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MAKING AMERICA "THE LAND OF SECOND CHANCES":* RESTORING SOCIOECONOMIC RIGHTS FOR EX-OFFENDERS

DEBORAH N. ARCHER† & KELE S. WILLIAMS**

"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."[1]

—Statement of ex-offender from Pennsylvania

INTRODUCTION

Virtually every felony conviction carries with it a life sentence. Upon being released from prison, ex-offenders face a vast and increasingly unnavigable maze of mandatory exclusions from valuable social programs and employment opportunities. These twists and turns—exclusions, ranging from restrictions on the ability to get a driver's license[2] to a lifetime federal welfare eligibility ban[3]—impede their hopes of success in the free world. Defenders of collateral sanctions justify most of them as preventive, as "exist[ing] in order to protect society from the ex-offender's corrupting influence, and [as] prevent[ing] the commission of future offenses by ex-offenders."[4] However, in adopting this array of civil disabilities, federal, state, and municipal governments have

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

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1. 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).

2. See *infra* notes 93–101 and accompanying text.

3. See *infra* notes 105–09 and accompanying text.

4. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 161 (1999) [hereinafter Demleitner, Preventing Internal Exile] (internal quotation omitted).

endorsed a social policy that condemns ex-offenders to a diminished social and economic status. For many, it means 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 promulgated and administered indiscriminately, a regime of collateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism.[6]

In this article, we argue that advocates must engage in a comprehensive litigation attack on reentry barriers to dismantle this crippling web of collateral sanctions and to restore the full citizenship of ex-offenders.[7] We argue that in light of unfavorable federal law, litigation under state law theories provides the best hope for relief. While legal advocacy aimed at helping ex-offenders surmount existing barriers to housing, employment, and other basic necessities is an invaluable step, 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, will exert pressure on the political process.[8]

Part I of this article briefly explores the problem of collateral sanctions and their impact on individual offenders, families, and communities.[9] Part II

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5. *See* Jeremy Travis, Laurie O. Robinson & Amy L. Solomon, *Prisoner Reentry: Issues for Practice and Policy*, CRIM. JUST., Spring 2002, at 12, 12.

6. ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 8–10 (3rd ed. 2004) (citiations omitted).

7. *See* Demleitner, *Preventing Internal Exile supra* note 4, at 158–59 (arguing that loss of economic and social rights, as well as the loss of political rights, denies ex-offenders the indicia of citizenship).

8. To illustrate, the Georgia Supreme Court, in the closely-decided *Stephens v. State*, upheld a provision imposing a mandatory life term for two-time drug offenders in the face of statistics showing that the statute had a severe discriminatory impact on African Americans. 456 S.E.2d 560, 561 (Ga. 1995). 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).

9. This article focuses on "socioeconomic rights," which we define as barriers that impede an individual's ability to support herself and/or to utilize the social safety net. These barriers include employment policies which discriminate against ex-offenders, denials of financial assistance for education, evictions and exclusions of ex-offenders and their families from public housing, and denials of welfare assistance and food stamps. There are at least two other significant civil disabilities resulting from a felony conviction: felony disenfranchisement laws, and state laws encouraging termination of parental rights as a consequence of incarceration. *See generally* THE

examines existing reentry barriers, focusing on those that eliminate the economic opportunities of ex-offenders. Part III explores the limitations of federal causes of action and legislative advocacy in achieving widespread, substantive reform. Finally, in part IV, we argue that the most effective means of attacking the maze of collateral sanctions is by focusing on state-by-state litigation, particularly encouraging advocates to hone in on states with extensive, yet vulnerable mazes of collateral sanctions and constitutional provisions that could support such challenges.

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

To prevent recidivism and afford ex-offenders a second chance, the government must facilitate an ex-offender's successful transition back into her community. 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.[10]

To make this transition, an ex-offender must have access to the tools necessary to construct self-sufficiency—social service programs, educational assistance, and employment opportunities. Only then may she navigate through a changed and often hostile society.[11] Thus, it is not surprising that, each year, an increasing number of ex-offenders—those ill-equipped to face these challenges—are denied access to these tools and lost in transition.

Saddled with collateral consequences, ex-offenders often return to the illegal practices that initially led to their convictions.[12] As one commentator noted,

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SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2004), http://www.sentencingproject .org/pdfs/1046.pdf; 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 (1991). While such laws also undermine an ex-offender's ability to successfully reintegrate into the community, they are beyond the scope of this article.

10. Karen R. Kadela & Richard P. Seiter, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 CRIME & DELINQ. 360, 361 (2003).

11. *See* JEREMY TRAVIS, AMY SOLOMON & MICHELLE WAUL, FROM PRISON TO HOME 18 (2001), *available at* http://www.urban.org/UploadedPDF/from_prison_to_home.pdf (noting that "heightened stress levels at the time of release reflect very real anxieties about successfully managing a return to the outside world"); Kathleen M. Olivares, Velmer S. Burton, Jr. & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, FED. PROBATION, Sept. 1996, at 10, 10 (1996) ("Upon release, incarcerated offenders often encounter barriers to successful reintegration involving stigma, loss of job opportunities, friendships, familial relationships, and denial of legal and civil rights.").

12. *See* Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A*

"[t]he ex-offender population has tended to recidivate due in part to an unavailability of economic and social supports."[13] According to the Bureau of Justice Statistics, "[o]f the 272,111 persons released from prison in [fifteen] States in 1994, an estimated 67.5 [percent] were rearrested for a felony or serious misdemeanor within [three] years, 46.9 [percent] were reconvicted, and 25.4 [percent were] resentenced to prison for a new crime."[14]

Drug offenders bear a disproportionate burden of collateral consequences.[15] Many collateral sanctions were created as part of the "war on drugs" and apply solely to drug offenses.[16] As a result of legislative activity primarily over the past decade, an individual with any drug-related felony (including nonviolent offenses) may have to manage her own reentry into society. At the same time, she may be: (1) banned from living with her family in public housing;[17] (2) denied eligibility for federal welfare and food stamp benefits;[18] (3) subjected to limits on financial aid for higher education;[19] (4) suspended from driving;[20] and, (5) and faced with far reaching restrictions on employment opportunities.[21] Such barriers have created an absurd result: ex-offenders convicted of rape or murder are nonetheless eligible for a number of rights denied to drug offenders.[22]

What's more, collateral sanctions also have profound economic and social

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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.").

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

14. Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Offender Statistics http://www.ojp.usdoj.gov/bjs/crimoff.htm (last updated Nov. 15, 2005).

15. The makeup of released prisoners has changed substantially over the past two decades. There has been a dramatic rise in the number of Americans imprisoned for drug-related offenses as a result of the "war on drugs." Rubinstein & Mukamal, *supra* note 1, at 37. Arrests for drug offenses have nearly tripled since 1980, and more than four-fifths of these arrests have been for drug possession. Bureau of Justice Statistics, U.S. Dep't of Justice, Drugs and Crime Facts, http://www.ojp.usdoj.gov/bjs/dcf/enforce.htm#drug (last updated Oct. 17, 2005). As of February 2006, federal prisons held 92,342 drug offenders, who made up 53.4 percent of all inmates. Fed. Bureau of Prisons, U.S. Dep't of Justice, Quick Facts, http://www.bop.gov/news/quick.jsp (last updated February 25, 2006) [hereinafter Fed. Bureau of Prisons, Quick Facts]. This is up from 45,367 drug offenders in 1994. *Id.* Almost one-quarter of the total incarcerated population in the United States (including those in local jails and state and federal prisons) are incarcerated as a result of drug convictions. JAMIE FELLNER, HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE: THE RACIAL COSTS IN THE WAR ON DRUGS 13 (2000).

16. Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491, 1494 (2003) [hereinafter Mauer, *Collateral Consequences*].

17. *See infra* notes 112–23 and accompanying text.

18. *See infra* notes 105–07 and accompanying text.

19. *See infra* notes 129–40 and accompanying text.

20. *See infra* notes 92–98 and accompanying text.

21. *See infra* notes 66–101 and accompanying text.

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

repercussions for ex-offenders' families and communities.[23] Whereas the punishment resulting from a felony conviction once focused primarily on the offender,[24] the consequences have a far broader impact today. Obstacles to reintegration cause profound stress on community institutions and local resources, leaving communities without sufficient resources to tackle other problems.[25] Moreover, a failed reintegration itself means added costs for public health, child welfare, public safety and criminal justice.

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.[26] Mass incarceration of nonviolent offenders resulting from the war on drugs,[27] from tough-on-crime stances at the state and federal level,[28] and from a decline in judicial sentencing discretion[29] have increased the numbers of inmates who will be released into their communities. "In 2005, 6.9 million people were on probation, in jail or prison, or on parole."[30] By the end of 2003, state and federal prison authorities had 1,470,045 adult inmates under their jurisdiction.[31] "If recent incarceration rates remain unchanged, an estimated [one] of every [fifteen] persons . . . will serve time in a prison during their lifetime."[32] These individuals return to a relatively small number of disadvantaged urban communities,[33] which often have disproportionately high amounts of poverty, unemployment, homelessness, and instability.[34] In these neighborhoods, the

23. *See infra* notes 46–56 and accompanying text.

24. Mauer & Chesney-Lind, *Introduction* to INVISIBLE PUNISHMENT, *supra* note 1, at 1.

25. *See* Thompson, *supra* note 13, at 285–88 (outlining some of the challenges facing communities with many reentering residents).

26. Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, SENT'G & CORRECTIONS (U.S. Dep't of Justice, Nat'l Inst. of Justice), Nov. 9, 2000, at 1, *available at* http://www.ncjrs.org/pdffiles1/nij/184253.pdf.

27. *See* Olivares, Burton & Cullen, *supra* note 11 at 10 (stating that the war on drugs and America's "imprisonment binge" have resulted in a state prison population that exceeds one million).

28. *See id.* (noting that the "get tough movement" has had a profound impact on the criminal justice system).

29. *See* Mauer, *Collateral Consequences*, *supra* note 16, at 1491–92 (arguing that the explosion in the prison population was largely the result of "increasing controls on judicial discretion," including mandatory sentencing and "three strikes and you're out" policies).

30. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STRATEGIC PLAN FY 2005–2008 6 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/bjssp08.pdf.

31. *Id.*

32. Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Offender Statistics, http://www.ojp.usdoj.gov/bjs/crimoff.htm (last updated Nov. 13, 2005).

33. Travis, Robinson & Solomon, *supra* note 5, at 12.

34. For example, in New York, African Americans 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. NAACP LEGAL DEF. & EDUC. FUND., FREE THE VOTE 1 (2003), *available at* http://naacpldf.org/content/pdf/felon/Free_the_Vote_brochure.pdf. Similarly, fifty-nine percent of all men and women released from Maryland prisons returned to Baltimore City, a community in

arrest, incarceration, and recidivism of large numbers of people place a severe burden on the formal and informal institutions that sustain the communities.[35] Overburdened and resource-strapped communities are less likely to have the means to provide the social services and economic support that those returning home from prison so desperately need.[36] Employment restrictions on ex-offenders combined with the incarceration of recidivist offenders unable to make a legitimate living means an extraction of members from the potential pool of workers in the community. In turn, this reduces the chances that the community can become economically vibrant. In short, there is a vicious cycle in which the vast majority of ex-offenders burden economically depressed communities ill-equipped to deal with their tremendous needs.

The spiraling consequences of collateral sanctions are especially critical in the African American and other minority communities.[37] Nationwide, African Americans are incarcerated at 8.2 times the rate of Whites.[38] Approximately nine percent of all African American males in their late-twenties are in prison or jail, compared to one percent of Whites in the same age group.[39] Of the almost 190,000 federal inmates, more than 75,000—nearly forty percent—are African American.[40] And the war on drugs has only exacerbated preexisting racial disparities within the prison population. To be sure, people of color are disproportionately imprisoned for drug offenses: eighty percent of those imprisoned for drug offenses in state facilities are African American or Latino.[41] Notwithstanding the fact that African Americans constitute only twelve percent of illegal drug users in the United States, they represent forty-four percent of those arrested for drug crimes and fifty-six percent of those convicted for drug crimes.[42] This imbalance is largely the result of policy decisions about where and how to prosecute the war on drugs.[43] A disproportionate impact on families

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which 22.9 percent of residents live below the poverty line. NANCY G. LA VIGNE & VERA KACHNOWSKI, URBAN INST., A PORTRAIT OF PRISONER REENTRY IN MARYLAND 51 (2003), *available at* http://www.urban.org/UploadedPDF/410655_MDPortraitReentry.pdf.

35. *See* Kadela & Seiter, *supra* note 10, at 380.

36. *See id.*

37. In Maryland, of the fifty-nine percent of all released prisoners returning to Baltimore City, eighty-nine percent of those are African American. LA VIGNE & KACHNOWSKI, *supra* note 34, at 51.

38. FELLNER, *supra* note 15, at 9. *See also* Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1502 (2003) ("African Americans are at least seven times more likely than [W]hites, and two times more likely than [Latinos], to be incarcerated.").

39. ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 1999, at 9 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p99.pdf.

40. Fed. Bureau of Prisons, Quick Facts, *supra* note 15.

41. Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, *in* INVISIBLE PUNISHMENT, *supra* note 1, at 50, 53.

42. *See* Thompson, *supra* note 13, at 265.

43. *See* Mauer, *Mass Imprisonment*, *supra* note 41, at 53 ("A considerable body of research documents that these figures are not necessarily the result of greater drug use in minority communities, but rather drug policies that have employed a law enforcement approach in

of color is also evident in the number of incarcerated African American parents.[44] "Among both [s]tate and [f]ederal prisoners with minor children, African-Americans compose[] the largest racial/ethnic group."[45] Thus, incarceration disproportionately tears African American families apart, while collateral consequences make successful reunification near impossible. In sum, the disproportionate arrest and incarceration of African Americans exacerbates racial stratification when combined with punitive collateral consequences.

Women, many of whom are parents, also suffer disproportionately as a result of collateral sanctions. According to the U.S. Department of Justice's Bureau of Justice Statistics, in 1999, just under 1.5 million children in the United States had a parent in prison, an increase of more than half-a-million since 1991.[46] Women—more so than men—are dramatically impacted by drug policies.[47] In 1999, drug offenders accounted for the largest source of total growth among female inmates,[48] a group which had recently experienced a more than sixfold increase. (The female inmate population rose from 12,000 in 1980 to more than 90,000 in 1999.[49]) Within the ballooning group of incarcerated women, one-third of them are currently serving a drug sentence.[50] This increase in number of imprisoned women, is, on the whole, devastating for women and their families. This is especially the case when combined with collateral sanctions affecting economic rights. For instance, women with criminal records are more likely than their male counterparts to have minor children and to have had custody of those children prior to incarceration.[51] These women are also more likely to have been the victims of physical or sexual abuse both as a child and as an adult, and to suffer from drug or alcohol addiction as a result of that abuse.[52] Women in state and federal prisons are also overwhelmingly poor and

communities of color and a treatment orientation in [W]hite and suburban neighborhoods.").

44. *See, e.g.*, CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 3 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf (finding that nearly half of all imprisoned parents are African American, and only one-quarter are White).

45. *Id.*

46. *Id.* at 2 (stating that in 1999, state and federal prisons held approximately 721,500 parents of minor children).

47. There are also racial disparities among the women being incarcerated. From 1974 through 2001, "adult [African American] females were [2.5] times more likely than adult [Latinas] and [5.5] times more likely than adult [W]hite females to have ever served time in State or [f]ederal prison." THOMAS BONCZAR, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001 5 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf.

48. BECK, *supra* note 39, at 10.

49. Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment, in Invisible Punishment*, *supra* note 1, at 79, 80.

50. Mauer & Chesney-Lind, *Introduction* to INVISIBLE PUNISHMENT, *supra* note 1, at 1, 3.

51. Amy E. Hirsch, *Battered Women, Battered Again: The Impact of Women's Criminal Records*, *in* CIVIL PENALTIES SOCIAL CONSEQUENCES 85, 85 (Christopher Mele & Teresa A. Miller eds., 2005).

52. *Id.*

poorly educated.[53] Approximately twenty percent of mothers in state prison were homeless in the year prior to their incarceration and seventy percent had incomes of less than 1000 dollars in the month preceding their incarceration.[54] Welfare benefits and public housing are critical resources to help these women get back on their feet. Nonetheless, for ex-offenders, collateral sanctions render those resources unavailable. For many, the only option is to return to abusive relationships in exchange for food and shelter.[55]

Most jurisdictions somewhat provide for the eventual removal of various collateral sanctions. However, the removal of sanctions does not address the critical period following release, during which ex-offenders and their families most desperately need temporary supports and employment opportunities. To be sure, relief mechanisms are generally unduly burdensome or ineffective,[56] and economic and social service restrictions are "generally not affected when civil rights are restored."[57] As a result, many ex-offenders return to a life of crime and return to prison before they are eligible to seek relief from the penalties.[58]

II.
EXISTING REENTRY BARRIERS

American law has a long tradition of "civil disabilities," which have effectively denied ex-felons and others the right to participate in civic life (*i.e.*, have prevented them from serving on juries, voting, holding public office, entering into contracts, or participating in civil litigation).[59] These examples of civil disabilities are somewhat akin to today's collateral sanctions. Like collateral sanctions, civil disabilities hamper ex-offenders' attempts to reintegrate into the community.[60] Historically, "most were acknowledged as a 'deserved' consequence of and as proportional in severity to an individual's

53. *Id.* at 87.

