Work in Progress

# MAKING AMERICA "THE LAND OF SECOND CHANCES":[1] RESTORING ECONOMIC RIGHTS FOR EX-OFFENDERS

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"I have been clean now for three years and six months with G[o]d's help, and I am trying to stay that way, but with no help for people like me it is very hard not to go back to that way of life. I want people to realize that is why people do time, get out and do it again. They can't survive any other way."[2]

## INTRODUCTION

Virtually every felony conviction carries with it a life sentence. Upon being released from prison, ex-offenders face a vast and increasing maze of mandatory exclusions from valuable social programs and employment opportunities that impede their hopes of success in the free world. These exclusions range from restrictions on the ability to get a driver's license[3] to a

1. President George W. Bush, State of the Union Address (Jan. 20, 2004), http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html ("America is the land of second chance[s]—and when the gates of the prison open, the path ahead should lead to a better life.").

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2. Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, *in* INVISIBLE PUNISHMENT 37, 42-43 (Marc Mauer & Meda Chesney-Lind eds., 2002) (citation omitted) (statement of ex-offender from Pennsylvania).

3. 23 U.S.C. § 159 (2000) (mandating the withholding of federal highway funds unless states enact laws revoking or suspending driver licenses of individuals convicted of drug offenses); *see also, e.g.*, ALA. CODE § 13A-12-290 to -291 (1994); ARK. CODE ANN. § 27-16-915(b)(1)(A) (Michie 2004); COLO. REV. STAT. § 42-2-125(1)(b) (2003); DEL. CODE ANN. tit. 21, § 4177K (1995 & Supp. 2004); FLA. STAT. ANN. § 322.055 (West 2001); FLA. STAT. ANN. § 322.056 (West 2001 & Supp. 2004); GA. CODE ANN. § 40-5-75 (2004); IND. CODE ANN. §§ 9-30-4-6, 35-48-4-15 (Michie 2004); IOWA CODE ANN. § 321.212(1)(d) (West 1997 & Supp. 2004); IOWA CODE ANN. § 901.5(10) (West 2003 & Supp. 2004); LA. REV. STAT. ANN. § 32:430 (West 2002); MICH. COMP. LAWS ANN. § 257.319e(2) (West 2001); MISS. CODE ANN. § 63-1-71(1) (1999); MISS. CODE ANN. § 63-11-30 (1999 & Supp. 2004); MO. ANN. STAT. §§ 577.500, .510 (West 2003); N.J. STAT. ANN. § 2C:35-16 (West 1995); N.Y. VEH. & TRAF. LAW §§ 510(2)(b)(v), 1192(1)-(4) (McKinney 1996 & Supp. 2005); OHIO REV. CODE ANN. § 4507.169(A) (Anderson 2003); OKLA. STAT. ANN. tit. 47, § 6-205(A)(2), (6) (West 2000 & Supp. 2005); 75 PA. CONS. STAT. ANN. § 1532(b)(3), (c)(1) (West 1996 & Supp. 2004); S.C. CODE

lifetime ban on eligibility for federal welfare.[4] In adopting this array of civil disabilities, federal, state and municipal governments have endorsed a social policy that condemns ex-offenders to a diminished social and economic status, and for many, a life of crime.[5] Recently the American Bar Association concluded that

> the dramatic increase in the numbers of persons convicted and imprisoned means that this half-hidden network of legal barriers affects a growing proportion of the populace. More people convicted inevitably means more people who will ultimately be released from prison or supervision, and who must either successfully reenter society or be at risk of reoffending. If not administered in a sufficiently deliberate manner, a regime of collateral consequences may frustrate the reentry and rehabilitation of this population, and encourage recidivism.[6]

This Article argues that to truly dismantle this crippling web of collateral sanctions and to restore ex-offenders to full citizenship, advocates must engage in a comprehensive litigation attack on reentry barriers, with litigation under state law theories providing the most effective hope for relief in light of hostile federal law. While the current focus on legal advocacy aimed at helping ex-offenders navigate existing barriers to secure housing, employment, and other basic necessities is invaluable, collateral sanctions will continue to have a devastating impact on individuals and their communities unless resources are directed at changing these policies. A state specific litigation strategy, coordinated with legislative and public education efforts, achieves that goal either through outright victory in the courts or, even if unsuccessful, as a counter to the lack of political will and negative public opinion that often hinders legislative reform in this area.

Part I of this Article briefly explores the problem of collateral sanctions and their impact on individual offenders, families, and communities.[7] Part II

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ANN. §§ 56-1-745(A), -5-2951(A) (Law. Co-op. 1991 & Supp. 2004); TEX. TRANSP. CODE ANN. §§ 521.341, .372 (Vernon 1999); UTAH CODE ANN. § 53-3-220 (2002 & Supp. 2004); VA. CODE ANN. § 18.2-271 (Michie 2004); VA. CODE ANN. § 46.2-390.1 (Michie 2002); WIS. STAT. ANN. § 961.50 (West 1998 & Supp. 2004); WYO. STAT. ANN. § 31-7-128 (Michie 2003); MASS. REGS. CODE tit. 540, § 20.03 (1996).

4. 21 U.S.C. § 862a(a)-(b), (d) (2000).

5. Jeremy Travis et al., *Prisoner Reentry: Issues for Practice and Policy*, CRIM. JUST., Spring 2002, at 12, 12.

6. STANDARDS FOR CRIMINAL JUSTICE (THIRD EDITION): COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS R-4 (2003) (footnote omitted).

7. This Article focuses on barriers that erase an individual's ability to utilize the social safety net or support herself, including employment policies which discriminate against ex-offenders, the denial of financial assistance for education, the eviction and exclusion of ex-offenders and their families from public housing, and the denial of welfare assistance and food stamps. There are at least two other significant civil disabilities resulting from a felony conviction: felony disenfranchisement laws, which deny ex-offenders voting rights in all but two states, and state laws encouraging termination of parental rights as a consequence of incarceration. *See* THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2004), *available at* http://www.sentencingproject.org/pdfs/1046.pdf. *See*

examines existing reentry barriers, focusing on those that eliminate economic opportunities for ex-offenders, and on the extent and range of restrictions faced by ex-offenders upon their release. Part III explores the limitations of federal causes of action and legislative advocacy in achieving widespread, substantive reform. Finally, Part IV advocates that the most effective form of attack on the maze of collateral sanctions is state-by-state litigation focusing on states with the most extensive maze of collateral sanctions as well as the constitutional and statutory provisions that would support the challenges.

## I. EX-OFFENDER REENTRY AND THE IMPACT OF COLLATERAL SANCTIONS

To prevent recidivism and afford ex-offenders a second chance, the government must help facilitate a successful transition for ex-offenders back into their communities. As one commentator has noted:

> Prisoners have historically returned to the communities from which they were sentenced, generally to live with family members, attempt to find a job, and successfully avoid future criminality. The world to which they return is drastically different from the one they left regarding availability of jobs, family support, community resources, and willingness to assist ex-offenders.[8]

This transition requires access to the tools necessary to navigate a changed and often hostile society.[9] Yet, each year an increasing number of ex-offenders who are ill-equipped to face these challenges are released into their communities and are denied access to the social service programs, educational assistance, and employment opportunities that can help them make the transition to a crime-free existence.

Without access to subsistence benefits, safe housing, and employment, ex-offenders are less likely to gain a foothold in modern society and to live as drug-free and crime-free members of their community. Saddled with collateral consequences, ex-offenders often return to the illegal practices that initially led to their convictions.[10] As one commentator noted, "The ex-offender population has tended to recidivate due in part to an unavailability of economic

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*generally* Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757 (1992). While those laws also undermine an ex-offender's ability to successfully reintegrate into the community, they are beyond the scope of this Article as they raise a unique set of legal issues and challenges.

8. Karen R. Kadela & Richard P. Seiter, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, CRIME & DELINQUENCY, July 2003, at 360, 361.

9. JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME 18 (2001), *available at* http://www.urban.org/UploadedPDF/from_prison_to_home.pdf; Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 10 (1996).

10. *See, e.g.*, Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 605 (1997) ("The more that convicted persons are restricted by law from pursuing legitimate occupations, the fewer opportunities they will have for remaining law abiding.").

and social supports."[11] "Of the 272,111 [offenders] released from prison in 15 States [examined] in [a] 1994 [study], . . . 67.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.9% were reconvicted, and 25.4% [were] resentenced to prison for a new crime."[12]

Drug offenders bear a disproportionate burden of collateral consequences.[13] Many of the collateral sanctions were born from the "war on drugs" and apply only to drug offenders.[14] As a result of legislation largely enacted over the past decade, an individual with any drug-related felony, including non-violent offenses, may have to manage her reentry into society while being banned from living with her family in public housing,[15] denied eligibility for federal welfare and food stamp benefits,[16] subjected to limits on financial aid for higher education,[17] suspended from driving,[18] and faced with far reaching restrictions on employment opportunities.[19] "Although [many would] consider[] murder . . . [or] rape . . . [to be] more serious offenses than drug possession or distribution," ex-offenders convicted of rape or murder are eligible for many of the rights denied to drug offenders.[20]

Beyond the effects on recidivism and survival chances, collateral sanctions are in essence criminal sanctions that unfairly continue to punish ex-offenders for their crimes long after they have served their sentence. Although collateral sanctions are technically classified as civil rather than criminal, they are often viewed as a punitive means to hold ex-offenders further accountable for their actions.[21] In fact, violations of post-conviction restrictions often constitute a criminal offense.[22] For example, "the United States . . . will prosecute any Pell

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11. Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. REV. 255, 259 (2004).

12. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, http://www.ojp.usdoj.gov/bjs/crimoff.htm (last revised Dec. 28, 2004).

13. The makeup of released prisoners has changed dramatically over the past two decades. There has been a dramatic rise in the Nation's prison population as a result of "the war on drugs." Rubinstein & Mukamal, *supra* note 2, at 37. Arrests for drug offenses have nearly tripled since 1980, with more than four-fifths being for possession violations. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, http://www.ojp.usdoj.gov/bjs/glance/drug.htm (last revised Oct. 25, 2004). As of May 2004, federal prisons held 87,174 drug offenders, or 54.3% of all inmates. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS QUICK FACTS, http://www.bop.gov/fact0598.html (last visited Jan. 11, 2005). This is up from 45,367 drug offenders in 1994. *Id.*

14. Marc Mauer, Introduction: The Collateral Consequences of Imprisonment, 30 FORDHAM URB. L.J. 1491, 1494 (2003).

15. 42 U.S.C. § 13661 (2000); 24 C.F.R. § 960.204 (2002).

16. 7 U.S.C. § 2015(b)(1)(iii) (2000).

17. 20 U.S.C. § 1091(r)(1) (2000).

18. 23 U.S.C. § 159 (2000).

19. *See* discussion *infra* Part II.A.

20. Nora V. Demleitner, *"Collateral Damage": No Re-entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1033 (2002).

21. *See id.* at 1032.

22. *See id.* at 1047.

grant applicant who [falsely] answers the question of whether he has ever been convicted of a drug offense."[23]

In *Trop v. Dulles*,[24] the U.S. Supreme Court laid out the test for determining whether sanctions are civil or criminal. If the purpose of the disability is to "reprimand the wrongdoer" or "to deter others," the law is punitive.[25] If the law is enacted "to accomplish some other legitimate governmental purpose," the law is a non-penal regulation.[26] Under the *Trop* test, collateral sanctions fail to meet the test for purely civil sanctions. This is evidenced by both the overbreadth and the underinclusiveness of various sanctions. Many collateral sanctions do not serve any non-penal, legitimate government purpose because the sanction has no correlation to the crime committed.[27] For example, many employment restrictions, such as restrictions preventing ex-felons from becoming barbers, have no rational connection to the goal of protecting the general public. Even if it were legitimate to assume that someone who was convicted of murder should not be trusted with a set of hair clippers, the inclusion of all ex-offenders, irrespective of their crime and its connection to the risk of the harm being prevented further undermines any claims of legitimacy.[28] Other sanctions are proven irrational because they are underinclusive. The government's purported purpose in denying Temporary Assistance for Needy Families to drug offenders is to prevent fraud.[29] However, if this were the government's true motivation, then other offenders with a higher risk, such as those actually convicted for fraud, would also be included in the ban. In the end, these sanctions are simply another layer of punishment.[30]

It has also been argued that "collateral sentencing consequences have contributed to exiling ex-offenders within their country."[31] Citizenship encompasses a basic level of economic and social rights.[32] Collateral sanctions often deny ex-offenders traditional rights of citizenship, causing them to be societal outcasts and further marginalized.[33]

Collateral sanctions reach beyond the individual ex-offender to have profound economic and social repercussions for their families and

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23. *Id.*; *see* 20 U.S.C. § 1070(a) (2000).

24. 356 U.S. 86 (1958).

25. *Id.* at 96 (plurality opinion).

26. *Id.* (plurality opinion); *see also* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1357-64 (1991) (discussing whether a sanction is civil or criminal).

27. *See* Demleitner, *supra* note 20, at 1028.

28. Mauer, *supra* note 14, at 1493.

29. *See* Turner v. Glickman, 207 F.3d 419, 431 (7th Cir. 2000).

30. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999).

31. *Id.*

32. *Id.* at 155.

33. *See id.* at 155-56.

communities.[34] The punishment resulting from a felony conviction used to be an issue primarily for the person convicted of the crime.[35] Today the impact is far more immense. Parents, spouses, children, and communities suffer punishments at the hands of the system for crimes they did not commit.[36] The delays in the reintegration of ex-offenders into society and their communities cause greater instability and ultimately higher crime rates. A community with significant social problems, such as a high crime rate, will not have the resources to tackle other problems of concern to the community due to profound stress on community institutions and resources.[37] Moreover, failed reintegration results in added costs for public health, child welfare, and criminal justice.[38] Collateral sanctions also disproportionately jeopardize public safety in low-income communities by erecting virtually insurmountable hurdles for ex-offenders to survive through legitimate means.[39]

The devastating impact of collateral consequences on entire communities becomes increasingly important as the prison population continues to balloon. Approximately 600,000 people are released from prisons and jails every year.[40] The mass incarceration of non-violent offenders resulting from the war on drugs,[41] the tough-on-crime stances at the state and federal level,[42] and the

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34. The consequences of collateral sanctions beyond the individual ex-offender are magnified by the rapidly rising imprisonment of women and those with families. According to the U.S. Department of Justice's Bureau of Justice Statistics, in 1999 more than 1.5 million children in the United States had a parent in prison. CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 2 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf (stating that in 1999, state and federal prisons held approximately 721,500 parents of minor children). Parents held in U.S. prisons had an estimated 1,498,800 minor children in 1999, an increase of over 500,000 since 1991. *Id.* The impact of drug policies has been even more dramatic for women than for men. One-third of the women in prison are currently serving a drug sentence. Mauer, *supra* note 14, at 1495; Marc Mauer & Meda Chesney-Lind, *Introduction* to INVISIBLE PUNISHMENT, *supra* note 2, at 1, 3. The female inmate population went from 12,000 in 1980 to more than 90,000 in 1999, a more than sixfold increase. Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, *in* INVISIBLE PUNISHMENT, *supra* note 2, at 79, 80. In 1999, drug offenders accounted for the largest source of total growth among female inmates. ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 1999, at 10 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p99.pdf.

35. Mauer & Chesney-Lind, *supra* note 34, at 1.

36. *See* Thompson, *supra* note 11, at 285-88.

37. *See id.* at 285-87.

38. *See, e.g.*, NANCY G. LA VIGNE & VERA KACHNOWSKI, URBAN INST., A PORTRAIT OF PRISONER REENTRY IN MARYLAND 3 (2003), *available at* http://www.urban.org/UploadedPDF/410655_MDPortraitReentry.pdf.

39. *See id.*

40. JOAN PETERSILLA, U.S. DEP'T OF JUSTICE, NO. 9, WHEN PRISONERS RETURN TO THE COMMUNITY: POLITICAL, ECONOMIC, AND SOCIAL CONSEQUENCES 1 (2000), *available at* http://www.ncjrs.org/pdffiles1/nij/184253.pdf.

41. Olivares et al., *supra* note 9.

42. Mauer, *supra* note 14, at 1491-92 (arguing that the explosion in the prison population was the result of "increasing controls on judicial discretion," including mandatory sentencing and three strikes policies, and the modern day war on drugs); Mauer & Chesney-Lind, *supra* note 2, at

decline in judicial sentencing discretion has increased the numbers of inmates who will be released into their communities debilitated by an expanding array of civil disabilities. "In 2002, 6.7 million people were on probation, in jail or prison, or on parole."[43] At mid-year 2003, state and federal prison authorities had under their jurisdiction 1,460,920 inmates—"1,290,459 under State jurisdiction and 170,461 under Federal jurisdiction."[44] "If recent incarceration rates remain unchanged, an estimated 1 [in] every 15 [people] . . . will serve time in a prison during their lifetime."[45] Yet, it is not just the numbers of ex-offenders reentering the community that is significant, but also that these individuals are returning to a relatively small number of disadvantaged urban communities.[46] Many of the communities to which ex-offenders return suffer disproportionately from poverty, unemployment, homelessness, and instability.[47] In these neighborhoods, the arrest, incarceration, and recidivism of large numbers of people severely burden the formal and informal institutions that should sustain a community, and distort family structures across generations.[48] "[These] communities . . . are less able to provide social services and [economic] support to [those] . . . returning [from prison]."[49] The repeated incarceration of large numbers of ex-offenders from a single community also removes potential members of the legitimate workforce from the community, reducing the chances that the community can become economically vibrant.

Many of the consequences of collateral sanctions are especially pressing in the African American and other minority communities.[50] Nationwide, African Americans are incarcerated at 8.2 times the rate of Whites.[51] Nine percent of

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6; Olivares et al., *supra* note 9 (noting that the "get tough movement" has had a profound impact on the criminal justice system).

43. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTION STATISTICS, http://www.ojp.usdoj.gov/bjs/correct.htm (last revised Nov. 7, 2004).

44. *Id.*

45. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDER STATISTICS, http://www.ojp.usdoj.gov/bjs/crimoff.htm (last revised Dec. 28, 2004).

46. Travis et al., *supra* note 5, 12.

47. For example, in New York State, Blacks and Latinos from the New York City communities of Harlem, Washington Heights, the Lower East Side, the South and East Bronx, Central and East Brooklyn, and Southeast Queens represent eighty percent of the State's prison population. Hayden v. Pataki*: Coalition of Civil Rights Organizations Challenge New York State's Law Denying the Vote to Prisoners and Parolees*, NAACP LEGAL DEF. & EDUC. FUND., http://www.naacpldf.org/content.aspx?article=78 (Jan. 15, 2003). Similarly, in Maryland, fifty-nine percent of all men and women released from Maryland prisons returned to Baltimore City. LA VIGNE & KACHNOWSKI, *supra* note 38, at 38-39. Twenty-two point nine percent of Baltimore City's residents live below the poverty line. *Id.* at 51.

48. *See* Kadela & Seiter, *supra* note 8, at 380.

49. *See id.*

50. In Maryland, of the fifty-nine percent of all released prisoners who return to Baltimore City, eighty-nine percent of those prisoners are African American. LA VIGNE & KACHNOWSKI, *supra* note 38, at 51.

51. JAMIE FELLNER, HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS, http://www.hrw.org/reports/2000/usa/

all African American males in their twenties and early thirties are in prison or jail, compared to one percent of Whites.[52] A September 2004 report from the Federal Bureau of Prisons indicates that of the total federal inmate population of over 180,000 people, 72,000, or nearly forty percent, were African American.[53] The racial disparities in the prison population were only exacerbated by the war on drugs. People of color are disproportionately represented among those arrested, tried, convicted, and sentenced to prison for drug offenses.[54] Indeed, eighty percent of those in prison for drug convictions are African American or Latino.[55] African Americans constitute only twelve percent of national drug users, but represent forty-four percent of those arrested for drug crimes and fifty-six percent of drug convictions.[56] This imbalance is largely the result of policy decisions about where and how to prosecute the war on drugs.[57] Again, the incarceration of parents has a disproportionate impact on families of color.[58] "Among both state and federal prisoners with minor children, African-Americans" composed the largest racial group.[59] This disproportionate arrest and incarceration of African Americans has combined with collateral consequences to exacerbate racial stratification.

