <http://www.aclu-tn.org/release051706.htm>.

724. TENN. CODE §§ 40-29-101 to 205 (2006). Individuals convicted of murder, rape, and certain other specified crimes, including voter fraud, are ineligible to have their voting rights restored. TENN. CODE § 40-29-204.

725. On November 7, 2006, 51.52% of Rhode Island voters approved an amendment to the Rhode Island constitution to grant the voting franchise to those felons who are currently serving parole or a probation sentence. *See, e.g.*, Joshua Pantesco, *Rhode Island Approves Measure Giving Felons on Parole Right to Vote*, JURIST, Nov. 8, 2006, <http://jurist.law.pitt.edu/paperchase/2006/11/rhode-island-approves-measure-giving.php>.

726. Editorial, *A Step for Voting Rights*, N.Y. TIMES, Mar. 30, 2007, at A26.

727. Abby Goodnough, *In a Break From the Past, Florida Will Let Felons Vote*, N.Y. TIMES, Apr. 6, 2007, at A14. Note, however, that convicted murderers, sexual predators, and "violent career criminals" still need a hearing before the Clemency Board. *Id.*

Uggen and Manza argue, “high rates of criminal punishment, rather than new laws, account for the political impact of felon disenfranchisement.”<sup>728</sup> While pushing for change in sentencing and punishment is both noble and needed and would result in immeasurable economic, social and public health benefits,<sup>729</sup> in addition to expanding the electorate, it is far easier to scale back or repeal criminal disenfranchisement laws than to affect major changes in the United States criminal justice system.<sup>730</sup> Given that legislative campaigns have been more successful than litigation in bringing about reform,<sup>731</sup> environmental organizations—both MEOs and grassroots environmental groups (many of whom are understaffed and underfunded)—might be better served joining forces with social justice organizations devoted to prisoners’ and ex-offenders’ rights to bring about change through legislation rather than litigation.<sup>732</sup>

The first step for a coalition of environmental and social justice organizations to undertake would be to push for legislation that eradicates disenfranchisement for misdemeanors. Given that there are only a handful

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728. Uggen & Manza, *Democratic Contraction*, *supra* note 39, at 795.

729. See sources cited *supra* note 86-97. In some instances, change in sentencing and punishment would just make plain old common sense. Consider, for example, the case of a Pennsylvania woman who was sentenced in June 2006 to prison for one to three years for telling her six-year-old daughter to steal a volunteer fire company’s fund-raising jar—a crime that netted \$1.85. See Associated Press, *National Briefing: Mid-Atlantic: Pennsylvania: Woman Sentenced in Theft of \$1.85*, N.Y. TIMES, June 14, 2006, at A18.

730. Cf. ABRAMSKY, *supra* note 37, at 203 (“Because those who can’t vote are, almost by definition, marginalized people, there’s no real political pressure to restore felons’ voting rights. Rather, politicians feel they have far more to lose than to gain by touching the issue.”).

731. See, e.g., *One Person, No Vote*, *supra* note 218, at 1958-59 (“Given that litigation has been relatively ineffective thus far, organizing communities around legislative campaigns may be the best hope for meaningful reforms.”); *but see* Behrens, *supra* note 183, at 272-74 (describing legislation as not going far enough, observing, “[o]ne of the biggest problems with legislation is that states are still picking and choosing who to enfranchise, drawing categorical lines based on correctional status or type of conviction,” and noting, “legislative change within a state is not safe from potential future change by a different state group of legislators”).

732. This is not to suggest that all efforts at litigation should be abandoned or that litigation should be dropped entirely as a strategy. Carefully selected suits may prove highly effective, see *One Person, No Vote*, *supra* note 218, at 1959 (“The low probability of winning wholesale judicial invalidations of state disenfranchisement laws should not preclude carefully targeted challenges”), and may work synergistically with legislative campaigns to provide exposure to the issue. Thus, this Article in no way contends that legislation should be the only means of attack and that a two-headed approach of legislation and litigation should be eschewed. Rather, this Article simply asserts that environmental organizations might be more willing to assist with legislative campaigns.

of states in which a misdemeanant might be disenfranchised,<sup>733</sup> such a modest campaign would be relatively easy to undertake and would generate relatively little controversy. In states where misdemeanants have encountered difficulty exercising their right to vote, either due to misinformation by local election officials or due to complicated rules and procedures for absentee voting by people in jail who have been convicted for a misdemeanor only, the coalition could urge state legislatures to pass resolutions clarifying state policies or to pass legislation facilitating absentee voting.

With respect to felon disenfranchisement, the most conservative measure—one supported by the National Commission on Federal Election reform, convened in the wake of the 2000 election and lead by former Presidents Jimmy Carter and Gerald Ford—would be for a coalition of environmental and social justice organizations to push for legislation that restores the right to vote to individuals who have served their prison sentences and who are no longer on probation or parole.<sup>734</sup> Such a step would eliminate the hassle and burden confronting both ex-offenders and state election officials in states that require case-by-case determinations of restoration. This type of modification would also remove the obstacle confronting those ex-offenders who have completed their sentences but who are barred from the polls because of outstanding fines, restitution or child support.<sup>735</sup>

Based on the responses of survey participants, discussed above, as well as the suggestion of a number of commentators,<sup>736</sup> however, this Author would recommend more progressive legislation—legislation that would automatically and immediately restore the right to vote following release from prison, with no complicated reinstatement paperwork, and which

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733. See EWALD, CRAZY-QUILT, *supra* note 15, at 6.

734. See NAT'L COMM'N ON FED. ELECTION REFORM, FINAL REPORT 8 (2001), [http://www.reformelections.org/data/reports/99\\_full\\_report.pdf](http://www.reformelections.org/data/reports/99_full_report.pdf); see generally *Denying the Vote*, *supra* note 188 (“The only honorable solution is to automatically restore voting rights to Alabamians who have completed their sentences.”).

