

# Irrational Collateral Sanctions

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In the modern era, a criminal sentence is rarely truly over just because someone has served their time. Instead, both legal and social barriers continue to haunt most people who have been convicted of crimes for years. These barriers often persist long past the point of making good sense.

While social barriers like stigma are not always easy for lawyers and lawmakers to address, legal barriers like so-called “collateral sanctions” (also known as “collateral consequences”) are their bread-and-butter. In Part I of this Essay, I tell an anonymized client story that illustrates many of the existing efforts to blunt the effects of collateral sanctions in Ohio. In Part II, I discuss in more depth both the problem of collateral sanctions and both the challenges and opportunities posed by existing remedial efforts. In Part III, I discuss the opportunity for rational-basis challenges to irrational collateral sanctions when other remedial opportunities are unavailing.

## I. DR. MICHELLE’S STORY

Early in my first year of legal practice, I met a woman whom I’ll call Dr. Michelle.<sup>1</sup> I call her “doctor” because that was the professional title she had earned: she had a Ph.D.

Besides a Ph.D., Dr. Michelle had something else less enviable on her resume: a conviction for aggravated assault, a felony, from 1992. The conviction occurred when she was still in college, and it stemmed from a fight between her and her then-boyfriend, with whom she’d reconnected while home from school in Cincinnati. As she describes it, the two of them had been drinking, they got into an argument in the kitchen, he started choking her, and she grabbed a kitchen knife and stabbed him. She called 9-1-1. He went to the hospital and recovered from the injury.

She went to prison. More specifically, after pleading guilty, she received a one-year prison sentence, though she ultimately had to serve only seven and a half months. After returning home from prison, she received her bachelor’s degree, and a few years later, she obtained a master’s degree. She also tried to seal her record,

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<sup>1</sup> I am using a pseudonym to protect Dr. Michelle’s privacy. She has given me permission to share her story.

and was initially successful, but the court later vacated its sealing order after determining that she was ineligible for record sealing.<sup>2</sup>

In 2008, she obtained her Ph.D. in Education. Over the years, she taught as an adjunct faculty member at a local university on the east coast, studied abroad as a Fulbright-Hays Scholar, presented at research conferences, and was active as a volunteer in her community. Aside from scattered traffic tickets and a similar minor-misdemeanor ticket for smoking marijuana in 1999 (which was later sealed), she never got in trouble again.

Dr. Michelle returned to Ohio in 2019. Because of her passion for teaching and helping young people, she hoped to work in the state's K-12 schools—jobs which generally come with higher, more stable salaries and benefits than adjunct teaching at the university level. But there was a problem: her 1992 aggravated assault conviction.

The State of Ohio regulates who can teach in K-12 schools. That alone is not shocking—our children are generally the most important people in the world to us, they are vulnerable, and people are not uniformly able at all times to reliably provide the care, guidance, and patience that children need. Tough-on-crime prosecutors and prison-abolitionist public defenders may not seem like they can agree on much, but my guess is that none of them want someone who committed felony child abuse last week teaching their child's kindergarten class today.

Under state law in 2019, Ohio Board of Education was required to deny a license to any applicant who had been convicted of one of a large number of crimes, including aggravated assault.<sup>3</sup> The law also allowed (as it still does) the Board to “adopt rules” to implement the statute,<sup>4</sup> which agencies can sometimes use to blunt the force of such collateral sanctions—for example, by creating lookback windows, outside of which the conviction no longer imposes a barrier.<sup>5</sup> But with regard to offenses such as aggravated assault, the statutory language at the time was mandatory, meaning the Board had no such discretion.<sup>6</sup> In the absence of a teaching license, Dr. Michelle made deliveries for Instacart to make ends meet.

Though the Ohio legislature had tied the Board's hands in this sense, it had created a different tool to untie the Board's hands: the Certificate of Qualification for Employment, or “CQE.”<sup>7</sup> A CQE is a remedial tool that has existed in some form

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<sup>2</sup> The conviction remains unsealable today. Under current Ohio law, most “offense[s] of violence” are not eligible for sealing. OHIO REV. CODE ANN. § 2953.36(A)(4) (West 2021). Aggravated assault is one of roughly three dozen such offenses. *Id.* § 2901.01(A)(9)(a).

<sup>3</sup> See OHIO REV. CODE ANN. § 3319.39(B)(1)(a) (West 2021) (citing, *inter alia*, *id.* § 2903.12).