Although most jurisdictions make some provision for the eventual removal of some collateral sanctions, relief mechanisms are generally unduly burdensome or ineffective.[60] Moreover, many economic and social service restrictions are not affected when civil rights are restored.[61] Removal also does not address the critical period following release during which ex-offenders and their families most desperately need temporary supports and employment opportunities, with many ex-offenders returning to a life of crime and being returned to prison before they can even reach the point of seeking relief from the penalties.[62]

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Rcedrg00.htm#P54_1086 (May 2000); *see* Debbie Mukamal & Paul Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1502 (2003).

52. BECK, *supra* note 34, at 1.

53. FED. BUREAU OF PRISONS, *supra* note 13.

54. Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, *in* INVISIBLE PUNISHMENT, *supra* note 2, at 50, 53.

55. *Id.*

56. *See* Thompson, *supra* note 11, at 265.

57. Mauer, *supra* note 54.

58. *See, e.g.*, MUMOLA, *supra* note 34, at 3.

59. *Id.*

60. SUSAN M. KUZMA, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY, at i (1996); Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1718-19 (2003).

61. Love, *supra* note 60, at 1719.

62. PETERSILLA, *supra* note 40, at 3. "Most rearrests occur in the first six months after release." *Id.* And, "two-thirds of all parolees are rearrested within three years." *Id.*

## II. EXISTING REENTRY BARRIERS

A review of the extent, range, and interplay of these sanctions is necessary to assess the viability of any proposed legal challenge. It is only through such an examination that one can see the true potential for devastation in the lives of ex-offenders and, conversely, the lack of any sound policy basis for this discrimination.

### *A. Employment Opportunities*

"Finding a job is often the most serious concern [for ex-offenders], who [on average] have few job skills and little work history."[63] A year after being released, sixty-percent of former inmates have not found legitimate employment.[64] As the availability of low-skilled jobs declines, the economic consequences of collateral sanctions restricting employment opportunities will excalate for ex-offenders, their families, and their communities.[65]

One of the primary employment restrictions facing ex-offenders is the prohibition against public employment.[66] Alabama, Delaware, Iowa, Mississippi, Rhode Island, and South Carolina permanently deny convicted felons the right to such public employment.[67] "The remaining 45 jurisdictions permit public employment . . . in varying degrees. . . . [Twelve] . . . apply a 'direct relationship test' to determine whether the conviction . . . bears . . . [a relationship to the applicant's] ability to handle the job . . . ."[68] Many states also impose general restrictions on hiring ex-offenders for particular professions, including law, real estate, medicine, nursing, physical therapy, and education.[69]

Further complicating access to employment, many states prohibit employment of ex-offenders through occupational licensing laws that contain character requirements[70] bearing no direct relation to the licensed occupation, or that do not consider the individual circumstances of the crime for which the applicant was convicted.[71] For many, being denied a license not only means

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63. Kadela & Seiter, *supra* note 8, at 367.

64. Demleitner, *supra* note 20, at 1040.

65. Mukamal, 11 Stan. L. & Pol'y 153, 156 (1999)

66. *See* Olivares et al., *supra* note 9, at 13.

67. TRAVIS ET AL., *supra* note 9, at 31; Olivares et al., *supra* note 9, at 13.

68. Olivares et al., *supra* note 9, at 13 (citation omitted).

69. *See, e.g.*, ALA. CODE § 5-6A-1 (1996 & Supp. 2004) (prohibiting felons from becoming bank directors); ALA. CODE § 11-65-11 (1994) (prohibiting felons from serving on a horse or greyhound racing commission); ALA. CODE § 34-24-166 (2002 & Supp. 2004) (allowing State Board of Chiropractic Examiners to deny a license to a felon); PETERSILLA, *supra* note 40, at 4 ("Colorado prohibits [ex-offenders] from becoming dentists, engineers, nurses, pharmacists, physicians or real estate agents.").

70. Many federal, state, and municipal laws, while not specifically excluding felons, effectively exclude them from obtaining licenses by requiring that the applicant show "good moral character." *See* Thompson, *supra* note 11, at 281. With no set definition of good moral character, licensing boards are given broad discretion in defining the term. *Id.* As a result, the term is often interpreted to bar anyone with a criminal conviction. *Id.*

71. *See* Demleitner, *supra* note 30, at 156; Thompson, *supra* note 11, at 281.

the loss of employment opportunities, but also a bar on reemployment in a profession in which the offender already has acquired certain skills.[72] Some employment restrictions are based directly on concerns for public safety, and are arguably appropriate.[73] For example, few would question why persons convicted of child molestation are not permitted to work in day care centers.[74] But there is a distinction between sanctions that are adopted with a goal of incapacitation or prevention of future criminal activity and those that are essentially retributive.[75] In many states the barriers include restrictions on professions ranging from barbering, cosmetology, real estate, physical therapy, personal training, and car sales.[76] "Forty-six states [have] statutory restrictions impacting the licensing of ex-felons as barbers."[77] "New York . . . [prohibits people with felony convictions from gaining employment in] more than 100 . . . job categories, including plumbing, real estate, barbers[], education, health care and private security."[78] "In Virginia, [an individual convicted of a felony] may not work in the areas of optometry, nursing, dentistry, accounting, funeral director, or pharmacy."[79] And in Maryland, state agencies and licensing boards have discretion to deny or revoke a wide range of professional licenses, including those for barbers,[80] insurance professionals,[81] accountants,[82] landscape architects,[83] plumbers,[84] and social workers.[85] While some may see

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72. *See id.*

73. Mauer, *supra* note 14, at 1493.

74. *Id.*

75. *Id.*

76. *E.g.*, FLA. STAT. ANN. § 320.27(9)(a)(2) (West Supp. 2005) (motor vehicle dealers).

77. *See* Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-felon's Employment Opportunities*, 71 N.D. L. REV. 187, 193 (1995).

78. *See* Fox Butterfield, *Freed from Prison, but Still Paying a Penalty*, N.Y. TIMES, Dec. 29, 2002, at 18.

> [D]epending on the nature of [an individual's] criminal history, an ex-offender [in New York] may be prohibited from gaining employment in any place beer or liquor is sold for drinking in the place where it is purchased, . . . an insurance adjuster's office, a bank, a billiard parlor, any agency connected with horse racing, boxing or wrestling; and from receiving a license as an auctioneer, junk dealer, gunsmith, pharmacist, doctor, physiotherapist, osteopath, podiatrist, dentist, dental hygienist, veterinarian, certified public accountant, undertaker, embalmer, private detective, investigator, watch guard, attorney, billiard room operator, notary public, insurance adjuster, bingo operator, beer or liquor dispenser, real estate broker or salesman, check casher, and union collector.

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, 433 (2004).

79. Brisman, *supra* note 78, at 433.

80. MD. CODE ANN., BUS. OCC. & PROF. § 4-314 (2004).

81. *E.g.*, MD. CODE ANN., INS. § 10-126 (2003); MD. CODE ANN., INS. § 10-410 (2003 & Supp. 2004).

82. MD. CODE ANN., BUS. OCC. & PROF. § 2-315 (2004 & Supp. 2004).

83. MD. CODE ANN., BUS. OCC. & PROF. § 9-310 (2004).

84. *Id.* § 12-312.

benefit in allowing employment discrimination against convicted felons, few could rationalize the relevance of an arrest that did not result in a conviction.[86] Yet, "thirty-eight states permit all employers . . . and occupational licensing agencies to inquire about and rely upon arrests that did not result in a conviction."[87] Arkansas, New Mexico, and New Hampshire allow private employers to rely on arrests that did not lead to conviction.[88]

The loss of driving privileges, while not a formal occupational disability, acts as a barrier to the employability of ex-offenders. In the Department of Transportation and Related Agencies Appropriation Act of 1992,[89] Congress mandated the withholding of ten percent of federal highway funds unless a state either enacts and enforces a law revoking or suspending for at least six months the driver's license of any individual who is convicted of any drug offense,[90] or the governor submits written certification to the Secretary of the Department of Transportation that he or she opposes the revocation or suspension and that the state legislature has adopted a resolution expressing its opposition to this law.[91] Twenty-four states automatically suspend or revoke driver licenses for convictions of drug offenses.[92] Of these states, seventeen have suspension periods of six months for the first offense.[93] Colorado,[94]

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85. MD. CODE ANN., HEALTH OCC. § 19-311 (2000 & Supp. 2004).

86. As noted by one commentator, given the prevalence of racial profiling, one's history of arrest "may have little to do with involvement in crime but much to do with discriminatory police behavior." *See* Mauer, *supra* note 14.

87. Mukamal & Samuels, *supra* note 51, at 1503-04.

88. *Id.*; *see* ARK. CODE ANN. § 17-1-103(c)(1) (Michie 2001); N.H. REV. STAT. ANN. § 21-I:51 (2001); N.M. STAT. ANN. §§ 28-2-2 to -3(B)(1) (Michie 2000).

89. Pub. L. No. 102-388, 106 Stat. 1520 (1992).

90. 23 U.S.C § 159(2)-(3) (2000).

91. *Id.* § 159(a)(3)(B).

92. Mukamal & Samuels, *supra* note 51, at 1516; ALA. CODE § 13A-12-290 to -291 (1994); ARK. CODE ANN. § 27-16-915(b)(1)(A) (Michie 2004); COLO. REV. STAT. § 42-2-125(1)(b) (2003); DEL. CODE ANN. tit. 21, § 4177K (1995 & Supp. 2004); FLA. STAT. ANN. § 322.055 (West 2001); GA. CODE ANN. § 40-5-75 (2004); IND. CODE ANN. §§ 9-30-4-6, 35-48-4-15 (Michie 2004); IOWA CODE ANN. § 321.212(1)(d) (West 1997 & Supp. 2004); IOWA CODE ANN. § 901.5(10) (West 2003 & Supp. 2004); LA. REV. STAT. ANN. § 32:430 (West 2002); MICH. COMP. LAWS ANN. § 257.319e(2) (West 2001); MISS. CODE ANN. § 63-1-71(1) (1999); MISS. CODE ANN. § 63-11-30 (1999 & Supp. 2004); MO. ANN. STAT. §§ 577.500, .510 (West 2003); N.J. STAT. ANN. § 2C:35-16 (West 1995); N.Y. VEH. & TRAF. LAW § 510(2)(b)(v) (McKinney 1996 & Supp. 2005); OHIO REV. CODE ANN. § 4507.169(A) (Anderson 2003); OKLA. STAT. ANN. tit. 47, § 6-205(A)(2), (6) (West 2000 & Supp. 2005); 75 PA. CONS. STAT. ANN. § 1532(b)(3), (c)(1) (West 1996 & Supp. 2004); S.C. CODE ANN. §§ 56-1-745(A), -5-2951(A) (Law. Co-op. 1991 & Supp. 2004); TEX. TRANSP. CODE ANN. §§ 521.341, .372 (Vernon 1999); UTAH CODE ANN. § 53-3-220 (2002 & Supp. 2004); VA. CODE ANN. § 18.2-271 (Michie 2004); VA. CODE ANN. § 46.2-390.1 (Michie 2002); WIS. STAT. ANN. § 961.50 (West 1998 & Supp. 2004); WYO. STAT. ANN. § 31-7-128 (Michie 2003); MASS. REGS. CODE tit. 540, § 20.03 (1996).

93. Mukamal & Samuels, *supra* note 51, at 1516; ALA. CODE § 13A-12-290 (1994); ARK. CODE ANN. § 27-16-915(b)(1)(A) (Michie 2004); FLA. STAT. ANN. § 322.055 (West 2001); GA. CODE ANN. § 40-5-75(a) (2004); IND. CODE ANN. § 35-48-4-15 (Michie 2004); IOWA CODE ANN. § 321.212(1)(d) (West 1997 & Supp. 2004); IOWA CODE ANN. § 901.5(10) (West 2003 & Supp. 2004); MICH. COMP. LAWS ANN. § 257.319e(2) (West 2001); MISS. CODE ANN. § 63-1-71(1) (1999); N.J. STAT. ANN. § 2C:35-16 (West 1995); N.Y. VEH. & TRAF. LAW § 510(2)(b)(v)

Delaware,[95] Massachusetts,[96] and South Carolina[97] revoke or suspend driver licenses for longer than six months for non-driving drug convictions. Provisions requiring the suspension or revocation of driving privileges severely impact the economic prospects of ex-offenders by depriving them of the mobility necessary to access jobs that require driving to the place of employment when public transportation is not available or that require a driver's license as a prerequisite, including chauffer, delivery person or cab driver. Together, bans on public employment, occupational licensing restrictions, and related prohibitions that affect job prerequisites leave many ex-offenders with little choice other than the pursuit of illegal activities to make a living.[98]

### *B. Public Assistance*

Through a series of legislative enactments, Congress has removed the social safety net for ex-offenders and their families.[99] Social and welfare benefits have a different quality than other restrictions because of their direct, and potentially devastating impact on the ex-offender and his or her family.[100] The welfare system was designed to provide a threshold below which no member of society should live.[101] This denial of subsistence benefits makes it harder for ex-offenders to exercise the economic and personal autonomy that many take for granted and to meet the basic needs of their families. "While the denial of assistance to ex-offenders is not designed to affect the public [assistance provided to] other family members, any denial of benefits to one family member necessarily impacts the others,"[102] particularly when the individual being denied the benefit is the head of the household and responsible for meeting the basic needs of others.[103] For many ex-offenders,

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(McKinney 1996 & Supp. 2005); OHIO REV. CODE ANN. § 4510.169(A) (Anderson 2003); OKLA. STAT. ANN. tit. 47, § 6-205.1(A)-(B) (West 2000 & Supp. 2005); 75 PA. CONS. STAT. ANN. § 1532(b)(3), (c)(1) (West 1996 & Supp. 2004); TEX. TRANSP. CODE ANN. §§ 521.312, .341, .372 (Vernon 1999); UTAH CODE ANN. § 53-3-220(1)(c) (2002 & Supp. 2004); VA. CODE ANN. § 18.2-271(A)-(C) (Michie 2004); VA. CODE ANN. § 46.2-390.1(A) (Michie 2002); WIS. STAT. ANN. § 961.50 (West 1998 & Supp. 2004).

94. COLO. REV. STAT. § 42-2-125(2) (2003).

95. DEL. CODE ANN. tit. 21, § 4177K (1995 & Supp. 2004); DEL. CODE ANN. tit. 16, § 4764(b)(1) (2003).

96. MASS. REGS. CODE tit. 540, § 20.03 (1996).

97. S.C. CODE ANN. §§ 56-1-745(A), -5-2951(K) (Law. Co-op. 1991 & Supp. 2004).

98. TRAVIS ET AL., *supra* note 9, at 31-34.

99. *See, e.g.*, 21 U.S.C. § 862(a)-(b) (2000).

100. Mukamal, 11 Stan. L. & Pol'y Rev. 153, 158.

101. Temporary Assistance for Needy Families was enacted to reduce the extent and severity of poverty and to promote self-sufficiency among families with children by providing temporary cash assistance to needy families. 42 U.S.C. § 601(a) (2000).

102. *See* Demleitner, *supra* note 30, at 158.

103. *See, e.g.*, PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 10-12 (2002), *available at* http://www.soros.org/initiatives/baltimore/articles_publications/publications/lifesentences/03-18-03atriciaAllardReport.pdf.

the inability to access public housing or food stamps makes it virtually impossible to create a suitable living environment for them and their families.[104]

*1. Eligibility for Temporary Assistance for Needy Families*

Federal welfare laws bar individuals with felony convictions from receiving welfare benefits or food stamps in the absence of countervailing state legislation. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996[105] permanently prohibits anyone convicted of a drug-related felony from receiving Temporary Assistance for Needy Families (TANF) and food stamps.[106] Section 115 of the TANF statute provides that persons convicted of a state or federal felony offense involving the use or sale of drugs are permanently ineligible for cash assistance and food stamps.[107] Federal law allows states to "opt out" of this requirement or to modify the ban.[108]

Forty-two states currently enforce the ban in full or in part.[109] Eighteen states have adopted the ban in its entirety.[110] Eighteen states have modified the ban, some by requiring recipients with felony drug convictions to seek or participate in alcohol and drug treatment to keep their eligibility.[111] Illinois

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104. *See id.*

105. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 7, 8, 21, 25, and 42 U.S.C.).

106. *See* § 814, 7 U.S.C. 2015(b)(1)(iii) (2000).

107. § 115, 21 U.S.C. § 862a(a) (2000).

108. *Id.* § 862a(d)(1).

109. Demleitner, *supra* note 20, at 1035.

110. Mukamal & Samuels, *supra* note 51, at 1506-07; ALASKA STAT. § 47.05.040 (Michie 2002); ARIZ. REV. STAT. ANN. § 13-3418 (West 2001); CAL. WELF. & INST. CODE § 11251.3 (West 2001 & Supp. 2005); CAL. WELF. & INST. CODE § 18901.7 (West 2001); DEL. CODE ANN. tit. 31, § 605 (Supp. 2004); GA. CODE ANN. § 49-4-184 (2002); MISS. CODE ANN. § 43-17-1(1) (1999); MO. ANN. STAT. §§ 205.965, 208.040 (West 2004); MONT. CODE ANN. § 53-4-231(1)(j) (2003); N.D. CENT. CODE § 50-09-02(10) (1999); S.D. CODIFIED LAWS § 28-12-1 (Michie 1999); VA. CODE ANN. §§ 63.1-25.2, -86.1 (Michie 2002); ALA. ADMIN. CODE §§ 660-2-2.36(3)(g), 660-4-1-.03(1)(m) (2002); KAN. ADMIN. REGS. 30-4-50(d); NEB. ADMIN. CODE tit. 475, ch. 1, § 1-008.03E (WESTLAW through Aug. 4, 2004); (2002); N.D. ADMIN. CODE § 75-02-11-02 (1995); S.D. ADMIN. R. 67:10:01:13 (2002); 40 TEX. ADMIN. CODE §§ 3.103, 3.501(b)(3)(x) (West 2004); Wyo. Dep't of Family Services Rules, § 6(a)(ii)(G)(IV) (2004), WL WY ADC FAMS PO ch. 1, § 6; BUREAU FOR CHILDREN & FAMILIES, W. VA. DEP'T OF HEALTH & HUMAN RES., INCOME MAINTENANCE MANUAL §§ 9.1(A)(2)(f), 9.21(A)(3), http://www.wvdhhr.org/bcf/policy/imm/new_manual/default.asp (last visited Jan. 16, 2005); INDIANA CLIENT ELIGIBILITY SYSTEM PROGRAM POLICY MANUAL, ch. 3200, § 3210.25.20, *available at* http://www.in.gov/fssa/families/pdf/3200.pdf (last visited Jan. 16, 2005); *see also* Mukamal & Samuels, *supra* note 51, at 1506-07.