735. In March 2006, Judge Michael S. Spearman of King County Superior Court in Washington State ruled that the state could not deny former prisoners the right to vote simply because they could not afford to pay outstanding court costs—debts that, because of high interest rates, often grows over time even when former prisoners attempt to pay them off in monthly installments. See Adam Liptak, *Ex-Prisoners With Court Debts Must Have Vote, Judge Rules*, N.Y. TIMES, Mar. 29, 2006, at A18; see generally, JoAnne Page, President and Chief Executive, The Fortune Society, Letter to the Editor, *After Prison, More Debt*, N.Y. TIMES, Feb. 26, 2006, § 4, 11 (arguing that because child support bills are not suspended during incarceration, and because of the difficulties in finding a job and affordable housing with no or low wages, many ex-offenders wind up back in prison).

736. See, e.g., FELLNER & MAUER, *supra* note 110, at part IX; ISPAHANI, *supra* note 15, at 4.

would also abolish criminal disenfranchisement for probationers. Such a measure could be politically palatable to many Democratic and Republican state legislators, especially given that states that limit their disenfranchisement policies to only those individuals who are currently incarcerated, appear better able to consistently enforce their disenfranchisement laws than those that bar non-incarcerated citizens from voting.<sup>737</sup> As Ewald explains:

Purely from the perspective of *administrative effectiveness*, policies disenfranchising only incarcerated people appear much more sound than those disqualifying people who are not in prison. In incarceration-only states, “purges” are not necessary, though some states use them; no conviction reporting is needed, though many states do this, as well; no complicated restoration process is necessary; and there are no worries about the eligibility of new arrivals to the state, nor about people who were not registered to vote back when they were convicted. It should be easy to make sure all public officials know the law, and know how to implement it effectively and fairly: registrars would simply need to have the mailing addresses of the state’s correctional facilities, and investigate any absentee-ballot requests appearing to come from prisons.

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Even if one is not convinced on philosophical grounds that all non-incarcerated people should have the right to vote, the practical problems documented here virtually ensure that the policy cannot be enforced with perfect fairness and accuracy.<sup>738</sup>

Similarly, King and Mauer of the Sentencing Project also find that disenfranchising those on probation and parole presents a number of practical challenges for election officials and that “permitting voting by all non-incarcerated persons would place the same requirements on registration for people on probation or parole as for any other potential voter.”<sup>739</sup> Ironically, this logic actually echoes (albeit faintly) with the musings of Roger Clegg, President and General Counsel of the conservative think tank, Center for Equal Opportunity, and former Deputy Assistant Attorney General in the Reagan and Bush Administrations, who has suggested that “perhaps not requiring voting is a good thing—not only is the freedom not to vote an important freedom, but also as a class those

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737. EWALD, *CRAZY-QUILT*, *supra* note 15, at iii.

738. *Id.* at 18. For a discussion of purges in various states, see generally ISPAHANI & WILLIAMS, *PURGED!*, *supra* note 42.

739. KING & MAUER, *THE VANISHING BLACK ELECTORATE*, *supra* note 15, at 20.

not motivated to vote are probably less informed and less conscientious.”<sup>740</sup> While Clegg’s comments reek of elitism and privilege, putting the onus on all who are not incarcerated, irrespective of whether they have no criminal record or are on probation or parole would avoid situations such as in New York, where the Brennan Center for Justice at the N.Y.U. School of Law found that in twenty-four of New York State’s sixty-three counties, election boards improperly deny voting rights to people who are on probation or who have completed parole.<sup>741</sup> While the fallout of this revelation was that on June 21, 2006, the New York State Assembly passed the Voting Rights Notification and Registration Act (Bill 11652)—a bill that would reduce barriers to voting for individuals with felony convictions by aiming to ensure that New Yorkers with felony convictions are informed of their voting rights and are provided the necessary assistance they need to participate in the democratic process<sup>742</sup>—states that permit everyone except those incarcerated to vote avoid such troubles and embarrassment and can avoid charges (usually from the left) of illegal purges, as well as assertions (usually from the right) of voter fraud by individuals who should be disenfranchised. As Laleh Ispahani of the American Civil Liberties Union (A.C.L.U.) writes: “Although [enfranchising all except the incarcerated] now survives only in the most regressive European nations, it would constitute a significant movement forward for most American states, given how far out of step the United States is on this issue. Moreover, inmate-only disenfranchisement—if you are able to appear physically at the polls and meet age and residency requirements, you are eligible to vote—would solve the multitude of problems now bedeviling the administration of disenfranchisement policies in the U.S.”<sup>743</sup>

The most progressive step for a coalition of environmental and social justice organizations to undertake and the one which this Author most endorses would be to campaign for legislation to remove *all* conviction-based restrictions on voting rights. While proposals to extend the franchise to those in prison would encounter some opposition from both the public

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740. Clegg, *supra* note 196, at 163; *cf.* Norman Ornstein, *Vote-or Else*, N.Y. TIMES, Aug. 10, 2006, at A23 (arguing for mandatory voting in the United States).

741. BRENNAN CENTER FOR JUSTICE AND DEMOS: A NETWORK FOR IDEAS & ACTION, BOARDS OF ELECTIONS CONTINUE ILLEGALLY TO DISFRANCHISE VOTERS WITH FELONY CONVICTIONS (2006), [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_34665.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_34665.pdf).

742. Press Release, Brennan Center for Justice, New York University School of Law, New York State Assembly Praised for Passing “Voting Rights Notification and Registration Act,” (June 23, 2006), [http://www.brennancenter.org/press\\_detail.asp?key=100&subkey=36474](http://www.brennancenter.org/press_detail.asp?key=100&subkey=36474).