<sup>4</sup> *Id.* § 3319.39(E).

<sup>5</sup> *E.g.*, *id.* § 5123.081(A)(4), (B)(2) (prohibition on serving individuals with developmental disabilities unless authorized by agency rule); OHIO ADMIN. CODE § 5123-2-02(E) (2019) (agency lookback windows for serving individuals with developmental disabilities); see also *id.* § 5160-1-17.8(E) (lookback windows for serving as a Medicaid provider).

<sup>6</sup> See OHIO REV. CODE § 3319.39(B) (2021).

<sup>7</sup> See *id.* § 2953.25 (West 2021).

for about a decade<sup>8</sup> but is still not widely known: a recent Westlaw search revealed only 10 court cases and 16 law-review writings citing the phrase.<sup>9</sup> Nevertheless, this remedy empowers Ohio courts, after they have made certain findings,<sup>10</sup> to eliminate most “automatic bar[s]” on employment.<sup>11</sup> A CQE also creates a “rebuttable presumption” that the CQE-holder’s convictions “are insufficient evidence that the person is unfit for” a given “license, employment opportunity, or certification”<sup>12</sup> and provides employers who know about the CQE with protection from negligent-hiring liability.<sup>13</sup>

Dr. Michelle applied for a CQE from the relevant Ohio trial court. As a Skadden Fellow at the Ohio Justice & Policy Center, I represented her. After a multi-month process that included submitting a twelve-page application and testifying at a hearing, Dr. Michelle was granted a CQE. The Board of Education was no longer statutorily prohibited from granting her a teaching license.

But that was not the end of the road. Just because the Board of Education could grant Dr. Michelle a license did not mean that it would. In fact, it didn’t agree to license her outright. Instead, the Board offered Dr. Michelle a provisional license subject to several conditions, including that she accept “formal discipline” and complete numerous hours of community service. The barrier was still Dr. Michelle’s aggravated-assault conviction from nearly 30 years before. And because race remains a salient fact in discussions of not only legal punishment but also educational inequity, it is worth adding that Dr. Michelle is a Black woman who was hoping to teach and inspire young students in the area of Ohio where she grew up.<sup>14</sup>

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<sup>8</sup> See, e.g., *Enactment News: Enacted Senate Bill 337/Collateral Sanctions*, OHIO JUD. CONF. (Sept. 28, 2012), <http://ohiojudges.org/Document.ashx?DocGuid=58e27087-61e1-4c84-80c3-cde9e306b101> [<https://perma.cc/KDP7-2H9D>].

<sup>9</sup> The most in-depth of which is likely Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL’Y REV. INTER ALIA 11 (2016). In their piece, Leasure and Andersen report empirical findings suggesting that people with CQEs fare equally well in the employment market as compared with people with no convictions and that a CQE increases “threefold” the likelihood of a callback or job offer for someone with a one-year-old felony drug conviction. *Id.* at 20.

<sup>10</sup> OHIO REV. CODE ANN. § 2953.25(C)(3) (2021).

<sup>11</sup> *Id.* § 2953.25(D)(1).

<sup>12</sup> *Id.* § 2953.25(D)(2).

<sup>13</sup> *Id.* § 2953.25(G)(2).

<sup>14</sup> “In the 2019–20 school year, state data showed 16.8% of students in Ohio were Black, compared with 4.3% of Black educators in grades K-12.” Madeline Mitchell & Kelli Weir, *94% of Ohio’s Teachers Are White. Could That Change Any Time Soon?*, CINCINNATI ENQUIRER (Aug. 18, 2021, 10:10 PM), <https://www.cincinnati.com/story/news/2021/08/18/94-percent-ohio-teachers-white-could-change-any-time-soon/8113681002/> [<https://perma.cc/M2NW-QVEL>]. Black prospective teachers’ rate of enrollment in teacher-prep programs has declined precipitously in Ohio in recent years. Lisette Partelow, *What to Make of Declining Enrollment in Teacher Preparation Programs*, CTR. FOR AM. PROGRESS (Dec. 3, 2019), <https://www.americanprogress.org/article/make-declining-enrollment-teacher-preparation-programs/> [<https://perma.cc/P42Z-J9CN>] (showing decline of more than 50% between 2010 and 2018).