111. *See, e.g.*, COLO. REV. STAT. § 26-2-706(3) (2003); CONN. GEN. STAT. ANN. § 17b-112d (West 1998 & Supp. 2004); HAW. REV. STAT. § 346-53 (Michie 2004); IOWA CODE Ann. § 234.12 (West 2000); KY. REV. STAT. ANN. § 205.2005 (Michie 1998); MINN. STAT. ANN. § 256D.024 (West 2003); NEV. REV. STAT. ANN. 422.29316 (Michie 2002); S.C. CODE ANN. § 43-5-1190 (Law. Co-op. 2003); 2003 TENN. PUB. ACTS 264; TENN. COMP. R. & REGS. 1240-1-1.02(10(b)(8), 1240-1-2-.02 (2002).

and Massachusetts have eliminated the ban on food stamps, but have retained the ban on cash assistance.[112]

The ban under TANF has meant that upon release, drug offenders have no transitional income to meet life's basic needs and to care for their children. TANF provides financial assistance to families with dependent children for the purpose of meeting basic needs and promoting a healthy and strong family.[113] "The purpose of [food stamps and TANF] is to end hunger and improve nutrition" by providing eligible low-income households with the nutritional meals and resources they need.[114] "The bans on TANF assistance [and] food stamps . . . are counterproductive public policies for [rehabilitation, reunification of families and treatment for addiction because] they actually make it more difficult for low-income individuals to [obtain food and meet their daily needs]."[115]

*2. Access to Public Housing*

> Housing has always [been] a problem for individuals returning to their communities [after] incarceration. Private property owners often inquire into the individual's background and tend to deny housing to anyone with a criminal record. . . . [I]n the past, when private housing options seemed foreclosed, public housing remained an option. . . . Congress [has] removed that safety net . . . .[116]

Changes in federal housing policy have had a dramatic effect on the ability of ex-offenders to obtain stable, affordable housing.[117] Most public housing laws and regulations stipulate a "one-strike" rule that automatically bars anyone with a criminal record, however minor the offense, from eligibility for such housing.[118] Indeed, many of these laws also impose penalties on public housing tenants—if other individuals in the household or guests engage in any

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112. 305 ILL. COMP. STAT. ANN 5/1-10 (West 2001); MASS. REGS. CODE tit. 106, § 701.110(2)(D) (2002) ("An individual convicted under federal or state law of a felony . . . that included the possession, use or distribution of a controlled substance is ineligible for TAFDC for 12 consecutive months following the individual's release from incarceration . . . .").

113. FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., ABOUT FSP—INTRODUCTION, *at* http://www.fns.usda.gov/fsp/applicant_recipients/about_fsp.htm (last modified July 23, 2004).

114. *Id.*

115. *See* Brisman, *supra* note 78, at 445 (first alteration and omission in original) (quoting Rubinstein & Mukamal, *supra* note 2, at 49).

116. *See* Thompson, *supra* note 11, at 278 (footnotes omitted); Heidi Lee Cain, Comment, *Housing Our Criminals: Finding Housing for the Ex-offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 149-50 (2003).

117. *See* Brisman, *supra* note 78, at 446-48.

118. *E.g.*, 24 C.F.R. § 960.204 (2003). "The public housing law *requires* public housing agencies and providers of Section 8 and other federally assisted housing to deny housing" if a member has engaged in any drug-related criminal activity. LEGAL ACTION CTR., HOUSING LAWS AFFECTING INDIVIDUALS WITH CRIMINAL CONVICTIONS 1. Federal public housing law states that "[a]ny household with a member who is subject to a lifetime registration requirement under a state *sex offender* registration program is [permanently] ineligible for public, Section 8 and other federally assisted housing." *Id.*

drug related criminal activity, tenants face eviction.[119] The tenant need not have actual knowledge of the drug activity.[120]

Under the Housing Opportunity Program Extension Act of 1996[121] and the Quality Housing and Work Responsibility Act of 1998,[122] applicants for Section 8[123] and other federally assisted housing are permanently barred for conviction of certain sex offenses and methamphetamine production on public housing premises.[124] Unlike the TANF ban, federal law does not automatically prevent people from receiving housing assistance merely because they have a criminal record. Under federal local public housing agencies may deny eligibility for three years to virtually anyone with a criminal background.[125] In determining eligibility, public housing authorities have implemented varying policies ranging from denying eligibility only to those previously evicted from public housing because of drug-related or violent activity to denying eligibility for current or past drug-related activity, regardless of when it occurred.[126]

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119. Brisman, *supra* note 78, at 446.

120. *Id.*

121. Pub. L. No. 104-120, 110 Stat. 834 (1996) (codified as amended at §§ 12 U.S.C. 1715z-20, 1721 (2000) and in scattered sections of 42 U.S.C.).

122. Pub. L. No. 105-276, tit. V, 112 Stat. 2518 (1998).

123. Section 8, formally known as "the housing choice voucher program[,] is the federal government's major program for assisting very-low income families, the elderly and the disabled obtain stable housing." *See* U.S. DEP'T OF HOUSING, HOUSING CHOICE VOUCHERS FACT SHEET, http://www.hud.gov/offices/pih/programs/hcv/about/fact_
sheet.cfm (last updated July 19, 2001). Through the program, landlords of privately owned rental units receive subsidies on behalf of qualified low-income tenants, allowing the tenants to pay a limited proportion of their incomes toward the rent. *Id.*

124. 42 U.S.C. § 13663(a) (2003); 24 C.F.R. § 960.204(a) (2003).

125. 24 C.F.R. § 960.203(c)(3) (2003).

126. *See, e.g.*, LEGAL ACTION CTR., PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS IN CALIFORNIA: SAN FRANCISCO 2 (2001) [hereinafter LEGAL ACTION CTR., CAL. POLICIES] (stating the San Francisco Housing Authority's policy to deny eligibility to "any individual who has 'any previous or current drug-related criminal activity or patterns of alcohol abuse' [unless the individual demonstrates rehabilitation]" (quoting S.F. HOUS. AUTH. ADMISSIONS & OCCUPANCY POLICY app. C, at 5)), *available at* http://www.lac.org/modules/ncjta/sf.pdf; LEGAL ACTION CTR., PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS IN DELAWARE: SUSSEX & NEW CASTLE COUNTIES 2 (2001) (stating the Sussex County Housing Authority's policy to deny eligibility to "previous tenants evicted for drug-related criminal activity for a specified time period"), *available at* http://www.lac.org/modules/ncjta/sussex.pdf; *id.* at 5 (stating the New Castle Housing Authority's policy to deny eligibility to families when "any member of the family has ever been evicted from public housing; [or] any family member's drug or alcohol abuse interferes with the health, safety, or right to peaceful enjoyment of other project residents"); LEGAL ACTION CTR., PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS IN FLORIDA: BROWARD COUNTY 1 (2001) [hereinafter LEGAL ACTION CTR., FLA. POLICIES] ("The [Broward County] Housing Authority has the discretion to bar . . . [f]amilies who have been previously evicted from public housing; [and a]pplicants or family members who have been convicted of criminal activity, drug-related criminal activity or violent criminal activity . . . ."), *available at* http://www.lac.org/modules/ncjta/broward.pdf; LEGAL ACTION CTR., PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS IN LOWELL, MASSACHUSETTS 1 (2001) [hereinafter LEGAL ACTION CTR., MASS. POLICIES] ("[Lowell Housing Authority] will consider any criminal history information, regardless of when the criminal activity occurred."), *available*

Similarly, although local housing authorities are required to use the same lease provisions,[127] the statute vests local housing authorities with discretion in determining when and why to invoke the provision. Public housing authorities across the country have enforced the law in a variety of ways. Some pursue eviction of tenants only when convicted of a drug offense.[128] Others evict tenants when they are charged with a drug crime, arrested, or involved in criminal "activity."[129] Still others evict tenants who were not involved in, or who did not know about, the drug activity of a relative or guest.[130]

Although purportedly designed to provide a safer environment for public housing residents,[131] the laws have exacerbated the difficulties faced by drug offenders and others seeking to reintegrate into their communities without significantly improving the quality of life for those living in public housing developments.[132] By imposing lengthy waiting periods on individuals with criminal records, these laws punish those who have paid their debt to society and are maintaining drug- and crime-free lives. Very few options are available

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*at* http://www.lac.org/modules/ncjta/lowell.pdf; LEGAL ACTION CTR., PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS IN NEW YORK CITY 1 (2001) [hereinafter LEGAL ACTION CTR., NEW YORK CITY POLICIES] ("[The New York City Housing Authority retains] discretion to deny housing to applicants who have been convicted of *any* criminal offense, including a violation."), *available at* http://www.lac.org/modules/ncjta/nyc.pdf.

127. All leases must contain a provision stating:

> [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment by other tenants or any drug-related criminal activity on or off [federally assisted low-income housing] 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, shall be cause for termination of tenancy . . . ."

42 U.S.C. § 1437d(*l*)(6) (2000).

128. *See* Richmond Tenants Org., Inc. v. Kemp, 956 F.2d 1300, 1303 (4th Cir. 1992).

129. *See* Escalera v. N.Y. Hous. Auth., 924 F. Supp. 1323, 1327 (S.D.N.Y. 1996); LEGAL ACTION CTR., CAL. POLICIES, *supra* note 125, at 3-4; LEGAL ACTION CTR., FLA. POLICIES, *supra* note 125, at 3 (terminating lease for any type of criminal activity and not requiring a conviction where drug-related activity is the basis for eviction); LEGAL ACTION CTR., MASS. POLICIES, *supra* note 125, at 3-4 (subjecting tenants to an eviction for "[d]rug-related criminal activity on or off the premises"); *see also* Hous. Auth. v. Jackson, 749 F. Supp. 622, 629-31 (D.N.J. 1990).

130. *See* Rucker v. Davis, 237 F.3d 1113, 1115-18 (9th Cir. 2001); OAKLAND HOUS. AUTH., FREQUENTLY ASKED QUESTIONS, http://oakha.org/owner/s8faq.html (last visited Jan. 13, 2005).

131. Public Housing Drug Elimination Act of 1988, § 42 U.S.C. § 11901 ("[T]he Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs.").

132. Despite tougher admission and eviction standards, crime remains a serious problem in public housing across the country. For example, in New York City, one of the jurisdictions with the most restrictive housing guidelines, five percent of the city's population lives in public housing, but in 2003, eleven percent of the murders and rapes and sixteen percent of the shootings in the city occurred on public housing grounds. Jennifer Steinhauer, *Drug and Sex Offenders Face Restrictions on Public Housing*, N.Y. TIMES, June 25, 2004, at B4. Similarly, in Nashville, Tennessee, in light of stricter admission standards, major crimes at public housing developments, including homicide, rape, robbery, and assault dropped only by .8%, even though major offenses in the city overall dropped nine percent. Christian Bottorff & Sheila Burke, *Crime Hard To Uproot in Public Housing*, TENNESSEAN, June 22, 2003, http://tennessean.com/local/archives/03/06/34744648.shtml.

for people who cannot live in public housing or with family members. In addition, these laws punish entire families for the past behavior of an individual member of the household. Without access to this housing, an ex-offender's ability "to obtain and retain employment and remain crime-free is significantly diminished."[133] The policy has also fractured families as growing numbers of formerly incarcerated parents "find it nearly impossible to reunify with their children without secure, stable housing."[134]

### *C. Educational Opportunity*

Students with minor drug convictions can lose federal educational aid pursuant to the aid ban provisions in the 1998 and 2000 Amendments to the Higher Education Act of 1965.[135] Under the Higher Education Amendments of 1998[136], students convicted of drug-related offenses are ineligible for any grant, loan, or work assistance.[137] The length of the suspension depends on the type of offense and the number of previous offenses.[138] The ineligibility period for a first offense of possession of a controlled substance is one year from the date of the conviction.[139] The ineligibility period for a second offense of possession is two years, and a third offense results in an indefinite period of ineligibility.[140] The period for a first offense for sale of a controlled substance is two years, with subsequent offenses resulting in an indefinite period of ineligibility.[141] A student may have ineligibility lifted before the end of the period if she satisfactorily completes a drug rehabilitation program or if the conviction is reversed, set aside, or otherwise struck down.[142]

Several grant and scholarship programs administered through the states are also closed to students with drug felony records. For example, many states link eligibility for need-based, state financial aid to the qualifications imposed by the Federal Government under the Higher Education Act.[143] Students

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133. Rubinstein & Mukamal, *supra* note 2, at 49.

134. *Id.* at 48.

135. Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of 20 and 42 U.S.C.). The Higher Education Act was signed into law by President Lyndon Johnson. It established federal financial aid programs including Perkins Loans, Pell Grants, Supplemental Educational Opportunity Grants, PLUS Loans, and work-study programs. 20 U.S.C. § 1091 (2000); *see also* Mukamal & Samuels, *supra* note 51, at 1508.

136. Pub. L. No. 105-244, 112 Stat. 1581 (1998) (codified as amended in scattered sections of 20 U.S.C.).

137. 20 U.S.C. § 1091(r)(1) (2000).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* § 1091(r)(2).

143. *See, e.g.*, NEB. ADMIN. CODE tit. 281, ch. 5, §§ 002.04, 002.13, ch. 6, §§ 002.03, 002.11 (WESTLAW through Aug. 4, 2004); ALA. STUDENT LOAN PROGRAM, PARENTS: FINANCIAL AID INFORMATION, http://www.kheaa.com/al/parents/fa_programs.html (last visited Jan. 13, 2005); R.I. HIGHER EDUC. ASSISTANCE AUTH., GRANTS, http://www.riheaa.org/borrowers/grants (last modified Oct. 23, 2003); VA. FOUND. FOR INDEP. COLLS., FINANCIAL AID & SCHOLARSHIPS,

convicted of a felony in Florida or Kentucky are ineligible for various scholarships and grants.[144] In Oklahoma, in order to qualify for the Oklahoma Higher Learning Access Program, which provides financial aid to students with a family annual income of less than $50,000, students must pledge that they do not abuse drugs or alcohol and do not commit criminal or delinquent acts.[145] Applicants for the South Carolina Need-Based Grant program, which is designed to aid South Carolina's "neediest students," must verify that they have not been convicted of any felonies or of any alcohol or drug-related misdemeanor offenses within the past academic year.[146] In Texas, students are not eligible for the Texas Grant Program if they have been convicted of a felony or a crime involving any controlled substance.[147]

In the 2000-2001 academic year, approximately 67,000 applicants for federal student aid indicated they had been convicted of selling or possessing drugs, with an additional 11,000 leaving the question blank.[148] During the 2001-2002 academic year, an estimated 103,502 students indicated that they had been convicted of drug offenses.[149] Of this number, 39,537 students were eventually denied aid.[150] Overall, approximately 140,000 students have been denied federal aid since the prohibition was enacted.[151]

### *D. Interplay of Factors*

While all of these barriers are onerous standing alone, their cumulative effect is to preclude many ex-offenders from making a living. For example, the ban on public assistance makes it difficult for ex-offenders to find suitable housing.[152] For those who struggle financially, most jobs that they can obtain, particularly without training (which they may not be able to get because of the ban on financial aid), barely pay enough to cover rent. In return, "the difficulty

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http://www.virginiacolleges.org/
finance/content5.html (last updated Dec. 7, 2004).

144. *See, e.g.*, FLA. DEP'T OF EDUC., FLORIDA BRIGHT FUTURES SCHOLARSHIP PROGRAM, http://www.firn.edu/doe/brfutures/howapply.htm (last visited Jan. 13, 2005).

145. OKLA. STATE REGENTS FOR HIGHER EDUC., OKLAHOMA HIGHER LEARNING ACCESS PROGRAM (OHLAP), http://www.okhighered.org/ohlap/student-requirements.shtml (last visited Jan. 13, 2005). While the language of the provision does not explicitly ban students with criminal records, it is clear that a requirement to "not commit a criminal act" or use drugs would exclude those with convictions. *See id.*

146. S.C. COMM'N ON HIGHER EDUC., Q & A, SOUTH CAROLINA NEED-BASED GRANTS, http://www.che.sc.gov/StudentServices/NeedBased/NBG.htm (last revised Dec. 3, 2004).

147. 19 TEX. ADMIN. CODE § 22.228(c)(6) (West 2004).

148. Curry, *supra* note 137.

149. COALITION FOR HIGHER EDUC. ACT REFORM, FREQUENTLY ASKED QUESTIONS ABOUT THE HIGHER EDUCATION DRUG PROVISION, http://www.raiseyourvoice.com/heainfo.shtml (last visited Jan. 13, 2005).

150. *Id.*

151. Press Release, Coalition for Higher Education Act Reform, Drug Treatment, Rehabilitation and Policy Reform Leaders Call for Repeal of Financial Aid Drug Penalty (May 12, 2004), *available at* http://www.raiseyourvoice.com/Press/PR-Natl-5-12-04.pdf.

152. *Id.*

in finding housing . . . affects the ability of ex-offenders to secure and maintain employment[,] . . . [because e]x-offenders applying for work need to have an address and telephone number."[153] Loss of educational assistance not only cuts off attempts to pursue higher education, but also diminishes access to employment opportunities which have higher education or specialized training as a prerequisite.

## III. NEED FOR COMPREHENSIVE STATE COURT LITIGATION STRATEGY

To truly dismantle this crippling web of collateral sanctions and to restore ex-offenders to full citizenship, advocates must engage in a comprehensive litigation attack on reentry barriers.[154] Legal advocates that provide services to ex-offenders use litigation and other advocacy tools to ensure that individual clients are able to obtain the necessities of life,[155] but less often bring strategic impact litigation directly challenging the policies.[156] These efforts

153. Thompson, *supra* note 11, at 279 (footnotes omitted).

154. *See* Demleitner, *supra* note 30, 158-59 (arguing that collateral consequences deny ex-offenders any indicia of citizenship).

155. Community Legal Services of Philadelphia provides an excellent model of a legal aid organization that provides comprehensive services to clients. The organization offers civil legal services to ex-offenders who are denied employment, occupational licenses, public benefits, public housing, and section 8 assistance. CMTY. LEGAL SERVS. OF PHILA., INFORMATION FOR EX-OFFENDERS, http://www.clsphila.org/Ex-Offenders_Information.htm (last visited Jan. 13, 2005). They also advocate on behalf of parents with criminal records. *Id.* Public defender offices also play an important role in assisting ex-offenders to navigate reentry barriers. For example, the Clark County Public Defender office in Las Vegas, Nevada, works with residents of the Buena Vista housing project to secure record expungement, deal with outstanding warrants, and promote literacy. Timothy Pratt, *Voting Rights 'Blessing' for Ex-felons*, LAS VEGAS SUN, June 18, 2004, http://www.lasvegassun.com/sunbin/stories/sun/2004/jun/18/517041245.html?launa%20hall. The public defender in Maricopa County, Arizona, trains defense lawyers on collateral consequences.

156. Debbie A. Mukamal, *Confronting the Employment Barriers of Criminal Records: Effective Legal and Practical Strategies*, 33 CLEARINGHOUSE REV. 597, 604 (2000).

> Legal advocates working with clients who have criminal histories can assist them in mitigating employment barriers by making them aware of laws affecting them, helping them clean up their criminal records and attain certificates of rehabilitation, and advising them on the most effective ways to address their criminal backgrounds. Advocates can also promote the employment of ex-offender clients by educating employers about the benefits of and regulations governing the hiring of ex-offenders.

*Id.* It is important to recognize that there has also been some systemic litigation, primarily in the area of voting rights, *see, e.g.*, Johnson v. Bush, 353 F.3d 1287 (11th Cir. 2003), *vacated en banc*, 377 F.3d 1163 (11th Cir. 2004); Hayden v. Pataki, No. 00 Civ. 8586(LMM), 2004 WL 1335921 (S.D.N.Y. June 14, 2004), and sporadic litigation challenging other barriers, Turner v. Glickman, 207 F.3d 419 (7th Cir. 2000) (welfare ban). The systemic litigation challenging other barriers, have for the most part been brought under federal law to very limited success, and there has not been a critical mass of cases or sufficient focus on the full range of reentry barriers. *See, e.g.*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (upholding eviction from public housing); *Turner*, 207 F.3d at 423 (upholding welfare ban); Delong v. Dep't of Health & Human Servs., 264 F.3d 1334 (Fed. Cir. 2001) (upholding termination of employment due to a felony conviction); Bolden v. City of New York, 256 F. Supp. 2d 193 (S.D.N.Y. 2003) (same); Schanuel v. Anderson, 546 F. Supp. 519 (S.D. Ill. 1982) (same).

undoubtedly provide an invaluable service to the individuals that must live with these barriers every day. However, unless resources are directed at actually changing these policies wholesale, collateral sanctions will continue to have a crippling effect on individuals and their communities.[157]

The most effective form of attack is state-by-state impact litigation focusing on states with the most extensive maze of collateral sanctions as well as constitutional and statutory provisions that would support legal challenges of those sanctions. Although some specialized challenges may be available under federal law, as discussed below, litigation relying on federal constitutional or statutory protections may not provide widespread relief to ex-offenders. Moreover, in the context of collateral sanctions, state court litigation may be more effective because states and municipalities have either been given latitude and discretion in setting qualifications for federal programs, or they have imposed the restrictions themselves.[158] Thus, local authorities have wide discretion in determining the restrictiveness of their policies.