743. ISPAHANI, *supra* note 15, at 4.

and elected officials in this country, eliminating state laws that curtail the franchise for persons with felony convictions would be consistent with many foreign countries. From a philosophical perspective, just as the Voting Rights Act has “made America a better, more consistent democracy,” to use the words of Rep. John Lewis (D-GA),<sup>744</sup> ending criminal disenfranchisement could well do the same. Perhaps more poignantly, as Alben William Barkley, Vice-President under President Harry S. Truman, remarked during World War II when poll tax opponents sought legislation to eliminate the poll tax: “I know of no more opportune time to try to spread democracy in our country than at a time when we are trying to spread it in other countries and throughout the world.”<sup>745</sup> Given our country’s current attempts to spread democracy in the Middle East, spreading democracy and expanding the electorate in the United States could send an important message to countries critical of United States foreign policy and skeptical of its commitment to participatory government. Just as the Reagan and Bush administrations’ reversal of United States environmental policies diminished national credibility abroad,<sup>746</sup> the United States appears hypocritical when it attempts to promote democracy abroad while curbing it (and some would argue eviscerating it) at home. Otherwise, as Abramsky argues:

We are at risk of becoming something absurd: a culture that prides itself on, even defines itself by, its democratic institutions and then systematically removes entire subgroups of people from political participation. We are becoming a country that boasts of its universal suffrage yet disenfranchises millions. In short, we are evolving into an oxymoron.<sup>747</sup>

From a practical perspective, allowing prisoners to vote would be neither difficult nor cost prohibitive. Administering absentee ballots to prisoners, as Maine and Vermont do, would be relatively easy and inexpensive.<sup>748</sup> With respect to voting in prison, Ispahani explains that “prison voting is relatively cheap and easy to administer, because the inmate population is constantly supervised and counted, and is subject to inexpensive

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744. Rep. John Lewis (D-GA), *Keeping The Polls Open*, N.Y. TIMES, Aug. 6, 2005, at A13.

745. PATRICIA SULLIVAN, DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA 119 (1996) (quoting Alben William Barkley, former United States Representative and Senator (D-KY), and Vice-President under Harry S. Truman from 1949 to 1953).

746. See Caldwell, *Globalizing Environmentalism*, *supra* note 491, at 64 (citation omitted).

747. ABRAMSKY, *supra* note 37, at 46.

748. ISPAHANI, *supra* note 15, at 4.

administrative control.”<sup>749</sup> In other countries where prisoners are allowed to vote, Ispahani continues, voting inmates neither threaten the security of the prison nor the security of the ballot boxes.<sup>750</sup> In fact, “[i]n Luxembourg, eligible prisoners may leave the prison to vote with or *without* an escort.”<sup>751</sup> While even this Author would not venture so far as to suggest Luxembourg-like policies in the United States, this Author does question whether it is really lack of political will stemming from fog of the War on Crime, rather than sturdy philosophical and pragmatic reasons, encumbering criminal disenfranchisement reform.

If the suggestion to lift all criminal disenfranchisement policies leaves legislators leery, this Author would encourage organizations and potential coalitions to pressure their elected officials to 1) identify the reasons for disenfranchising incarcerated offenders and the important state interests served by such disenfranchisement; and 2) reconsider the appropriateness of disenfranchising all incarcerated offenders and specify the crimes for which disenfranchisement is both reasonable and proportionate (such as election fraud).<sup>752</sup> In addition, any reexamination of legislation pertaining to the disenfranchisement of incarcerated offenders should scrutinize criminal disenfranchisement as a collateral consequence rather than as part of the sentence imposed by a judge; any subsequent legislation should require that imprisoned offenders only be excluded from voting if the loss of the vote is imposed by a judge as part of a criminal sentence.<sup>753</sup> Such a modification would be consistent with European courts, such as those in France and Portugal, which permit criminal disenfranchisement only when courts specifically include the loss of voting rights in the sentence.<sup>754</sup> As Demleitner contends, “[i]ntegrating collateral consequences into sentencing . . . would allow the court to factor them into the overall sentence rather than having the offender perceive them as a separate and additional punishment. Public awareness of the existence and impact of such consequences would grow, and perceived injustices might be more

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749. *Id.* at 21.

750. *Id.* at 21-22.

751. *Id.* at 22 (emphasis added).

752. FELLNER & MAUER, *supra* note 110, at part IX; ISPAHANI, *supra* note 15, at 6 (“Deprivation of the right to vote should only be a response to abuse of the electoral process, not to other forms of crime.”); *see also* EWALD, CRAZY-QUILT, *supra* note 15, at iv.

753. Demleitner, *Preventing Internal Exile*, *supra* note 32, at 162 (“[T]he imposition of collateral consequences must be public and should be part of the sentencing process.”); *see also* FELLNER & MAUER, *supra* note 110, at part IX.

754. *See* ISPAHANI, *supra* note 15, at 7; *see also* Manza & Uggem, *Punishment and Democracy*, *supra* note 58, at 502 (noting that “French courts can . . . impose restrictions on political rights that extend beyond the prison sentence, but these are part of the original punishment (and hence do not apply to ex felons).”).

easily scrutinized.”<sup>755</sup> If openly integrating criminal disenfranchisement into the penalty, rather than allowing it to continue to hide in the morass of collateral consequences, were accompanied by a requirement that an individual be informed of his or her loss of the franchise during any plea bargaining stages,<sup>756</sup> then public awareness of the range and scope of punishment would further increase. This kind of transparency could foster some of the respect for the criminal justice and political systems that Demleitner feels is often lost and could act as both a specific and general deterrent to future criminal endeavors.<sup>757</sup>