54. *Id.*

55. *Id.*

56. 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).

57. *Id.* at 1719.

58. *See* Petersilia, *supra* note 26, at 3 ("Most rearrests occur in the first [six] months after release. Fully two-thirds of all parolees are rearrested within [three] years.").

59. *See* Christopher Mele & Teresa A. Miller, *Collateral Civil Penalties as Techniques of Social Policy*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 51, at 9; Demleitner, *Preventing Internal Exile*, *supra* note 4, at 155. It should be noted that many of these civil disabilities—particularly disenfranchisement—were adopted as part of a scheme of racial subordination, particularly in the South. *See* Gabriel Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 51, at 27, 29–32; Andrew Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, 103 YALE L. J. 537, 537–42 (1993).

60. *See* Mele & Miller, *supra* note 59, at 9.

breach of the social contract,"[61] or were clearly linked to the crime committed.[62]

Civil disabilities decreased in number and in severity during the 1960s and 1970s, but this lull did not last long.[63] In the 1980s and 1990s, the war on drugs and the "get tough on crime" movement led to the enactment of harsher collateral consequences[64] that are "grossly disproportionate and noticeably disconnected from" the crimes to which they are attached.[65]

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 how collateral consequences can devastate the lives of ex-offenders and, conversely, how collateral consequences lack any sound policy rationale.

A. Employment Opportunities

Upon release, an ex-offender often has difficulty finding legitimate employment since she frequently lacks marketable job skills or a work history,[66] and also faces discrimination by employers against former offenders. Statistics show that sixty percent of former inmates have still not found legitimate employment a year after being released.[67] Why? Licensing restrictions have generally been justified as essential "to foster high professional standards," while restrictions on employment opportunities are said to ensure that those hired have "good moral character."[68] Employment-related sanctions have also been held out as preventive measures: "[s]ince organizations and employers are generally considered responsible for their employees, they must be allowed access to applicants' backgrounds and have the right to exclude those who present a danger to society as measured by their prior record."[69] These restrictions are imposed not only for positions requiring specialized training, but for jobs typically held by workers with minimal educational and work experience. As the availability of low-skilled jobs declines, the economic consequences of collateral sanctions that restrict employment opportunities will escalate for ex-offenders, their families, and their communities.[70]

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61. *Id.* at 9–10.

62. *Id.* at 10 ("Other disabilities were largely precautionary measures, employed to protect the public from the possibility of ex-felons further breaching laws. These penalties tended to be explicitly connected to the original criminal culpability of the offender.").

63. Demleitner, *Preventing Internal Exile*, *supra* note 4, at 155.

64. *See* Patricia Allard, *Claiming our Rights: Challenging Postconviction Penalties Using an International Human Rights Framework*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 51, at 223, 225–26 [hereinafter Allard, *Claiming our Rights*]; Demleitner, *Preventing Internal Exile*, *supra* note 4, at 155; Mele & Miller, *supra* note 59, at 10.

65. Mele &. Miller, *supra* note 59, at 10.

66. *See* Kadela & Seiter, *supra* note 10, at 367.

67. *See* Petersilia, *supra* note 26, at 3.

68. Demleitner, *Preventing Internal Exile*, *supra* note 4, at 156 (internal quotations omitted).

69. *Id.* at 161.

70. *See id.* at 156.

One of the primary employment restrictions facing ex-offenders is the prohibition against public employment.[71] Alabama, Delaware, Iowa, Mississippi, Rhode Island, and South Carolina permanently deny convicted felons the right to public employment.[72] The other forty-five states "permit public employment of convicted felons in varying degrees."[73] Some states also impose or allow restrictions on hiring or licensing ex-offenders or parolees for particular professions (*e.g.*, law, real estate, medicine, dentistry, engineering, pharmacy, nursing, physical therapy, and education).[74]

Many states further decrease ex-offenders' employment prospects through occupational licensing laws that contain character requirements[75] that either bear no direct relation to the licensed occupation or that do not consider the individual circumstances of the crime for which the applicant was convicted.[76] Licensing restrictions not only result in the loss of new employment opportunities, but also often act as a bar on reemployment in the profession in which the offender worked before she was convicted. Other ex-offenders find themselves unable to use skills they learned in prison occupational training programs.[77]

Some employment restrictions are grounded in concerns for public safety, and may therefore be appropriate. As one commentator noted: "[I]t is clear why persons convicted of child molestation are not permitted to work in day care centers."[78] However, there is a distinction between sanctions that are adopted with a goal of preventing future criminal activity and those that are essentially retributive,[79] as is, perhaps, a bar on ex-offenders becoming licensed as barbers.[80] A wide range of jobs include restrictions that bear no reasonable

71. *See* Olivares, Burton & Cullen, *supra* note 11, at 13.

72. *Id.*

73. *Id.* (finding that twelve states apply a "direct relationship test" to determine whether there is a sufficient relationship between the applicant's criminal record and his ability to perform the job, seventeen permit public employment after completion of sentence, and ten leave to the employer the decision whether or not to hire a previously convicted felon).

74. *See, e.g.*, ALA. CODE § 5-6A-1 (1996) (prohibiting felons from becoming bank directors); § 34-24-166 (2002 & Supp. 2005) (allowing State Board of Chiropractic Examiners to deny a license to a felon); Petersilia, *supra* note 26, at 4 ("In California, [parolees] are barred from the law, real estate, medicine, nursing, physical therapy, and education. Colorado prohibits [parolees] from becoming dentists, engineers, nurses, pharmacists, physicians or real estate agents.").

75. Many federal, state, and municipal laws which do not specifically exclude felons nonetheless effectively exclude them from obtaining licenses by requiring that the applicant show "good moral character." *See* Thompson, *supra* note 13, at 281 (explaining that when there is no clear definition of good moral character, licensing boards are given broad discretion in defining the term, and as a result, the term is often interpreted to bar anyone with a criminal conviction).

76. Demleitner, *Preventing Internal Exile*, *supra* note 4, at 156; Thompson, *supra* note 13, at 281.

77. *See* Thompson, *supra* note 13, at 282 (noting that "prisons have continued to provide vocational training to inmates in certain occupations from which they will be barred upon release").

78. Mauer, *Collateral Consequences*, *supra* note 16, at 1493.

79. *See id.*

80. Forty-six states restrict the ability of ex-felons to become licensed as barbers. Bruce

relationship to the job function or a public safety concern. For example, depending on the nature of the conviction, New York may deny ex-felons employment in more than one hundred trades and professions, including barbering, plumbing, real estate, education, health care, and private security.[81] In Virginia, individuals convicted of a felony may not work as nurses, funeral directors, pharmacists, optometrists, accountants, or dentists.[82] And in Maryland, state agencies and licensing boards have discretion to deny or revoke a wide range of professional licenses, including those for barbers,[83] insurance professionals,[84] accountants,[85] landscape architects,[86] plumbers,[87] and social workers.[88]

While some may see the benefit of allowing employers to discriminate against convicted felons, it is especially difficult to rationalize such discrimination on the basis of an arrest that did not even result in a conviction.[89] Yet, this happens in a majority of states: "Thirty-eight states permit all employers (public and private) and occupational licensing agencies to inquire about and rely upon arrests that did not result in a conviction."[90] Arkansas, New Hampshire, and New Mexico forbid public employers to rely on arrests that did not lead to conviction, but permit private employers to do so.[91]

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).

81. *See* Fox Butterfield, *Freed from Prison, but Still Paying a Penalty*, N.Y. TIMES, Dec. 29, 2002, at 18. Avi Brisman explains further that:

> [I]n New York, depending on the nature of one's criminal history, an ex-offender may be prohibited from gaining employment in any place beer or liquor is sold for drinking in the place where it is purchased (for example, bars, restaurants), 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).

82. *See* Brisman, *supra* note 81, at 433.

83. MD. CODE ANN., BUS. OCC. & PROF. § 4-314(a)(1)(viii) (LexisNexis Supp. 2005).

84. *See, e.g.*, MD. CODE ANN., INS. § 10-126(a)(8) (LexisNexis 2003) (insurance providers); MD. CODE ANN., INS. § 10-410(a)(7) (LexisNexis Supp. 2004) (public adjusters).

85. MD. CODE ANN., BUS. OCC. & PROF. § 2-315(a)(1)(iii) (LexisNexis 2004 & Supp. 2005).

86. MD. CODE ANN., BUS. OCC. & PROF. § 9-310(a)(1)(iii) (LexisNexis 2004 & Supp. 2005).

87. MD. CODE ANN., BUS. OCC. & PROF. § 12-312 (LexisNexis 2004).

88. MD. CODE ANN., HEALTH OCC. § 19-311(8) (LexisNexis 2005).

89. As Marc Mauer points out, 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." Mauer, *Collateral Consequences*, *supra* note 16, at 1494.

90. Mukamal & Samuels, *supra* note 38, at 1503–04.

91. Mukamal & Samuels, *supra* note 38, at 1504. *See* ARK. CODE ANN. § 17-1-103(c)(1) (2001); N.H. REV. STAT. ANN. § 21-I:51 (2001) (forbidding inquiry into applicant's arrest record);

The loss of driving privileges also acts as an employment barrier. In the Department of Transportation and Related Agencies Appropriation Act of 1992,[92] Congress mandated the withholding of ten percent of federal highway funds unless a state enacts and enforces a law that revokes or suspends (for six months) the driver's license of anyone convicted of any drug offense. Federal funds are not withheld, however, if a governor submits written statement to the Secretary of the Department of Transportation certifying both that she opposes the revocation or suspension and that the state legislature has adopted a resolution expressing its opposition.[93] Today, twenty-three states automatically revoke or suspend driver's licenses for drug convictions.[94] Of these states, seventeen have suspension periods of at least six months for the first offense.[95] Delaware,[96] Massachusetts,[97] and South Carolina[98] revoke or suspend driver's licenses for more than six months for nondriving drug convictions. That provisions requiring the suspension or revocation of driving privileges severely

N.M. Stat. Ann. § 28-2-3(B)(1) (LexisNexis 2000).

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

93. 23 U.S.C §§ 159(a)(2)–(3) (2000).

94. *See* Mukamal & Samuels, *supra* note 38, at 1516; ALA. CODE §§ 13A-12-290–291 (LexisNexis 2005); ARK. CODE ANN. § 27-16-915(b)(1)(A) (2004); DEL. CODE ANN. tit. 21, § 4177K (2005); FLA. STAT. ANN. § 322.055 (West 2001); GA. CODE ANN. § 40-5-75 (2004); IND. CODE ANN. § 9-30-4-6 (LexisNexis 2004); IOWA CODE ANN. §§ 321.212(1)(d), 901.5(10) (West 2003); LA. REV. STAT. ANN. § 32:430 (2002); 540 MASS. CODE REGS. 20.03 (1996); MICH. COMP. LAWS ANN. § 257.319e(2) (West 2001); MISS. CODE ANN. § 63-1-71(1) (West 1999); MO ANN. STAT. §§ 577.500, .510 (West 2003); N.J. STAT. ANN. § 2C:35-16 (West 2005); N.Y. VEH. & TRAF. LAW § 510(2)(b)(v) (McKinney 1996 & Supp. 2006); OHIO REV. CODE ANN. § 4510.17 (Supp. 2005); OKLA. STAT. ANN. tit. 47, § 6-205(A)(6) (West 2000 & Supp. 2005); 75 PA. CONS. STAT. ANN. § 1532(c)(1) (West 1996 & Supp. 2004); S.C. CODE ANN. § 56-1-745(A) (1991 & Supp. 2005); TEX. TRANSP. CODE ANN. § 521.372 (Vernon 1999); UTAH CODE ANN. § 53-3-220(1)(c) (2002 & Supp. 2005); VA. CODE ANN. § 46.2-390.1 (2005); WIS. STAT. ANN. § 961.50 (West 1998 & Supp. 2005); WYO. STAT. ANN. § 31-7-128(f) (2005) (suspending license for those under the age of nineteen).

95. Mukamal & Samuels, *supra* note 38, at 1516. *See* ALA. CODE § 13A-12-290 (LexisNexis 2005); ARK. CODE ANN. § 27-16-915(b)(1)(A) (2004); FLA. STAT. ANN. § 322.055 (West 2001); GA. CODE ANN. § 40-5-75(a) (2004); IND. CODE ANN. § 35-48-4-15 (LexisNexis 2004); IOWA CODE ANN. §§ 321.212(1)(d), 901.5(10) (West 2003); MICH. COMP. LAWS ANN. § 257.319e(2) (West 2001); MISS. CODE ANN. § 63-1-71(1) (West 1999); N.J. STAT. ANN. § 2C:35-16 (West 2005); N.Y. VEH. & TRAF. LAW § 510(2)(b)(v) (McKinney 1996 & Supp. 2006); OHIO REV. CODE ANN. § 4510.17(A) (Supp. 2005); OKLA. STAT. ANN. tit. 47, § 6-205.1(B)(1) (West 2000 & Supp. 2005); 75 PA. CONS. STAT. ANN. § 1532(c)(1)(i) (West 1996 & Supp. 2004); TEX. TRANSP. CODE ANN. § 521.372(c) (Vernon 1999); UTAH CODE ANN. § 53-3-220(1)(c) (2002 & Supp. 2005); VA. CODE ANN. § 46.2-390.1 (2005); WIS. STAT. ANN. § 961.50 (West 1998 & Supp. 2005).

96. DEL. CODE ANN. tit. 21, § 4177K (1995 & Supp. 2004) (two year revocation; offenders permitted to apply for conditional license within six months for misdemeanor offenses and one year for felony offenses); DEL. CODE ANN. tit. 16, § 4764(b)(1) (2003) (one year revocation for first offense, with driving privileges restored upon completion of diversion program).

97. 540 MASS. CODE REGS. 20.03 (1996).

98. S.C. CODE ANN. § 56-1-745(A) (1991 & Supp. 2005) (requiring suspension of license for controlled substance violation other than one involving marijuana or hashish).

impact the economic prospects of ex-offenders goes without saying.[99] Together, bans on public employment, occupational licensing restrictions, and the revocation or suspension of driver's licenses leave many ex-offenders with little ability to make a legitimate living.[100]

B. Public Assistance

Through a series of legislative enactments, Congress has effectively dismantled the social safety net for ex-offenders and their families. Restrictions on the right to receive social and welfare benefits, in contrast to restrictions on civil and political rights, have a direct and potentially devastating impact on the ex-offender and her family.[101] Denial of subsistence benefits and subsidized housing makes it harder for ex-offenders both to meet the basic needs of their families and to exercise the economic and personal autonomy that many take for granted.[102] Many ex-offenders, unable to access public housing or food stamps, are unable to create a suitable living environment for their families.[103]

1. Eligibility for Temporary Assistance for Needy Families ("TANF")

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 ("PRWORA")[104] provides that anyone convicted of a state or federal felony offense involving the use or sale of drugs is permanently ineligible for cash assistance and food stamps.[105] States may "opt out" of this requirement or modify the ban.[106]

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99. Clearly, such provisions deprive ex-offenders 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 (*e.g.*, chauffeurs, delivery people, or cab drivers). *See* TRAVIS, SOLOMON & WAUL, *supra* note 11, at 31–33 (explaining why job placement and training programs for prisoners have not been more successful).

100. *See id.*

101. *See* Demleitner, *Preventing Internal Exile*, *supra* note 4, at 158.

102. *Id.* "While the denial of assistance to ex-offenders is not designed to affect the public support granted other family members, any denial of benefits to one family member necessarily impacts the others," *id.*, particularly when the individual being denied the benefit is the head of the household and responsible for meeting the basic needs of others. *See, e.g.*, PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 10–14 (2002), *available at* http://www.soros.org/initiatives/ baltimore/articles publications/publications/lifesentences/03-18-03atriciaAllardReport.pdf [hereinafter ALLARD, LIFE SENTENCES] (describing impact of denial of benefits to female ex-offenders on children).

103. *See* ALLARD, LIFE SENTENCES, *supra* note 103 (describing how women may be forced to surrender their children to foster care as a result of loss of benefits).

104. 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. (2000)).

105. PRWORA § 115(a) (codified at 21 U.S.C. § 862a(a) (2000)).

106. 21 U.S.C. § 862a(d)(1) (2000). As of 2003: nineteen states had adopted the ban in its entirety; eleven had opted out entirely; and eighteen had modified the ban by requiring recipients

As a result of the TANF ban, recently released drug offenders lack transitional income to meet life's basic needs and to care for their children. TANF provides financial assistance to indigent families with dependent children, while "[f]ood stamps are the first line of defense against hunger," providing eligible low-income households with the means to obtain healthy food.[107] To prevent ex-offenders and their families from receiving TANF and food stamps undermines efforts at reentry, rehabilitation, reunification of families and treatment for addiction by making it virtually impossible for them to meet their daily needs without returning to a life of crime.[108]

2. Access to Public Housing

Many landlords reject applicants because of criminal history or because of marred credit or work histories—problems common among ex-offenders.[109] So, it is not surprising that securing safe and affordable housing has long been a challenge for ex-offenders. While collateral sanctions are not the basis of *all* housing obstacles facing ex-offenders, collateral sanctions are a significant basis. Indeed, changes in federal housing policy have had a dramatic effect on the ability of ex-offenders to obtain stable, affordable housing,[110] for they often cause landlords to reject ex-offenders' applications[111] and prevent ex-offenders from staying with family members who live in public housing.