It is clear that any litigation strategy will be unsuccessful standing alone. State court litigation must be accompanied by supportive legislative and public education efforts. Through a coordinated three-prong approach advocates can counter the negative public opinion and lack of political will that often defeat attacks on these civil penalties.[159] In addition to the potential for victory in the

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157. *See* Neal Pierce, *Bush's "Prisoner Re-entry" Proposal—Mighty Modest but a Start*, WASH. POST WRITERS GROUP, http://www.postwritersgroup.com/archives/peir0126.htm (last visited Jan. 13, 2005) (critiquing President Bush's reentry initiative with the observation that if the President were truly concerned about providing ex-offenders a second chance he would support a repeal of the harsh mandatory minimum sentencing laws that precipitated the unprecedented rate of incarceration and the numerous federal provisions that prevent ex-offenders from obtaining welfare benefits, affordable housing, or tuition assistance).

158. For example, the Federal Government requires local public housing agencies to adopt policies and procedures to evict individuals who engage in activity considered "detrimental to the public housing community." 24 C.F.R. § 966.4(1)(5)(vii) (2001). Public housing officials have interpreted this mandate to cover individuals who may pose no current danger, but who happen to have criminal histories. *See* LEGAL ACTION CTR., NEW YORK CITY POLICIES, *supra* note 125, at 1-2 (allowing denial of housing to individuals convicted of criminal violations, regardless of amount of time passed); Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, *in* INVISIBLE PUNISHMENT, *supra* note 2, at 45-47. Similarly, although Congress allows states to avoid the withholding of federal highway funds for failing to revoke the driver licenses of individuals convicted of drug offenses by submitting certification that the governor and state legislature oppose revocation, 23 U.S.C. § 159 (2000), many states have instead chosen to automatically revoke driver licenses. *See, e.g.*, DEL. CODE ANN. tit. 21, § 4177K (1995 & Supp. 2004); FLA. STAT. ANN. § 322.055 (West 2001); GA. CODE ANN. § 40-5-75 (2004); IND. CODE ANN. §§ 9-30-4-6, 35-48-4-15 (Michie 2004); IOWA CODE ANN. § 321.212(1)(d) (West 1997 & Supp. 2004); IOWA CODE ANN. § 321.212(1)(d) (West 1997 & Supp. 2004); IOWA CODE ANN. § 901.5(10) (West 2003 & Supp. 2004); LA. REV. STAT. ANN. § 32:430 (West 2002); MICH. COMP. LAWS ANN. § 257.319e(2) (West 2001); MISS. CODE ANN. § 63-1-71(1) (1999); MISS. CODE ANN. § 63-1-71(1) (1999); MISS. CODE ANN. § 63-11-30 (1999 & Supp. 2004); MO. ANN. STAT. §§ 577.500, .510 (West 2003); N.J. STAT. ANN. § 2C:35-16 (West 1995); N.Y. VEH. & TRAF. LAW § 510(2)(b)(v) (McKinney 1996 & Supp. 2005); OHIO REV. CODE ANN. § 4507.169(A) (Anderson 2003); MASS. REGS. CODE tit. 540, § 20.03 (1996).

159. Felix Lopez, *Lawyers Matter, Policy Matters: How One Small Not-For-Profit Combats Discrimination Against Ex-offenders, People in Recovery, and People with AIDS*, 17 YALE L. &

courts, the litigation may act as an impetus for change in the legislative and public opinion arenas. Even if unsuccessful, a comprehensive litigation challenge will bring to light a problem that is otherwise invisible to the general public and policymakers—the many layers of civil disabilities imposed on ex-offenders. "The number and scope of such adverse consequences tend to be unknown even to the participants in the criminal justice system, often because they are scattered throughout different bodies of law."[160] The focus on one state and its many barriers brings to light the weight of all the barriers and their combined impact. State law litigation, whether or not successful, may exert pressure on the political process and may generate media and public attention to the issue.[161]

### *A. Ineffectiveness of Federal Causes of Action*

#### *1. Constitutional Challenges*

As a class, people with criminal records have been afforded very little protection under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Thus, the Equal Protection Clause offers little hope for relief.[162] The most stringent test for the protection of rights under the Equal Protection Clause is strict scrutiny, under which the governmental entity must prove that a classification serves a compelling governmental interest and is

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POL'Y REV. 443, 445 (1998) (discussing the "political warfare" necessary to enact public policy changes for those who "occupy such a low rung on the American social ladder").

160. Demleitner, *supra* note 30.

161. The Georgia Supreme Court's closely decided decision in *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995), upholding a provision imposing a mandatory life term for two-time drug offenders in the face of alarming statistics that the statute had a discriminatory impact on African Americans, is illustrative, *id.* at 561. Justice Thompson, in his concurrence, explicitly called on the legislature to reconsider the law in light of the fact that "only a true cynic can look at these statistics and not be impressed that something is amiss." *Id.* at 564. "The court's decision shifted the debate to the halls of the legislature where something remarkable happened: Despite political trends towards ever-tougher penalties for drug crimes, the legislature eliminated the mandatory life term for two-time drug offenders, thereby defusing the explosive issue raised in *Stephens*." James P. Fleissner, *Criminal Law and Procedure: A Two-Year Survey*, 48 MERCER L. REV. 219, 220 (1996-1997).

162. The Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV § 1. Under the three-tiered approach applied to equal protection cases developed by the Supreme Court, government classifications that burden a "suspect class" or infringe upon a "fundamental right" will be sustained only if they are narrowly tailored to serve a compelling state interest. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995). An intermediate level of scrutiny, requiring that classifications serve "important governmental objectives" and be "substantially related" to achieving those objectives, has been developed for gender and illegitimacy classifications. United States v. Virginia, 518 U.S. 515, 534-36 (1996). A classification subject to the lowest level of scrutiny will be upheld if there is a "rational" relationship between the classification and the subject matter of the legislation. Romer v. Evans, 517 U.S. 620, 632-33 (1996). Predominantly applied to social and economic legislation, the highly deferential rational basis test treats legislative classifications as presumptively valid. *See id.*

narrowly tailored to promote that interest.[163] Strict scrutiny is triggered only when the challenged governmental action burdens a fundamental right or targets a suspect class.[164] Convicted felons are not a suspect class for equal protection purposes under the U.S. Constitution.[165] And, the Supreme Court has not found economic rights, such as welfare and employment, to be fundamental rights.[166]

"[Although] . . . states . . . [from their inception] derived from English law [a duty to provide for the poor, which shifted to the federal government as] the class of eligible needy . . . expanded[,] . . . this [obligation] never blossomed into a . . . right to state assistance [protected by the Federal Constitution]."[167] The Supreme Court recognized in *Goldberg v. Kelly*[168] that, rather than being "mere charity" or a "privilege," welfare benefits "are a matter of statutory entitlement for persons qualified to receive them."[169] However, the Court did not explicitly find poverty to be a suspect classification or welfare to be a fundamental property right, worthy of heightened scrutiny.[170] Subsequent cases have explicitly rejected the notion that the Federal Constitution imposes an affirmative obligation upon the government to provide a minimum level of

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163. *Adarand*, 515 U.S. at 227; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986); *see also Adarand*, 515 U.S. at 243 (Stevens, J. dissenting) ("[Strict scrutiny] has usually been understood to spell the death of any governmental action to which a court may apply it."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978).

164. *See Adarand*, 515 U.S. at 224.

165. Cook v. Wiley, 208 F.3d 1314, 1323 (11th Cir. 2000); United States v. Wicks, 132 F.3d 383, 389 (7th Cir. 1997); Baker v. Cuomo, 58 F.3d 814, 820-22 (2d Cir. 1995), *vacated on other grounds by* Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996). Although no court has accepted the theory, one commentator has argued that classifications based on criminal conviction should be treated as suspect, much like race and immigrant status, because of the history of purposeful unequal treatment of ex-offenders, civil disabilities that they face, and their political powerlessness. Kay Kohler, *The Revolving Door: The Effect of Employment Discrimination Against Ex-prisoners*, 26 HASTINGS L.J. 1403, 1420 (1975).

166. United Bldg. & Constr. Trades Council v. Mayor & Council, 465 U.S. 208, 219 (1984) (finding no fundamental right to public employment); Lavine v. Milne, 424 U.S. 577, 583-85 (1976) (finding no fundamental right to receive welfare); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29-37 (1973) (finding no fundamental right to education); Lindsey v. Normet, 405 U.S. 56 (1972) (finding no fundamental right to housing); Silva v. Bieluch, 351 F.3d 1045, 1047 (11th Cir. 2003) (finding that "'employment rights are state-created rights and are not fundamental rights created by the Constitution'" (quoting McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994))); Thompson v. Ashe, 250 F.3d 399, 407-08 (6th Cir. 2001) (finding no fundamental right to visit family members who live in public housing); Miller v. Reed, 176 F.3d 1202, 1206 (9th Cir. 1999) (finding no fundamental right to drive a motor vehicle); Wells v. Malloy, 402 F. Supp. 856, 858 (D. Vt. 1975) (finding driver's license not a fundamental property right), *aff'd* 538 F.2d 317 (2d Cir. 1976).

167. William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 548 (1998).

168. 397 U.S. 254 (1970).

169. *Id.* at 260-66 (declaring that termination of welfare benefits without an evidentiary hearing violated right to accurate determination of eligibility, and was therefore in violation of Fourteenth Amendment due process rights).

170. *See id.*

subsistence, affording social welfare legislation the utmost deference.[171] Similarly, the Supreme Court has held that employment is not a fundamental right and economic regulations enjoy an almost irrebuttable presumption of validity.[172] At the same time that the federal courts have been withdrawing from their role as protectors of the poor, Congress has made clear that there is no entitlement to federal welfare and has shifted responsibility for welfare implementation to the states.[173] This trend makes independent state constitutional analysis particularly appropriate and necessary, in some instances providing the only hope of securing food, housing, and other financial assistance for poor ex-offenders.[174]

A facially neutral law is still subject to strict scrutiny if it is an obvious pretext for discrimination.[175] In order to trigger strict scrutiny, the plaintiffs must do more than show that the laws have a disproportionate impact on a protected class, such as African Americans; disparate impact alone is insufficient to support a finding of invidious racial discrimination in a facially neutral law.[176] The disparate impact must be traceable to a discriminatory legislative purpose.[177]

Despite the significant disproportionate racial impact of many of these collateral sanctions, it would be difficult to establish racially discriminatory intent in enacting the legislation to sustain an equal protection challenge based on race because there is little to no evidence that these collateral sanctions were enacted "'because of,' [and] not merely 'in spite of' [their] adverse [impact]."[178] Courts applying the federal standard have rejected the argument

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171. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

172. Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 (1976) (stating that there is no fundamental right to government employment and strict scrutiny review is not available for "state legislation restricting the availability of employment opportunities"); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1463, 1463 (1982) [hereinafter *State Constitutional Rights*] (arguing that since 1937, and the demise of the *Lochner* era, federal courts have abandoned serious review of economic regulations).

173. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601(a)(1) (2000).

174. Dan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 595-605 (1989) (arguing that state constitutions may serve as better basis for state duty to assist poor children); Helen Hershkoff, *Rights and Freedoms Under the State Constitution: A New Deal for Welfare Rights*, 13 TOURO L. REV. 631, 634, 651-52 (1997) (arguing that New York's Constitution provides strong protections for the poor); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 896-901 (1989) (arguing that state courts are institutionally better suited than federal courts to protect welfare rights); Risa E. Kaufman, Note, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions To Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 321-26 (1997) (arguing that because federal statutory and constitutional challenges offer limited relief, state constitutions provide a useful and necessary alternative litigation strategy for protecting the rights of welfare recipients).

175. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

176. Washington v. Davis, 426 U.S. 229, 239 (1976).

177. *Feeney*, 442 U.S. at 272.

178. *Id.* at 279. Similar challenges were mounted without success to the crack cocaine versus powder cocaine disparity in the federal sentencing guidelines. *See, e.g.*, United States v. Teague,

that statistical evidence that a statute has a disproportionate impact on a particular class of people is sufficient to prove intentional discrimination.[179] Specifically, courts have rejected this argument when raised by plaintiffs challenging reentry barriers. In *Lewis v. Alabama Department of Public Safety*,[180] the plaintiff challenged a regulation barring individuals with felony convictions and misdemeanors involving violence or moral turpitude from being placed on the list of wrecker operators to be called by state troopers.[181] The plaintiff introduced statistical evidence of the percentage of African American misdemeanor convictions compared with White misdemeanor convictions in Lee County, Alabama.[182] The court declined to apply strict scrutiny, finding that the plaintiff "failed to produce statistical evidence which supports a claim that this regulation discriminates against blacks."[183]

Absent a suspect classification or a fundamental right, the rational basis test would apply. The rational basis test, the most lenient type of review under the Equal Protection Clause, upholds governmental classifications that bear a rational relationship to a legitimate governmental objective.[184] When applying the rational basis test to the suspension or termination of the rights of people with convictions, the federal courts have interpreted the Equal Protection Clause to make it easy for governmental entities to meet their burden.[185]

The Due Process Clause of the Fourteenth Amendment also offers little hope for substantive relief from collateral sanctions. The Due Process Clause

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93 F.3d 81, 84-85 (2d Cir. 1996) (noting racial disparities in sentencing guidelines between sentences for crack and powder cocaine is not evidence of intent to discriminate on basis of race); United States v. Dumas, 64 F.3d 1427, 1430-31 (9th Cir. 1995) (stating that the hasty manner in which Congress adopted the distinction between sentencing for crack and powder cocaine is not evidence of intentional racial discrimination); United States v. Moore, 54 F.3d 92, 96-98 (2d Cir. 1995) (stating that congressional knowledge of statistical evidence that the vast majority of crack cocaine offenders are African American while many powder cocaine offenders are White is not evidence of enactment with racially discriminatory purpose).

179. *See, e.g.*, *Teague*, 93 F.3d at 85; *Moore*, 54 F.3d at 97-99.

180. 831 F. Supp. 824 (M.D. Ala. 1993).

181. *Id.* at 825.

182. *Id.*

183. *Id.* Although the court found the statistical evidence insufficient, it implied that plaintiff had at least stated a valid legal theory and that had plaintiff been able to adequately prove disproportionate racial impact, the court may have applied strict scrutiny. *See id.* Nonetheless, plaintiff's burden in such a case would be so extraordinarily high that it may in fact be an insurmountable burden.

184. *See generally* Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

185. *See, e.g.*, Lewis v. United States, 445 U.S. 55, 55 (1980) (right of convicted person to possess firearms); Richardson v. Ramirez, 418 U.S. 24 (1974) (right of ex-felon to vote); Woodruff v. Wyoming, 49 Fed. Appx. (10th Cir. 2002) (same); United States v. Walls, 225 F.3d 858, 865-66 (7th Cir. 2000); United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) (right of convicted person to participate in jury service); Davis v. Bowen, 825 F.2d 799 (4th Cir. 1987) (right of convicted person to social security benefits); Darks v. City of Cincinnati, 745 F.2d 1040 (6th Cir. 1984) (right of convicted person to obtain license); Shelton v. Richmond Pub. Sch., 186 F. Supp. 2d 646 (E.D. Va. 2002) (right of convicted person to employment); Kronlund v. Honstein, 327 F. Supp. 71 (N.D. Ga. 1971).

embodies a substantive and procedural component.[186] Substantive due process protects against arbitrary government deprivation of life, liberty, or property.[187] The test applied by the courts requires that there be "a reasonable connection between the [restriction] and the promotion of the safety and welfare of the community."[188] The procedural component of the Due Process Clause focuses on the means by which the interest at issue is deprived.[189] To determine whether governmental action complies with the constitutional requirement of procedural due process, the court must (1) determine whether there is a life, liberty, or property interest at stake and, if a protected interest is found, (2) determine the nature of the process due to the plaintiff.[190] Thus, even if a court found that ex-offenders possessed a property interest[191] in the economic and social service benefits and opportunities being denied through collateral sanctions, the only remedy available would be implementation of sufficient process prior to the benefit being denied.[192] Moreover, unsuccessful federal litigation has virtually foreclosed a successful due process challenge.[193]

For example, one federal court of appeals has considered the constitutionality of the ban on TANF assistance, holding that it does not violate federal equal protection or substantive due process.[194] In *Turner v. Glickman*,[195] because the statute involved no fundamental rights or suspect

186. 16B AM. JUR. 2D. *Constitutional Law* § 901 (2004).

187. *Id.*

188. *Id.*

189. *See* Boddie v. Connecticut, 401 U.S. 371, 379-80 (1971); Bell v. Burson, 402 U.S. 535, 542 (1971) ("[D]ue process requires that when a State seeks to terminate [a protected] interest . . . it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." (quoting Mullane v. Cent. Hanover Bank & Trust Co. 339 U.S. 306, 313 (1950))).

190. Brock v. Roadway Express, Inc., 481 U.S. 252, 260-61 (1987).

191. Further complicating actions under the Due Process Clause is the arising question of whether or not some of these interests are protected by the Due Process Clause. Due process protections apply only to those governmental benefits to which people have a "legitimate claim of entitlement" under the applicable statute. *See* Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972). Under the Personal Responsibility and Work Opportunity Reconciliation Act, Congress stated that the statute should not be interpreted to entitle any person to welfare assistance. 42 U.S.C. § 601(b) (2000). This express disclaimer reopens the question of whether procedural due process protects a welfare recipient's interest in receiving benefits.

192. It is not that this result is of no benefit to ex-offenders, but that such process would not provide the widespread, substantive relief advocated in this Article.

193. *See, e.g.*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002) (upholding eviction from public housing); Delong v. Dep't of Health & Human Servs., 264 F.3d 1334 (Fed. Cir. 2001) (holding that the statute requiring dismissal due to conviction is not violative of Due Process Clause); Bolden v. City of New York, 256 F. Supp. 2d 193 (S.D.N.Y. 2003) (upholding statute causing city employees to automatically lose their jobs upon conviction of a felony, because employees lost any property right in their jobs immediately upon conviction, and as such they were not entitled to due process); Schanuel v. Anderson, 546 F. Supp. 519, 526 (S.D. Ill. 1982) (upholding statute prohibiting employment by felon because the plaintiff "did not have a viable liberty or property right that was infringed").

194. Turner v. Glickman, 207 F.3d 419 (7th Cir. 2000).

195. *Id.*

classifications, the Court assessed whether the provision was rationally related to a legitimate government interest for both the equal protection and due process claim.[196] The Court found that the statute was a rational means to deter drug use because it provided a serious sanction to those who engaged in drug-related activity.[197] Denying food stamps to those with drug convictions also was, according to the Court, a rational means to reduce fraud in the food stamp program because it decreased the likelihood that individuals would trade food stamps for drugs.[198] Legal advocates seeking to challenge the ban would have an almost impossible task convincing any federal court that applied a similar deferential review that the ban does not further some valid state interest.

*2. Disparate Impact and Title VI of the Civil Rights Act of 1964*

In response to the shortcomings of the Equal Protection Clause in addressing disparate impact, civil rights advocates have traditionally looked to Title VI of the Civil Rights Act of 1964. However, a series of recently decided U.S. Supreme Court cases has narrowed this avenue of redressing the disparate racial impact of collateral sanctions. While not completely foreclosed, challenges under regulations promulgated pursuant to Title VI and § 1983 have only a questionable chance of success. Although this challenge may be used to supplement state court litigation in some jurisdictions, it cannot be relied on as the centerpiece of any litigation strategy.