### C. Education Regarding State Criminal Disenfranchisement Laws and Policies

If integrating the loss of franchise into the sentencing process and permitting the court to factor disenfranchisement into the overall penalty proves unfeasible or impractical, this Author would recommend the more modest step of requiring judges and attorneys to inform criminal defendants that the loss of voting rights exists as a collateral consequence. Obviously, a situation in which *all* criminal defendants are informed of *all* of the collateral consequences of conviction and imprisonment would be preferable, but given the difficulties of imposing such a requirement on judges and attorneys,<sup>758</sup> any modification that would obligate judges and attorneys to inform criminal defendants of *just criminal disenfranchisement* would be significant given that “disenfranchising provisions are even more unknown to would-be offenders than are the details of the penal code.”<sup>759</sup> In other words, because disenfranchisement might be the most confusing collateral consequence,<sup>760</sup> any steps to expose this phenomenon to criminal defendants serves the interests of the individual offender, the overall fairness of the system, and democracy. In fact, whether the reforms that a legislature might bring about to its criminal disenfranchisement laws are modest or robust, an offender needs to be informed of the collateral consequence of disenfranchisement early and often during his or her journey through the criminal justice system. As two commentators suggest:

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755. Demleitner, *Preventing Internal Exile*, *supra* note 32, at 162.

756. See sources cited *supra* notes 166-68 and accompanying text.

757. See generally Sykes & Matza, *supra* note 387, at 668 (discussing how deviants justify their deviant behaviors by condemning the condemners, labelling them “hypocrites, deviants in disguise, or impelled by personal spite. This orientation toward the conforming world may be of particular importance when it hardens into a bitter cynicism directed against those assigned the task of enforcing or expressing the norms of the dominant society.”).

758. See sources cited *supra* notes 166-68 and accompanying text.

759. Ewald, *Civil Death*, *supra* note 15, at 1106.

760. See *id.* at 1057.



At the very first point in time that an individual becomes ineligible to vote—when a defendant is being sentenced to prison or probation, where applicable, for a felony crime—the judge should advise defendants that they will lose the right to vote and when and how they may regain the right. When paroled, the parole boards or parole officers should be required to advise parolees if they are, or when they will be, eligible to vote or register. In states where individuals can vote while on probation, the sentencing court or probations officers should inform probationers that they can vote. These notifications will go a long way toward dispelling the now well-documented confusion surrounding ex-felons' eligibility to vote.<sup>761</sup>

While informing the offender of the impact of conviction on his or her voting rights is important at the sentencing and parole stages, it is not enough. In states where disenfranchised individuals can regain their right to vote, such individuals need to be educated as to how to do so. As Abramsky discovered in Montana, Washington, and Wyoming, for example, most ex-offenders were either misinformed or unaware of the process by which they could become reenfranchised.<sup>762</sup> In Utah, he found “[s]o pervasive was the word on the prisoners’ grapevine that a felony conviction resulted in disenfranchisement” that few ex-cons bothered to register.<sup>763</sup> Based on his research in Mississippi, he concluded that “[t]he combination of true disenfranchisement and street rumor stoked by correctional officials and judicial authorities had indeed served to decimate Mississippi’s electorate—removing more than enough voters to swing close election results.”<sup>764</sup> Although some states do indeed inform those who have completed their sentences how to restore their rights, such efforts are scattered. As Ewald remarks:

[M]ost incarceration-only states do nothing, while several post-incarceration states are relatively active. In Indiana, the “state DOC is now required to give prisoner notification” of rights restoration after incarceration; Oklahoma’s DOC “may provide some information,” but there is no statutory mandate that it do so; Oregon and Nevada both distribute informational flyers; and Montana’s Secretary of State “works with advocates for prisoners to release information to the media.” North Carolina and Nevada also have non-governmental advocacy groups’

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761. ISPAHANI & WILLIAMS, PURGED!, *supra* note 42, at 10; *see also* KING & MAUER, THE VANISHING BLACK ELECTORATE, *supra* note 15, at 21 (“Corrections officials should develop policies and practices that routinely inform persons under supervision of the means by which they can obtain voting rights upon leaving the relevant category of supervision in that state.”).

762. ABRAMSKY, *supra* note 37, at 13, 82.

763. *Id.* at 76.

764. *Id.* at 208.

materials on file, and returned them with their completed surveys; Connecticut state officials are well-connected with local advocacy groups.<sup>765</sup>

The inconsistency of these measures has led Abramsky to advocate that “[t]o overcome this legacy, state and federal governments will have to fund massive public education campaigns and outreach drives informing communities of the restoration-of-voting-rights process.”<sup>766</sup> Although such public education campaigns would indeed be a good idea, *codifying* the requirement that state departments of corrections (including parole and probation departments, if they are not under a state’s department of corrections) notify offenders of their restoration rights and facilitate the process of restoration, should accompany any outreach drives.<sup>767</sup>

In addition to informing offenders and ex-offenders about their loss of voting rights and how to regain the franchise, election officials must be educated about their state’s voting laws. As noted above, the Brennan Center for Justice found that more than one-third of New York county election officials improperly denied voting rights to probationers and those who had completed parole. Such discrepancies in the treatment of the franchise for offenders and ex-offenders are not isolated to New York. In a survey of election officials in ten states, Ewald found that more than one-third of the respondents either misstated their state’s eligibility law or admitted not knowing a central feature of the law.<sup>768</sup> More significantly, Ewald discovered that “[m]ore than 85% of the officials who misidentified their state’s law . . . specified that the law was more restrictive than was actually the case,”<sup>769</sup> leading him to stress, as the Brennan Center for Justice has, the need to train election officials, in addition to all correctional and criminal justice officials (particularly probation and parole staff).<sup>770</sup>

Educating offenders, ex-offenders, correctional and criminal justice officials, including probation and parole staff, as well as state election officials, becomes even more imperative when a state modifies its disenfranchisement laws and policies. One commentator recently expressed

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765. EWALD, CRAZY-QUILT, *supra* note 15, at 13. See also DARRYL McMILLER, DEMOCRACYWORKS, THE RIGHT TO VOTE: THE CAMPAIGN TO RESTORE THE VOTING RIGHTS OF PERSONS CONVICTED OF A FELONY AND SENTENCED TO PROBATION IN CONNECTICUT 25 (2004), <http://www.democracyworksct.org/RightToVoteReport.pdf>.