Fortunately, another remedial pathway had been created in the meantime: the Ohio Governor's Expedited Pardon Project, or "EPP."<sup>15</sup> Pardons themselves, of course, are of longstanding vintage: they are part of the United States' British colonial history,<sup>16</sup> and full pardons have long been understood to "absolve [a] party from all the consequences of his crime, and of his conviction therefor, direct and collateral."<sup>17</sup> But the standard pardon process in Ohio often takes years.<sup>18</sup> The EPP seeks to change that.<sup>19</sup>

The EPP is not open to all comers; applicants must meet certain criteria and submit an application for acceptance into the program.<sup>20</sup> Among the criteria are having completed all sentences for convictions that the applicant wants pardoned at least 10 years ago and not having obtained any new convictions in the past 10 years (other than minor traffic citations).<sup>21</sup> In addition, people with convictions for certain offenses are categorically ineligible. Those automatic disqualifiers include homicide offenses (including involuntary manslaughter, negligent homicide, and vehicular homicide); most sex offenses (though not low-grade sex offenses such as soliciting); kidnapping; and domestic violence.<sup>22</sup>

Dr. Michelle sought a pardon through the EPP, and I represented her again. In June 2020, she sent in her application forms to the EPP, and in August 2020, she was formally accepted into the program. Because the EPP is a two-step process,<sup>23</sup> she then had to apply directly to the Parole Board. In March 2021, she had her hearing in front of the Parole Board, and the Parole Board issued a positive recommendation the following month. In June 2021, Governor Mike DeWine issued Dr. Michelle a full pardon, and the Board of Education granted her a teaching license.

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<sup>15</sup> See OHIO GOVERNOR'S EXPEDITED PARDON PROJECT, <https://www.ohioexpeditedpardon.org/> [<https://perma.cc/C5MD-HLN4>] (last visited Feb. 26, 2022). The project is the result of a collaboration involving the Drug Enforcement and Policy Center at The Ohio State University Moritz College of Law, with which I was affiliated at the time this piece was written.

<sup>16</sup> E.g., Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 5–7 (2013).

<sup>17</sup> *Ex parte Garland*, 71 U.S. 333, 342 (1866) (quoting BISHOP'S CRIMINAL LAW § 713).

<sup>18</sup> See Joann Sahl, *Encouraging "Healing" for Home Health Aides By Employing Individuals with Criminal Convictions—Balancing Risk with Rehabilitation*, 56 CRIM. L. BULL. 405, 425 (January 2020).

<sup>19</sup> See OHIO GOVERNOR'S EXPEDITED PARDON PROJECT, *supra* note 15.

<sup>20</sup> Acceptance into the program does not itself guarantee a pardon, and meeting the minimum criteria does not guarantee that an applicant will be accepted into the program. See *Can I Apply?*, OHIO GOVERNOR'S EXPEDITED PARDON PROJECT, <https://www.ohioexpeditedpardon.org/can-i-apply/> [<https://perma.cc/4TS9-EYU9>] (last visited Feb. 28, 2022).

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *How to Apply*, OHIO GOVERNOR'S EXPEDITED PARDON PROJECT, <https://www.ohioexpeditedpardon.org/how-to-apply/> [<https://perma.cc/3LGT-Z9SL>] (last visited Feb. 28, 2022).

## II. COLLATERAL CONSEQUENCES AND EFFORTS TO BLUNT THEIR EFFECTS

### A. Problems with Collateral Consequences

One aspect of Dr. Michelle's story is eye-catching: to my knowledge, she is the only client I helped tackle a collateral sanction who has a Ph.D. But much else about Dr. Michelle's story is sadly common.

Little needs to be said about the scope of the broader criminal system. In the past half-century, jurisdictions across the United States embarked on an unprecedented project of criminal punishment.<sup>24</sup> People call the aggregate result "mass incarceration" because it has most notably led to the wide-scale imprisonment of as many as 2.3 million people at any given time, spread out across a "carceral archipelago"<sup>25</sup> of facilities (federal, state, local), numbering in the thousands, nationwide.<sup>26</sup> And while no corner of our society has proven completely immune to this massive increase in punishment, the effects have not been imposed randomly. Rather, as is becoming more widely appreciated, mass incarceration has been imposed disproportionately on poor people and people of color.<sup>27</sup>

Less widely discussed, though still increasingly understood, is the degree to which the effects of mass incarceration ramify beyond the actual physical imprisonment of people found to have committed crimes. The glut of conviction and punishment that has occurred in the past five decades means that roughly "somewhere between 19 and 24 million Americans have felony conviction records,"<sup>28</sup> and many more have misdemeanor convictions or arrest records.<sup>29</sup> Legislatures and agencies, both state and federal, have enacted laws and policies that

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<sup>24</sup> See generally, e.g., *Criminal Justice Facts*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/Y3BD-SFHB>] (accessed Feb. 28, 2022).