Sections 601 and 602 of Title VI provide two potential avenues for enforcement. Section 601 of Title VI prohibits discrimination in federally assisted programs, providing that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[199] The United States Supreme Court interpreted section 601 to allow citizens to file private lawsuits challenging the discriminatory actions of any recipient of federal funds,[200] but required plaintiffs to prove that recipients of the funds engaged in intentional discrimination.[201]

Section 602 of Title VI states that federal agencies shall issue regulations that specify how agencies should deal with recipients of federal funds who implement policies resulting in disparate impact. [202] In *Guardians Ass'n v.*

196. *Id.* at 424-27.

197. *Id.* at 425.

198. *Id.*

199. 42 U.S.C. § 2000d (2000).

200. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979).

201. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (opinion of Brennan, J.).

202. § 602, 42 U.S.C. § 2000d-1 (2000). The section states:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions

*Civil Service Commission*,[203] Justice White strongly suggested that this part of the Act prohibits practices that have a disparate racial impact.[204] For some time there was a presumed private right of action to enforce Title VI regulations.[205] Under this framework, Title VI had become a powerful weapon to attack systemic discrimination.[206]

*Alexander v. Sandoval*[207] put an end to all of that. In *Sandoval*, the Supreme Court found that no implied private cause of action existed to enforce Title VI regulations enacted pursuant to section 602.[208] According to the Supreme Court, only section 601 creates a private right of action and it prohibits only intentional discrimination.[209] Federal agencies may use section 602 to further

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> of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

*Id.* A significant number of regulations explicitly prohibiting disparate impact in federally funded programs have been promulgated under section 602. *See* Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 592 n.13 ("[S]hortly after these initial regulations were promulgated, every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination."); *see also, e.g.*, 7 C.F.R. § 15.3(b)(2) (2003) (Department of Agriculture); 10 C.F.R. § 1040.13(c)-(d) (2003) (Department of Energy); 15 C.F.R. § 8.4(b)(2) (2003) (Department of Commerce); 22 C.F.R. § 141.3(b)(2) (2003) (Department of State); 24 C.F.R. § 1.4(2)(i), (3) (2003) (Department of Housing and Urban Development); 28 C.F.R. § 42.104(b)(2)-(3) (2004) (Department of Justice); 29 C.F.R. § 31.3(b)(2)-(3) (2003) (Department of Labor); 32 C.F.R. § 195.4(b)(2) (2004) (Department of Defense); 34 C.F.R. § 100.3(b)(2) (2003) (Department of Education); 43 C.F.R. § 17.3(b)(2)-(3) (2004) (Department of the Interior); 45 C.F.R. § 80.3(b)(2)-(3) (2003) (Department of Health and Human Services); 49 C.F.R. § 21.5(b)(2)-(3) (2003) (Department of Transportation).

203. 463 U.S. 582 (1983).

204. *See id.* at 589 ("The Court squarely held in *Lau v. Nichols* that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those endeavors that have a disparate impact on racial minorities." (citation omitted)); Lau v. Nichols, 414 U.S. 563, 566 (1974) (finding a violation of Title VI where a school district's policy had a disparate impact).

205. Alexander v. Sandoval, 532 U.S. 275, 294 (2001) (Stevens, J., dissenting); Powell v. Ridge, 189 F.3d 387, 400 (3d Cir. 1999); Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 936-37 (3d Cir. 1997); N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Latinos Unidos de Chelsea en Accion v. Sec'y of Hous. & Urban Dev., 799 F.2d 774, 785 & n.20 (1st Cir. 1986).

206. *See, e.g.*, Pitts v. Freeman, 755 F.2d 1423 (11th Cir. 1985) (challenging racially discriminatory impact of school construction and expansion); Larry P. *ex rel.* Lucille P. v. Riles, 793 F.2d 969 (9th Cir. 1984) (challenging racially discriminatory impact of use of IQ tests to place educable mentally retarded students); Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (challenging racial profiling); Davis v. New York City Hous. Auth., 60 F. Supp. 2d 220 (S.D.N.Y. 1999) (challenging racially discriminatory impact of housing policies); Md. State Conference of NAACP Branches v. Md. Dep't of State Police, 72 F. Supp. 2d 560 (D. Md. 1999) (challenging racial profiling); Linton v. Tenn. Comm'r of Health & Env't, No. 3-87-0941, 1990 WL 180245 (M.D. Tenn. July 5, 1990) (challenging racially discriminatory impact of policy regarding access to nursing homes).

207. 532 U.S. 275 (2001).

208. *Id.* at 293.

209. *Id.* at 280.

enforce rights conferred in section 601, but section 602 cannot create new private rights that are not contained in section 601 nor can it create an additional private right of action.[210]

After *Sandoval*, many civil rights advocates looked to § 1983 as the means to challenge disparate impact under Title VI regulations.[211] In fact, some members of the Court appeared to invite such actions.[212] Section 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws,"[213] which includes rights conferred by federal statute.[214] Accordingly, § 1983 provides a private right of action whenever an individual has been deprived of any constitutional or statutory federal right under color of state law.[215] Moreover, several courts have interpreted federal regulations to create rights enforceable under § 1983, including regulations promulgated under Title VI.[216]

But it appears that this was a short-lived remedy. The Supreme Court effectively ended the use of § 1983 to enforce Title VI regulations with its decision in *Gonzaga University v. Doe*.[217] In *Gonzaga*, the plaintiff sought to enforce conditions imposed by the Family Educational Rights and Privacy Act of 1974 (FERPA)[218] against the State of Washington. Ultimately the Court rejected plaintiff's claim, concluding that Congress had not "*intended to create a federal right*" in FERPA.[219] In reaching its conclusion, the *Gonzaga* Court

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210. *Id.* at 291-92.

211. *See, e.g.*, Robinson v. Kansas, 295 F.3d 1183 (10th Cir 2002); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001).

212. *Sandoval*, 532 U.S. at 299-300 (Stevens, J., dissenting) (stating that *Sandoval* was merely an exercise in mental gymnastics because a cause of action is still available under § 1983).

213. 42 U.S.C. § 1983 (2000).

214. Maine v. Thiboutot, 448 U.S. 1, 4-8 (1980).

215. *See* 42 U.S.C. § 1983; *see also Thiboutot*, 448 U.S. at 4.

216. *See, e.g.*, Powell v. Ridge, 189 F.3d 387, 401-03 (3d Cir. 1999) (holding that Title VI administrative regulations prohibiting disparate impact could be enforced under § 1983); Buckley v. City of Redding, 66 F.3d 188, 190-93 (9th Cir. 1995) (holding that regulations promulgated under an act create enforceable rights under § 1983); Loschiavo v. City of Dearborn, 33 F.3d 548, 551-53 (6th Cir. 1994); W. Va. Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 18 (3d Cir. 1989) (finding that "valid federal regulations as well as federal statutes may create rights enforceable under section 1983").

217. 536 U.S. 273 (2002).

218. 20 U.S.C. § 1232(g) (2000).

219. 536 U.S. at 283; *see also id.* at 291 (Breyer, J., concurring in the judgment) ("The ultimate question, in respect to whether private individuals may bring a lawsuit to enforce a federal statute, through 42 U.S.C. § 1983 or otherwise, is a question of congressional intent."). *Gonzaga* altered the test to determine the existence of rights enforceable under § 1983 established by the Supreme Court in *Blessing v. Freestone*, 520 U.S. 329 (1997). In *Blessing*, the Supreme Court noted that they

> [had] traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that

asserted that some courts had misunderstood its previous decision in *Blessing* to permit § 1983 enforcement of statutes whenever "the plaintiff falls within the general zone of interest that the statute is intended to protect."[220] The Court flatly rejected this interpretation, stating, "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."[221] When *Gonzaga* is read with *Sandoval*, it seems likely that the current Supreme Court would not allow a § 1983 action to enforce Title VI disparate impact regulations. *Gonzaga* focuses on congressional intent to create a right, which was the support *Sandoval* found lacking in section 602.[222] Prior to *Gonzaga*, courts had allowed a private right of action to enforce section 602 of Title VI based on the conclusion that the test for a Section 1983 cause of action was distinct from that of implied rights of action under other statutes.[223] The *Gonzaga* court has blended the § 1983 test with the test for establishing an implied private cause of action[224] and has stated that "implied right of action cases should guide the determination of whether a statute confers rights enforceable under Section 1983."[225]

Interpretation of *Gonzaga* has lead to widespread disagreement among the lower federal courts. Under some lower court interpretations, *Gonzaga* effectively eliminates enforcement of statutory rights under Section 1983 by requiring the plaintiff to demonstrate an implied private right of action in the underlying statute.[226] Still, under others, *Gonzaga* would effect no change in the § 1983 doctrine.[227] Although *Gonzaga*'s treatment by lower courts does

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> its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

*Id.* at 340-41 (citations omitted).

220. *Gonzaga*, 536 U.S. at 283.

221. Id.

222. *Compare id.* at 282-86, *with* Alexander v. Sandoval, 532 U.S. 275, 286-88 (2001). In *Sandoval*, the Court made an explicit distinction between section 601 of Title VI and section 602, finding an implied cause of action exists under section 601 but not under section 602. *Id.* at 286.

223. *Gonzaga*, 536 U.S. at 279-82.

224. *Id.* at 302-03 (Stevens, J., dissenting).

225. *Id.* at 283.

226. Almendares v. Palmer, No. 3:00-CV-7524, 2002 WL 31730963, at *4 (N.D. Ohio Dec. 3, 2002) (stating that the inquiry is whether Congress unambiguously created a private cause of action); Briand v. Lavigne, 223 F. Supp. 2d 241, 244 (D. Me. 2002) (stating that the determination is whether Congress intended to confer a private right of action); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 329 n.1 (N.Y. 2003) (stating that "where a statute does not clearly and unambiguously create an implied private right of action, it also does not create rights enforceable under 42 U.S.C. § 1983").

227. *See* Sabree *ex rel.* Sabree v. Richman, 367 F.3d 180 (3d Cir. 2004) (acknowledging *Gonzaga*, but then applying *Blessing* test); Bryson v. Shumway, 308 F.3d 79, 88-89 (1st Cir. 2002) (acknowledging *Gonzaga*, but then applying *Blessing* test with little modification); Mo. Child Care Ass'n v. Cross, 294 F.3d 1034, 1040 n.8 (8th Cir. 2002) (limiting *Gonzaga* to the specific holding that the Family Educational Rights and Privacy Act creates no § 1983 rights); Kapps v. Wing, 283 F. Supp. 2d 866, 879-81 (E.D.N.Y. 2003) (acknowledging *Gonzaga*, but then applying *Blessing* test); Rabin v. Wilson-Coker, 266 F. Supp. 2d 332, 341 (D. Conn. 2003) (acknowledging *Gonzaga*, but then applying *Blessing* test), *rev'd* 362 F.3d 190 (2d Cir. 2004); Arrington v. Fuller, 237 F. Supp. 2d 1307, 1311–15 (M.D. Ala. 2002) (same); *see also Gonzaga*,

not signify a foregone conclusion that § 1983 is unavailable, the divergent analyses by the courts makes its future far from certain. Moreover, the ultimate arbiter will likely be the Supreme Court; and, if its decisions in *Sandoval* and *Gonzaga* are any indication, advocates should not rely on the availability of § 1983.[228]

### *B. Limitations on Current Non-litigation Strategies*

Given the limited chance of success and the expense of litigation under federal law, advocates have rightly focused their limited resources on legislative and policy reform and on helping individual clients navigate the complex maze of reentry barriers. Advocates have been actively pursuing legislative and policy change at the federal, state, and local level to eradicate collateral sanctions.[229] Although there has been recent momentum at the federal level, with the introduction in Congress of the Second Chance Act of 2004: Community Safety through Recidivism Prevention,[230] advocates are

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536 U.S. at 302 (noting that if the Court is taken on its word "there should be no difference between the Court's 'new' approach to discerning a federal right in the § 1983 context and the test we have 'traditionally' used, as articulated in *Blessing*").

228. The potential unavailability of Title VI does not mean that all means to challenge the disproportionate impact of collateral sanctions on racial minorities are lost. Ex-offenders are blocked from employment not only by formal statutes and ordinances, but also by private discrimination. *See* Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-convicts*, 38 U.S.F. L. REV. 193, 196 (2004). A study of five major cities showed that two-thirds of employers would not knowingly hire ex-offenders and one-third checked criminal histories to eliminate ex-offenders. *Id.* Coupled with the disparate rate of incarceration of African Americans and other racial minorities, such policies have a disproportionate impact. The U.S. Equal Employment Opportunity Commission has ruled that employment policies excluding people based upon arrests or convictions unrelated to the job sought may violate Title VII because of their disproportionate impact on minorities. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, N-91 5.061, 2 COMPLIANCE MANUAL § I, *available at* http://www.hirecheck.com/downloads/pdf/ComplianceAssistance/EEOCNOFRAME.pdf (last visited Jan. 14, 2005). Similar regulations have been adopted in state human rights agencies. *See* N.Y. EXEC. LAW § 296(15) (McKinney 2001 & Supp. 2005) ("It shall be . . . unlawful . . . to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by a reason of a finding of a lack of 'good moral character' which is based upon his or her having been convicted of one more criminal offenses . . . ."). Accordingly, advocates should consider filing disparate impact litigation under Title VII challenging discriminatory employment practices.

229. At the federal level, the Second Chance Act of 2004: Community Safety Through Recidivism Prevention was introduced on June 23, 2004, in the House of Representatives with bi-partisan support by Representatives Rob Portman (R., OH), Danny Davis (D., IL.), Mark Souder (R., IN), and Stephanie Tubbs-Jones (D., OH). H.R. 4676, 108th Cong. (2004). In addition, several institutional projects have been launched at the national level to address reentry issues.

> The Council of State Governments has established a Reentry Policy Council to develop model programs and legislation to make prisoner reentry more successful. The American Bar Association Criminal Justice Section has created a Task Force on Collateral Sanctions to propose a new framework for assessing the growing maze of legal barriers to the reintegration of ex-offenders.

Travis et al., *supra* note 5, at 13.

230. H.R. 4676.

unsure of the legislation's chances for success, and the current legislation does not completely repeal the federal limitations placed on education and welfare assistance.[231] Thus, while the bill's passage would be a significant victory, it would leave in place many of the obstacles currently faced by ex-offenders.

There have also been some legislative successes at the state level. For example, Pennsylvania recently repealed its welfare ban,[232] and Delaware passed a bill lifting the ban on licensing for people with felony convictions in over thirty-five professions.[233] Because so many barriers are sanctioned by explicit state law or discretionary application of federal policy by state agencies, these state level initiatives are an important strategy for reform. They are, however, sporadic, subject to the whims of political will, and could take many years to achieve meaningful reform.

There are an increasing number of programs at the federal and state level aimed at assisting ex-offenders to navigate the maze of collateral sanctions and meet their daily needs. For example, in the 2004 State of the Union address President Bush unveiled a proposal to spend $300 million on reentry initiatives over the next few years to help ex-offenders obtain housing, employment, and mentoring.[234] The federal initiative will fund direct services programs like

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231. The Second Chance Act would establish a National Adult and Juvenile Offender Reentry Resource Center for states, local governments, service providers, and other organizations to collect and disseminate best practices and provide training and support around reentry. *Id.* § 3(m). It would also create a federal task force to review and issue a report on the federal barriers to reentry and provide grants to community based organizations for the purposes of providing mentoring and other transitional services essential to re-integrating ex-offenders. *Id.* §§ 4, 16. While these reforms represent an important first step in addressing the myriad of barriers facing those returning home from prison, they do not repeal the existing barriers. The bill upholds the ban on federal student loans, limiting its applicability to those convicted while receiving federal aid, as opposed to the current interpretation that denies aid to those with past as well as present drug convictions. *Id.* § 15. The proposed law leaves in place federal restrictions on welfare and public housing. Most employment restrictions are creatures of state law, and thus the bill does nothing to eliminate those.

232. Press Release, Pennsylvania Department of Public Welfare, Were You Turned Down for Cash Assistance or Food Stamps?, *available at* http://www.clsphila.org/PDF%20folder/Notice_lifting_ban_on_DPW_benefits.pdf (last visited Jan. 14, 2005).

233. Annie Turner, *Delaware Law Lifts Employment Barrier for Ex-cons*, JOIN TOGETHER ONLINE, Aug. 13, 2004, *at* http://www.jointogether.org/sa/news/features/reader/0%2C1854%2C574135%2C00.html ("The legislation, sponsored by State Senator Karen Peterson (D) says that licenses may only be refused if the applicant has been convicted of crimes that are 'substantially related' to the licensed profession or occupation.")

234. President Bush announced:

> This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison. So tonight, I propose a four-year, $300 million dollar prisoner re-entry initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups. . . . America is the land of second chance[s]—and when the gates of the prison open, the path ahead should lead to a better life.

Bush, *supra* note 1. The program, implemented through the Department of Labor (DOL), the Department of Housing and Urban Development, and the Department of Justice would help ex-

those already in the community that, in addition to housing, employment, and counseling, help ex-offenders with a full range of services including health care and reunification with children.[235] These programs provide an invaluable service to ex-offenders and mitigate the impact of certain collateral sanctions, but they do not eliminate these restrictions altogether.

## IV. THE CENTERPIECE: STATE COURT LITIGATION

Given the limitations on remedies available under federal law, state constitutional and statutory claims may offer more, and in some cases, the only hope for bringing systemic challenges to post-conviction penalties. In light of inhospitable federal law, turning to more hospitable state courts is not a new strategy in civil rights litigation.[236] State constitutions often offer broader

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offenders find and keep employment, obtain transitional housing and, receive mentoring. U.S. DEP'T OF LABOR, PRESIDENT BUSH'S PRISONER RE-ENTRY INITIATIVE: PROTECTING COMMUNITIES BY HELPING RETURNING INMATES FIND WORK, http://www.dol.gov/cfbci/reentryfactsheet.htm (last visited Jan. 14, 2005) [hereinafter PRESIDENT BUSH'S INITIATIVE]. It would expand on elements of a pilot project at the DOL, the Ready4Work Project, *id.*, which provided funding to two successful direct services programs. U.S. DEP'T OF LABOR, READY4WORK: A BUSINESS, FAITH, COMMUNITY, & CRIMINAL JUSTICE PARTNERSHIP, http://www.dol.gov/cfbci/Ready4Work.htm (last visited Jan. 14, 2005).

235. Two participants in the Federal Ready4Work project provide good examples of the kinds of direct services provided to ex-offenders by community-based organizations. Exodus Transitional Community in East Harlem was established in 1999 by a group of ex-offenders. UNION SQUARE AWARDS, JULIO MEDINA, http://www.fcny.org/scripts/usq/getpage02.pl?orgid=0111 (last visited Jan. 14, 2005).

> Exodus' services include counseling, employment preparation, job, housing, health and education referrals, court and parole assistance, and computer training. Exodus also provides HIV/AIDS education and referrals for the person released from prison and his or her partners, spouses, friends and families. Other activities include an after school group with neighborhood youth and gang members and a speakers' bureau of formerly incarcerated persons who make presentations to raise public awareness about prison conditions and the impact of incarceration on individuals and communities.

*Id.* The City of Memphis Second Chance Program, established by Mayor Willie E. Herrington, offers similar services. PRESIDENT BUSH'S INITIATIVE, *supra* note 225. Legal advocates who represent indigent clients or work on criminal justice issues are increasingly developing programs to address legal problems faced by individuals released from prison. For example, Community Legal Services of Philadelphia's Ex-Offender Unit provides legal services to ex-offenders in the areas of employment, public benefits, family advocacy, public housing and section 8, and expungement of criminal records. *See* CMTY. LEGAL SERVS. OF PHILA., *supra* note 156. The Legal Action Center has, among other things, established the National H.I.R.E. Network to provide training, technical assistance, and other services aimed at increasing employment opportunities for people with criminal records. LEGAL ACTION CTR., LAC PROGRAMS, http://www.lac.org/programs/crimjus.html (last visited Jan. 13, 2005).