766. ABRAMSKY, *supra* note 37, at 15.

767. Luxembourg, Portugal, and Lithuania, for example, educate prisoners about their voting rights. ISPAHANI, *supra* note 15, at 22.

768. EWALD, CRAZY-QUILT, *supra* note 15, at i, iii.

769. *Id.* at iii.

770. *Id.* at iv. See also BRENNAN CENTER FOR JUSTICE AND DEMOS: A NETWORK FOR IDEAS & ACTION, *supra* note 741, at 6-7; KING & MAUER, THE VANISHING BLACK ELECTORATE, *supra* note 15, at 21.

support for states that have modified or repealed laws that prohibit ex-felons, parolees and probationers from voting, but cautioned that “states will need to re-educate elections officials, who are often dismally ignorant of election laws and biased against people who have been convicted of even minor crimes.”<sup>771</sup>

Finally, this Author would suggest that any educational campaigns should not be undertaken without first clarifying policies regarding out-of-state convictions. As Ewald explains, no state has systematically addressed the migration to a new state of persons with a felony conviction, nor is there any consensus “among indefinite-disenfranchisement states on whether the disqualification is properly confined to the state of conviction, or should be considered in the new state of residence.”<sup>772</sup> Because states differ in their disenfranchisement laws and because there are interstate discrepancies in the treatment of out-of-state convictions,<sup>773</sup> attempts to ascertain a state’s out-of-state conviction policies should precede any individual state educational efforts.

As with legislative changes to state criminal disenfranchisement laws, discussed in Part IV.B, the extent to which environmental organizations might participate in educational efforts depends on their willingness to deviate from their existing agendas, as well as the degree of progressiveness with which they feel most comfortable. Certainly, any legislative campaigns come with some risks. Thus, pushing for legislation that would allow judges to consider the loss of franchise (and any other consequences that are currently collateral, rather than direct) as part of the sentence would be the most divisive and most difficult change to implement. Legislation that requires state departments of corrections (including parole and probation departments, if they are not under the jurisdiction of a state’s department of corrections) to notify offenders of their restoration rights and to facilitate the process of restoration would be far less contentious. But such a measure is also less preferable to the transparency of including the loss of franchise in the sentence or informing the offender of the collateral consequence of a guilty plea and/or conviction.

The other recommendations in this Section are unlikely to generate much controversy and should prove comparably easier for environmental organizations to undertake, especially given that the national organizations without local chapters may not have the infrastructure to significantly assist

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771. Editorial, *Go Away: You Can’t Vote*, N.Y. TIMES, Mar. 25, 2006, at A14.

772. EWALD, CRAZY-QUILT, *supra* note 15, at ii.

773. See Ewald, *Civil Death*, *supra* note 15, at 1057 (“An ex-felon may vote in one state, but his former cellmate may not in a neighboring state; an ex-convict who moves across state lines may gain or lose the right to vote.”).

in state legislative campaigns. Of the educational endeavors mentioned here, environmental organizations with a strong litigation component and/or American Bar Association connections could help encourage judges and criminal lawyers to inform criminal defendants of the consequences of conviction. Environmental organizations that rely on direct mail (and increasingly email) as a form of mass mobilization—and most of the MEOs do<sup>774</sup>—could use their expertise in this arena to inform offenders and ex-offenders of disenfranchisement laws, as well as to restoration processes.

D. Recommendations Vis-a-Vis the Application of “Usual Residence Rule” to Prisoners

As discussed in Part II.B.3.b, the Census Bureau applies the “usual residence rule” to prisoners, who are counted at the locus of their correctional institutions (including prisons, jails, detention centers, or halfway houses), which are usually in rural areas, rather than at their home addresses, which are usually in urban areas. This enumeration dilutes the voting power of prisoners’ home communities (by diminishing those communities’ entitlement to legislative seats) and rechannels funding and resources away from these needy urban areas. Environmental organizations should take an interest in this phenomenon because not only may vote dilution impact their members (depending on the size of the legislative district), but could also tip the balance of state legislatures. The rechanneling of funding and resources away from needy urban areas could exacerbate environmental ills in those locations or prevent those communities from addressing certain environmental problems.

Two methods of rectifying the injustices generated by the application of the Census Bureau’s “usual residence rule” to prisoners are unlikely to transpire without great difficulty: the Census Bureau is unlikely to change its enumeration methodology, and states are equally unlikely to duplicate the Census Bureau’s efforts, undertaking their own census.<sup>775</sup> But states could modify Census Bureau data without great expenditures of time or money, and without running afoul of the federal government’s task of apportioning Congressional seats. As David Hamsher explains in his Comment, *Counted Out Twice – Power, Representation & the ‘Usual Residence Rule’ in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*:

While the number of congressional seats apportioned to each state is determined by the federal government, it is up to each individual state to determine the Congressional and state legislative district maps within that state. Thus, while a state legislature may not be able directly to

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774. See Mitchell, Mertig & Dunlap, *supra* note 4, at 16.