Under the Housing Opportunity Program Extension Act of 1996[112] and the Quality Housing and Work Responsibility Act of 1998,[113] an ex-offender is permanently barred from seeking Section 8[114] and other federally-assisted housing if any member of her household is subject to a state sex offender

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with drug felony convictions to seek or participate in alcohol or drug treatment to keep their eligibility or to submit to drug tests, limiting eligibility to those convicted of possession offenses, etc. Mukamal & Samuels, *supra* note 38, at 1506–07. Illinois and Massachusetts eliminated the ban on food stamps but retained, in some form, the ban on cash assistance. *Id.* at 1507–08.

107. FOOD & NUTRITION SERVS., U.S. DEP'T OF AGRIC., FOOD STAMP OUTREACH TOOLKIT 1 (2006), *available at* http://www.fns.usda.gov/fsp/outreach/pdfs/toolkit/office/3_offices_introduction.pdf.

108. *See* Brisman, *supra* note 81, at 445 (quoting Rubinstein & Mukamal, *supra* note 1, at 49).

109. *See* Elizabeth Curtin, *Home Sweet Home for Ex-Offenders*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 51, at 115.

110. *See* Brisman, *supra* note 81, at 446–48.

111. *See* Curtin, *supra* note 109, at 115 (noting that "ex-offenders are frequently rejected upon first application based on their criminal records").

112. Pub. L. No. 104-120, 110 Stat. 834 (1996) (codified as amended in scattered sections of 12 and 42 U.S.C. (2000)).

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

114. Section 8, or "the housing choice voucher program[,] is the federal government's major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market." 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 Feb. 3, 2006). Through the program, landlords of privately owned rental units receive subsidies on behalf of qualified low-income tenants, allowing tenants to pay lower rent. *See id.*

registration requirement or has been convicted of methamphetamine production on a public housing premises.[115] If any member of the household was evicted from public housing because of drug-related crimes, the household is barred for three years, unless the ex-offender completes an approved rehabilitation program.[116] Significantly, federal law grants public housing agencies broad discretion to deny housing to virtually anyone with a criminal record. For example, local housing authorities may deny housing for a "reasonable time" to individuals who have "engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees . . . ."[117] With this discretion, public housing authorities have implemented a variety of policies, ranging from specific—automatically denying eligibility to those previously evicted from public housing because of drug-related or violent activity—to broad—denying eligibility for current or past criminal activity, regardless of when it occurred.[118]

115. 42 U.S.C. § 13663(a) (2000) (registered sex offenders); 24 C.F.R. §§ 960.204(a)(3)–(4) (2005) (registered sex offenders and those convicted of manufacturing methamphetamine on the premises of federally-assisted housing).

116. 42 U.S.C. § 13661(a) (2000); 24 C.F.R. § 960.204(a)(1) (2005) (also specifying that a rehabilitation program must be approved by the local housing provider).

117. 42 U.S.C. § 13661(c) (2000). *See also* 24 C.F.R. § 960.203(c) (2005) (providing that in screening applicants, public housing authorities may consider "all relevant information").

118. *See, e.g.*, LEGAL ACTION CTR., PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS IN CALIFORNIA: SAN FRANCISCO 2–3 (2001), http://www.lac.org/modules/ncjta/sf.pdf [hereinafter LEGAL ACTION CTR., CAL. POLICIES] (stating that the San Francisco Housing Authority considers "any individual who has 'any previous or current drug-related criminal activity or patterns of alcohol abuse'" ineligible, but it has discretion to lift the bar to eligibility based on evidence of rehabilitation) (citations omitted); LEGAL ACTION CTR., PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS IN DELAWARE: SUSSEX & NEW CASTLE COUNTIES 2 (2001), http://www.lac.org/modules/ncjta/ sussex.pdf (stating that the Sussex County Housing Authority bars "previous tenants evicted for drug-related criminal activity . . . from applying for public housing for a specified time period") (citations omitted); *id.* at 5 (stating that it is the New Castle Housing Authority's policy to deny eligibility if "any member of the family has ever been evicted from public housing" or if "any family member's drug or alcohol abuse interferes with the health, safety, or peaceful enjoyment of other project residents"); LEGAL ACTION CTR., PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS IN FLORIDA: BROWARD COUNTY 1 (2001), http://www.lac.org/modules/ncjta/broward.pdf [hereinafter LEGAL ACTION CTR., FLA. POLICIES] ("The [Broward County] Housing Authority has the discretion to bar . . . [f]amilies who have previously been 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 . . . ."); LEGAL ACTION CTR., PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS IN LOWELL, MASSACHUSETTS 1 (2001), http://www.lac.org/modules/ncjta/lowell.pdf [hereinafter LEGAL ACTION CTR., MASS. POLICIES] ("In determining an applicant's eligibility for housing assistance, the [Lowell Housing Authority] will consider any criminal history information, regardless of when the criminal activity occurred.") (citations omitted); LEGAL ACTION CTR., PUBLIC HOUSING POLICIES AFFECTING INDIVIDUALS WITH CRIMINAL RECORDS IN NEW YORK CITY 1–2 (2001), http://www.lac.org/modules/ncjta/nyc.pdf [hereinafter LEGAL ACTION CTR., NEW YORK CITY POLICIES] ("[The New York City Housing Authority] has the discretion to deny housing to applicants who have been convicted of *any* criminal offense, including a violation. In general, people with criminal convictions must complete their sentences (including probation and/or parole and the payment of any fines) and then may be

Federal law requires local housing authorities to include provisions in leases that permit housing authorities to terminate the leases of criminals,[119] but it allows local housing authorities to discern when to invoke the provision. Unsurprisingly, public housing authorities across the country have enforced the law in a variety of ways: Some evict tenants only when they have been convicted of a drug offense.[120] Others may evict tenants when they are charged with a drug crime, arrested, or are involved in allegedly criminal activity on or off the premises.[121] The Supreme Court has dealt another blow, finding that these federally-mandated lease provisions may be triggered regardless of whether a tenant knew or had reason to know of the drug-related activity of a relative or guest.[122]

Although purportedly designed to provide a safer environment for public housing residents,[123] these laws, decisions, and policies do not significantly advance this goal.[124] Instead, they just exacerbate the challenges of reentry.

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made ineligible for public housing for two to six years, depending on the severity of their crimes." (emphasis in original)).

119. 42 U.S.C. § 1437d(l)(6) (2000) ("[All leases must] provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . . .").

120. *See, e.g.*, Richmond Tenants Org., Inc. v. Kemp, 956 F.2d 1300, 1303 (4th Cir. 1992) (describing the Forfeiture Project of the Department of Housing and Urban Development ("HUD") and the Department of Justice ("DOJ"), in which public housing authorities in more than twenty cities were selected to participate, and through which the federal government encourages summary eviction without notice or a hearing where a public housing tenant participated in at least two felony drug offenses).

121. *See, e.g.*, Escalera v. N.Y. Hous. Auth., 924 F. Supp. 1323, 1327 (S.D.N.Y. 1996) (noting that termination proceedings were brought as a result of the arrest of a tenant on a narcotics charge several miles from the housing project); LEGAL ACTION CTR., CAL. POLICIES, *supra* note 118, at 3–4 (stating that the San Francisco Housing Authority may terminate tenancy without a grievance hearing based on criminal activity that threatens the health, safety, or right of peaceful enjoyment of the premises or on drug-related activity either on or off premises); LEGAL ACTION CTR., FLA. POLICIES, *supra* note 118, at 3 (stating that Broward County Housing Authority will terminate a lease for any type of criminal activity, and that a conviction is not required where drug-related activity provides the grounds for eviction); LEGAL ACTION CTR., MASS. POLICIES, *supra* note 118, at 3–4 (stating that public housing tenants in Lowell are subject to eviction if any household member or guest engages in "[c]riminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants," or " [d]rug-related criminal activity on or off the premises," whether or not the person was arrested or prosecuted (citations omitted)).

122. Dep't of Housing and Urban Dev. v. Rucker, 535 U.S. 125, 127–28 (2001) (affirming that 42 U.S.C. § 1437d(l)(6) "requires lease terms that allow a local public housing authority to evict a tenant when a member of the tenant's household or a guest engages in drug-related criminal activity, regardless of whether the tenant knew, or had reason to know, of that activity").

123. *See* Public and Assisted Housing Drug Elimination Act of 1990 § 5122, 42 U.S.C. § 11901(1) ("[T]he [f]ederal [g]overnment has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs.").

124. For example, in Nashville, Tennessee, public housing applicants are barred if they have a history of violent or drug-related offenses, and residents may be evicted if guests or household members are involved in criminal activity. Nonetheless, major crimes (including homicide, rape, robbery, and assault) at public housing developments dropped by only 0.8 percent in 2001, even

Indeed, an ex-offender's inability to access subsidized housing "significantly diminishe[s]" her ability "to obtain and retain employment and [to] remain drug- and crime-free . . ."[125] Furthermore, these policies punish, even fracture entire families for the past behavior of one member of the household. Indeed, a growing numbers of formerly incarcerated parents "find it nearly impossible to reunify with their children without secure, stable housing."[126] From a policy standpoint, by permanently barring or imposing lengthy waiting periods on individuals with criminal records, housing authorities further punish those who have already paid their debt to society.

C. Educational Opportunities

Education and vocational training are critical tools to help ex-offenders gain employment, for many lack high school educations, job skills, and sizeable work histories,[127] However, those with even minor drug convictions are ineligible for federal educational aid under the Higher Education Amendments of 1998.[128] These amendments generally specify that students convicted of federal or state drug-related offenses are ineligible for grants, loans, and work assistance for varying periods of time depending on the nature of the offense and the number of previous offenses.[129] For example: For one convicted of first-time possession of a controlled substance, the ineligibility period is one year from the date of conviction;[130] for one convicted of second-time possession, the ineligibility period is two years, and, for one convicted of third-time possession, the ineligibility period is "indefinite."[131] The ineligibility period for someone convicted of first-time *sale* of a controlled substance is two years, and

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though major offenses in all of Nashville dropped nine percent. Christian Bottorff & Sheila Burke, *Crime Hard To Uproot in Public Housing*, TENNESSEAN, June 22, 2003, *available at* http://tennessean.com/local/archives/03/06/34744648.shtml.

125. *See* Rubinstein & Mukamal, *supra* note 1, at 48.

126. *Id.*

127. *See* Kadela & Seiter, *supra* note 10, at 367; TRAVIS, SOLOMON & WAUL, *supra* note 11, at 31–32; Eric Blumenson & Eva S. Nilson, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 75–83 (2002). Empirical research suggests that, among ex-offenders, vocational training reduces recidivism and improves job readiness skills. Kadela & Seiter, *supra* note 10, at 373–74; TRAVIS, SOLOMON & WAUL, *supra* note 11, at 32–33.

128. Pub. L. No. 105-244, 112 Stat. 1581 (1998) (codified as amended in scattered sections of 20 U.S.C. (2000)).

129. 20 U.S.C. § 1091(r)(1) (2000). The author of the amendments, Rep. Mark E. Souder of Indiana, stated that the amendments were intended to: "1) deter students from using and selling drugs on [their] college campuses; 2) help those who abuse drugs receive treatment; [and] 3) hold students accountable for the taxpayer-provided financial aid they receive for their education." Mark Souder, Editorial, *Actions Have Consequences*, USA TODAY, June 13, 2000, at 16A.

130. 20 U.S.C. § 1091(r)(1).

131. *Id.* The Department of Education defines "indefinite" as "permanent, unless (1) the student completes an approved drug rehabilitation program . . . or (2) convictions are reversed, set aside, or removed from the student's record . . . ." Student Assistance General Provisions, 64 Fed. Reg. 57356, 57357 (Oct. 22, 1999) (amending 34 C.F.R. § 668.40).

subsequent offenses result in indefinite ineligibility.[132]

Various states link eligibility for need-based, state financial aid to the qualifications imposed by the federal government under the Higher Education Act.[133] Students convicted of a felony in Florida are ineligible for various scholarships and grants.[134] Applicants for the South Carolina Need-Based Grant program, designed to aid South Carolina's "neediest students," must verify that they have never been convicted of any felonies or any alcohol or drug-related misdemeanor offenses within the past academic year.[135] 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.[136] In Oklahoma, students qualifying for the Oklahoma Higher Learning Access Program, providing aid to students with annual family income of less than 50,000 dollars, must pledge to "refrain from substance abuse" and "refrain from criminal or delinquent acts."[137]

In the 2000 to 2001 academic year, approximately 67,000 applicants for federal student aid indicated they had been convicted of selling or possessing drugs, and an additional 11,417 left the question blank.[138] Overall, more than 140,000 students have been denied federal aid since the prohibition was enacted.[139] Thus, substantial numbers of students are denied the assistance necessary to pursue a higher education and, in turn, the opportunity to increase their employment options and earning potential.

D. Interplay of Factors

Patricia Allard details how the fate of ex-offenders crystallizes when all of these sanctions converge:

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132. 20 U.S.C. § 1091(r)(1).

133. *See, e.g.*, 281 NEB. ADMIN. CODE ch. 6, § 006.01 (2004) ("In order to be eligible . . . [a] student shall be eligible to receive a Federal Pell Grant . . ."); R.I. HIGHER EDUC. ASSISTANCE AUTH., FINANCIAL AID HANDBOOK 5 (2005), http://www.riheaa.org/borrowers/ handbook0506.pdf (eligible students must "meet Title IV eligibility requirements concerning drug convictions and registering with Selective Service").

134. *See* Fla. Dep't of Educ., Florida Bright Futures Scholarship Program, http://www.firn .edu/ doe/brfutures/howapply.htm (last visited Mar. 26, 2006).

135. S.C. COMM'N ON HIGHER EDUC., SCHOLARSHIPS AND GRANTS 1 (2005), *available at* http://www.che.sc.gov/StudentServices/scholarship_brochure_2005.pdf.

136. 19 TEX. ADMIN. CODE § 22.228(c)(6) (2004). A student is ineligible for two years after the completion of her sentence. *Id.*

137. OKLA. STATE REGENTS FOR HIGHER EDUC., OKLAHOMA HIGHER LEARNING ACCESS PROGRAM ("OHLAP") APPLICATION 2 (2005), *available at* http://www.okhighered.org/ohlap/2005-06-app.pdf. This "refrain from" language strongly suggests that any violation or conviction while in the OHLAP could cause the student to be removed. While the language of the application does not explicitly ban students with prior criminal records, it could also apply to them, as well.

138. Dan Curry, *U.S. May Relax Ban on Aid for Those with Drug Convictions*, CHRON. OF HIGHER EDUC., Sept. 7, 2001, http://chronicle.com/weekly/v48/i02/02a03402.htm.

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

> Please imagine that you are a young woman in your first year in college who works as a nurse's aide part-time to help pay your tuition. You meet a young man who is charming, caring, and who works in a factory in town. You fall madly in love with him, get married, and give birth to your first child . . .
>
> During the second year of your marriage the factory in town closes and relocates overseas. Your husband loses his job. He tries for months to find another job but has no luck because the economy has gone sour. He starts using and selling drugs . . . [O]ne night a drug squad awakens you, and both you and your husband are arrested for possession of controlled substances . . . Ten grams of crack are found in your home. The prosecutor tells you, "I'll cut you a deal if you give me some names." But you can't give him any names because you're not involved in the drug ring; you've never even used drugs. So, you're convicted and sentenced under a mandatory minimum sentencing law to a sentence lengthier than those received by the actual drug dealers your husband knew.
>
> At the time of your conviction, you're expecting your second child. You receive no prenatal care while in prison, and give birth shackled to the hospital bed and surrounded by prison guards. During your prison term, your mother cares for your daughter but is unable to care for the newborn. So your brother and sister-in-law agree to care for your baby boy in addition to their four children. But because your sister-in-law has a three-year old drug conviction, she and your brother cannot be foster or adoptive parents, and so your son becomes a ward of the state. After the baby spends [fifteen] consecutive months in the child welfare system, your parental rights to the baby are terminated, and the baby is placed on an adoption list. You may never see your child again.
>
> When you leave prison, you decide to move in with your mother and your daughter, who live in Section 8 housing. But if you move in, they may be evicted because of your drug conviction. So you go to a woman's shelter and try to get your old job back as a nurse's aide. However, due to your drug conviction you're barred from the field of nursing. You figure you'll go back to college to get another degree. But because of your drug conviction you're denied federal financial aid.
>
> Your mother falls ill and can no longer care for your daughter. You decide to apply for welfare benefits to provide for you and your daughter until you get back on your feet, but once again, because of your conviction, you're denied access to these benefits.[140]

While each barrier is onerous standing alone, their cumulative effect completely precludes many ex-offenders from ever making a living. For example, the ban on public assistance makes it difficult for an ex-offender to find suitable housing. In turn, not being able to secure a stable place to live affects her ability to secure employment. (After all, the application process calls for an

140. Allard, *Claiming our Rights*, *supra* note 64, at 223–24.

address and telephone number.[141]) If she does gain employment, her job may barely pay enough to cover rent (as is the case with most jobs available to those financially-strapped and particularly to those who, perhaps due to a ban on financial aid, lack training). And she is caught in a web: her job may *never* pay enough to cover rent. Indeed, a lack of educational assistance not only cuts off attempts to pursue higher education, but also diminishes access to higher-paying employment opportunities which require specialized training.