<sup>25</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 298 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

<sup>26</sup> See generally Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/QEF5-FQVM>].

<sup>27</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW*, 122-174 (2010); Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT'G PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [<https://perma.cc/6JC4-9HRE>]; Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/X7US-24JN>]; Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/> [<https://perma.cc/4TNU-PMRN>]; *Criminal Justice Facts*, *supra* note 24.

<sup>28</sup> J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2461-62 (2020).

<sup>29</sup> *Id.*, nn.1-2.

turn these conviction records into mandatory or discretionary barriers to achieving employment, housing, public benefits, and any number of other resources or opportunities a person might seek to help build a flourishing life.<sup>30</sup>

These barriers are generally known as “collateral consequences” or “collateral sanctions,” and in 2015 the American Bar Association’s National Inventory of the Collateral Consequences of Conviction counted roughly 45,000 of them nationwide.<sup>31</sup> A 2018 report counted 1,100 in Ohio alone, with more than 850 limiting employment possibilities.<sup>32</sup> And these limitations do not affect simply the most sensitive jobs, such as supervising young children, but extend to jobs like commercial truck driving and cosmetology.<sup>33</sup> The rise of this “vigorous, existing network of collateral consequences”<sup>34</sup> has prompted scholars to speak of a “new civil death.”<sup>35</sup> Because collateral consequences have almost never been understood as “punishment”<sup>36</sup> for purposes of constitutional criminal procedure, they do not trigger the same rights that attach (or scrutiny that at least sometimes follows) when undisputed punishment such as incarceration is on the line.<sup>37</sup>

While the ideal scope of remedies to mitigate draconian collateral sanctions is open to debate on both consequentialist and nonconsequentialist grounds,<sup>38</sup> at least some ongoing collateral barriers are both counterproductive and morally wrong. For one, they are sometimes counterproductive because, instead of helping people who

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<sup>30</sup> E.g., MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE § 1:3 (2021); ALEXANDER, *supra* note 27, at 175-220; Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791, 1805-06 (2012); Prescott & Starr, *supra* note 28, at 2462, nn. 3-6.

<sup>31</sup> AM. BAR ASS’N CRIM. JUST. SEC., NATIONAL SUMMIT ON COLLATERAL CONSEQUENCES CONFERENCE REPORT (Feb. 27, 2015), [http://ccresourcecenter.org/wp-content/uploads/2015/12/cc\\_national\\_summit\\_report.authcheckdam.pdf](http://ccresourcecenter.org/wp-content/uploads/2015/12/cc_national_summit_report.authcheckdam.pdf) [<https://perma.cc/PT3H-YQ4M>]; see also Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1321 & n.15 (2017).

<sup>32</sup> MICHAEL SHIELDS & PAMELA THURSTON, WASTED ASSETS: THE COST OF EXCLUDING OHIOANS WITH A RECORD FROM WORK 4 (Dec. 18, 2018), <https://www.policymattersohio.org/files/news/collateralsanctions-12-2018.pdf> [<https://perma.cc/3HC4-HCLH>].

<sup>33</sup> See *id.* at 14.

<sup>34</sup> Chin, *supra* note 30, at 1826.

<sup>35</sup> See *id.* at 1815-1825; see also, e.g., ALEXANDER, *supra* note 27, at 175-220; Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”: Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 527-28 (2006); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 755-56 (2011).

<sup>36</sup> E.g., *Smith v. Doe*, 538 U.S. 84, 105 (2003).

<sup>37</sup> See Chin, *supra* note 30, at 1791-92, 1814-15; Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between “Direct Punishment” and “Collateral Consequences,”* 59 HOW. L.J. 341, 343 (2016).