775. Hamsher, *supra* note 15, at 322.

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force the Census Bureau to alter its enumeration policy, the legislature does have some latitude in determining what data source to use and how to use it.<sup>776</sup>

The State of Kansas, for example, modifies Census Bureau data prior to apportionment for state legislative purposes.<sup>777</sup> While these modifications pertain to students resident in the state (apportioned to their legal home address), non-resident military (excluded), and resident military at their legal residence (included),<sup>778</sup> Kansas does not readjust data for the residence of prisoners.<sup>779</sup> The state legislatures of Illinois, New York, and Texas have all considered bills to reapportion prison inmates to their home of record, but, with the exception of New York, have pertained only to state legislative districting (not federal congressional districting or federal population-based funding).<sup>780</sup> None have passed.<sup>781</sup> Nevertheless, given the public's and Congress's growing concern over the inequities caused by the application of the Census Bureau's "usual residence rule" to prisoners,<sup>782</sup> environmental organizations should feel encouraged that pushing for legislation, either with respect to state legislative redistricting or federal congressional redistricting, is worthwhile.

## V. CONCLUSION

"Environmentalism will not be able to claim full legitimacy for its aims, however, until it addresses the even graver social ills of poverty, hunger, prejudice, and economic inequity."<sup>783</sup>

In the past few years, as national and state elections have become more contentious with seemingly more at stake and with margins of victory shrinking to just handfuls of votes,<sup>784</sup> commentators have offered a number

776. *Id.* (footnotes omitted).

777. KAN. CONST. art. 10, § 1; KAN. STAT. ANN. § 11-205 (2001). *See also* Hamsher, *supra* note 15, at 323-24.

778. KAN. CONST. art. 10, § 1(a)(1).

779. Hamsher, *supra* note 15, at 324.

780. *Id.* at 324-25 & n.194.

781. *Id.* The Texas bill did not pass the Texas Legislature. *Id.* The Illinois bill, H.B. 0906, 94th Gen. Assemb. (Ill. 2005), sponsored by Democratic Illinois State Representative Arthur L. Turner, was referred to the Rules Committee on March 10, 2005. That legislative session has since adjourned. The New York bill, S. 2754-A (N.Y. 2005), sponsored by Democratic New York State Senator Eric T. Schneiderman, was referred to the Elections Committee on January 4, 2006. That legislative session has since adjourned. *See generally*, Hamsher, *supra* note 15, at 324 n.194.

782. *See* sources cited *supra* notes 417-20 and accompanying text.

783. SHABECOFF, *supra* note 2, at 284.

784. Despite these phenomena, only seventy-two percent of eligible citizens in the

of ways to expand the electorate. For example, Norman Ornstein, a political scientist and resident scholar at the American Enterprise Institute, a private, nonpartisan, not-for-profit institution dedicated to research and education on issues of government, economics, and social welfare, advocates mandatory voting, which is the practice in Singapore, Cyprus, Austria, Belgium, and Australia, whereby registered voters, who do not show up at the polls and cannot offer a reason for not voting, pay a small fine.<sup>785</sup> Mark Osterloh, a political gadfly and former Democratic candidate for governor in Arizona, proposes awarding one million dollars in every general election to one Arizona resident, chosen by lottery, simply for voting; the measure, known as the Arizona Voter Reward Act, appeared on the November 2006 ballot.<sup>786</sup> In addition, John B. Anderson, former U.S. Congressman (R-Ill.), independent candidate for President in 1980, and current chairman of FairVote, which promotes fair elections, and Ray Martinez III, United States Election Assistance Commission, propose a “leave no voter behind” policy, in which all eligible high school students would be registered to vote before they graduate.<sup>787</sup>

While mandatory voting would certainly improve turnout, there is something perverse and anti-democratic about compelling participation—a point acknowledged by Ornstein.<sup>788</sup> Although Ornstein is correct that low turnout has “ever-greater polarization in the country and in Washington, which in turn has led to ever-more rancor and ever-less legislative progress,”<sup>789</sup> punishing people for failing to vote would be especially problematic given that Election Day in the United States is not a national holiday (meaning that individuals must often decide between voting and working or school) and would thus suppress the minority vote.<sup>790</sup>

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United States were registered to vote in 2004, according to the Census Bureau. John B. Anderson and Ray Martinez III, *Voters' Ed*, N.Y. TIMES, Apr. 6, 2006, at A25. See also Ornstein, *supra* note 740. Participation rates in many primaries hover at ten percent or less and rise to approximately thirty-five percent in midterm general elections. *Id.*

785. Ornstein, *supra* note 740.

786. Randal C. Archibold, *Arizona Ballot Could Become Lottery Ticket*, N.Y. TIMES, July 17, 2006, at A1. The measure failed. *Propositions at a Glance*, ARIZ. DAILY STAR, Nov. 8, 2006, at A15.

787. Anderson & Martinez, *supra* note 784.

788. Ornstein, *supra* note 740 (“Americans don’t like compulsory anything—we value the freedom not to vote.”).

789. *Id.*

790. See Editorial, *Making Votes Count: New Standards for Elections*, N.Y. TIMES, Nov. 7, 2004, § 4, at 10 (arguing for Election Day as a national holiday to “give all voters time to cast ballots and to free up more qualified people to serve as poll workers”; more early voting to permit individuals to vote at times convenient to them; “fair and uniform voter ID rules”; and an end to “the sort of dirty tricks that are aimed at minority voters every year, like fliers distributed in poor neighborhoods warning that people with outstanding

The Arizona Voter Reward Act, which has been called “ingenious,”<sup>791</sup> “undignified,”<sup>792</sup> and “crassly commercial,”<sup>793</sup> and which may or may not have been legal,<sup>794</sup> would have, if approved by voters, likely resulted in higher participation rates in elections. Although it is debatable whether it would encourage people to study the candidates or issues<sup>795</sup> and perhaps to take a more active role in the political process in general (such as in the context of environmental decision making), the money, which would come from unclaimed state prize money, private donations and, potentially state money,<sup>796</sup> could be better spent – such as supporting a poor school district or health insurance and prescription medication relief for the many uninsured immigrants and elderly people in Arizona. In addition, the measure, like Ornstein’s, would do nothing to address the problem of criminal disenfranchisement—meaning that many of the people who need the money the most (and who often purchase lottery tickets) will be ineligible.<sup>797</sup> This is especially troubling given that Arizona, which, as of 2000, had 147,340 criminally disenfranchised individuals,<sup>798</sup> and which possesses one of the most draconian criminal disenfranchisement policies in the United States: it prohibits individuals convicted of felonies while they are incarcerated, on parole or on probation from voting.<sup>799</sup> There is no automatic restoration for individuals convicted of more than one felony; such persons must wait two years before applying for civil rights

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traffic tickets are ineligible to vote.”).