III.
NEED FOR COMPREHENSIVE STATE COURT LITIGATION STRATEGY

To dismantle this crippling web of collateral sanctions, advocates must engage in a comprehensive, citizenship-freeing[142] litigation attack on reentry barriers. While legal advocates who provide services to ex-offenders often use litigation and other advocacy tools to help ensure that individual clients are able to obtain the life necessities,[143] advocates often do not specifically bring strategic impact litigation to directly challenge collateral sanctions.[144] To do so

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141. Thompson, *supra* note 13, at 279.

142. *See* Demleitner, *Preventing Internal Exile supra* note 4.

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

> 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. 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, public benefits, public housing, and Section 8 assistance. *See* Cmty. Legal Servs. of Phila., Information for Ex-offenders, http://www.clsphila.org/Ex-Offenders_Information.htm (last visited Mar. 23, 2006). 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 and to register voters. *See* 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.

144. Thus far, systemic litigation has focused on 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) (challenging disenfranchisement of ex-felons in Florida); Hayden v. Pataki, No. 00Civ.8586, 2004 WL 1335921 (S.D.N.Y. June 14, 2004) (challenging New York law barring incarcerated or paroled felons from voting). There has also been sporadic litigation challenging other reentry barriers. *See, e.g.*, Turner v. Glickman, 207 F.3d 419 (7th Cir. 2000) (challenging the TANF ban); Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003) (challenging a Pennsylvania law barring employment of persons convicted of various offenses in facilities providing care to the elderly). Cases challenging economic and social barriers have for the most part been brought under federal law, with 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, 128 (2002) (upholding evictions from public housing); Bolden v. City of New York, 256 F. Supp. 2d 193, 194 (S.D.N.Y. 2003) (upholding termination of public employment due to felony conviction); Delong

would be a bigger step in restoring the rights of individuals who must live with these barriers, for collateral sanctions will continue to ensnare individuals and their communities unless resources are directed toward actually changing these policies wholesale.[145] And to change these policies, the most effective form of attack is state-by-state impact litigation, particularly in vulnerable states: those with extensive, challenge-worthy mazes of collateral sanctions and constitutional and statutory provisions. Why state courts? 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 are the arbiter of reentry policy; they have either been given latitude and discretion in setting qualifications for federal programs, or they have imposed the restrictions themselves.[146] Thus, local authorities determine how restrictive their policies will be.

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.[147] After all, litigation may act as an impetus for

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v. Dep't of Health & Human Servs., 264 F.3d 1334, 1336 (Fed. Cir. 2001) (same); *Turner*, 207 F.3d at 423 (upholding TANF ban); Schanuel v. Anderson, 546 F. Supp. 519, 526 (S.D. Ill. 1982), *aff'd*, 708 F.2d 316 (7th Cir. 1983) (upholding statute prohibiting employment of convicted felons as armed guards or investigators).

145. *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 Mar. 23, 2006) (observing that if the President were truly concerned about providing ex-offenders a second chance, he would support a repeal of both 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).

146. For example, the federal government rewards local public housing agencies that adopt policies and procedures to evict individuals who engage in "certain activity detrimental to the public housing community." 24 C.F.R. § 966.4(1)(5)(vii) (2001). Public housing officials have interpreted this mandate to include individuals who may pose no current danger, but who happen to have criminal histories. *See, e.g.*, LEGAL ACTION CTR., MASS. POLICIES, *supra* note 118, at 1–2 ("In determining an applicant's eligibility for housing assistance, the [Lowell Housing Authority] will consider any criminal history information, regardless of when the criminal activity occurred .... All applicants who have engaged in *any* criminal activity are initially denied housing.") (emphasis in original); Rubinstein & Mukamal, *supra* note 1, at 45–47 (describing how local housing authorities have implemented the federal government's "mandate to get tough on drugs and crime in public housing"). Similarly, Congress allows states to refuse to revoke a driver's license of an individual convicted of a drug offense but keep federal highway funds by submitting certification that the governor and state legislature oppose revocation. 23 U.S.C. § 159(a)(3)(B) (2000). Nonetheless, many states have instead chosen to automatically revoke an individual's driver's license. *See supra* note 94 and accompanying text.

147. *See* 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. & POL'Y REV. 443, 445 (1998) (discussing the "political warfare" necessary to enact

change in the legislative and public opinion arenas. For—even if unsuccessful—comprehensive litigation challenge will bring to light a problem that is otherwise invisible to the general public and, hence, to policymakers: the many layers of civil disabilities imposed on ex-offenders.[148]

A. The 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 United States Constitution. Thus, the Equal Protection Clause offers little hope for relief.[149] The most stringent test 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 narrowly tailored to promote that interest.[150] A governmental action triggers strict scrutiny when it burdens a fundamental right or makes a classification on the basis of race, ethnicity, or national origin.[151] Convicted felons are not a suspect class for equal protection purposes under the federal constitution.[152] Furthermore, the

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public policy changes for ex-offenders, who "occupy such a low rung on the American social ladder").

148. *See* Demleitner, *Preventing Internal Exile*, *supra* note 4, at 154 ("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.")

149. 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 narrowly tailored to serve a compelling state interest. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (stating that classifications subject to strict scrutiny "are constitutional only if they are narrowly tailored measures that further compelling government interests"); Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Classifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny."). An intermediate level of scrutiny applies to classifications on the basis of gender and illegitimacy. *Id.* This level of scrutiny requires that the classification serve "important governmental objectives" and be "substantially related" to the achievement of those objectives. United States v. Virginia, 518 U.S. 515, 533–34 (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, 631–32 (1996). The highly deferential rational basis test treats legislative classifications as presumptively valid. *See id.* at 632 ("In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.").

150. *Adarand*, 515 U.S. at 227. *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

151. *Clark*, 486 U.S. at 461.

152. Woodruff v. Wyoming, 49 F. App'x 199, 203 (10th Cir. 2002) (unpublished opinion) ("It is well-settled . . . that prisoners do not constitute a suspect class"); Baker v. Cuomo, 58 F.3d

Supreme Court has not found economic rights, such as welfare and employment, to be fundamental rights.[153]

Together, the Supreme Court and Congress have significantly limited federal sources of economic rights, making it all the more necessary that advocates rely on state-law-based rights to protect poor ex-offenders. "From the founding, the states were charged with providing for the poor, a state duty derived from English law and tradition. Although the class of eligible needy slowly expanded . . . this expansion of beneficiaries never blossomed into a corre -sponding citizen right to state assistance."[154] In *Goldberg v. Kelly*, the Supreme Court recognized that welfare benefits—rather than being "mere charity" or "privilege"—"are a matter of statutory entitlement for persons qualified to receive them."[155] However, the Court did not explicitly find that poverty was a suspect classification, nor did it find that receipt of welfare benefits was a fundamental property right worthy of heightened scrutiny.[156] In subsequent cases, the Court has rejected the notion that the federal constitution imposes an affirmative obligation upon the government to provide a minimum level of subsistence, and it has afforded social welfare legislation the utmost deference.[157] Similarly, the Court has held that employment is not a fundamental right,[158] and that

814, 820–22 (2d Cir. 1995), *vacated on other grounds sub nom.* Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996) (applying rational basis scrutiny to a felon disenfranchisement law because "in the absence of any allegation that a challenged classification was intended to discriminate on the basis of race or other suspect criteria, statutes that deny felons the right to vote are not subject to strict judicial scrutiny"). Although no court has accepted the theory, one commentator has argued that classifications based on criminal conviction should be treated as suspect, much like classifications on the basis of race and national origin, because of the history of purposeful unequal treatment of ex-offenders, the 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, 1420–21 (1975).

153. United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 219 (1984) ("[T]here is no fundamental right to government employment for purposes of the Equal Protection Clause."); Lavine v. Milne, 424 U.S. 577, 584 n.9 (1976) (noting that there is 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, 73–74 (1972) (finding no fundamental right to "decent, safe, and sanitary 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 (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) (same), *aff'd*, 538 F.2d 317 (2d Cir. 1976).

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

155. 397 U.S. 254, 262, 265 (1970).

156. *See id.* at 260–66 (finding that termination of welfare benefits without an evidentiary hearing violated Fourteenth Amendment due process rights).

157. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 483–87 (1970) (applying rational basis scrutiny in a challenge to Maryland's public assistance program).

158. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–13 (1976) (finding no fundamental right to government employment and noting that "a standard less than strict scrutiny has consistently

economic regulations are presumptively constitutional.[159]

Just as the federal courts have been withdrawing from their role as protectors of the poor, Congress has also been doing so by making clear that there is no entitlement to federal welfare and by shifting responsibility for welfare implementation to the states.[160] This trend makes independent state constitutional analysis particularly appropriate—and necessary. In some instances, state law remedies may be the only hope of indigent ex-offenders seeking food, housing, and other financial assistance.[161]

Under the federal constitution, a facially neutral law is also subject to strict scrutiny if it is an obvious pretext for racial discrimination.[162] In order to trigger strict scrutiny, however, 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.[163] Federal courts have rejected the argument that statistical evidence that a statute has a disproportionate impact on a particular class of people is sufficient to prove intentional discrimination.[164] Instead, the disparate impact must be traceable to a discriminatory purpose.[165] This well-established line of cases would likely foreclose strict scrutiny review for challenges to reentry barriers.[166] Despite the significant disproportionate racial impact of

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been applied to state legislation restricting the availability of employment opportunities") (internal citation omitted).

159. *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, with the demise of the *Lochner* era, "federal courts have abandoned serious review of economic regulations").

160. *See* Personal Responsibility and Work Opportunity Reconciliation Act § 401, 42 U.S.C. § 601 (2000) (stating that TANF block grants are intended to increase the flexibility of the states in operating welfare programs, and that there is no individual entitlement to assistance under any state program funded by TANF).

161. *See* Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 595–605 (1989) (arguing that, in contrast to the federal constitution, specific provisions in state constitutions may guarantee state protection for indigent children); 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, *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).

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

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

164. *See, e.g.*, United States v. Moore, 54 F.3d 92, 97–99 (2d Cir. 1995) (finding no racial animus even though "[t]he statistical evidence regarding discriminatory impact is . . . irresistible: approximately [eighty-eight percent] of defendants charged with crack/cocaine-related crimes are [African American]").

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

166. In one case in which plaintiffs sought strict scrutiny review of a reentry barrier, the court never addressed whether a showing of intent was necessary, but found that strict scrutiny was not triggered because there was no showing of disparate impact. In *Lewis v. Alabama Dep't of Public*

many of these collateral sanctions, it would be difficult to establish sufficient racially-discriminatory intent to sustain an equal protection challenge based on race; there is little to no evidence that these collateral sanctions were enacted "'because of,' not merely 'in spite of' [their] adverse effects upon an identifiable group."[167]

Absent a finding of suspect classification or fundamental right, federal courts would apply the "rational basis" test to collateral sanctions. The rational basis test, the most lenient type of review under the Equal Protection Clause, upholds governmental classifications that bear a "rational relation to some legitimate end."[168] When applying the rational basis test to the suspension or termination of the rights of convicted persons, federal courts have interpreted the Equal Protection Clause so as to make it easy for governmental entities to meet their burden.[169]

The Due Process Clause of the Fourteenth Amendment also offers little hope for substantive relief from collateral sanctions. The Due Process Clause includes both a substantive component and a procedural component.[170]

Safety, 831 F. Supp. 824 (M.D. Ala. 1993), the plaintiff challenged a regulation barring individuals with felony convictions and misdemeanor convictions involving violence or moral turpitude from being placed on the list of wrecker operators to be called by state troopers. *Id.* at 825. The plaintiff introduced statistical evidence of the percentage of African American misdemeanor convictions compared with White misdemeanor convictions in Lee County, Alabama, but admitted that "out of a total of 2,055 misdemeanor convictions in Lee County, the racial makeup of the offenders was unknown in 1,366 of the cases." *Id.* The court declined to apply strict scrutiny, finding that the plaintiff's evidence could not support "a claim that this regulation discriminates against [African Americans]." *Id.* The court nonetheless found a violation of the Equal Protection Clause under the rational basis test. *Id.* at 827.

167. *Feeney*, 442 U.S. at 279. Similar equal protection challenges were mounted, without success, to address the vast disparity between sentences for crack/cocaine and powder cocaine under the federal sentencing guidelines. *See, e.g.*, United States v. Teague, 93 F.3d 81, 85 (2d Cir. 1996), (holding that there is no evidence that Congress reaffirmed the sentencing disparity in 1995 because of its adverse impact on African Americans); United States v. Moore, 54 F.3d 92, 96–99 (2d Cir. 1995) (finding that Congress did not enact the sentencing disparity with a discriminatory intent); United States v. Dumas, 64 F.3d 1427, 1430–31 (9th Cir. 1995) (finding no evidence of racial animus and 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).

168. Romer v. Evans, 517 U.S. 620, 631 (1996).

169. *See, e.g.*, Woodruff v. Wyoming, 49 F. App'x 199, 203 (10th Cir. 2002) (unpublished decision) (upholding disenfranchisement of convicted felons under rational basis test); United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) (upholding statute barring convicted felons from jury service because "[t]he government has a legitimate interest in protecting the probity of juries"); Davis v. Bowen, 825 F.2d 799, 800 (4th Cir. 1987) (upholding denial of right of Social Security benefits to convicted felon under rational basis test); Darks v. City of Cincinnati, 745 F.2d 1040, 1043 (6th Cir. 1984) (upholding denial of dance hall operation license to convicted felon because the city "could [have] rationally conclude that denying a license to felons would [have] further[ed] the city's legitimate purpose of insuring that dance halls are operated by persons of integrity with respect for the law").

170. *See* DeShaney v. Winnebago Cty. Soc. Servs. Dep't, 489 U.S. 189, 195 (1989) ("The claim is one invoking the substantive rather than the procedural component of the Due Process Clause; petitioners do not claim that the State denied [plaintiff] protection without according him appropriate procedural safeguards, but that it was categorically obligated to protect

Substantive due process "forbids the government to infringe certain fundamental liberty interests . . . no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[171] Where the claimed right is not fundamental, state action need only be "rationally connected" to a legitimate state objective in order to survive a substantive due process challenge.[172] Federal substantive due process challenges to collateral consequences have been unsuccessful because courts have found either that there was no liberty interest at stake or that the regulation met the rational basis test.[173]

One federal court of appeals has considered whether the ban on TANF assistance violates substantive due process.[174] In *Turner v. Glickman*, the plaintiffs brought substantive due process and equal protection claims; the Court of Appeals for the Seventh Circuit applied rational basis scrutiny on both claims because the statute did not implicate any fundamental rights or make any suspect classifications.[175] The court found that "rendering those convicted of drug-related felony crimes ineligible to receive food stamps or aid under TANF is a potentially serious sanction," and was therefore a rational means to deter drug use.[176] The court also noted that, based on testimony in the legislative record that food stamps were being traded for drugs, Congress could rationally have determined that the ban would reduce fraud.[177] Legal advocates seeking to challenge the TANF ban would have a difficult time convincing any federal court applying a similarly deferential review that the ban does not further a valid state interest.

The procedural component of the Due Process Clause focuses on the means by which the interest at issue is deprived.[178] To determine whether govern-

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him in these circumstances." (citations omitted)).

171. Reno v. Flores, 507 U.S. 292, 302 (1993).

172. *Id.* at 303.

173. *See, e.g.*, Delong v. Dep't of Health & Human Servs., 264 F.3d 1334, 1343 (Fed. Cir. 2001) (finding that statute requiring dismissal of federal employees with prior convictions from positions involving regular contact with Indian children is rationally related to government's interest in "protecting [Indian] children from abuse"); Bolden v. City of New York, 256 F. Supp. 2d 193, 195 (S.D.N.Y. 2003) (upholding statute requiring automatic dismissal of city employees upon conviction of a felony, because civil servant convicted of a felony while in office loses all property interest in the position); Schanuel v. Anderson, 546 F. Supp. 519, 523 (S.D. Ill. 1982) (upholding statute prohibiting employment of felons as armed guards or investigators because the government could "conclude rationally that someone who has chosen to violate the laws of the federal or state government within the previous ten years has demonstrated himself unfit for a potentially sensitive position . . . .").

174. Turner v. Glickman, 207 F.3d 419, 426–27 (7th Cir. 2000).

175. *Id.* at 424–27.

176. *Id.* at 425.

177. *Id.*

178. *See, e.g.*, 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))); Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (Due Process Clause provides that an individual must have a meaningful

mental action complies with the constitutional requirement of procedural due process, the court must determine whether there is a liberty or property interest at stake, and, if a protected interest is found, determine the nature of the process due to the plaintiff.[179] Thus, even if a court found that ex-offenders possess a property interest[180] in the economic and social service benefits and opportunities being denied through collateral sanctions, the only remedy available would be implementation of sufficient process before ex-offenders may be denied benefits.[181]

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, which prohibits discrimination in federally funded programs.[182] However, a series of recent Supreme Court cases has narrowed this avenue of redress. While not completely foreclosed, challenges under regulations promulgated pursuant to Title VI and Section 1983 have questionable chances of success. Although such challenges could be used to supplement state law claims in some jurisdictions, advocates cannot rely upon them 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 provides that "[n]o 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."[183] The Supreme Court interpreted Section 601 as enabling citizens to file private

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opportunity to be heard before the state may deprive her of any significant property interest).