236. *See* William J. Brennan, Jr. *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) ("Between 1970 and 1984, state courts, increasingly reluctant to follow the federal lead, have handed down over 250 published opinions holding that constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law.").

equal protection and due process protections.[237] Indeed, by one commentator's count, at least forty-two states have given their own constitutions more expansive interpretations than that accorded to the U.S. Constitution in a similar context.[238] As a result, in many areas of civil rights and civil liberties, challenges that were encountering resistance in federal courts were more successful when litigated in state court using state constitutional or statutory provisions.[239]

The litigation approach must be carefully crafted for each state based upon constitutional or statutory language that may broadly protect rights, and upon the traditional understandings of such provisions in light of the specific restrictions. Individual advocates must identify the most viable states in which to mount these strategic legal challenges. Each state has adopted a myriad of sanctions, through legislation, administrative regulations and policies, and municipal ordinances. Similarly, each state offers a multitude of constitutional and statutory provisions that might provide a basis to challenge reentry barriers. The following discussion does not attempt to provide an in-depth analysis of the many possible grounds for state challenges to post-conviction sanctions. Rather, the discussion will explore some state constitutional and statutory provisions and analytical tools that should be explored further by advocates and scholars concerned with the impact of these sanctions in their state. Although the language and application of constitutional and statutory provisions will vary from state to state, the type of litigation advocated in this Article falls into three general legal frameworks: equal protection challenges, due process challenges, and challenges under state poverty provisions.

### *A. Equal Protection*

Several state courts have adopted the same approach to equal protection analysis under the state constitution as under the Federal Constitution.[240] In those states, social and economic legislation, such as limiting economic

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237. *E.g.*, Doe v. Dep't of Soc. Servs., 487 N.W.2d. 166, 174-76 (Mich. 1992). Consistent with principles of federalism, states may elevate civil rights above the federal constitutional floor to satisfy the demands of its constitutional text and history, as well as local concerns. *Id.*

238. JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 1:7 (2003).

239. *Compare* Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996), *and* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003), *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *compare* Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982), *with* Harris v. McRae, 448 U.S. 297 (1980), *and* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). In addition, state courts struck down sodomy laws under their own constitutions long before the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). *E.g.*, Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

240. *See* Kelly v. State, 525 N.W.2d 409, 411 (Iowa 1994); Gora v. City of Ferndale, 576 N.W.2d 141, 145 (Mich. 1998); *see also* Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1014 (2003); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1206 (1985) ("Most state courts . . . have not developed doctrine independent of the federal equal protection clause under state equality provisions.").

entitlements of ex-offenders, is presumptively valid and will be upheld if the classification is rationally related to some legitimate state interest.[241] Some state courts, however, have taken a more rigorous approach to equal protection.[242] These courts may apply heightened review to a broader range of rights than the Federal Constitution, such as the right to education or the right to pursue an occupation and livelihood.[243] Or, in applying lower level "rational basis" scrutiny, courts in these states apply a more rigorous analysis than the highly deferential federal rational basis review.[244]

Economic and social prohibitions on ex-offenders should be challenged under state equal protection clauses that have been interpreted to provide stronger protection than their federal counterpart. While the precise standard may vary from state to state, any analysis that offers more searching review than a near irrebuttable presumption of validity provides an opportunity to carefully consider why denying housing, employment, or welfare to those with criminal records unfairly and unjustifiably discriminates against individuals with convictions.[245] Wyoming is illustrative of this type of challenge. Derived

241. *E.g.*, *Kelly*, 525 N.W.2d at 411.

242. *See* Williams v. State, 895 P.2d 99, 103 (Alaska 1995); Baker v. State, 744 A.2d 864, 867 (Vt. 1999); *see also* Pan-Alaska Constr., Inc. v. State, 892 P.2d 159, 162-63 (Alaska 1995).

243. *See generally* Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983) (education); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (same); Horton v. Meskil, 376 A.2d 359 (Conn. 1977) (same); Page v. Welfare Comm'r, 365 A.2d 1118 (Conn. 1976) (noting gender is a suspect classification subject to strict scrutiny); People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974) (same); Knowles v. State Bd. of Educ., 547 P.2d 699 (Kan. 1976) (education); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989) (same); Robinson v. Cahill, 339 A.2d 193 (N.J. 1975) (same); Tanner v. Or. Health Scis. Univ., 971 P.2d 435 (Or. Ct. App. 1998) (holding sexual orientation is a suspect class); Low Income Women of Tex. v. Bost, 38 S.W.3d 689, 696-97 (Tex. Ct. App. 2000) (education); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (same); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979) (same).

244. Bierkamp v. Rogers, 293 N.W.2d 577, 583-84 (Iowa 1980) (applying a more rigorous rational basis review to strike down guest statute similar to those upheld under federal rational basis review); MacCallum v. Seymour, 686 A.2d 935, 939-40 (Vt. 1996); Williams, *supra* note 241, at 1219-20 ("Under the first, the state court adopts the federal frame of analysis but applies those constructs independently. Under the second, courts reject the federal constructs and apply their own analytical frameworks." (footnote omitted)).

245. The example of Wyoming used in the following discussion illustrates a state that applies a more searching rational basis review to all social and economic legislation than afforded under the Federal Constitution. Certain states may provide heightened review to certain rights that are afforded special treatment under other provisions of the constitution. In *Butte Community Union v. Lewis*, 712 P.2d 1309 (Mont. 1986), the Supreme Court of Montana combined the state equality guarantee with another constitutional provision in deciding to strike down a state statute that eliminated certain welfare benefits. A benefit lodged in the state constitution, the court stated, was an interest whose abridgement requires something more than a rational relationship to a governmental objective. *Id.* at 1314. Given the importance of equal protection of the law, the court saw a need to develop a meaningful mid-level analysis, because "[t]he old rational basis test allows government to discriminate among classes of people for the most whimsical reasons." *Id.* Hence, the court concluded that "welfare benefits grounded in the Constitution itself are deserving of great protection." *Id.*

from four separate provisions of the state constitution,[246] Wyoming's equal protection guarantee "'mandates that all persons similarly situated shall be treated alike, both in privileges conferred and in liabilities imposed,'"[247] and offers more protection than the Federal Equal Protection Clause.[248] Wyoming is also one of nineteen states that permanently deny cash assistance and food stamp benefits to individuals convicted of drug-related felonies.[249] Together, these two factors make Wyoming an ideal jurisdiction to challenge the TANF ban.

Wyoming courts have adopted a two-tiered approach to equal protection analysis, applying strict scrutiny where a suspect class or fundamental right is implicated and a rational relationship test where ordinary interests are involved.[250] Recognizing the state constitution's particular prohibition against discrimination based on any circumstance or condition, the Wyoming Supreme Court has held that "'even at the lowest traditional . . . level [of scrutiny],'" state courts are empowered "'to scrutinize classification legislation more carefully than they can under federal doctrine.'"[251] The State's rational relationship test makes four inquiries: (1) "what class is harmed by the legislation and has [the] group been subjected to a 'tradition of disfavor' by [the state's] laws"; (2) "what is the public purpose [to be] served by the law";

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246. WYO. CONST. art. I, § 2 (providing that "[i]n their inherent right of life, liberty and the pursuit of happiness, all members of the human race are equal").

The Wyoming Constitution provides:

> Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthyness duly ascertained by a court of competent jurisdiction.

*Id.* § 3; *id.* § 34 ("All laws of a general nature shall have a uniform operation.").

> The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: For . . . granting to any corporation, association or individual . . . any special or exclusive privilege, immunity or franchise whatever . . . . In all other cases where a general law can be made applicable no special law shall be enacted.

*Id.* art. III, § 27.

247. *See* Allhusen v. Wyo. Mental Health Professions Licensing Bd., 898 P.2d 878, 884 (Wyo. 1995) (quoting Small v. State, 689 P.2d 420, 425 (Wyo. 1984)).

248. *Id.*; *see* Wilson v. State, 841 P.2d 90, 95 (Wyo. 1992); Johnson v. State Hearing Examiner's Office, 838 P.2d 158, 164-65 (Wyo. 1992).

249. Wyo. Rules & Regulations, Personal Opportunities with Employment Responsibilities § 6(a)(ii)(G)(IV) (2004), WL WY ADC FAMS PO ch. 1, § 6; WYO. DEP'T OF FAMILY SERVS., INCLUDING/EXCLUDING INDIVIDUALS FOR FOOD STAMP AND POWER, § 507, http://www.thresholdcomputer.net/dfs/training.htm (2004).

250. Hays v. State, 768 P.2d 11, 15 (Wyo. 1989); *see Johnson*, 838 P.2d at 166-67.

251. *Johnson*, 838 P.2d at 165 (quoting Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527, 553 (1986)). The court found the Federal Constitution's application of heightened scrutiny for those laws seeking to "distribute benefits or burdens because of race, color, alienage, sex or legitimacy inadequate to protect against legislative discrimination based on any other characteristic other than individual incompetency," as required by article 1, section 3 of the Wyoming Constitution. *Id.* The court also pointed to the state constitution's protection of natural rights. *Id.*

(3) "what is the characteristic of the disadvantaged class that justifies disparate treatment"; and (4) "how are the characteristics used to distinguish people for disparate treatment relevant" to the purposes of the challenged law.[252] The underlying purpose of this test is to require that an assumed characteristic of a group be *relevant* to a valid public purpose.[253]

The first prong of the test examines the harm to the class and determines whether the group has been subjected to a "'tradition of disfavor'" by the laws.[254] "'That a classification disadvantages a traditionally disfavored class signals the likelihood that the classification is a product of stereotypical thinking.'"[255] Wyoming's adoption of the TANF ban clearly harms those convicted of drug offenses. The ban on welfare benefits permanently denies those convicted of drug-related felonies financial assistance to support themselves and their families.[256] The women impacted by the ban are more likely than those without a criminal record to be in need of economic assistance,[257] and the ban seriously hinders an ex-offender's "ability to overcome addiction, . . . raise . . . children, find work, and access drug treatment services."[258] Ex-drug offenders may have a difficult time securing employment and thereby supporting themselves through other means because of their relatively low employment skills, employment and licensing restrictions, and the stigma associated with a criminal record.[259] The ban further undermines hopes of survival in the outside world.[260] Furthermore, ex drug offenders (and ex-offenders generally) have been subjected to a tradition of disfavor by the law. Wyoming law includes several examples of discrimination against individuals with felony convictions, including the denial of public assistance,[261] public housing, certain forms of employment, and

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252. *Id.* at 166.

253. *Id.* at 165.

254. *Id.* at 166 (quoting Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 Harv. L. Rev. 1146, 1146 (1987)).

255. *Id.* (quoting Note, *supra* note 255, at 1155).

256. *See* ALLARD, *supra* note 102, at 1.

257. *Id.* at 8 ("Nationally, Department of Justice data show that nearly 30% of women in prison have been on welfare in the month prior to their arrest, and as such we anticipate a significant number of women will require public assistance immediately upon their release from prison.").

258. *Id.* at 8, 10, 17-24; see also notes 34-3 and accompanying text, *supra*.

259. Cynthia Godsoe, *The Ban on Welfare for Felony Drug Offenders: Giving a New Meaning to "Life Sentence,"* 13 BERKELEY WOMEN'S L.J. 257, 266 (1998); *see* Allhusen v. State, 898 P.2d 878, 886 (Wyo. 1995) (holding that licensing requirements prohibiting unlicensed counselors employed by private institutions from having any patient contact harmed those counselors because, among other things, it may not even be possible for those individuals to obtain employment in public or educational institutions).

260. *See* Godsoe, *supra* note 260, at 266-67.

261. Wyo. Rules & Regulations, Personal Opportunities with Employment Responsibilities § 6(a)(ii)(G)(IV) (2004), WL WY ADC FAMS PO ch. 1, § 6; WYO. DEP'T OF FAMILY SERVS., INCLUDING/EXCLUDING INDIVIDUALS FOR FOOD STAMPS AND POWER, § 507, http://www.threshold???/dfs/training.htm (2004).

voting rights.[262] Individuals with drug convictions are "'politically powerless' [as] they are deprived of the right to vote and . . . unable to make legislators directly accountable for [their] disparate treatment."[263] In fact, proponents often cite this as the very purpose of felony disenfranchisement statutes.[264] In light of these restrictions, the Wyoming Supreme Court has already found that ex-offenders fulfill the requirements of this prong of the equal protection analysis:

> It is fair to state that members of this class, persons on probation, parole, or bail, have been subject to a tradition of disfavor by our laws. Public policy traditionally has assumed it is necessary to impose special requirements as to conduct, freedom of movement, and other responsibilities upon those members in this class.[265]

The second prong of Wyoming's test identifies the public purpose of the legislation.[266] In implementing the federal welfare ban, Wyoming did not pass separate legislation or provide an independent rationale for the restriction.[267] The federal ban was implemented through regulations promulgated by Wyoming's Department of Family Services pursuant to its authority under legislation mandating the provision of public assistance and social services to those unable to support themselves.[268] As discussed in Park III. A, supra, in *Turner v. Glickman*, a federal court of appeals held that the ban on TANF assistance does not violate federal equal protection or substantive due process. Wyoming would likely adopt the purposes and defense offered in the federal challenge to the lifetime welfare ban: "(1) deterring drug use; (2) reducing

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262. WYO. CONST. art. 6, § 6.

263. Johnson v. State Hearing Examiner's Office, 838 P.2d 158, 166 (Wyo. 1992). Individuals convicted of a felony in Wyoming lose their voting rights unless they have their rights restored. WYO. CONST. art. 6, § 6. Mindful that the judicial branch has a particular obligation to protect the politically powerless, the Wyoming Supreme Court in *Johnson* found that individuals under the age of eighteen whose driver licenses were revoked for alcohol related offenses were politically powerless and especially deserving of judicial protection. *Johnson*, 838 P.2d at 166.

264. *See, e.g.*, Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967).

> A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact. On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.

*Id.*

265. Garton v. State, 910 P.2d 1348, 1354 (Wyo. 1996).

266. *See Johnson*, 838 P.2d at 166.

267. *See* Wyo. Rules & Regulations, Personal Opportunities with Employment Responsibilities § 1 (2004), WL WY ADC FAMS PO ch. 1, § 1.

268. The Public Assistance and Social Services Law provides: "The department shall provide and administer programs for public assistance and social services in Wyoming to those individuals lacking sufficient income or resources to provide themselves or their families with a reasonable subsistence compatible with decency and health or with services necessary for their well-being." WYO. STAT. ANN. § 42-2-103 (Michie 2003).

fraud in the food stamp program; and (3) curbing welfare spending."[269] All three are likely to be considered valid public goals.[270]

The third prong of the rational basis test demands inquiry into what characteristics of individuals convicted of drug-related crimes justify the disparate treatment.[271] The Wyoming Supreme Court has made clear that "the characteristics ascribed to the group to justify the classification must also rest on more than conjecture."[272] Therefore, the State would have to show that persons convicted of drug crimes share some common characteristic that justifies singling them out for denial of welfare in the interest of deterring drug abuse, reducing fraud, or reducing welfare spending. "It is important to the understanding of equal protection not to confuse commonly shared prejudices with relevance."[273] Other than the fact that they were all convicted for drug-related crimes, this class of individuals may have very little in common that justifies grouping them together for disparate treatment. The legislation lumps together those convicted of charges ranging from simple possession to drug sales or trafficking.[274] This group has little in common. Actions that may deter fraud for someone convicted of possession may not deter fraud for those convicted of trafficking. Also, the types of public assistance abuses possible by someone convicted of possessing drugs are different than the possible abuses by someone convicted of possession with intent to sell.

The final prong addresses how the characteristics are relevant to the purpose of the regulation.[275] None of the justifications advanced in *Turner* can withstand careful scrutiny.[276] There is no evidence that a permanent denial of public assistance would deter drug use.[277] In addition, "[g]iven the . . . harsh [criminal sanctions] that drug offenders already face, [the threat of loss of welfare benefits] cannot seriously be viewed as a deterrent."[278] Similarly,

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269. Turner v. Glickman, 207 F.3d 419, 424 (7th Cir. 2000).

270. *See id.* at 424-26.

271. *Johnson*, 838 P.2d at 166.

272. *Id.* at 167.

273. *Id.*

274. Godsoe, *supra* note 260, at 257.

275. *Johnson*, 838 P.2d at 166-67.

276. 207 F.3d 419 (7th Cir. 2000). The *Turner* court did not require any evidentiary basis for the contention that the welfare ban furthered the proffered justifications. *Id.* at 425-26. Instead, the court said it was not irrational for Congress to conclude that the law would deter drug abuse and welfare fraud. *Id.*

277. Godsoe, *supra* note 260, at 260-63 (arguing that "[l]ike the emphasis on punishment and incarceration driving the 'war on drugs,' the lifetime ban on public assistance fails to address the underlying causes of drug abuse and trafficking in our society, such as poverty and a lack of employment or educational opportunities"). Indeed, the tough criminal penalties imposed by the war on drugs have failed to solve the addiction problem in America. *Id.*; Rubinstein & Mukamal, *supra* note 2. It is hard to imagine that where the war on drugs has failed, denial of welfare benefits will be the cure. On the contrary, empirical evidence suggests that substance abuse treatment is the most effective means of addressing drug addiction. *Id.*

278. Recent Legislation, *Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 115, 110 Stat. 2105 (to be codified at 42 U.S.C. § 862)*, 110 HARV. L. REV. 983, 988 (1997). A person convicted under Wyoming state law of sale or

denying welfare to drug offenders is not a reasonable means to deter fraud among welfare participants.

The justifications for the ban are further undermined by its overbreadth and underinclusion in the class of individuals subject to the ban. If the motivation behind this legislation is to prevent fraud, those burdened should not be those convicted of drug-related offenses, but rather those who have been convicted of crimes with fraud as a factor or underlying element. Similarly, if one of the true goals is deterring drug use, there are more tailored means to achieve this rationale, such as a freeze out period rather than a permanent ban, or an exception for rehabilitation. The ban singles out drug offenders for punishment, while leaving those convicted of fraud and every other crime free to obtain benefits. In *Johnson v. State Hearing Examiners*,[279] the Wyoming Supreme Court found no evidence that revocation of driver's license as punishment for those under nineteen convicted of alcohol related crimes, but not for those a year or two older or convicted of other crimes, was relevant for "purpose[s] of improving highway safety or deterring . . . illegal use or possession of alcohol."[280] Likewise, a Wyoming court or another court applying a standard that carefully scrutinizes the justifications for the lifetime welfare ban for drug offenders is likely to find that it violates equal protection.

Moreover, the welfare ban is inconsistent with the overall purpose of Wyoming's welfare legislation. The public assistance legislation provides that the State "*shall* provide and administer programs for public assistance and social services in Wyoming to those individuals lacking sufficient income or resources to provide themselves or their families with a reasonable subsistence compatible with decency and health or with services necessary for their well-being."[281] Permanently denying welfare based on a single drug conviction frustrates this purpose because it deprives those individuals of public assistance without regard to the fact that they may lack sufficient income or resources to support themselves and their families. The State would have to support the relevance of the restriction with more than just conjecture, and must instead provide some substantive basis for the relationship between the classification and legislative purpose.[282]

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possession of a controlled substance could face incarceration for up to twenty years. WYO. STAT. ANN. § 35-7-1031 (Michie 2003). If the prospect of spending twenty years in prison does not deter an individual from committing a drug related offense, it is unlikely that the possibility of losing welfare benefits after prison will. *See* Recent Legislation, *supra*; *see also Johnson*, 838 P.2d at 166 (holding that criminal penalties for underage drinking and alcohol related driving infractions already served as a direct deterrent against that conduct).

279. 838 P.2d 158 (Wyo. 1992).

280. *Id.* at 167.

281. WYO. STAT. ANN. § 42-2-103(a) (Michie 2003) (emphasis added).

282. Allhusen v. State, 898 P.2d 878, 888 (Wyo. 1995) (holding that there was no substantive difference between counselors employed in private versus public sector to justify harsher licensing requirements for those employed by private companies); *see Johnson*, 838 P.2d at 167 (holding that revocation of driver licenses for those under age nineteen who are convicted of alcohol-related crimes is not relevant to the goals of deterring underage drinking and road safety).