791. Paul J. Donahue, Letter to the Editor, N.Y. TIMES, July 24, 2006, at A16. For other perspectives, see, e.g., Thomas Crowley, Letter to the Editor, N.Y. TIMES, July 24, 2006, at A16; Edward Lacy, Letter to the Editor, N.Y. TIMES, July 24, 2006, at A16.

792. Amanda J. Crawford, *Voter Lottery May Break Federal Law*, ARIZ. REPUBLIC, July 30, 2006, available at <http://www.azcentral.com/news/election/topstories/articles/0730voter-lottery0730intro.html>.

793. Archibold, *supra* note 786.

794. *Id.* (discussing the different perspectives on the legality of the measure); see also Crawford, *supra* note 792.

795. Compare Archibold, *supra* note 786 (reporting that Osterloh regards the “gimmick as the linchpin to improve voter turnout and get more people interested in politics,” but that many editorial writers and bloggers view the measures as “bribery” and would “draw people simply trying to cash in without studying candidates and issues”), with Crawford, *supra* note 792 (“If it gets more people interested in voting, that would be a good result. . . . [I]f people do vote they will think about it, and that is better than them not voting at all.” (quoting Paul Bender, Professor of Law, Sandra Day O’Connor College of Law, Arizona State University)).

796. Archibold, *supra* note 786.

797. See Donahue, *supra* note 791.

798. ISPAHANI & WILLIAMS, PURGED!, *supra* note 42, at 15.

799. ARIZ. CONST., art. VII, § 2C; ARIZ. REV. STAT. ANN. § 16-101(A)(5) (2006).

restoration.<sup>800</sup> According to the A.C.L.U., there is no statutory requirement to inform voters that their names have been taken off the voter list,<sup>801</sup> making it difficult to challenge incorrect purges.

Anderson and Martinez's "leave no voter behind" policy of registering eligible high school students would certainly improve upon the dismally low rate of registered voters in the eighteen- to twenty-four-year-old age bracket—fifty-eight percent in 2004, and would also encourage them to work in election offices.<sup>802</sup> By introducing high school students to the electoral process and "the importance of active participation in our democratic system,"<sup>803</sup> Anderson and Martinez's proposal would further Principle of Environmental Justice #16, which provides: "Environmental justice calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives."<sup>804</sup> But like Ornstein's suggestion and the Arizona Voter Reward Act, Anderson and Martinez's "leave no voter behind" policy is prospective and would do nothing to address the millions of Americans who have been disenfranchised by a criminal conviction. Furthermore, although the "leave no voter behind" policy could include an educational component that would inform high school students about criminal disenfranchisement policies (if the laws were not liberalized or repealed, as this Author recommends), with significant numbers of young African American men unable to vote because of a criminal conviction and given the communal nature of voting,<sup>805</sup> it is unlikely that Anderson and Martinez's proposal would have the desired impact on a demographic that could most benefit from increased participation and representation.<sup>806</sup>

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800. ARIZ. REV. STAT. ANN. § 13-909 to 912 (2006).

801. ISPAHANI & WILLIAMS, PURGED!, *supra* note 42, at 15.

802. Anderson & Martinez, *supra* note 784.

803. *Id.*

804. LESTER ET AL., *supra* note 433 at 31-32. Cf. Mitchell, Mertig & Dunlap, *supra* note 4, at 19 ("By the late 1960s most environmentalists realized that an *exclusively* educational approach to policy change was insufficiently aggressive, although educational campaigns continue to play an important role in the activities of most environmental organizations.").

805. See sources cited *supra* note 421 and accompanying text.

806. Note that Vincent Schiraldi, Director of the D.C. Department of Youth Rehabilitation Services, recently coordinated a candidate forum and voter registration drive at Oak Hill Youth Center—Washington, D.C.'s juvenile detention facility. Eighty juvenile offenders, most of whom were African American, and many of whom were too young to vote, asked the mayoral candidates questions regarding the closure of D.C. General Hospital, the rising cost of housing in the city, and the state of public schools in the nation's capital. See Nikita Stewart and Robert Pierre, *In 2 Wards, Democrats Go for Gray*, WASH. POST, July 20, 2006.



Repealing, or even just liberalizing, state criminal disenfranchisement laws could better achieve the goal of increasing voter turnout and rekindling the spirit of civic participation than the proposals of Orstein, Osterloh, Anderson and Martinez. In so doing, it would allow the United States to 1) achieve consistency with other democratic countries;<sup>807</sup> 2) avoid some of the appearance of hypocrisy on the foreign stage;<sup>808</sup> and 3) potentially reduce recidivism.<sup>809</sup> Given the United States' history of minority vote suppression and the continued disproportionate number of minorities who are in prison and disenfranchised, changing our criminal disenfranchisement policies would help overcome some of the injustices in our electoral and criminal justice systems.