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

180. This question further complicates claims under the Due Process Clause. Due process protections apply only to benefits to which individuals 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). Thus, the Supreme Court has found that "a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process." *Id* (citing Goldberg v. Kelly, 397 U.S. 254 (1970)). In the Personal Responsibility and Work Opportunity Reconciliation Act, however, Congress stated that the TANF 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 TANF recipient's interest in receiving benefits. Notwithstanding the Congressional amendment, however, lower courts have subsequently continued to apply procedural due process protections in welfare benefit termination cases. *See, e.g.*, Kapps v. Wing, 404 F.3d 105, 113 (2d Cir. 2005); Lawson el rel. Lawson v. Dept of Health and Social Services, 2004 WL 440405, at *3–4 (Del. Sup. 2004); Vance v. Housing Opp. Comm'n of Montgomery County, 332 F. Supp. 2d 832 (D. Md. 2004).

181. This result would certainly benefit ex-offenders, but would not provide the widespread, substantive relief advocated in this article.

182. 42 U.S.C. §§ 2000d–d7 (2000).

183. *Id.* § 2000d.

lawsuits challenging the discriminatory actions of any recipient of federal funds.[184] However, the Court required citizen plaintiffs to prove that recipients of the funds engaged in intentional discrimination.[185]

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.[186] In *Guardians Association v. Civil Service Commission*, Justice White strongly suggested that Title VI prohibits practices that have a disparate racial impact.[187] In addition, lower courts consistently found that Title VI granted a private right of action to enforce regulations promulgated under Section 602,[188] making Title VI a powerful

184. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 703 (1979) ("We have no doubt that Congress . . . understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.").

185. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

186. 42 U.S.C. § 2000d-1 (2000) ("Each [f]ederal department and agency which is empowered to extend [f]ederal 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 of [S]ection 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."). A significant number of regulations prohibiting disparate impact in federally funded programs have been promulgated under Section 602. *See* Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 592 n.13 ("[S]hortly after these initial regulations were promulgated, every Cabinet department and about [forty] federal agencies adopted Title VI regulations prohibiting disparate impact discrimination."). *See, e.g.*, 7 C.F.R. § 15.3(b)(2) (2005) (Department of Agriculture); 10 C.F.R. §§ 1040.13(c)–(d) (2005) (Department of Energy); 15 C.F.R. § 8.4(b)(2) (2005) (Department of Commerce); 22 C.F.R. § 141.3(b)(2) (2005) (Department of State); 24 C.F.R. §§ 1.4(2)(i), (3) (2005) (Department of Housing and Urban Development); 28 C.F.R. § 42.104(b)(2)–(3) (2005) (Department of Justice); 29 C.F.R. §§ 31.3(b)(2)–(3) (2005) (Department of Labor); 32 C.F.R. § 195.4(b)(2) (2004) (Department of Defense); 34 C.F.R. § 100.3(b)(2) (2005) (Department of Education); 43 C.F.R. §§ 17.3(b)(2)–(3) (2005) (Department of the Interior); 45 C.F.R. §§ 80.3(b)(2)–(3) (2005) (Department of Health and Human Services); 49 C.F.R. §§ 21.5(b)(2)–(3) (2005) (Department of Transportation).

187. *Guardians Ass'n*, 463 U.S. 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). *See also* Lau v. Nichols, 414 U.S. 563, 566 (1974) (finding a violation of Section 601 where a school district's refusal to provide English language instruction to students of Chinese ancestry made many students' classroom experiences "wholly incomprehensible and in no way meaningful.").

188. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 294 (2001) (Stevens, J., dissenting) ("[E]very Court of Appeals to address the question has concluded that a private right of action exists to enforce the rights guaranteed both by the text of Title VI and by any regulations validly promulgated pursuant to that Title . . ."); Powell v. Ridge, 189 F.3d 387, 400 (3d Cir. 1999) (rejecting defendants' argument that Title VI regulations do not provide a private right of action); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (stating that private plaintiff may sue to enforce regulations promulgated by the Department of Transportation); Latinos Unidos de Chelsea en Accion v. Sec'y of Hous. & Urban Dev., 799 F.2d 774, 785 n.20 (1st Cir. 1986) (noting that private plaintiffs must establish discriminatory impact in order to prevail in a suit to enforce Title VI regulations).

weapon to attack systemic discrimination.[189]

Alexander v. Sandoval put an end to all of that.[190] In *Sandoval*, the Supreme Court found that there was no private cause of action to enforce regulations enacted pursuant to Section 602.[191] According to the Court, only Section 601 creates a private right of action, and furthermore, Section 601 prohibits only intentional discrimination.[192] Federal agencies may use Section 602 to further enforce rights conferred in Section 601, but regulations promulgated under Section 602 cannot create an additional private right of action.[193]

In *Sandoval*, some members of the Court appeared to invite actions under 42 U.S.C. § 1983 to enforce regulations promulgated under Section 602,[194] although lower courts differed on whether such suits could in fact be brought.[195] 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,"[196] including rights conferred by federal statute.[197] Accordingly, Section 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.[198] Moreover, several courts have interpreted federal regulations to create rights enforceable under Section 1983,[199] including

189. *See, e.g.*, Pitts v. Freeman, 755 F.2d 1423, 1427 (11th Cir. 1985) (holding that the district court erred in requiring plaintiffs to show discriminatory intent in a case challenging school construction and expansion under Title VI and accompanying regulations); Larry P. *ex rel.* Lucille P. v. Riles, 793 F.2d 969 (9th Cir. 1984) (holding that defendants violated regulations promulgated under Title VI by using I.Q. tests to place students in classes for the educable mentally retarded where those tests had a racially discriminatory impact); Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131, 1139 (N.D. Cal. 2000) (denying defendants' motion to dismiss complaint in which plaintiffs alleged that highway drug interdiction practices had a discriminatory impact on motorists of color in violation of Title VI regulations); Md. State Conference of NAACP Branches v. Md. Dep't of State Police, 72 F. Supp. 2d 560 (D. Md. 1999) (finding private of action available to challenge racial profiling of motorists under Title VI regulations).

190. 532 U.S. 275 (2001).

191. *Id.* at 293.

192. *Id.* at 280.

193. *Id.* at 291–92.

194. *Id.* at 300 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.) ("Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference [Section] 1983 to obtain relief . . . .").

195. *Compare* Robinson v. Kansas, 295 F.3d 1183, 1187 (10th Cir 2002) ("Disparate impact claims may still be brought against state officials for prospective injunctive relief through an action under 42 U.S.C. § 1983 to enforce [S]ection 602 regulations"), *with* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790–91 (3d Cir. 2001) ("Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination, and . . . while the [agency's] regulations on that point may be valid, they nevertheless do not create rights enforceable under [S]ection 1983.").

196. 42 U.S.C. § 1983 (2000).

197. *See* Maine v. Thiboutot, 448 U.S. 1, 4–8 (1980).

198. *See id.* at 4 (finding that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law").

199. *See, e.g.*, Buckley v. City of Redding, 66 F.3d 188, 193 (9th Cir. 1995) (holding that regulations promulgated under the Federal Aid in Sport Fish Restoration Act create enforceable

regulations promulgated under Title VI.[200]

This too was a short-lived remedy. The Supreme Court effectively ended the use of Section 1983 to enforce Title VI regulations with its decision in *Gonzaga University v. Doe*.[201] In *Gonzaga*, the plaintiff sued a private university to enforce provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA").[202] The Court rejected plaintiff's claim, concluding that Congress had not intended to create a new federal right when it enacted FERPA.[203] In reaching its conclusion, the *Gonzaga* Court asserted that some courts had misunderstood its previous decision in *Blessing v. Freestone*[204] to permit enforcement of statutes through private suits under Section 1983 whenever "the plaintiff falls within the general zone of interest that the statute is intended to protect . . . ."[205] 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 [Section] 1983."[206] *Gonzaga*, therefore, settled the question of whether the test to determine availability of a private cause of action under Section 1983 was distinct from the test to determine whether implied rights of action were available under other statutes.[207] The *Gonzaga* Court found that "implied right of action cases should guide the determination of whether a statute confers rights

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rights under § 1983); Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994) (holding that plaintiffs are entitled to bring § 1983 action to enforce FCC regulations); 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 [S]ection 1983").

200. *See, e.g.*, *Powell*, 189 F.3d at 401–03 (holding that Title VI regulations prohibiting disparate impact may be enforced under § 1983).

201. 536 U.S. 273 (2002).

202. *Id.* at 276.

203. *Id.* at 287–91. *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 it:

> 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 allegedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

Id. at 340–41 (citations omitted).

204. 420 U.S. 329 (1997).

205. *Gonzaga*, 536 U.S. at 283. *See also id.* ("Fueling this uncertainty is the notion that our implied private right of action cases have no bearing on the standards for discerning whether a statute creates rights enforceable by § 1983. . . . [W]e further reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action under § 1983.").

206. *Id.*

207. *Id.* at 279–82.

enforceable under [Section] 1983."[208]

When *Gonzaga* is read with *Sandoval*, it appears that the current Supreme Court would not allow a Section 1983 action to enforce Title VI disparate impact regulations. *Gonzaga* requires clear congressional intent to create an individual right in order for a private suit to be brought under Section 1983; the Court in *Sandoval* found such congressional intent lacking in Section 602 of Title VI.[209]

Interpretation of *Gonzaga* has created widespread disagreement among the lower federal courts. Some lower courts have interpreted *Gonzaga* as effectively eliminating enforcement of statutory rights under Section 1983 by requiring the plaintiff to demonstrate that the underlying statute contains an implied private right of action.[210] Other courts have found that *Gonzaga* did not substantially change the test to determine whether a private right of action is available under Section 1983.[211] Although *Gonzaga*'s treatment by lower courts does not signify a foregone conclusion that Section 1983 is unavailable, the divergent analyses adopted by the courts make its future far from certain.[212]

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208. *Id.* at 283.

209. *Compare id.* at 282–86, *with* Alexander v. Sandoval, 532 U.S. 275, 293 (2001). In *Sandoval*, the Court made an explicit distinction between Sections 601 and 602 of Title VI, finding a private right of action exists under Section 601, *Sandoval*, 532 U.S. at 285, but not under Section 602, *Sandoval*, 532 U.S. at 293.

210. *See, e.g.*, Almendares v. Palmer, No. 3:00-CV-7524, 2002 WL 31730963, at *4 (N.D. Ohio Dec. 3, 2002) (declining to apply *Blessing* test because "after *Gonzaga* . . . the key inquiry is whether Congress unambiguously created a private cause of action"); Briand v. Lavigne, 223 F. Supp. 2d 241, 244–45 (D. Me. 2002) (finding that *Gonzaga* requires a determination whether statutory provisions are "right creating"); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 329 n1 (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. [Section] 1983").

211. *See* Sabree *ex rel.* Sabree v. Richman, 367 F.3d 180, 186–87 (3d Cir. 2004) (stating that *Gonzaga* did not abandon the *Blessing* test but rather "clarified and emphasized that it is only violations of rights, not laws, which give rise to [Section] 1983 actions") (citations omitted); Bryson v. Shumway, 308 F.3d 79, 88–89 (1st Cir. 2002) (applying the *Blessing* test); Kapps v. Wing, 283 F. Supp. 2d 866, 879–81 (E.D.N.Y. 2003) (acknowledging *Gonzaga*, but applying *Blessing* test), *vacated*, 404 F.3d 105 (2d Cir. 2005) (vacating district court's reliance on *Blessing* because relief was available on an alternative legal theory, and it was thus not necessary to decide how to interpret Section 1983 after *Gonzaga*); Rabin v. Wilson-Coker, 266 F. Supp. 2d 332, 341 (D. Conn. 2003) (same), *rev'd on other grounds*, 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*, 536 U.S. at 302 (Stevens, J., dissenting) (noting that if the majority opinion is taken at its word "there should be no difference between the Court's 'new' approach to discerning a federal right in the [Section] 1983 context and the test we have 'traditionally' used, as articulated in *Blessing* . . . .").

212. Though remedies under Title VI may be unavailable, other federal remedies to the disproportionate impact of collateral sanctions on racial minorities need not be foreclosed. "Ex-offenders are blocked from employment not only by formal statutes and ordinances, but by private employers. One study done in five major cities showed that two-thirds of employers would not knowingly hire ex-offenders and at least one-third checked for criminal histories to weed ex-offenders out." Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-convicts*, 38 U.S.F. L. REV. 193, 196 (2004). 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 found that "due to this adverse impact, an

B. Limitations on Current Nonlitigation Strategies

Given the limited chance of success 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 actively pursued legislative and policy change at the federal, state, and local level to eradicate collateral sanctions. There has been some momentum at the federal level with the introduction in Congress of the Second Chance Act of 2004: Community Safety Through Recidivism Prevention,[213] but advocates are unsure of the legislation's chance of success. Also, the current legislation does not completely repeal the federal limitations placed on education and welfare assistance.[214] Thus, while the bill's passage would be a significant victory, it would leave in place many of the obstacles ex-offenders currently face.

At the state level, there have also been some legislative successes. For example, Pennsylvania recently repealed its welfare ban,[215] and Delaware passed a bill lifting the ban on licensing for convicted felons in over thirty-five

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employer may not base an employment decision on the conviction record of an applicant or an employee absent business necessity." Equal Employment Opportunity Comm'n, Notice N-91 5.061 (Sept. 7, 1990), *available at* http://www.hirecheck.com/downloads/pdf/Compliance Assistance/EEOCNOFRAME.pdf. Accordingly, advocates should consider filing disparate impact litigation under Title VII challenging discriminatory employment practices.

213. The Second Chance Act of 2004 was introduced in the House of Representatives by Representatives Rob Portman (R–OH), with bipartisan support of three other Republicans and two Democrats, on June 23, 2004. H.R. 4676, 108th Cong. (2004). A related bill has also been introduced in the Senate, again with bipartisan support. *See* The Second Chance Act of 2004, S. 2789, 108th Cong. (2004) (introduced by Sen. Sam Brownback (R-KS)); S. 2923, 108th Cong. (2004) (introduced by Sen. Joseph R. Biden, Jr. (D-DE)). In addition, several institutional projects have been launched at the national level to address reentry issues. For example:

> 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, Robinson & Solomon, *supra* note 5, at 13.

214. 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. H.R. 4676 § 3(m). It would also create a federal task force to review and issue a report on federal barriers to reentry and provide grants to community-based organizations "for the purpose 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 barriers facing those returning home from prison, they do not repeal the existing barriers. For example, the bill upholds the ban on federal student loans, but limits its applicability to those convicted while receiving federal aid, in contrast to the current statute which denies aid to those with past as well as present drug convictions. *Id.* § 15. The bill does not address federal restrictions on welfare and public housing. In addition, most employment restrictions are creatures of state law, and thus the bill does nothing to eliminate those.

215. *See* Pa. Dep't of Public Welfare, Were You Turned Down for Cash Assistance or Food Stamps?, http://www.clsphila.org/PDFfolder/Notice_lifting_ban_on_DPW_benefits.pdf (last visited Mar. 23, 2006).

professions.[216] Because so many barriers are products of state law or of the discretionary application of federal policy by state agencies, state-level initiatives are an important strategy for reform. They are, however, subject to the whims of political will, and it could take many years to achieve meaningful reform.

There are an increasing number of programs aimed at assisting ex-offenders to navigate the maze of collateral sanctions and to meet their daily needs at the federal- and state-levels. For example, in the 2004 State of the Union address President George W. Bush unveiled a proposal to spend 300 million dollars on reentry initiatives over the next few years to help ex-offenders obtain housing, employment, and mentoring.[217] The federal initiative will fund direct services programs that—in addition to housing, employment, and counseling—help ex-offenders with a full range of services including health care and reunification with children.[218] These programs provide an invaluable service to ex-offenders

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216. *See* Annie Turner, *Delaware Law Lifts Employment Barrier for Ex-Cons*, JOIN TOGETHER, Aug. 13, 2004, http://www.jointogether.org/news/headlines/features/2004/delaware-law-lifts-employment.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.")

217. Bush, *supra* note *. 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 [sic]—and when the gates of the prison open, the path ahead should lead to a better life.

Id. The program—implemented through the Department of Labor ("DOL"), the Department of Housing and Urban Development, and the Department of Justice—would help ex-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 Mar. 23, 2006) [hereinafter President Bush's Initiative]. It would expand on elements of the Ready4Work Project, a pilot project at the DOL providing funding to successful direct services programs. *See* U.S. Dep't of Labor, Ready4Work: A Business, Faith, Community & Criminal Justice Partnership, http://www.dol.gov/cfbci/Ready4Work.htm (last visited Mar. 23, 2006).

218. 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, Inc., established in 1999 in East Harlem, is staffed by ex-offenders and individual directly affected by incarceration and/or HIV/AIDS. Union Square Awards, Julio Medina, http://www.fcny.org/scripts/usq/getpage02.pl?orgid=0111 (last visited Mar. 23, 2006).

> 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 217. Legal advocates who

and mitigate the impact of certain collateral sanctions. Nonetheless, they do not eliminate these restrictions altogether.

IV.
STATE CONSTITUTIONS AS GUARDIANS OF THE RIGHT TO A SECOND CHANCE[219]

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 postconviction penalties. In the face of inhospitable federal jurisprudence, turning to state courts affords a powerful civil rights litigation strategy.[220] Indeed, by one commentator's count, at least forty-two states have given relevant provisions in their own constitutions a more expansive interpretation than that accorded to similar provisions of the U.S. Constitution.[221] As a result, many civil rights challenges that encountered resistance in federal courts have succeeded when litigated in state courts using state constitutional or statutory provisions.[222]

Legal strategizing must begin with individual advocates identifying the state

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 143. The Legal Action Center has 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. *See* Press Release, Legal Action Center, Legal Action Center Appoints New Co-Directors for the National H.I.R.E. Network (June 9, 2005), http://www.hirenetwork.org/pdfs/Press Release 6-9-05.pdf.