State equal protection provisions may also provide an avenue to challenge prohibitions on economic entitlements that have a racially discriminatory impact. Although state courts have generally avoided disparate impact analysis, some courts have invalidated legislation because of its disproportionate impact on African Americans without requiring proof of intentional discrimination.[283] For example, in *State v. Russell*,[284] by applying a "stricter standard of rational basis review," the Minnesota Supreme Court struck down a sentencing scheme that imposed longer sentences for possession of crack cocaine than for possession of the same quantity of powdered cocaine.[285] The plaintiffs introduced statistical evidence that "a far greater percentage of blacks than whites are sentenced for possession of . . . crack cocaine . . . with more severe consequences than . . . white[s] . . . who possess [the same quantity] of cocaine powder [face]."[286] Judges in other states, including states with a long history of racial discrimination, have suggested that in the appropriate case, courts may be willing to carefully scrutinize statutes that have a disproportionate racial impact.[287]

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283. *See* State v. Russell, 477 N.W.2d 886, 887-88 (Minn. 1991) (finding equal protection violation under state constitution due to more severe sentences imposed for possession of crack cocaine than for powdered cocaine when 96.6% of those charged with possession of crack cocaine are Black and 79.6% of those charged with possession of powdered cocaine are White).

284. 477 N.W.2d 886 (Minn. 1991).

285. *Id.* at 887, 889. According to the court, this heightened review was appropriate "where the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection." *Id.* at 889. The court suggested that because the racial disparity in the punishment "cries out for closer scrutiny," it might be appropriate to invoke strict scrutiny under the Minnesota Constitution. *Id.* at 888 n.2. "[T]he statistics showing the effect of the statute in operation combined with relevant factors that appear in the statute's history could be held to create an inference of invidious discrimination which would trigger the need for satisfaction of a compelling state interest not shown on the record . . . ." *Id.* Nonetheless, the court did not decide the issue, finding that the statute failed Minnesota's rational basis test. *Id.*

286. *Id.* at 887.

287. *See Ex parte* Wooden, 670 So. 2d 892, 895-97 (Ala. 1995). Denying certiorari in a case alleging the disparate impact of sentencing laws, Alabama Supreme Court Justice Cook took the opportunity to file a special concurrence "to acknowledge the gravity of the federal and state constitutional issues implicated by these [drug sentencing] statutes." *Id.* at 894 (Cook, J., concurring specially). Citing national statistics on the racial impact of these laws and referring to the *Russell* decision, Justice Cook noted that the Minnesota rational basis test closely resembles the test Alabama has applied in challenges under its own equal protection clause, *id.* (Cook, J., concurring specially), and "a properly presented challenge of the [sentencing] provisions [at issue in the petition for certiorari] should invoke a standard of review under the Alabama constitution *at least* as searching as [the court had applied in other cases]." *Id.* at 897 (Cook, J., concurring specially). Similarly, in *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995), a closely decided and controversial decision, the Georgia Supreme Court considered an equal protection challenge based on statistics showing that the application of a statute imposing a mandatory life sentence upon a second drug conviction was racially skewed against African Americans. *Id.* at 560. Although the four-justice majority held that the statistics presented were insufficient to establish an equal protection claim, the court explicitly left open the question of "whether statistical evidence alone [may] be sufficient to prove an allegation of discriminatory intent in sentencing under the Georgia Constitution." *Id.* at 562. Two of the three dissenting justices advocated for a

To continue using the welfare ban as an example, legal advocates may be able to demonstrate that the restriction has a disproportionate impact on people of color, particularly women of color. Due to racially biased drug policies and enforcement of drug laws, African Americans and Latinos represent a disproportionate number of people convicted for drug offenses.[288] "[Nationally, w]hile African Americans [represent only] 13% of . . . monthly drug users, [a number consistent with their proportion in the population,] they [account for] 35% of those arrested for drug [possession], 53% of drug [possession] convictions, and 58% of those [sentenced to] prison for drug [possession]."[289] In addition, "as a result of race and gender-based socio-economic inequalities, African American and Latina mothers are highly susceptible to poverty and as such, are disproportionately represented in the welfare system."[290] This kind of statistical evidence at the national and state level, together with evidence of the historical and social context of race in the criminal justice and welfare systems, should be developed to demonstrate that the welfare ban is racially discriminatory.[291]

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new standard under the Georgia Constitution: where a defendant can establish, through statistical evidence, "a prima facie showing sufficient to raise an inference of unequal application of the statute," the burden shifts to the prosecution to demonstrate that the decision was based on race-neutral criteria. *Id.* at 570 (Benham, P.J., dissenting).

288. ALLARD, *supra* note 102, at 25-26. In twenty-one states that impose a lifetime ban on welfare benefits, forty-eight percent of women ineligible to receive benefits under the ban from 1996 to 1999 were African American or Latina. *Id.* at 6. "In five states African-American women represent the majority of women subject to the ban—Alabama (61%), Delaware (65%), Illinois (Cook County) (86%), Mississippi (54%), and Virginia (63%)." *Id.*

289. *Id.* at 4-5. African Americans and Latinos convicted of drug crimes yielding long sentences account, in large part, for the incarceration explosion over the last thirty years. *See* Chris Weaver & Will Purcell, Comment, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349, 349 (1998). Blacks and Latinos are disproportionately incarcerated for drug offenses compared to their White counterparts. *See* ALLARD, *supra* note 102, at 26.

290. ALLARD, *supra* note 102, at 2.

291. In addition to a disparate impact theory, this inextricable relationship between the racism endemic to America's drug policies and history of racial discrimination that has restricted Black women's access to welfare may provide another basis to establish that the welfare ban is racially discriminatory. In interpreting state equality provisions, state courts may look to the context and history in which discriminatory welfare provisions are enacted, rather than relying exclusively on purposeful intent to establish racial discrimination. *See* Risa E. Kaufman, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions To Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 320-25 (1997) (Citing the Massachusetts court's active protection of civil liberties under the state constitution and, in desegregation cases, its willingness to explore context and history in discerning race discrimination, Kauffman argues that state equal protection guarantees may offer a vehicle to challenge welfare provisions that, though facially race-neutral, are rooted in the history of racial discrimination against Black women and racist stereotypes and myths surrounding welfare recipients.).

### *B. Due Process*

The substantive component of due process protects individuals from arbitrary and irrational deprivation of life, liberty, and property.[292] Substantive due process requires that the statutory imposition not be completely arbitrary and lacking any rational connection to a legitimate government interest.[293] Procedural due process requires the state to comport with fundamental concepts of fairness, most often notice and an opportunity to be heard, before deprivation of life, liberty, or property.[294] While some states apply traditional federal standards in interpreting their own due process provisions, others have opted for a more liberal application of due process protections.[295]

State due process theories offer a particularly bright ray of hope for dismantling post conviction penalties because of recent successes striking down employment barriers to reentry under state law. For example, Pennsylvania courts recently struck down separate statutes barring individuals with criminal convictions from employment as service providers for children and the elderly.[296] The Pennsylvania State Constitution's due process clause vigorously protects the right to work.[297] Even when weighty interests in protecting vulnerable populations are at issue, the legislature must not "'run[] afoul of the deeply ingrained public policy of [the] State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders.'"[298]

In *Nixon v. Commonwealth*,[299] five individuals who were either terminated from their current position or denied a position because of prior convictions challenged Pennsylvania's Older Adults Protective Services Act (OAPSA).[300] The criminal records provision of OAPSA "required any applicant seeking employment in a . . . facility [providing services to the elderly and] any [person employed at such a] facility for less than two years to submit a criminal records report to [their employer]."[301] "[OAPSA] prohibited the hiring or retention of [individuals] whose records revealed . . . [a] convict[ion for certain] enumerated crimes."[302] In affirming the lower court's decision, the Pennsylvania Supreme Court recognized that one of the rights guaranteed

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292. *See* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997).

293. *Id.* at 728.

294. *See* Bell v. Burson, 402 U.S. 535, 542 (1971); Boddie v. Connecticut, 401 U.S. 371, 377-78 (1971).

295. *State Constitutional Rights*, *supra* note 173, at 1466-68.

296. Nixon v. Commonwealth, 839 A.2d 277, 281, 288, 290 (Pa. 2003); Warren County Human Servs. v. State Civil Servs. Comm'n, 844 A.2d 70, 71, 73-74 (Pa. Commw. Ct. 2004).

297. *Warren County*, 844 A.2d at 73.

298. *Id.* at 74 (quoting Sec'y of Revenue v. John's Vending Corp., 309 A.2d 358, 362 (Pa. 1973)). A Massachusetts court reached a similar result in *Cronin v. O'Leary*, No. 00-1713-F, 2001 WL 919969 (Mass. Super. Ct. Aug. 9, 2001), striking down a state statute barring job applicants from municipal employment under the Massachusetts Declaration of Rights. *Id.* at *7.

299. 839 A.2d 277 (Pa. 2003).

300. *Id.* at 279, 282.

301. *Id.* at 281.

302. *Id.*

under Article 1, section 1 of the Pennsylvania Constitution is the due process right to pursue a lawful occupation.[303] However, the court noted that because "[t]he right to engage in a particular occupation is not a fundamental right," the rational basis test is appropriate.[304] Pennsylvania applies a "more restrictive rational basis test" under its due process clase than applied under the Federal Constitution, requiring a showing that the classification bears a "real and substantial relationship" to the interest the legislature is seeking to achieve.[305] Applying this standard, the Court reasoned:

> Here, it is clear that no such real and substantial relationship exists. If the goal of the criminal records chapter is, as the Commonwealth Parties allege, to protect the Commonwealth's vulnerable citizens from those deemed incapable of safely providing for them, there was simply no basis to distinguish caretakers with convictions who had been fortunate enough to hold a single job since July 1, 1997, i.e., a year before the effective date of the chapter, from those who may have successfully worked in the industry for more than a year but had not held one continuous job in a covered facility since July 1, 1997.
>
> The only conceivable explanation for the distinction between individuals who had completed a one year tenure in a covered facility and those who had previously had successful tenures in covered facilities, but had not been at one facility since July 1, 1997, is that the General Assembly determined that those persons convicted of the disqualifying crimes who had been working at a covered facility for more than a year presented less of a risk because they had proven that they were not likely to harm the patient population and had established a degree of trust with their patients and management. However, if convicted criminals who had been working at a covered facility for more than a year as of July 1, 1998, were capable of essentially rehabilitating themselves so as to qualify them to continue working in a covered facility, there should be no reason why other convicted criminals were not, and are not, also capable of doing the same.[306]

Significantly, two justices filing concurrences in *Nixon* would have based the decision on broader grounds, arguing that the statute was unconstitutional because a "lifetime ban [on employment] . . . aris[ing] from the broad class of prior convictions [listed in the statute] has no rational relationship to the

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303. *Id.* at 288. Article I, section I of the Pennsylvania Constitution provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § I.

304. *Nixon*, 839 A.2d at 288.

305. *Id.* at 287 n.15.

306. *Id.* at 289.

legitimate [goal] of protecting the elderly, disabled and infirm from victimization."[307]

Relying on *Nixon*, a court in *Warren County Human Services v. State Civil Services Commission*,[308] struck down Pennsylvania's Child Protective Services Law (CPSL) imposing a lifetime ban on hiring applicants convicted of certain violent and sexual crimes.[309] Edward Roberts worked as a caseworker for the Forest/Warren County Department of Human Services from January 2001 until December 2001, when the Department was reorganized.[310] When he was hired, Mr. Edwards disclosed his 1980 conviction for aggravated assault.[311] After the reorganization, Mr. Edwards was rehired in April 2002 and terminated two months later based on the CPSL.[312] The court held that the CPSL was unconstitutional because, like the statute at issue in *Nixon*, it "[prohibited] the hiring of applicants previously convicted of certain . . . crimes [but did] not ban existing employees [with similar convictions] from continuing to work in the child-care field."[313] The court also found that the lifetime employment ban bore no rational relationship to the state interest in protecting children.[314] On the contrary, the court found that the ban ran "afoul

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307. *Id.* at 291 (Castille, J., concurring) (emphasis added).

308. 844 A.2d 70 (Pa. Commw. Ct 2004).

309. *Id.* at 71-74.

310. *Id.* at 71.

311. *Id.*

312. *Id.* at 71-72.

> Section 6344 provides, in relevant part:
>
> Information relating to prospective child-care personnel
>
> (a) Applicability.—This section applies to all prospective employees of child-care services, prospective foster parents, prospective adoptive parents, prospective self-employed family day-care providers and other persons seeking to provide child-care services under contract with a child-care facility or program.
>
> * * *
>
> (c) Grounds for denying employment.
>
> * * *
>
> (2) In no case shall an administrator hire an applicant if the applicant's criminal history record information indicates the applicant has been convicted of one or more of the following offenses under Title 18 (relating to crimes and offenses) or an equivalent crime under Federal law or the law of another state:
>
> * * *
>
> Section 2702 (relating to aggravated assault).
>
> Section 6344(c) also bars the hiring of individuals to a position with direct child contact who has [sic] ever been convicted of, *inter alia*, kidnapping, robbery, indecent assault, sexual assault and prostitution, or if they have been listed in the central register as the perpetrator of child abuse or convicted of a felony related to drugs in the last five years.

*Id.* at 71 n.2 (citation omitted).

313. *Id.* at 74.

314. *Id.*

of the deeply ingrained public policy of [the] State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders."[315]

Using *Nixon* and *Warner* as a template, advocates in search of state law due process theories should explore whether their state generally adopts a more rigorous approach to due process than under federal analysis or specifically accords the right to work strong protections. The courts in *Nixon* and *Warner* grounded their decision in the right to earn a livelihood, a guarantee that had been vigorously protected by Pennsylvania courts in the past.[316] In other states, the word "liberty," as used in the Due Process Clause, includes the liberty to pursue any livelihood or lawful vocation.[317] Many state courts have held that their constitution's due process clause protects the right to earn a livelihood and pursue a lawful occupation.[318] For example, the Alabama Supreme Court explained in early jurisprudence that the liberty protected by the due process clause

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315. *Id.* (citing Sec'y of Revenue v. John's Vending Corp., 309 A.2d 358, 362 (Pa. 1973)). In *John's Vending*, the court held that under the Cigarette Tax Act, which precluded granting licenses to companies whose officers had been convicted of a crime involving moral turpitude, conviction "cannot provide a basis for revocation of a wholesaler's license," 309 A.2d at 362, "where the prior conviction[] [does] not . . . reflect [on] the [individual's] present ability to properly discharge the responsibilities required by the position." *Id.* The court noted:

> [T]he fact that these crimes occurred almost twenty years ago renders them of little value in predicting future conduct of their perpetrator.
>
> . . . .
>
> We are also mindful that such a result runs afoul of the deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders. This State in recent years has been unalterably committed to rehabilitation of those persons who have been convicted of criminal offenses. To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.

*Id.* at 361-62.

316. Adler v. Montefiore Hosp. Ass'n of W. Pa., 311 A.2d 634, 640 (Pa. 1973); Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954).

317. *See, e.g.*, Toney v. State, 37 So. 332, 333 (Ala. 1904).

318. *See, e.g.*, State v. McMillan, 319 S.E.2d 1, 7 (Ga. 1984) ("A person's right to work, namely the right to accept employment from private firms and individuals, is protected by our state due process clause."); De Berry v. City of La Grange, 8 S.E.2d 146, 150 (Ga. Ct. App. 1940) ("The right to earn a living [which includes right to contract and] pursue[] an ordinary occupation . . . is [a] fundamental, natural, inherent, and . . . most sacred and valuable right[] of a citizen [and cannot be violated without due process of law]."). One Alabama court noted:

> The above cited decisions are in accord with our decisions which hold that the liberty which is so sedulously guarded by the Constitution "includes the right to pursue any useful and harmless occupation, and to conduct the business in the citizens' own way, without being discriminated against either by being prohibited from engaging in it or by being burdened with discriminative taxation.

Ala. Indep. Serv. Station Ass'n v. McDowell, 6 So. 2d 502, 507 (Ala. 1962); *see also* Ironworkers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971) (noting article I, section I of the Iowa Constitution, which provides that all men are by nature free and equal, "must and does extend into the areas of . . . employment practices")

> "embrace[s] the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for the purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." . . . "A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit."[319]

There may be states that explicitly afford the right to work a higher level of scrutiny.[320] But most state courts apply the equivalent of a federal rational basis review to legislation involving employment classifications.[321] Even among those states, however, application of rational basis review may not mean a conclusive presumption that the statute is valid, but may require some serious consideration of whether the legislation is rationally related to the state's interest.[322] For example, North Carolina courts have given greater protection over individual liberties than the Federal Constitution and have applied a rigorous analysis in determining whether a statute violates due process.[323] Article I, section 1 of the North Carolina State Constitution declares that among the inalienable rights of the people are "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."[324] Section 19 of the same provision provides that "[n]o person shall be . . . deprived of . . . liberty, or property, but by the law of the land."[325] Although the law of the land provision is sometimes said to be synonymous with the Due Process Clause of the Federal Constitution, North Carolina courts have made it clear that the clause may provide greater relief than the Federal Due Process Clause and appears to apply a more rigorous review than the rationality standard applied in federal cases.[326] Legislation satisfies the restraints imposed

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319. *Toney*, 37 So. at 333 (quoting Allgeyer v. Louisiana, 165 U.S. 578, 579 (1897); State v. Goodwill, 10 S.E. 285, 286 (W. Va. 1889)).

320. North Carolina is an example. *See infra* notes 324-34 and accompanying text.

321. *E.g.*, Nixon v. Commonwealth, 839 A.2d 277, 287 (Pa. 2003).

322. *See, e.g., McMillan*, 319 S.E.2d at 8 (holding that that blanket prohibitions on practice of law by retired judges receiving retirement benefits violated state due process clause).

323. Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1749, 1752 (1992) (arguing that the Supreme Court of North Carolina has interpreted the North Carolina Constitution to provide greater civil protection than the U.S. Constitution affords and urging practitioners to look to the state constitution as a "rich and vibrant source of personal liberties").

324. N.C. CONST. art. I, § 1.

325. *Id.* § 19.

326. Treants Enters., Inc. v. Onslow County, 350 S.E.2d 365, 369 (N.C. Ct. App. 1986). The court held:

> Although the 'law of the land' is sometimes considered synonymous with Fourteenth Amendment 'due process of law,' our state Supreme Court has reserved the right to grant relief against unreasonable, arbitrary, or capricious legislation under our state constitution in circumstances under which no relief might be granted by federal court interpretation of due process.

by the law of the land clause if it is not "'unreasonable, arbitrary, or capricious, . . . and [if] the means selected . . . has a real and substantial relation to the object sought to be obtained.'"[327] This standard has been recognized to mandate heightened judicial scrutiny.[328]

North Carolina courts have held that the "law of the land" provision "creates a right to conduct a lawful business or to earn a livelihood that is 'fundamental' for purposes of state constitutional analysis."[329] As the court explained in *Treants Enterprises, Inc. v. Onslow County*,[330] "A State cannot under the guise of protecting the public arbitrarily interfere with private businesses or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them."[331] While the court has not adopted strict scrutiny analysis of employment related legislation, instead requiring that the

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*Id.* (citation omitted); Louis Bilionis, *Liberty, the "Law of the Land," and Abortion in North Carolina*, 71 N.C. L. REV. 1839, 1845-46 (1993). Bilionis argued that

> [s]ince very early in their state's constitutional history, North Carolinians have understood the safeguards of the "law of the land" to include the protections of a rigorous, yet responsible, judicial review . . . akin to the heightened judicial scrutiny . . . associated with substantive due process jurisprudence under the federal Due Process Clause.

*Id.*

327. Bilionis, *supra* note 327, at 1848 (alteration and omissions in original) (quoting McNeil v. Harnett County, 398 S.E.2d 475, 482 (1990)).

328. *Id.* at 1849.

329. *Treants*, 350 S.E.2d at 371; *see* Roller v. Allen, 96 S.E.2d 851, 854 (N.C. 1957) ("The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare."); McCormick v. Proctor, 6 S.E.2d 870 (N.C. 1940) (Stacy, C.J., concurring) ("The right to conduct a lawful business, or to earn a livelihood, is regarded as fundamental.").