<sup>38</sup> See, e.g., Colleen Chien, *America’s Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 565 (2020) (acknowledging arguments in defense of a “second chance gap”).

may have previously struggled to achieve a productive, stable life, they consign people to cycles of poverty that often lead to renewed despair and recidivism.<sup>39</sup> They can also be counterproductive by depriving workplaces and communities of productive members, leaving jobs to go unfilled (or filled with less qualified workers) and diminishing the tax base.<sup>40</sup> In addition, they often lead to society spending more money over the long haul (whether to incarcerate someone or to provide increased public benefits) than if society had simply invested in helping the person build a flourishing life from the beginning.<sup>41</sup>

Ongoing collateral sanctions can also present starker moral problems. Because they often sweep broadly, they can violate core principles of proportionality—for example, treating someone who committed an assault in 1992 in the heat of physical altercation with her boyfriend the same as someone who has committed five stabbings in the past year, or treating wholly different types of offenses the same way.<sup>42</sup> (Perversely, collateral sanctions can also have a particularly outsized effect on people convicted of relatively minor crimes, given that the defendants’ actual sentences may be relatively light.<sup>43</sup>) From a public-safety perspective, they also often treat people arbitrarily, given that data suggests that once someone is trouble-free for 7–10 years, they are “no more likely to be convicted of a crime than someone who never had a criminal history.”<sup>44</sup> They can replicate or even amplify upstream racial inequity in criminal adjudication, hampering efforts to clean up its toxic effects.<sup>45</sup> And because of the legal construct that they are “collateral,” these

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<sup>39</sup> See Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 820 (2010); Radice, *supra* note 31, at 1341; Cara Suvall, *Certifying Second Chances*, 42 CARDOZO L. REV. 1175, 1184–86 (2021); see also SHIELDS & THURSTON, *supra* note 32, at 14 (“A worker can lose any license to practice—including a Commercial Driver’s License, cosmetology license, or social work license—for alleged nonpayment of child support. This sanction is itself often the result of indigency: then it locks the affected Ohioan out of work opportunities, creating a destructive cycle that makes it less likely that the person will be able to pay child support.”).

<sup>40</sup> See Prescott & Starr, *supra* note 28; Shields & Thurston, *supra* note 32, at 18 (estimating total lost wages due to criminal records in Ohio at \$3.4 billion in 2017).

<sup>41</sup> See Radice, *supra* note 31, at 1344–45.

<sup>42</sup> See *id.* at 1320, 1341.

<sup>43</sup> See Chin, *supra* note 30, at 1806 (“If a person is sentenced to twenty-five years imprisonment at hard labor, it likely matters little that she will be ineligible to get a license as a chiropractor when she is released. But to a person sentenced to unsupervised probation and a \$250 fine for a minor offense, losing her city job or being unable to teach, care for the elderly, live in public housing, or be a foster parent to a relative can be disastrous.”).

<sup>44</sup> Radice, *supra* note 31, at 1340; see also Chien, *supra* note 38, at 541 (“When a person has served their time and no longer poses an elevated risk, their record of past crimes becomes irrelevant from a public safety perspective.”).

<sup>45</sup> Cf. Radice, *supra* note 31, at 1346 (restating the “central critique . . . that the system is fraught with conscious and unconscious racial bias at every discretionary contact with a defendant, from arrest to sentencing”).

consequences can be imposed at any time, in tension with core principles of notice<sup>46</sup> and contract theory. After all, criminal sentences (which are often the result of plea bargains<sup>47</sup>) entail a specific punishment: after defendants have completed their punishments, they are supposed to have paid their debts to society.<sup>48</sup> Collateral sanctions can rewrite salient parts of those deals.

The situation facing Dr. Michelle for at least a time reflected many of these critiques. Though Dr. Michelle was never at risk for recidivism, her exclusion was still counterproductive because it (at least temporarily) kept a woman with a Ph.D. underemployed doing Instacart deliveries and deprived Ohio's public schools of a good teacher.<sup>49</sup> And it was unjust because it kept Dr. Michelle from pursuing her passion for teaching youth without any regard to proportionality (it is not clear why Dr. Michelle's actions in 1992 would have justified a lifetime ban) or public safety (it is not clear why Dr. Michelle in the 2020s would have presented any greater risk than someone with no criminal record at all).

Furthermore, in keeping Dr. Michelle, a Black woman, from teaching because of a decades-old conviction, it reinforced rather than reduced existing racial disparities.<sup>50</sup> And it presented a palpable case of goalpost-shifting. Not only had Dr. Michelle paid her debt; not only had she stayed out of trouble; not only had she succeeded to the extent that she had a Ph.D.—still, the State of Ohio thought she was such a threat to its youth that the Board of Education (in the absence of a CQE) did not even have discretion to grant her a license. The Supreme Court can say that such a bar isn't truly "punishment,"<sup>51</sup> but it is hard to see how it could have felt like anything else to Dr. Michelle.