219. Justice Brennan wrote two influential articles encouraging state courts to assume the role of "guardians of individual rights" and commending those that interpreted their own constitutions to afford protections beyond those federal courts had found to be guaranteed by the United States Constitution. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); 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 (1986).

220. *See* Brennan, *The Bill of Rights and the States*, *supra* note 219, at 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.").

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

222. *Compare, e.g.*, Sheff v. O'Neill, 678 A.2d 1267, 1270 (Conn. 1996), *and Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 328 (N.Y. 2003), *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (state's affirmative duty to provide equal educational opportunities for socioeconomically disadvantaged students). *Compare also, e.g.*, Harris v. McRae, 448 U.S. 297, 326 (1980), *with* Right to Choose v. Byrne, 450 A.2d 925, 928 (N.J. 1982) (state's obligation to provide funding for abortions). In addition, state courts struck down laws criminalizing sodomy under their own constitutions well before the U.S. Supreme Court determined in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), that such laws violate the U.S. Constitution. *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (striking down a statute criminalizing homosexual sodomy under the Kentucky constitution).

schemes most likely to support successful postconviction challenges. Most states have adopted a myriad of sanctions, through legislation, administrative rules, and municipal ordinances. Similarly, each state may have a number of constitutional and statutory provisions that could provide a basis for challenging reentry barriers. The following discussion is not an attempt to provide a comprehensive analysis of the many possible grounds for state challenges to postconviction sanctions. Rather, the discussion highlights several state courts' interpretations of paradigmatic state constitutional and statutory provisions, with the hope of encouraging advocates to examine whether similar provisions might be utilized in their own states.[223] Although the language and application of constitutional and statutory provisions will vary from state to state, in this article we advocate litigating within 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 their state constitutions as under the federal constitution.[224] In those states, social and economic legislation, such as limitations on economic entitlements of ex-offenders, is presumptively valid and will be upheld if the classification is merely rationally related to some legitimate state interest.[225] Some state courts, however, have taken a more rigorous approach to equal

223. Although this article focuses on three possible causes of action, several others exist that advocates should explore. These strategies include challenges to sanctions as cruel or unusual punishment, focusing on those states with constitutional provisions prohibiting "cruel *or* unusual" punishment as opposed to "cruel *and* unusual" punishment. Nineteen states have constitutional provisions that outlaw cruel or unusual punishment. *See* ALA. CONST. art. 1, § 15; ARK. CONST. OF 1874 art. 2, § 9; CAL. CONST. art. I, § 17; HAW. CONST. art. I, § 12; KAN. CONST. BILL OF RIGHTS § 9 (1968); LA. CONST. art. I, § 20; ME. CONST. art. I, § 9; MASS. CONST. pt. I, art. 26; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. 3, § 28; NEV. CONST. art. I, § 6; N.H. CONST. pt. 1, art. 33; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OKLA. CONST. art. II, § 9; TEX. CONST. art. I, § 13; WYO. CONST. art. I, § 14. In two of these states, California and Michigan, courts have expressly found that the use of the disjunctive "or" indicates that the provision provides greater protection than the Eighth Amendment to the U.S. Constitution, which uses the conjunctive "and." People v. Bullock, 485 N.W.2d 866, 872 (Mich. 1992); People v. Anderson, 493 P.2d 880, 885–87 (Cal. 1972).

224. *See, e.g.*, Kelly v. State, 525 N.W.2d 409, 411 (Iowa 1994) (noting that in an equal protection context, "[t]he scrutiny of a challenged statute is the same under both the United States and Iowa constitutions"); Gora v. City of Ferndale, 576 N.W.2d 141, 145 (Mich. 1998) ("[W]e do not find in the wording used, nor in its arrangement, any evidence of purpose on the part of the drafters to provide broader protection in the Equal Protection Clause of the state constitution than is found in its federal counterpart." (quoting Doe v. Dep't of Soc. Servs., 487 N.W.2d 166, 175 (Mich. 1992))) (alteration in the original)) *See also* 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.").

225. *See, e.g.*, *Kelly*, 525 N.W.2d at 411 (finding that the state could rationally have decided "for economic reasons" not to give equal pay increases to union and nonunion employees alike).

protection.[226] These courts apply heightened equal protection review to a broader range of rights than the federal constitution, such as the right to education.[227] Alternately, though technically applying lower level rational basis scrutiny, courts in these states may apply a more rigorous analysis than the highly deferential federal rational basis review.[228] For example, despite insufficient proof of intentional discrimination, some state courts have struck down statutes that have a racially disparate impact using the rational basis standard under the state constitution, whereas federal courts would apply a more deferential review.[229]

Accordingly, economic and social restrictions on ex-offenders should be challenged under state equal protection clauses that have been interpreted to

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226. *See, e.g.*, Williams v. State, 895 P.2d 99, 103 (Alaska 1995) ("Alaska's equal protection clause may be more protective of individual rights than the federal equal protection clause. In analyzing equal protection issues under the Alaska Constitution, we have rejected the traditional two-tiered federal approach in favor of a more flexible 'sliding scale' test.") (citations omitted); Baker v. State, 744 A.2d 864, 867 (Vt. 1999) (finding that the Common Benefits Clause in the Vermont Constitution guarantees committed same-sex couples the statutory benefits and protections provided to opposite-sex married couples). One commentator has offered an explanation of this trend: "[S]ince the rise of the New Federalism, at least twenty-one states have ruled that the equality guarantees in their state constitutions afford more expansive protection that [sic] the Federal Equal Protection Clause." Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1020–21 (2003).

227. *See, e.g.*, Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (finding that the equal protection guarantee in the state constitution requires equal educational opportunity); Serrano v. Priest, 557 P.2d 929, 949–51 (Cal. 1977) (finding, under the state constitution, that education is a fundamental right and that discrimination in educational opportunity on the basis of district wealth is a suspect classification); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) ("[I]n Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized."); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) (holding that education is a fundamental right and therefore the equal protection guarantee in the state constitution requires application of strict scrutiny to any discriminatory classifications in the education financing system). Similarly, other state courts have suggested that under state equality guarantees, classifications such as sex or sexual orientation are subject to strict scrutiny. *See, e.g.*, Page v. Welfare Comm'r, 365 A.2d 1118, 1123–24 (Conn. 1976) (noting that the passage of the state equal rights amendment could require application of strict scrutiny to classifications on the basis of sex); People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974) (holding that "a classification based on sex is a suspect classification" and is subject to strict scrutiny); Tanner v. Or. Health Scis. Univ., 971 P.2d 435 (Or. Ct. App. 1998) (holding that classifications on the basis of sexual orientation are suspect under the equality guarantee in the state constitution).

228. *See, e.g.*, Bierkamp v. Rogers, 293 N.W.2d 577, 583–85 (Iowa 1980) (applying rigorous rational basis review under state constitution to strike down tort liability statute similar to that upheld under weaker federal rational basis review). *See also* Williams, *supra* note 224, at 1219 ("Under the first [methodology], 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)).

229. *Compare, e.g.*, State v. Russell, 477 N.W.2d 886 (Minn. 1991) (using the state constitution's more rigorous rational basis standard to strike down state sentencing guidelines with a disparate impact on African Americans), *with* U.S. v. Clary, 34 F.3d 709 (8th Cir. 1994) (refusing to apply strict scrutiny in an equal protection challenge to federal sentencing guidelines because plaintiff failed to prove that racial animus was a motivating factor in the enactment of the guidelines).

provide stronger protection than the federal counterpart. While the precise standard may vary from state to state, any analysis that guarantees more searching review than a near-irrebuttable presumption of validity provides an opportunity for the court to understand why denying housing, employment, or welfare to those with criminal records unfairly and unjustifiably discriminates against those individuals.[230] Wyoming will be used to illustrate this type of challenge. Wyoming's equal protection guarantee "'mandates that all persons similarly situated shall be treated alike, both in privileges conferred and in the liabilities imposed.'"[231] This guarantee offers more protection than the Federal Equal Protection Clause.[232] Until recently, Wyoming counted itself among the group of fifteen states that continue to permanently deny cash assistance and food stamp benefits to individuals convicted of drug-related felons.[233] Although

230. 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 the rational basis review afforded under the Federal Constitution. Certain states provide such heightened review to certain rights that explicitly are afforded special treatment under other provisions of the constitution. For example, in *Butte Community Union v. Lewis*, 712 P.2d 1309, 1313 (Mont. 1986), the Supreme Court of Montana chose to apply a middle-tier standard of review (between rational basis scrutiny and strict scrutiny) to a statute that eliminated certain welfare benefits in light of a state constitutional provision that required the legislature to "provide necessary assistance to the misfortunate." The court found that a benefit grounded in the state constitution "is an interest whose abridgement requires something more than a rational relationship to a governmental objective." *Id.* at 1313–14. Given the fact that the state constitution recognized the need to provide welfare benefits to the poor, the court saw a need to articulate a substantive mid-level analysis. . . .[because]. . . ."[t]he old rational basis test allows government to discriminate among classes of people for the most whimsical reasons." *Id.* at 1314.

231. . 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)). Wyoming's equal protection guarantee is derived from several different provisions of the state constitution. *Id. See* WYO. CONST. art. I, § 2 ("In their inherent right of life, liberty and the pursuit of happiness, all members of the human race are equal."); *id.* art. I, § 3 ("[T]he laws of this state affecting the 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 unworthiness duly ascertained by a court of competent jurisdiction."); *id.* art. I, § 34 ("All laws of a general nature shall have a uniform operation."); *id.* art. III, § 27 ("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.")

232. *Allhusen,* 898 P.2d at 884. *See also* Wilson v. State, 841 P.2d 90, 95 (Wyo. 1992); Johnson v. State Hearing Examiner's Office, 838 P.2d 158, 165 (Wyo. 1992).

233. *See* THE SENTENCING PROJECT, SUMMARY—LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES (State Modifications Updated April 2006), http://www.sentencingproject.org/pubs_03.cfm (last visited April 18, 2006). When Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act in 1996, *see supra* notes 105–07, Wyoming implemented the federal ban in its entirety, permanently denying food stamps and cash assistance to individuals with felony drug convictions. Personal Opportunities with Employment Responsibilities ("POWER"), Wyo. Dept. of Family Services Doc. No. 4565 Ch. 1, § 6(a)(ii)(G)(IV) (Oct. 9, 2001) (superseded), *available at* http://soswy.state.wy.us/Rule_Search_Main.asp; http://soswy.state.wy.us/RULES/4565.pdf. In March 2005, the Wyoming legislature passed a statute exempting Wyoming residents from the federal TANF ban. .Public Assistance and Social Services Act, 2005 Wyo. Sess. Laws 530–31 (codified at WYO. STAT. ANN.

Wyoming has now opted out of the lifetime TANF ban, it provides a useful example of state equal protection jurisprudence exacting enough to sustain a viable challenge to socioeconomic reentry barriers. Advocates in states that continue to impose the TANF ban or other prohibitions against ex-offenders should examine whether their state's equal protection jurisprudence supports a challenge similar to the one described below using Wyoming law.

Wyoming courts, like the federal 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.[234] Recognizing the state constitution's particular prohibition against discrimination based on any circumstance or condition, the Wyoming Supreme Court has held that "the state constitution, even at the lowest traditional scrutiny level, empowers courts to scrutinize classification legislation more carefully than they can under federal doctrine."[235] The State's rational relationship test involves four inquiries: (1) [W]hat is "the harm or burden[] occasioned by the legislation and . . . has [the class harmed] been subjected to a tradition of disfavor"; (2) "[W]hat is the governmental purpose being served by the classification"; (3) "what is the characteristic of the group that justifies the disparate treatment"; and (4) "How are the characteristics used to distinguish people for . . . disparate treatment relevant to the purpose that the challenged laws purportedly intend to serve?"[236] The test seeks to ensure that the characteristic the group is presumed to share is actually relevant to a valid public purpose.[237]

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.[238] "That a classification disadvantages a traditionally disfavored class signals the likelihood that the classification is a product of stereotypical thinking."[239] Wyoming's prior adoption of the TANF ban clearly harmed those convicted of drug offenses. The ban on welfare benefits permanently denied those convicted of drug-related felonies financial assistance to support themselves and

§ 42-2-103 (2005)). The Wyoming legislature did not pass legislative findings explaining its decision to opt out of the federal TANF ban. As of July 1, 2005, individuals with felony drug convictions are eligible for TANF assistance. WYOMING DEPARTMENT OF FAMILY SERVICES, 2005 STATE PLAN DOCUMENT: TEMPORARY ASSISTANCE TO NEEDY FAMILIES 1, 24 (Jan., 2005).

234. Hays v. State, 768 P.2d 11, 15 (Wyo. 1989).

235. *Johnson*, 838 P.2d at 165 (quoting Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, XXI 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 illegitimacy is inadequate for protection against legislative discrimination based on any other characteristic other than individual incompetency," as required by the Wyoming Constitution. *Id.*

236. *Id.* at 166–67.

237. *Id.* at 165.

238. *Id.* at 166 (quoting Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1146 (1987)).

239. *Id.* (quoting Note, *supra* note 240, at 1155)

their families. Many women in prison lack sufficient resources or social support to help them make the transition from prison to the community.[240] The federal ban seriously hinders an ex-offender's ability to care for her children, find work, and access drug-treatment services.[241] Ex-drug offenders, like other ex-offenders, are likely to have a difficult time securing employment because of a lack of employment skills, the stigma associated with a criminal record,[242] and employment and licensing restrictions.[243] The ban thus undermines hopes of survival by legitimate means in the outside world.[244] 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 housing,[245] certain forms of employment,[246]and voting rights,[247] and until recently, the denial of public assistance.[248] In 1992, the Wyoming Supreme Court overturned a statute requiring that individuals under the age of eighteen lose their driver's licenses if convicted of any drug- or alcohol-related offense because those individuals were politically powerless and especially deserving of judicial protection.[249] Individuals with felony drug convictions in Wyoming are likewise "'politically powerless' since they are deprived of the right to vote and thus unable to make legislators directly accountable for [their] disparate

240. ALLARD, LIFE SENTENCES, *supra* note 102, at 8 ("Nationally, Department of Justice data show that nearly [thirty percent] 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.").

241. *See id.* at 10–24.

242. 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 be possible for those individuals to obtain employment in public or educational institutions).

243. *See supra* notes 71–91 and accompanying text.

244. *See* Godsoe, *supra* note 242, at 262–63.

245. *See, e.g.*, Cheyenne Housing Authority, Admissions and Continued Occupancy Policy for Public Housing, § 8.4 (amended Mar. 29, 2005) (on file with the author) (listing criminal activity as one of the grounds for denial of public housing).

246. *See, e.g.*, WYO. STAT. ANN. § 9-1-704(b)(iv) (2005) (peace officer); WYO. ST. ANN. § 9-1-710(b)(iv) (2005) (correction officer); WYO. ST. ANN. § 31-16-103(c)(vii) (2005) (car dealer); 005-000 WYO. CODE R. .CH. 1, § 9 (Weil 1995) (private school administrator). Conviction of a crime may also be considered as a basis to deny an applicant for state public employment. 006 140 WYO. CODE. R. Ch. 3, § 2(a)(xv) (Weil 2006).

247. WYO. CONST. art. 6, § 6 ("All persons . . . convicted of felonies, unless restored to civil rights, are excluded from the elective franchise.").

248. Personal Opportunities with Employment Responsibilities (POWER), Wyo. Dept. of Family Services Doc. No. 4565 Ch. 1, § 6(a)(ii)(G)(IV) (Oct. 9, 2001), *superseded* by 049 187 WYO. CODE R. ch. 1, § 6 (Weil 2005), *available at* http://soswy.state.wy.us/Rule_Search_Main.asp, *and* http://soswy.state.wy.us/RULES/4565.pdf.

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

treatment."[250] In fact, proponents often cite this as the very purpose of felony disenfranchisement statutes.[251] In light of these restrictions, the Wyoming Supreme Court has already found that ex-offenders fulfill the requirements of the first prong of Wyoming's 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.[252]

The second prong of Wyoming's test identifies the governmental purpose of the legislation.[253] In implementing the federal welfare ban, Wyoming did not pass separate legislation or provide an independent rationale for the restriction.[254] The Wyoming Department of Family Services promulgated rules to implement the federal ban, pursuant to the Department's authority under legislation mandating the provision of public assistance and social services to those unable to support themselves.[255] As discussed above 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 requirements.[256] When Wyoming implemented the lifetime welfare ban, it would likely have adopted the purposes offered in *Turner v. Glickman* : "(1) deterring drug use; (2) reducing fraud in the food stamp program; and (3) curbing welfare spending."[257]

The third prong of Wyoming's rational basis test demands inquiry into what characteristics shared by individuals convicted of drug-related crimes justify the disparate treatment.[258] The Wyoming Supreme Court has made clear that "the characteristic ascribed to the group to justify the classification must also rest on more than conjecture."[259] Therefore, the State would have to show that

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250. *Id.*

251. *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.").

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

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

254. *See* 049 187 WYO. CODE R. Ch.1 § 1 (Weil 2005).

255. 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(a) (2005).

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

257. *See id.*, at 424–26.

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

259. *Id.* at 167.

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."[260] 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, yet regulations that may deter fraud by someone convicted of possession may not deter fraud by those convicted of trafficking.