330. 350 S.E.2d 365 (1986).

331. *Id.* at 371 (quoting Hartford Accident & Indem. Co. v. Ingram, 226 S.E.2d 498, 507 (N.C. 1976)).

> [O]rdinary lawful and innocuous occupations of life . . . must be open to all alike upon the same terms. . . . [T]he legislature can neither deny nor unreasonably curtail common right secured to all men . . . to maintain themselves and their families by the pursuit of usual legitimate and harmless occupations of life.

State v. Ballance, 51 S.E.2d 731, 735 (N.C. 1949). In *Treants*, the court struck down an ordinance that, among other things, prohibited the granting of licenses to any business providing "companionship" if an owner "has been convicted of a felony or of a crime involving prostitution or related offense within the preceding five years" and the business could not "knowingly hire a new employee who has been convicted of a felony within three years or of prostitution . . . or a related offense within two years." *Treants*, 350 S.E.2d at 366-67. The court distinguished due process analysis under the U.S. Constitution from that under the North Carolina Constitution. The standard used by North Carolina courts in determining whether legislation violates the "law of the land" clause is: "[T]he law must have a rational, real and substantial relation to a valid governmental objective (i.e., the protection of the public health, morals, order, safety, or general welfare)." *Id.* at 369-70. The court held that: the statute went far beyond what is necessary to deter organized prostitution, the primary rationale for the ordinance; its sweeping prohibition of all businesses that provide "companionship" covered a host of legitimate businesses such as babysitting, legitimate dating and escort services, and nursing and rest homes; and it was impermissibly vague. *Id.* at 372. Although the court invalidated the statute on overbreadth grounds, the court explicitly declined to find any provision of the statute valid. *Id.* at 373.

law bear a "real and substantial" relationship to the state's interest,[332] the courts have not treated employment related legislation with the kind of conclusive deference applied by the federal courts.[333] There may be other states that have rigorously protected the right to work, which may provide a basis to challenge employment related collateral sanctions.

### *C. Poverty Provisions*

Unlike the Federal Constitution, many state constitutions explicitly impose an obligation—or recognize the need—to provide assistance based on economic need.[334] Some of these provisions "impose an affirmative duty on the state to care for indigent residents," while others explicitly or implicitly grant the state authority to care for the needy using varying degrees of obligatory language.[335] For example, the New York Constitution specifically declares that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."[336] Alabama's Constitution provides: "It shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor."[337] As commentators have argued, these provisions require states to subject welfare classifications to rigorous scrutiny.[338] While the scope of many of these provisions has not been tested in the courts, these provisions provide textual support for the claim that the state has the obligation to care for its indigent residents, and that such an obligation

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332. *Treants*, 350 S.E.2d at 369-70.

333. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999).

334. Rava, *supra* note 168, at 551 (finding that twenty-three state constitutional provisions impose some obligation to provide assistance to indigent persons).

335. *Id.* at 533. Rava categorizes state constitutional "poverty" provision into four categories: (1) Alabama, Kansas, New York, and Oklahoma provide an affirmative duty on the state to care for indigent residents; (2) Montana, New Mexico, Pennsylvania, and, Texas constitutions permit a state actor to care for the needy; (3) Alaska, California, Hawaii, and Louisiana grant the state the generalized power to care for the needy; and (4) "Arizona, Colorado, Idaho, Indiana, Mississippi, Missouri, Nevada, North Carolina, Washington, West Virginia, and Wyoming all contain implied grants of constitutional authority." *Id.* at 554-59.

336. N.Y. CONST. art. XVII, § 1.

337. ALA. CONST. art. IV, § 88.

338. Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 895 (1989).

> [O]ne can understand the reluctance of a federal judge to use the federal Equal Protection and Due Process Clauses to generate substantive floors in areas that are wholly foreign to the federal text. Where, however, the constitutional test demonstrates an intensive substantive interest in the plight of the poor, a judge's willingness to use the state's Equal Protection and Due Process Clauses to reinforce the substantive concerns already present in the state's constitution's text should be much greater.

*Id.*; Hershkoff, *supra* note 334, at 1184.

is incompatible with a lifetime ban on welfare benefits or denial of public housing because of a conviction.[339]

New York has the most well-developed jurisprudence under a poverty provision and may provide some indication of how other states might interpret the contours of their own provisions. While the State has opted out of the lifetime welfare ban, it denies public housing to those convicted of felonies. New York has held that it is a constitutional requirement that the State provide "aid, care and support of persons in need."[340] While New York reviews, with varying degrees of rigor, challenges dealing with the exclusion of poor people from existing welfare programs, it has taken a more deferential approach to questions involving the adequacy of aid provided to the poor.[341] The constitutional mandate "unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy."[342] In other words, the legislature cannot make eligibility contingent on overly burdensome requirements, unrelated to need.[343] Under this rubric, the New York court

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339. Several states have enacted legislation that creates a statutory duty to care for the indigent, which may provide another basis to challenge the welfare ban. For example, *California's Welfare and Institutions Code* provides in relevant part:

> [E]very city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.

CAL. WELF. & INST. CODE § 17000 (West 2001). Advocates may be able to argue that these provisions create a duty to provide housing and welfare to individuals with criminal records, notwithstanding the federal ban. For example, in California, a state that has adopted the welfare ban in its entirety, a court invalidated a county ordinance that barred *all* persons convicted of drug-related felonies from obtaining state funded "general relief" benefits. Arenas v. San Diego County Bd. of Supervisors, 112 Cal. Rptr. 2d 845, 847-48 (Cal. Ct. App. 2001). The legislation implementing the federal ban denied benefits to persons convicted of a drug-related felony on or after December 31, 1997, and denied benefits from the state's "general relief" funds if the person was part of a family receiving funds under the federal program. *Id.* at 847-48. A single man denied general relief benefits pursuant to this ordinance challenged its validity to the extent it denied benefits to individuals convicted before December 31, 1997, or who were not part of a family unit receiving aid under the federally funded CalWORKS program. *Id.* at 848. The three-judge panel of the court of appeals held that the county's ordinance was not authorized by, and was in direct conflict with, section 17001's mandate that counties "relieve and support" indigent residents. *Id.* at 850. Furthermore, the court found the ordinance did not "'further any governmental interest necessary to effectuate the purposes of the general relief statutes.'" *Id.* (quoting Nelson v. Bd. of Supervisors, 235 Cal. Rptr. 305, 309 (Cal. Ct. App. 1987)). Similarly, several states have enacted legislation that expressly creates a right to shelter or housing. Florence Wagman Roisman, *Establishing a Right to Housing: An Advocate's Guide*, *in* THE RIGHTS OF THE HOMELESS (Practicing Law Inst. 1992) (1991), WL 428 PLI/Lit 9 (discussing statutory provisions creating a right to housing); *see also* Hodge v. Ginsberg, 303 S.E.2d 245, 249-50 (W. Va. 1983) (liberally interpreting statute mandating services for "incapacitated adults" to require West Virginia's Department of Social Services to provide shelter to indigent homeless individuals).

340. Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. 1977).

341. Hershkoff, *supra* note 175, at 639-40.

342. *Toia*, 371 N.E.2d at 452.

343. *Id.* (holding that a provision requiring minors to obtain final orders of disposition in support proceedings against their parents before they could become eligible for home relief is so

invalidated a provision that required individuals under the age of twenty-one to obtain a legal disposition against the adult relative responsible for their care[344] and a provision barring legal residents from receiving Medicaid benefits.[345]

Although some have argued that New York courts have not engaged in as searching a review as the history and context of Article XVII demand,[346] this provision offers poor people in New York more protections than under federal law and, at a minimum, a viable possibility of relief.[347] If other states adopt a similar approach, advocates could argue that a decision that completely bans anyone convicted of a drug-related offense from receiving welfare benefits or housing denies aid to otherwise eligible individuals based on criteria other than need, thereby triggering more intense judicial review of the ban. Thus, even the less-than-perfect standard adopted by the New York courts may provide advocates a viable basis for widespread relief.

The New York Court of Appeals decision in *Aliessa ex rel. Fayad v. Novello*,[348] which considered the State's failure to provide Medicaid benefits to legal immigrants,[349] is illustrative of the type of challenge that may be mounted against housing and welfare restrictions. New York has developed a two-tiered system to provide Medicaid.[350] One is subsidized through federal matching funds and conforms to federal standards.[351] The other, funded entirely by the State, provides Medicaid benefits to certain residents "whose income and resources fall below a statutory 'standard of need' and who are not otherwise entitled to federally subsidized Medicaid."[352] New York had long opened its state public assistance program to legal immigrants, but stopped doing so in 1997 after Congress passed the Personal Responsibility and Work

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onerous that it constitutes a practical deprivation of benefits in contravention of the "letter and spirit" of the constitutional provision).

344. *Id.* at 457-52. The court recognized that the law served legitimate state interests in requiring responsible adults to care for their minor dependents and in preventing unnecessary welfare expenditures but found that the delays resulting from having to pursue disposition hearings and the inability to obtain relief in some cases where an adult's whereabouts were unknown effectively denied aid to the needy in violation of the state constitution. *Id.*

345. *See* Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085, 1098-99 (N.Y. 2001). On the other hand, the constitution affords the state wide discretion in setting benefit levels. Bernstein v. Toia, 373 N.E.2d 238, 244 (N.Y. 1977); Barie v. Lavine, 357 N.E.2d 349, 349-50 (N.Y. 1976) (upholding a regulation that required welfare recipients to participate in a work relief program and denied them benefits for thirty days if they failed to comply). Thus, the court has upheld a regulation placing a fixed cap on shelter allowances. *Bernstein*, 373 N.E.2d at 244.

346. Hershkoff, *supra* note 175, at 640-48 (proposing an alternative approach to analyzing claims under New York's poverty provision to fulfill the provision's promise of a "New Deal" in welfare rights)

347. *See id.* 635-37.

348. 754 N.E.2d 1085 (N.Y. 2001).

349. *Id.* at 1085.

350. *Id.* at 1089.

351. *Id.*

352. *Id.*

Opportunity Reconciliation Act's (PRWORA)[353] provision, precluding federally funded Medicaid benefits from certain legal immigrants.[354] The court of appeals held that the provision violated the letter and spirit of the New York Constitution by imposing on plaintiffs an overly burdensome eligibility condition having nothing to do with need, depriving them of an entire category of otherwise available basic necessity benefits.[355] Similarly, the welfare ban for people convicted of drug-related felonies imposes an overly burdensome eligibility condition on otherwise needy individuals. If states insist on maintaining the ban to protect federal funding, advocates can argue that poverty provisions mandate states to provide welfare benefits to individuals with felony convictions through independent state funding streams.

### *D. The Unique Challenge of Educational Aid Bans*

Despite the existence of state constitutional provisions mandating public education and the fact that many states have found education to be a fundamental right under their state constitutions, these provisions will not bolster challenges to restrictions on financial aid to students with felony or drug convictions.[356] Every state constitution contains an education clause mandating the provision of a free, public education.[357] The strength and language of these clauses vary, but most require states to provide a "thorough

353. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 7, 8, and 42 U.S.C.).

354. *Aliessa*, 754 N.E.2d at 1089-90.

355. *Id.*

356. The ban on education support is also the area of collateral sanctions that can benefit most from public education and legislative advocacy. In fact, due to public pressure from a national network of substance abuse professionals, the American Bar Association's Standing Committee on Substance Abuse, and students, there is some momentum for reform in Congress. Press Release, *supra* note 152. "S.1860, a bill to reauthorize the Office of National Drug Policy . . ., [would] revise the 1998 . . . provision of the Higher Education Act . . . [to] make[] [it] applicable only to [students] who were [already] in school at the time they committed their drug offense." While any movement toward reform is helpful, the aid ban provisions would still deny educational opportunity and assistance to many who have paid their debt to society and are trying to live clean lives. *Id.*

357. *See* ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

and efficient" or "general and uniform" education.[358] While these provisions have been very helpful in ensuring access to education for children in elementary and secondary schools, they are of little assistance for those seeking to fund their college education because these provisions have not been held to create any entitlement to higher education.[359] Many of the provisions on their face will not support challenges to restrictions on funding for higher education. For example, the New Jersey Constitution's education provision requires the legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and *eighteen* years."[360] The Florida constitutional provision calls for an adequate and efficient system of high quality public schools, but only for the establishment and maintenance of institutions of higher learning.[361] Others only require the provision of "common schools" which have been interpreted to cover only elementary and secondary education.[362]

In states with more ambiguous constitutional provisions, courts have defined the constitutional mandate in terms that do not translate to the higher education context.[363] A New York state court interpreting its education provision concluded that a "sound basic education" required a high school education.[364] Similarly, other state courts have indicated that the right to education does not

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358. *E.g.*, ARIZ. CONST. art. XI; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; N.J. CONST. art. VIII, § 4, ¶ 1; N.C. CONST. art. IX, § 2.

359. *See, e.g.*, Richards v. League of United Latin Am. Citizens, 868 S.W.2d 306, 315 (Tex. 1993).

360. N.J. CONST. art. VIII, § 4, ¶ 1 (emphasis added).

361. FLA. CONST. art. IX, § 1.

362. *See, e.g.*, Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1354 (N.H. 1997) (stating that constitutional mandate covers elementary and secondary education); DeRolph v. State, 677 N.E.2d 733, 737 (Ohio 1997) (finding that constitutional provision requiring "common school" applied to elementary and secondary education).

363. *See, e.g.*, Hull v. Albrecht, 950 P.2d 1141, 1145 (Ariz. 1997) (requiring the state to provide financing sufficient to provide the facilities and equipment necessary to enable students to master educational goals); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 552-53 (Mass. 1993) (looking to factors such as teacher training, teaching of basic subjects, curriculum development, and availability of guidance counselors to determine whether education was "adequate" under state constitution); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995) (defining sound basic education in terms of minimally adequate physical facilities, instrumentalities of learning, and sufficient numbers of adequately trained teachers); Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 550-51 (N.Y. Sup. Ct. 2001) (emphasizing the need for adequate resources for students with extraordinary needs), *rev'd*, 295 A.2d 1 (N.Y. App. Div. 2002), *aff'd*, 801 N.E.2d (N.Y. 2003); Hoke County Bd. of Educ. v. State, No. 95 CVS1158, 2000 WL 1639686, at *6 (N.C. Super. Oct. 12, 2000) (holding that at-risk students are constitutionally entitled to a pre-school education), *rev'd and remanded by* 599 S.E.2d 365 (N.C. 2004); *DeRolph*, 677 N.E.2d at 741-42 (stating that state constitution required educational facilities in good repair, in addition to supplies and materials); Vincent v. Voight, 614 N.W.2d 388, 397 (Wis. 2000) (requiring legislature to take into account "districts with disproportionate numbers of disabled students, economically disadvantaged students and students with limited English language skills").

364. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 337 (N.Y. 2003).

extend beyond a high school education.[365] Many state courts have held that education is a fundamental right under their state constitutions even though it is not so under the Federal Constitution.[366] However, this protection has not been extended to higher education.[367]

The strongest direct challenge for the ban on funding for higher education will be suits brought under state equal protection provisions in states where the courts apply a more rigorous "rational basis" scrutiny than federal courts. These suits may be brought in states where courts have applied a stringent rational basis analysis to strike irrational government policies and practices. For example, although Maryland courts apply the three-tiered federal equal protection analytical framework,[368] they have long applied a more rigorous rational basis review than that applied under the federal scheme.[369] Also possible is a challenge based on disparate impact in those states that recognize a disparate impact theory under their Equal Protection clauses.[370] Most

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365. Opinion of the Justices, 624 So. 2d 107, 110-11 (Ala. 1993) (stating that constitutional right to "equitable and adequate" education applies to "school aged" children); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (holding that state must equip children for entry to college).

366. *See, e.g.*, Serrano v. Priest, 487 P.2d 1241, 1258 (Cal. 1976); Horton v. Meskill, 376 A.2d 359, 371-73 (Conn. 1977); Washakie County Sch. Dist. Number One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980). These cases stand in contrast to the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). In *Rodriguez*, parents brought a class action suit on behalf of poor and minority students residing in school districts with low property tax bases. *Id.* at 4-5. After holding that there was no federal constitutional right to education protected under the Equal Protection Clause, the Court applied rational basis scrutiny in upholding the Texas system of financing education. *Id.* at 35, 39.

367. *See, e.g.*, Skeen v. State, 505 N.W.2d 299, 315 (Minn. 1993) (holding that although education was a fundamental right under the equal protection clause of the Minnesota Constitution, this protection did not extend beyond providing a basic level of funding to a general education system); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 256-57 (N.D. 1994) (declining to apply strict scrutiny to educational funding scheme while acknowledging that education was a fundamental right); Richards v. League of United Latin Am. Citizens, 868 S.W.2d 306, 315 (Tex. 1993). No court has found a fundamental right to higher education.

368. Frankel v. Bd. of Regents of the Univ. of Md. Sys., 761 A.2d 324, 332 (Md. 2000); Murphy v. Edmonds, 601 A.2d 102, 106-08 (Md. 1992) (applying federal three-tiered equal protection analysis to claim under article 24 of the Declaration of Rights); Attorney Gen. of Md. v. Waldron, 426 A.2d 929, 946 (Md. 1981) ("When evaluating an equal protection claim grounded on Article 24, we utilize in large measure the basic analysis provided by the United States Supreme Court in interpreting the like provision contained in the fourteenth amendment.").

369. Verzi v. Baltimore County, 635 A.2d 967, 970, 975 (Md. 1994) (applying heightened rational basis review); *Waldron*, 426 A.2d at 947-49, 54 (applying heightened rational basis review to employment restriction); Dismas N. Locaria, Frankel v. Board of Regents of the University of Maryland System—*In the Name of Equality: The Proper Expansion of Maryland's Heightened Rational Basis Standard*, 61 MD. L. REV. 847, 847, 853-60 (2002) (discussing cases in which the Maryland Court of Appeals has applied a more stringent rational basis review than that applied under federal equal protection scheme). This standard has been applied to Maryland higher education tuition policies. *Frankel*, 761 A.2d at 334-35 (holding that Maryland tuition policy that precluded in-state tuition status for any student whose primary monetary support came from out-of-state source arbitrarily and irrationally discriminated against bona fide Maryland residents).

370. *See supra* Part IV.A.

jurisdictions that deny aid to students based on criminal activity focus on convictions for drug-related offenses. As there continues to be a correlation between race and poverty, students of color are disproportionately reliant upon financial aid to attend college.[371] When this fact is combined with the fact that many of the convictions at the state and federal level for drug offenses are against people of color, it is likely that education aid ban provisions have had a racially disparate impact on students of color.

## CONCLUSION

Unless the labyrinth of collateral sanctions is dismantled, it will continue to have a devastating impact on the over 600,000 people released from prison each year and on the communities they call home. Without the assistance of the social safety net or the ability to attain an education or employment, these individuals cannot realistically be said to receive a second chance, finding it nearly impossible to afford the basic necessities of life and to successfully reintegrate into society. To eradicate these policies, legal advocates should mount a comprehensive litigation attack coordinated with legislative and public education efforts. In light of inhospitable federal jurisprudence and, conversely, the willingness of state courts to more vigorously protect civil liberties under their own constitutions, the most effective litigation strategy centers around state law theories. Exploring equal protection, due process, and poverty provisions as a starting place, advocates should implement this strategy in states that have broadly interpreted their constitutions and have imposed a myriad of collateral sanctions.

371. *See* DONALD E. HELLER & DOUGLASS T. SHAPIRO, HIGH-STAKES TESTING AND STATE FINANCIAL AID: EVIDENCE FROM MICHIGAN 8 (2000) (showing a statistical study from the State of Michigan that confirms there is a disproportionate relationship between race, poverty, and the need for financial aid to go to college), *available at* http://www.personal.psu.edu/faculty/d/e/deh29/papers/ashe_meap00.pdf.