In addition to these broad goals, this Article has set forth four arguments for why criminal disenfranchisement is an environmental issue and why environmental organizations should join forces with (other) social justice groups to bring about changes in state criminal disenfranchisement laws. Naturally, not all of the currently disenfranchised voters would vote if reenfranchised, nor would they vote for environmental causes or vote for politicians with environmental sympathies. Thus, this Author does not suggest that expanding the franchise will result in a "green bloc."<sup>810</sup> As McCloskey contends: "environmentalists do not seem to be having much success in getting Presidents into power who share their view of the world, and cannot look to the Presidency to rescue them from unresponsive bureaucracies."<sup>811</sup> Similarly, Ingram, Colnic and Mann assert:

[T]here remains some doubt about the efficacy of environmentalist election strategies in creating an environmentally conscious Congress. In spite of the victories of environmentalist-endorsed candidates to Congress, a green wave has not emerged in Congress and mainstream environmental forces still see the scarcity of committed backers in the legislature as a major impediment to environmentally sensitive policy.<sup>812</sup>

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807. See *supra* Part II.B.

808. See *supra* Part II.B; Part IV.

809. See *supra* Part II.A.

810. Riley E. Dunlap, *Public Opinion and Environmental Policy*, *supra* note 450, at 107.

811. McCloskey, *supra* note 440, at 86.

812. Ingram, Colnic & Mann, *supra* note 433, at 135; *cf.* Riley E. Dunlap, *Trends in Public Opinion Toward Environmental Issues: 1965-1990*, *supra* note 14, at 113 ("[E]cologically aware public officials should realize that they are in a unique position for providing leadership on environmental issues, and the polls suggest that it might be politically astute for them to take the lead in environmental protection. The future of our environment, as well as that of environmentalism, will be heavily influenced by the effectiveness of such leadership.").

While a broader electorate—one that includes some of the currently disenfranchised—likely would have resulted in a different presidency in 2000 and perhaps in 2004, in contrast to McCloskey's assertion, Ingram, Colnic and Mann are correct that a "green wave" is unlikely to emerge in Congress—even with the greater civic engagement and political participation that liberalizing criminal disenfranchisement laws would engender. As sociologists Robert D. Bullard and Beverly H. Wright assert: "There is no single agenda or integrated political philosophy binding the hundreds of environmental organizations found in the nation."<sup>813</sup>

But as this Article argued in Part III.D, we need not agree on one conception of "environment," on one type of human-nature relationship, on one set of environmental values in order to increase and improve environmental protection; diversity is to be encouraged, not condemned. Although some element of *unity* is required in order to address today's and tomorrow's most severe ecological crises, *unanimity* is unnecessary and, as Shellenberger and Nordhaus suggest, may result in short-sightedness and stagnation. As the civil rights movement exhibited beautifully in the 1960s, shared commitment to a cause, not strict adherence to a religious or even political ideology, is often what is most crucial to the success of a movement.<sup>814</sup> While organization is to be espoused, high degrees of centralization is desirable in only certain contexts.

This is not to suggest that we need to abandon governmental initiatives in order to protect the environment—that we should forsake legislation and litigation, education and advocacy, in favor of ecoterrorism. Dunlap has noted the "considerable data showing that the public views government as having primary responsibility for environmental protection."<sup>815</sup> Similarly, Lynton K. Caldwell writes:

The practical expression of a globalized issue is its acceptance as an object of negotiation among national governments. No amount of popular concern over transboundary environmental problems—for example, over nuclear radiation, pollution of air, water, and outer space, export of hazardous materials, loss of the world's genetic heritage, or the spread of contagious disease—can lead to effective action without the involvement of government. However, governments (and private corporate organizations as well) seldom act in the absence of organized

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813. R. Bullard & B. Wright, *supra* note 438, at 41; *see generally* Freudenberg & Steinsapir, *supra* note 435, at 31 ("Although the grassroots environmental movement is hardly a homogenous grouping, its organizations, activists, and leaders generally share certain principles and beliefs.").

814. *See generally* Robert Pape, Op-Ed, *Ground to a Halt*, N.Y. TIMES, Aug. 3, 2006, at A21.

815. Riley E. Dunlap, *Public Opinion and Environmental Policy*, *supra* note 450, at 94.

public demand.<sup>816</sup>

Indeed, we would be years closer to an environmental Armageddon were it not for public demand that brought about key environmental statutes and court cases within the past thirty-five years. And in order to further slow the planet's decline, we need good elected officials to help craft creative environmental policy and responsible judges to ensure the effective enforcement of environmental law. But we also cannot expect environmental law and policy alone to protect the environment.<sup>817</sup> "Progress cannot be made with regulatory Band-Aids, blind faith in the invisible hand of the market, or other facile remedies," Shabecoff contends. "There must be changes in our institutions, in our economic systems, in technology, and in social relationships in ways that reflect our hard-won understanding of the changing balance between human beings and nature."<sup>818</sup> Perhaps with an expanded electorate, and subsequently greater civic engagement and involvement in environmental decision making, and a richer, more elaborate typology of environmental values, we can foment the ideas, ingenuity and creativity necessary to bring about these institutional, economic, social, interpersonal, political and environmental changes.

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816. Caldwell, *Globalizing Environmentalism*, *supra* note 491, at 66; *Cf.* Interview by MSNBC Live Talk with Jerry Adler, Senior Editor, Newsweek (July 12, 2006), *available at* <http://www.msnbc.msn.com/id/13768340/site/newsweek/print/1/displaymode/1098/> ("[I]t will take more than just the effort of ordinary citizens to solve a problem of this size [global warming].").

817. *See generally* ENVTL. LAW INST., *supra* note 618, at 2 (discussing federal environmental standards as often setting a "floor" which states may then exceed, and characterizing these federal statutes as "the 'safety net' for environmental protection"); *cf.* Cole, *supra* note 4, at 648 (stating that "the more desperate the struggle, the more willing you are to try anything - even the law.").

818. SHABECOFF, *supra* note 2, at 277.