The final prong of Wyoming's equal protection analysis addresses whether these characteristics in question are relevant to the purpose of the regulation.[261] None of the justifications advanced in *Turner* can withstand careful scrutiny.[262] There is no evidence that a permanent denial of public assistance would deter drug use.[263] In addition, "[g]iven the extremely harsh sentences that drug offenders already face, [the threat of loss of welfare benefits] cannot seriously be viewed as a deterrent . . . ."[264] Similarly, 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

260. *Id.*

261. *Id.*

262. The *Turner* court did not require any evidentiary basis for the contention that the welfare ban furthered the proffered justifications. *Turner*, 207 F.3d at 425–26. Instead, the court merely found that it was not irrational for Congress to conclude that the law would deter drug abuse and welfare fraud. *Id.*

263. *See* Godsoe, *supra* note 242, at 262 ("Like 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 1. 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. Godsoe, *supra* note 242, at 263.

264. Recent Legislation, *Welfare Reform—Punishment of Drug Offenders—Congress Denies Cash Assistance and Food Stamps to Drug Felons,* 110 HARV. L. REV. 983, 988 (1997) (noting further that 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 upon release will do so). A person convicted under Wyoming state law of manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance could face incarceration for up to twenty years. WYO. STAT. ANN. § 35-7-1031 (LexisNexis 2005).

exception for rehabilitation. The Wyoming 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*, the Wyoming Supreme Court found "no evidence from which [the] court can infer the relevance between suspending the driver's license of those less than nineteen years of age but not those nineteen or twenty to the purported purpose of improving highway safety or deterring the illegal use or possession of alcohol."[265] Likewise, a Wyoming court applying careful scrutiny to the justifications for the lifetime welfare ban for drug offenders is likely to find that the ban violates equal protection.

Moreover, the welfare ban was 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."[266] 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 must support the relevance of the restriction with more than just conjecture, and must provide some substantive basis for the relationship between the classification and legislative purpose.[267]

State equal protection provisions may also provide an avenue to challenge economic-entitlement prohibitions that have a racially discriminatory impact. Some courts have already invalidated legislation because of its disproportionate effect on African Americans without requiring proof of intentional discrimination. For example, in *State v. Russell*,[268] the Minnesota Supreme Court applied a self-described "stricter standard of rational basis review" under the state equal protection guarantee than is available under the federal constitution, and struck down a sentencing scheme that imposed longer sentences for possession of crack/cocaine than for possession of the same quantity of powdered cocaine.[269] The plaintiffs introduced statistical evidence

265. 838 P.2d at 167.

266. WYO. STAT. ANN. § 42-2-103(a) (2005) (emphasis added).

267. *See Allhusen*, 898 P.2d at 888 (finding that Wyoming's justification for prohibiting supervision of unlicensed counselors by licensed counselors in private, for-profit institutions but not in public or charitable institutions was based on conjecture and unsupported by any evidence); *Johnson*, 838 P.2d at 167.

268. 477 N.W.2d 886 (Minn. 1991).

269. *Id.* at 887, 889. According to the court, heightened rational basis review is 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 the racial disparity in punishment "cries out for closer scrutiny" and that "the 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

that: "[A] far greater percentage of [African Americans] than [W]hites are sentenced for possession of three or more grams of crack/cocaine under Minn. Stat. § 152.023 with more severe consequences than their white counterparts who possess three or more grams of cocaine powder."[270] Judges in other states have also suggested that in appropriate cases, courts may be willing to carefully scrutinize statutes that have a disproportionate racial impact.[271]

Similarly, litigating welfare bans, legal advocates may be able to demonstrate that such a restriction has a disproportionate impact on people of color, particularly women of color. As a result of racially biased drug policies and enforcement of drug laws, African Americans and Latinos represent a disproportionate number of people convicted for drug offenses.[272] The Sentencing Project reports that "[a]lthough African Americans represent only 13% of monthly drug users, a number consistent with their proportion of the population, they account for 35% of those arrested for drug possession, 55% of drug possession convictions, and 74% of those sentenced to prison for drug possession."[273] In addition, "as a result of race and gender based socioeconomic

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which would trigger the need for satisfaction of a compelling state interest not shown on the record[.]" *Id.* at 888 n.2. Nonetheless, the court did not decide this issue, having found instead that the statute failed Minnesota's rational basis test. *Id.*

270. *Id.* at 887.

271. *See, e.g.*, *Ex parte* Wooden, 670 So. 2d 892, 897 (Ala. 1995) (Cook, J., concurring specially) (noting that a "properly presented challenge [to the drug sentencing statute at issue]should invoke a [searching] standard of review under the Alabama constitution"). The opinion also "acknowledge[d] the gravity of the federal and state constitutional issues implicated by these statutes." *Id.* at 894. Citing national statistics on the racial impact of drug sentencing 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.* at 895–97. Similarly, in *Stephens v. State*, 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. 456 S.E.2d 560, 561 (Ga. 1995). Although the four justice majority held that the statistics presented were insufficient to establish an equal protection claim, the court left open the question of "whether statistical evidence alone can ever 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 new standard under the Georgia Constitution, based on the U.S. Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Under this standard, where a defendant establishes, 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 decisions were based on "permissible racially neutral selection criteria." *Stephens* at 570 (Benham, P.J., dissenting, joined by Sears, J.) (internal quotations omitted).

272. ALLARD, LIFE SENTENCES, *supra* note102, at 25–26. The Sentencing Project found that 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.*

273. *Id.* at 26 (citations and internal quotations omitted). 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, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349, 349–50 (1998).

inequalities, African American and Latina mothers are highly susceptible to poverty and as such, are disproportionately represented in the welfare system."[274] Advocates should develop 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 to support state constitutional challenges on the grounds that welfare bans are racially discriminatory.[275]

B. Due Process

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests."[276] Even where no fundamental right is implicated, substantive due process prohibits statutory impositions that are completely arbitrary and lacking any rational connection to a legitimate governmental interest.[277] In contrast, procedural due process allows a deprivation of an individual liberty or property interest to stand so long as the implementation of the constraint comports with fundamental concepts of fairness; most often a state satisfies procedural due process guarantees by providing notice and an opportunity to be heard.[278] Because the most effective relief stems from eliminating reentry barriers altogether, rather than simply assuring adequate procedural safeguards, this discussion focuses only on substantive due process claims. 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.[279]

With notable recent successes striking down employment barriers to reentry under state law, state due process theories offer a particularly bright ray of hope for dismantling postconviction penalties. For example, Pennsylvania courts recently struck down separate statutes barring individuals with criminal

274. ALLARD, LIFE SENTENCES, *supra* note102, at 2.

275. 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 African American 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, *supra* note 161, at 321–26 (citing the Massachusetts Supreme 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, although facially race-neutral, are rooted in the history of racial discrimination against African American women and racist stereotypes and myths surrounding welfare recipients).

276. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

277. *Id.* at 728.

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

279. *State Constitutional Rights*, *supra* note 159, at 1467–69.

convictions from employment as service providers for children and the elderly.[280] The Pennsylvania Constitution's due process clause protects the "right to engage in any of the common occupations of life."[281] Furthermore, when weighty interests in protecting vulnerable populations are at issue, the Pennsylvania 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.'"[282]

Nixon v. Commonwealth[283] involved a challenge to Pennsylvania's Older Adults Protective Services Act ("OAPSA")[284] by five individuals who were either terminated from their current position or denied a position because of prior convictions.[285] The criminal records provision of OAPSA required "new applicants and those employees who had been at a facility for less than a year before the effective date of the Act to submit criminal record reports," and "permanently prohibit[ed] a covered facility from hiring or retaining those persons whose criminal records established that they had been convicted of any one of the enumerated crimes."[286] In affirming the lower court's decision, the Pennsylvania Supreme Court recognized that one of the rights guaranteed under article 1, section 1 of the Pennsylvania Constitution is the due process right to pursue a lawful occupation.[287] However, the court noted that because "[t]he right to engage in a particular occupation . . . is not a fundamental right," the rational basis test was appropriate.[288] Pennsylvania applies a "more restrictive rational basis test" under its due process clause than is applied under the federal

280. Nixon v. Commonwealth, 839 A.2d 277, 281 (Pa. 2003); Warren County Human Servs. v. State Civil Serv. Comm'n, 844 A.2d 70 (Pa. Commw. Ct. 2004).

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

282. *Id.* at 74 (quoting Sec'y of Revenue v. John's Vending Corp., 309 A.2d 358, 362 (Pa. 1973)). Challenges to employment restrictions can also be brought under procedural due process guarantees in state constitutions. For example, a Massachusetts court struck down regulations barring job applicants who had been convicted of certain crimes from municipal employment because applicants were given no opportunity to rebut the inference that their convictions made their employment a safety risk. Cronin v. O'Leary, No. 00-1713-F, 2001 WL 919969 (Mass. Super. Ct. Aug. 9, 2001). The court found that the statute violated procedural due process under the Massachusetts Declaration of Rights. *Id.* at *7.

283. 839 A.2d 277 (Pa. 2003).

284. 35 PA. CONS. STAT. ANN. § 10225 (West 2003).

285. *Nixon*, 839 A.2d. at 279–83. One of the individuals was not laid off because he had been employed in his job for more than a year before the statute was enacted, but the court noted that he was nonetheless prohibited from ever working at another facility covered by the statute. *Id.* at 283.

286. *Id.* at 281. The enumerated crimes included any drug-related felony, criminal homicide, aggravated assault, kidnapping, unlawful restraint, sexual assault (including statutory sexual assault), arson, burglary, robbery, forgery, incest, intimidation of witnesses, and prostitution. *Id.* at 281–82.

287. *Id.* at 288. Article I, section 1 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, § 1.

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

constitution. Pennsylvania courts require a showing that the classification bears a "real and substantial relation" to the interest the legislature is seeking to achieve.[289] 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 . . . 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 . . . 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.[290]

Significantly, three justices filed concurrences to preserve their opinion that the court should have reached its decision on broader grounds, arguing that the statute was unconstitutional because a "lifetime ban [on employment] which arises from the broad class of prior convictions covered by [OAPSA] has no rational relationship to the legitimate, desired end of protecting the elderly, disabled and infirm from victimization."[291]

Relying on *Nixon*, a lower court in *Warren County Human Services v. State Civil Services Commission*,[292] struck down the ban imposed by Pennsylvania's Child Protective Services Law ("CPSL") on hiring applicants convicted of certain violent and sexual crimes.[293] 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.[294] When he was hired, Mr. Edwards disclosed his 1980 conviction for aggravated assault.[295] After the reorganization, Mr. Edwards was rehired in April 2002 and terminated

289. *Id.* at 287 & n.15.
290. *Id.* at 289 (footnotes omitted).
291. *Id.* at 291 (Cappy, C.J., joined by Newman, J., concurring, and Castille, J., concurring).
292. 844 A.2d 70 (Pa. Commw. Ct 2004).
293. *Id.* at 73–74.
294. *Id.* at 71.
295. *Id.*

two months later, based on the CPSL's lifetime ban on hiring anyone for "a position with direct client contact if they have previously been convicted" of an enumerated crime.[296] The court held that the CPSL failed the rational basis test because, like the statute at issue in *Nixon*, it "prohibit[ed] the hiring of applicants previously convicted of certain enumerated crimes [but did] not ban existing employees from continuing to work in the child-care field, despite having a similar conviction."[297] The court also found that the lifetime employment ban bore no rational relationship to the state interest in protecting children.[298] On the contrary, the court found that the ban "'[ran] afoul of the deeply ingrained public policy of [the] State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders.'"[299]

Using *Nixon* and *Warner* as templates, advocates in search of state law due process theories should explore whether their state generally adopts a more rigorous approach to due process than the federal analysis, or specifically accords strong protections to the right to work. The courts in *Nixon* and *Warner* grounded their decision in the constitutional right to earn a livelihood, a guarantee that had been protected by Pennsylvania courts in the past.[300] In other states, the word "liberty," as used in state due process clauses, may include the liberty to pursue any livelihood or lawful vocation.[301] A number of other state

296. *Id.* at 71–72. The court noted that the statute, in relevant part, applied to "all prospective employees of childcare services, prospective foster parents, prospective adoptive parents, prospective self-employed family daycare providers and other persons seeking to provide childcare services under contract with a childcare facility or program." *Id.* at 71 n.2. Any such applicant could not be hired if he or she had previously been convicted of aggravated assault or a number of other crimes, including "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.*

297. *Id.* at 74.

298. *Id.*

299. *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, "where the prior convictions do not in anyway [sic] reflect upon the appellant's present ability to properly discharge the responsibilities required by the position . . . the convictions cannot provide a basis for revocation of a wholesaler's license." 309 A.2d at 362. The court noted:

> 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.

300. *See, e.g.*, Adler v. Montefiore Hosp. Ass'n., 311 A.2d 634, 640 (Pa. 1973) (noting, in a case involving limitations on a physician's hospital privileges, that the state constitution forbids the legislature to "impose unusual and unnecessary restrictions upon lawful occupations" (citation omitted)); Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954) (holding similarly, in a case involving restrictions imposed on retail sellers of liquid fuels), *cited in Nixon* 839 A.2d at 286, *and Warren*, 844 A.2d at 73.

301. *See, e.g.*, Toney v. State, 37 So. 332, 333–34 (Ala. 1904) (striking down a statute that interfered with the right to make contracts for employment in violation of the due process

courts have held that their state constitutions' due process clauses protect the right to earn a livelihood and pursue a lawful occupation. For example, the Alabama Supreme Court explained in early jurisprudence that the liberty protected by the due process clause

> 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.[302]

Some states explicitly afford the right to work a higher level of scrutiny.[303] For example, on several occasions, North Carolina courts have given greater protection over individual liberties than the federal constitution.[304] The North Carolina 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,"[305] and that "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land."[306] 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

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guarantees in the federal and state constitutions).

302. *Toney*, 37 So. at 333–34 (internal quotations omitted). *See also, 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 by pursuing an ordinary occupation is protected by the constitution. This right is fundamental, natural, inherent, and is one of the most sacred and valuable rights of a citizen. [Her] business of calling is properly within the meaning of the due process clause of the constitution."). One Alabama court noted:

> [O]ur decisions . . . 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) (quoting City Council of Montgomery v. Kelly, 38 So. 67, 69 (Ala. 1905)). *See also* Ironworkers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971) ("[T]he Iowa Constitution declares all men are, by nature, free and equal. This freedom and equality must and does extend into the areas of . . . employment practices. No working man should be deprived of the right to earn his industrial way on free and equal terms." (citations and internal quotations omitted)).

303. Two examples are North Carolina, *see infra* notes 305–13 and accompanying text, and Montana, *see* Wadsworth v. State, 911 P.2d 1165, 1171 (Mont. 1996) (holding that the opportunity to pursue employment is a fundamental right under the state constitution).

304. *See* Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1751–57 (1992) (describing a number of illustrative cases).

305. N.C. CONST. art. I, § 1.

306. *Id.* § 19.

may provide greater relief than the Federal Due Process Clause and applies a more rigorous review than the rationality standard applied in federal cases.[307] Legislation satisfies the restraints imposed by the law of the land clause if it is not "'unreasonable, arbitrary or capricious, . . . and [if] the means selected . . . have a real and substantial relation to the object sought to be obtained.'"[308]

North Carolina courts have held that the North Carolina constitution "creates a right to conduct a lawful business or to earn a livelihood that is 'fundamental' for purposes of state constitutional analysis."[309] As the *Treants* court explained, "'[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.'"[310] While the court

307. *See* Treants Enters., Inc. v. Onslow County, 350 S.E.2d 365, 369 (N.C. Ct. App. 1986) ("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 interpretations of due process." (citations omitted)) .*See also* Louis Bilionis, *Liberty, the "Law of the Land," and Abortion in North Carolina*, 71 N.C. L. REV. 1839, 1845–46 (1993) ("Since 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 of official action associated with substantive due process jurisprudence under the federal Due Process Clause.").

308. Bilionis, *supra* note 307, at 1848 (alteration and omissions in original) (quoting McNeil v. Harnett County, 398 S.E.2d 475, 482 (1990)).

309. *Treants*, 350 S.E.2d at 371. *Accord* 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, 876 (N.C. 1940) (Stacy, C.J., concurring) ("The right to conduct a lawful business, or to earn a livelihood, is regarded as fundamental.").

310. 350 S.E.2d at 371 (quoting Hartford Accident & Indem. Co. v. Ingram, 226 S.E.2d 498, 507 (N.C. 1976)). *Accord* State v. Ballance, 51 S.E.2d 731, 735 (N.C. 1949) ("[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 the common right secured to all men by . . . the State Constitution to maintain themselves and their families by the pursuit of the usual legitimate and harmless occupations of life."). In *Treants*, the court struck down an ordinance that, among other things, prohibited the granting of licenses to any business "providing or selling male or female companionship" if an owner "has been convicted of a felony or of a crime involving prostitution or related offense within the preceding five years." 350 S.E.2d at 366–67. The ordinance also forbid such businesses to "knowingly hire a new employee who has been convicted of a felony within three years or of prostitution, assignation, or a related offense within two years, or is a felon whose citizenship has not been restored" or to continue to employ an existing employee convicted of such an offense after the effective date of the ordinance. *Id.* at 367. The court distinguished due process analysis under the U.S. Constitution from that under the North Carolina Constitution, declaring that in order to comply with the law of the land clause, a "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 ordinance went "far beyond what is necessary" to regulate organized prostitution (the primary rationale for the ordinance) because it "place[d] onerous burdens upon [a host of] legitimate businesses (such as legitimate dating escort services and nursing and rest homes). *Id.* at 372. Although the statute contained a severability clause, the court declined to sever any provisions because "[a]ll parts of the statute are related to [an] unconstitutional purpose

has not adopted strict scrutiny analysis of employment related legislation, instead requiring that the law bear a "real and substantial" relationship to the state's interest,[311] the North Carolina courts have not treated employment-related legislation with the kind of conclusive deference applied by the federal courts.[312] Advocates should look for other states that have rigorously protected the right to work, and thus provide a basis to challenge employment related collateral sanctions. Even in states where courts analyze legislation involving employment classifications using a highly deferential rational basis review more similar to the federal standard such review does not necessarily lead to a conclusive presumption that the statute is valid, but may instead require some serious consideration of whether the legislation is substantially related to, and likely to serve, the state's asserted interest.[313]

C. Poverty Provisions

Unlike the federal constitution, many state constitutions explicitly impose an obligation, or at least recognize the need, to provide public assistance based on economic necessity.[314] Some constitutions "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.[315] 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."[316] Alabama's constitution provides: "It shall be the duty of the general assembly to require the several counties of this state to make adequate provision for the maintenance of

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and there are no provisions which may validly be given effect." *Id.* at 373.

311. *Treants*, 350 S.E.2d at 369–70.

312. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999) (noting that federal rationality review asks only "whether the law is within the bounds of state legislative power").

313. *See, e.g.*, Nixon v. Commonwealth, 839 A.2d 277, 287 (Pa. 2003). *Nixon* defines Pennsylvania's rational basis test as follows: "a law 'must not be unreasonable, unduly oppressive, or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained'" (quoting Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954)).

314. *See* Rava, *supra* note 154, at 551, 569–77 (finding that twenty-three state constitutional provisions impose some obligation to provide assistance to indigent persons).

315. *See id.* at 553–54. Rava groups state constitutional "poverty" provisions into four categories: (1) Alabama, Kansas, New York, and Oklahoma impose an affirmative duty on the state to provide assistance for those in need; (2) the Montana, New Mexico, Pennsylvania, and Texas Constitutions expressly permit state or local governments 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.

316. N.Y. CONST. art. XVII, § 1.

the poor."[317] As commentators have argued, these provisions require states to subject welfare classifications to rigorous scrutiny.[318] While the scope of many of these provisions has not been tested in the courts, the text of these provisions supports the claim that the state has an obligation to care for its indigent residents, which is incompatible with a lifetime ban on welfare benefits or denial of public housing because of a conviction.[319]

New York has a well-developed jurisprudence under its poverty provision that may indicate how other states might interpret the contours of their own provisions. While New York has opted out of the lifetime welfare ban, it denies public housing to those convicted of felonies.[320] New York has held that the

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317. ALA. CONST. art. IV, § 49.

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

> [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 text demonstrates an intense 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. (footnotes omitted). *See also* Hershkoff, *supra* note 312, at 1184 ("A state court faced with a state constitutional welfare challenge ought to subject a legislative classification to rigorous scrutiny to determine whether the provision is likely to effectuate the constitutional goal.").

319. States may also have created a statutory duty to care for the indigent, which can provide another basis to challenge the welfare ban. For example, *California's Welfare and Institutions Code* provides:

> Every county and every 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, where the state legislature 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 county-funded "general relief" benefits. Arenas v. San Diego County Bd. of Supervisors, 112 Cal. Rptr. 2d 845, 847–48 (Cal. Ct. App. 2001). The court contrasted the state legislation implementing the federal ban and denying CalWORKS benefits to persons convicted of a drug-related felony on or after December 31, 1997, with the county ban denying benefits from the "general relief" fund to anyone "convicted of a felony committed after August 22, 1996 for possession, use or distribution of illegal drugs," regardless of whether that person was ineligible for CalWORKS benefits. *Id.* A 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 17000's mandate that counties 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 creates a right to shelter or housing. *See* Florence Wagman Roisman, *Establishing a Right to Housing: An Advocate's Guide*, *in* PRACTICING LAW INSTITUTE, THE RIGHTS OF THE HOMELESS 11, 18–29 (1992) (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 Welfare to provide shelter to indigent homeless individuals).

320. *See* LEGAL ACTION CTR., NEW YORK CITY POLICIES, *supra* note 118.

State is constitutionally required to provide "aid, care and support of persons in need."[321] New York courts carefully scrutinize challenges dealing with the exclusion of a category of poor people from existing welfare programs.[322] The constitutional mandate "unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy."[323] In other words, the legislature cannot make eligibility contingent on overly burdensome requirements, unrelated to need.[324] Under this rubric, the New York Court of Appeals 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 in order to receive welfare benefits,[325] and a statute denying Medicaid benefits to certain lawful permanent residents.[326]

Although some argue that New York courts have not engaged in as searching a review as the history and context of article XVII demand,[327] this provision offers poor people in New York more protections than under federal law and, at a minimum, a viable possibility of relief.[328] Advocates should seek to convince courts in other states to adopt a similar approach and argue that a legislative 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. In the case of the ban on welfare benefits for

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

322. *See* Helen Hershkoff, *Rights and Freedoms Under the State Constitution: A New Deal for Welfare Rights*, 13 TOURO L. REV. 631, 639–40 (1997). New York courts have, however, taken a more deferential approach to questions concerning whether the state had provided adequate aid to the poor, leading some commentators to argue that courts have not properly construed the provision. *See id.* The New York Constitution affords the state broad discretion in setting benefit levels. *See, e.g.*, Bernstein v. Toia, 373 N.E.2d 238, 244 (N.Y. 1977) (upholding a regulation placing a fixed cap on shelter allowances, and noting that the constitutional principle that the state must provide for the needy applies "to questions of impermissible exclusion of the needy from eligibility for benefits, not to the absolute sufficiency of the benefits distributed to each eligible recipient"); 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).

323. *Tucker*, 371 N.E.2d at 452.

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

325. *Id.* 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.* at 451–52.

326. Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085, 1093 (N.Y. 2001).

327. *See* Hershkoff, *supra* note 322, at 640–51 (proposing an alternative approach to analyzing claims under New York's poverty provision in order to fulfill the provision's promise of a "New Deal" for welfare rights)

328. *See id.* at 635–37.

ex-offenders, 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*,[329] in which the court considered the State's failure to provide Medicaid benefits to legal immigrants,[330] is illustrative of the type of challenge that may be mounted against housing and welfare restrictions under constitutional "poverty provisions." The court noted that in New York's two-tiered Medicaid system one tier depends upon subsidies through federal matching funds and conformity to federal standards.[331] The other tier, 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."[332] New York had long provided state public assistance to legal immigrants, but stopped doing so in 1997 after Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA")[333] which precluded federally funded Medicaid benefits from certain legal immigrants.[334] The court of appeals held that the provision violated the "letter and spirit of article XVII, [section] 1 [of the New York Constitution] by imposing on [certain lawful permanent residents] an overly burdensome eligibility condition having nothing to do with need, depriving them of an entire category of otherwise available basic necessity benefits."[335] Similarly, the welfare ban for people convicted of drug-related felonies arguably imposes an overly burdensome eligibility condition on needy individuals. If states insist on maintaining the ban to protect federal funding, advocates can argue that poverty provisions mandate that states 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 support challenges to restrictions on financial aid to students with felony or drug convictions.[336]

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329. 754 N.E.2d 1085 (N.Y. 2001).

330. *Id.* at 1085.

331. *Id.* at 1089.

332. *Id.*

333. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 7, 8, and 42 U.S.C. (2000)).

334. *Aliessa*, 754 N.E.2d at 1090–92.

335. *Id.* at 1093.

336. Consequently, the ban on education support, among all collateral sanctions, may benefit most from public education and legislative advocacy. Although there is some momentum for reform in Congress, *see supra* note 213, the aid ban provisions as amended by the Second Chance Act would still deny educational opportunity and assistance to many who have paid their debt to society and are trying to live clean lives. *See* Press Release, *supra* note 139.

Every state constitution contains an education clause, most of which mandate that the state provide free, public education.[337] The strength and language of these clauses vary, but most require states to provide a "thorough and efficient" or "general and uniform" education.[338] While these provisions have helped ensure access to primary and secondary education, they offer little assistance for those seeking to fund their college education because the courts have avoided addressing whether they create any entitlement to higher education.[339]

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."[340] The Florida constitution calls upon the legislature to ensure "adequate provision . . . for a uniform, efficient, safe, secure, and high quality system of free public schools," but only for the "establishment, maintenance, and operation of institutions of higher learning."[341] Other state constitutions require only the provision of "common schools," which has been interpreted to apply to elementary and secondary education, excluding from the analysis higher education institutions.[342]

In states with relatively ambiguous constitutional provisions, courts have defined the constitutional mandate in terms that do not translate to the higher

337. 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. 8, § 1; IOWA CONST. art. 9, § 3; KAN. CONST. art. 6, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MD. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MICH. CONST. art. 8, § 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. 83; 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. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. 10, § 3; WYO. CONST. art. 7, § 1.

338. *E.g.*, ARIZ. CONST. art. XI, § 1 ("general and uniform"); MD. CONST. art. VIII, § 1 ("thorough and efficient"); MINN. CONST. art. XIII, § 1 ("thorough and efficient"); N.J. CONST. art. VIII, § 4, ¶ 1 ("thorough and efficient"); N.C. CONST. art. IX, § 2 ("general and uniform").

339. *See, e.g.*, Richards v. League of United Latin Am. Citizens, 868 S.W.2d 306, 316–17 (Tex. 1993).

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

341. FLA. CONST. art. IX, § 1.

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

education context.[343] For example, the New York Court of Appeals, interpreting the state constitution's education provision, concluded that a "sound basic education" required a high school education.[344] Other state courts have indicated that the constitutional right to education does not extend beyond a high school education.[345] While 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,[346] this protection has not been extended to higher education.[347]

The strongest challenges to the ban on funding for higher education will likely be suits brought under state equal protection provisions in states where the

343. *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 set by the legislature); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 552–53 (Mass. 1993) (looking to factors such as class size, teacher training, adequacy of teaching of basic subjects, curriculum development, and availability of guidance counselors to determine whether education was "adequate" under state constitution); Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 380–81 (N.C. 2004) (finding that the state constitution guarantees every child an opportunity to receive a "sound basic education," defined in part as one that provides "sufficient academic and vocational skills to enable the student to successfully engage in postsecondary education or vocational training"); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 337 (N.Y. 2003) (finding that the "sound basic education" mandated by the state constitution means "a meaningful high school education"); *DeRolph*, 677 N.E.2d at 741–45 (finding that state constitution requires the state to provide educational facilities in good repair, in addition to supplies and materials); Vincent v. Voight, 614 N.W.2d 388, 397 (Wis. 2000) (holding that constitutional mandate to provide a "sound basic education" requires legislature to take into account "districts with disproportionate numbers of disabled students, economically disadvantaged students, and students with limited English language skills").

344. *Campaign for Fiscal Equity*, 801 N.E.2d at 337.

345. *See, e.g.*, Opinion of the Justices, 624 So. 2d 107, 110–11 & n.6 (Ala. 1993) (stating that constitutional right to "equitable and adequate" education applies to "school-age" children); *Hoke County Bd. of Educ.*, 599 S.E.2d at 380–81 (finding that the state constitution guarantees every child an opportunity to receive a "sound basic education," defined in part as one that provides "sufficient academic and vocational skills to enable the student to successfully engage in postsecondary education or vocational training"); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (holding that state must equip children for entry to college).

346. *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) (holding that education is a fundamental interest under the California Constitution); Horton v. Meskill, 376 A.2d 359, 371–73 (Conn. 1977) (holding that education is a fundamental right under the Connecticut Constitution); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993) (holding that education is a fundamental right under the Minnesota Constitution); Bismarck Pub. Sch. Dist. v. State, 511 N.W.2d 247, 256–57 (N.D. 1994) (acknowledging that education is a fundamental right under the North Dakota Constitution but declining to apply strict scrutiny in an equal protection challenge to state system of funding public education); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980) (holding that education is a "matter of fundamental interest" under the Wyoming Constitution). These cases stand in contrast to the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), 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 to uphold the Texas system of financing education. *Id.* at 35, 39–40.

347. *See, e.g.*, Richards v. League of United Latin American Citizens, 868 S.W.2d 306, 316–17 (1993) (holding that the education provision of the Texas Constitution does not apply to higher education). No court has found a fundamental right to higher education.

courts apply a more rigorous "rational basis" scrutiny than federal courts.[348] As discussed above, advocates may bring these suits in states where courts have applied a stringent rational basis analysis in various contexts to strike irrational government policies and practices. For example, although Maryland courts apply the three-tiered federal equal protection analytical framework,[349] they have long applied a more rigorous rational basis review than that applied under the federal scheme.[350]

Also possible is a challenge based on disparate impact in those states that recognize the theory under their equal protection clauses.[351] Most jurisdictions that deny aid to students based on criminal activity focus on convictions for drug-related offenses. Because there is a strong correlation between race and wealth, students of color are disproportionately reliant upon financial aid to attend college.[352] Given further 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 we dismantle the labyrinth of collateral sanctions, it will continue to have a devastating impact on the more than 600,000 people who are released from prison each year, and on the communities they call home. Without the

348. *See supra* notes 224–30 and accompanying text.

349. *See* Murphy v. Edmonds, 601 A.2d 102, 107–13 (Md. 1992) (applying federal three tiered equal protection analysis to claim under article 24 of the Maryland 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.").

350. *See, e.g.*, Frankel v. Bd. of Regents of the Univ. of Md. Sys., 761 A.2d 324, 332–334 (Md. 2000) (applying rational basis review to strike down university policy of denying in-state resident status to students whose primary source of monetary support resides outside of the state); Verzi v. Baltimore County, 635 A.2d 967, 971 (Md. 1994) (noting that rational basis review under the Maryland Constitution requires that a legislative classification "rest upon 'some ground of difference having a fair and substantial relation to the object of the legislation'" (quoting State Bd. of Barber Examiners v. Kuhn, 312 A.2d 216, 222 (Md. 1973))); *Waldron*, 426 A.2d at 948–54 (striking down under rational basis review a statute prohibiting retired judges receiving state pensions from engaging in the practice of law for compensation); Stephanie Kaye Baron, 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, 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).

351. *See supra* notes 224–76 and accompanying text.

352. *See, e.g.*, DONALD E. HELLER & DOUGLASS T. SHAPIRO, HIGH-STAKES TESTING AND STATE FINANCIAL AID: EVIDENCE FROM MICHIGAN 8 (2000), http://www.personal.psu.edu/faculty/d/e/deh29/papers/ashe_meap00.pdf (stating that African American, Latino, and low-income students are more likely to enroll in college, or change the type of institution in which they enroll, as a result of changes in the amount of financial aid offered than are white and middle- and upper-income students).

assistance of the social safety net or the ability to obtain an education or secure employment, these individuals cannot realistically be said to receive a second chance. Instead, they will find it nearly impossible to afford the basic necessities of life and to successfully reintegrate into society.

Beyond the practical 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 by those who enact them as punitive means to hold ex-offenders further accountable for their actions.[353] In fact, violations of postconviction restrictions often constitute a criminal offense.[354]

In *Trop v. Dulles*,[355] the U.S. Supreme Court laid out the test for determining whether sanctions are civil or criminal.[356] If the purpose of the disability is to "reprimand the wrongdoer" or "to deter others," the law is punitive. If the law is enacted "to accomplish some other legitimate governmental purpose," the law is a nonpenal regulation.[357] Under *Trop*, collateral sanctions fail to meet the test for purely civil sanctions. This is evidenced by both the overbreadth and the underinclusiveness of various penalties. Many collateral sanctions bear no correlation to the crime committed.[358] 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 cannot 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 implicates dispositive overbreadth issues.[359] The underinclusiveness of other sanctions demonstrates their irrationality. For instance, one of the government's purported purposes in denying Temporary Assistance for Needy Families to drug offenders is to prevent fraud.[360] 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

353. Demleitner, *Collateral Damage*, *supra* note 22, at 1032.

354. *See id.* at 1047.

355. 356 U.S. 86 (1958) (plurality opinion).

356. *Id.* at 96.

357. *Id.*

358. *See* Demleitner, *Collateral Damage*, *supra* note 22, at 1028 (noting that most collateral sanctions are counterproductive).

359. As one commentator asked:

> Is the prohibition on barbering based on a fear of permitting former offenders to handle a straight edge razor? And if so, did legislators at the time of enactment actually believe that someone convicted of tax fraud or auto theft was a threat with a razor? Or that former offenders who wanted to use sharp knives would have no other means of obtaining them?

Mauer, *Collateral Consequences*, *supra* note 16, at 1493.

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

included in the ban. Appreciating the uselessness of these restrictions, their essential nature comes out: these sanctions are simply another layer of punishment.[361]

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 the willingness of state courts to protect civil rights and civil liberties under their own constitutions, the most effective litigation strategy will focus on state law theories. Beginning with equal protection, due process, and poverty provisions, advocates should seek to implement this strategy in states that have broadly interpreted their constitutions and have imposed a myriad of collateral sanctions.

361. *See* Demleitner, *Preventing Internal Exile*, *supra* note 4, at 154 ("Sweeping, automatically imposed restrictions, which are reminiscent of mandatory sentences, should be abolished since they are unnecessarily punitive.").