### B. Mitigating Collateral Sanctions

In recent years, growing attention to the burden, unfairness, and counterproductivity of these restrictions has inspired lawmakers to try to ease the burdens of collateral sanctions.<sup>52</sup> For example, as Colleen Chien notes, most states have, in the last fifteen years, reclassified or downgraded charges, and every state

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<sup>46</sup> E.g., Chin, *supra* note 30, at 1814–15; Radice, *supra* note 31, at 1343.

<sup>47</sup> *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).

<sup>48</sup> See, e.g., Joseph C. Dugan, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L.J. 1321, 1324 (2015).

<sup>49</sup> This type of problem struck me as especially stark during the early days of the COVID-19 pandemic, when the nation was facing alarming nursing shortages while a number of our clients who wished to be frontline nurses were barred from doing so under the law in effect at the time. See OHIO REV. CODE § 4723.092 (2020); cf. Sahl, *supra* note 18, at 408 (noting shortage in home health aides).

<sup>50</sup> See *supra* note 14 and accompanying text.

<sup>51</sup> Cf., e.g., *Smith v. Doe*, 538 U.S. 84, 105 (2003) (holding that a sex-offender registration scheme did not qualify as “punishment” for ex post facto purposes).

<sup>52</sup> E.g., Chien, *supra* note 38, at 531–32; Radice, *supra* note 31, at 1318.



(plus D.C.) has passed laws seeking to mitigate collateral sanctions.<sup>53</sup> Over forty states have expanded access to record sealing or expungement.<sup>54</sup>

But there is a problem: not everyone is able to take advantage of these benefits. This is what Chien calls the “second chance gap”—“the difference between the apparent eligibility and delivery of a particular second chance in accordance with the law.”<sup>55</sup> Chien focuses on two main causes of the gap: administrative failures and low “uptake rates.”<sup>56</sup> In other words, one set of causes involves how second-chance policies are set up: sometimes they are endlessly complex, for example; sometimes they are subject to incomplete or inaccurate data.<sup>57</sup> Another set of causes stems from people who are eligible for relief not seeking it—perhaps because they don’t know it exists, for example, or perhaps the burdens of doing so are prohibitively high.<sup>58</sup> Chien’s empirical work suggests, for example, that “around 30–40 percent of adults with records, or twenty to thirty million individuals, could clear their criminal records, partially or fully, but have not done so.”<sup>59</sup>

There are other problems, too. First, not everyone is eligible for a “second chance”<sup>60</sup> under these programs: some people or types of offenses are ineligible.<sup>61</sup> Second, sometimes “debt obligations” (usually to the courts or other governmental entities) or costly filing fees can pose their own *de facto* barriers.<sup>62</sup> Third, even if someone does successfully obtain relief such as record sealing, the nature of the Internet and the proliferation of large-scale databases means that sealed records may remain available in practice from the private sector even if they are sealed from view in the public sector.<sup>63</sup> Fourth, sometimes novel statutory remedies such as Dr. Michelle’s CQE are largely unheard of, rendering them less powerful in practice than they are in theory.<sup>64</sup>

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<sup>53</sup> Chien, *supra* note 38, at 531–32.

<sup>54</sup> *Id.* at 532.

<sup>55</sup> *Id.* at 539.

<sup>56</sup> *Id.* at 541.

<sup>57</sup> *E.g., id.* at 526, 579–80.

<sup>58</sup> *E.g., id.* at 523–24, 544, 577; *see also* Suvall, *supra* note 39 at 1178.

<sup>59</sup> Chien, *supra* note 38, at 528.

<sup>60</sup> As Cara Suvall notes, this term is imperfect; “many people do not receive a fair ‘first’ chance, and all people need to be able to support themselves and their families regardless of the number of contacts they may have had with the criminal legal system.” Suvall, *supra* note 39, at 1177. I use it occasionally here, as Suvall does, for its useful shorthand, though I more often simply talk about efforts to mitigate or remedy collateral sanctions.

<sup>61</sup> *E.g.,* Radice, *supra* note 31, at 1372; David A. Singleton, *Restoring Humanity by Forgetting the Past*, 81 OHIO ST. L.J. 1011, 1030 (2020).

<sup>62</sup> *E.g.,* Chien, *supra* note 38, at 576–77; Joy Radice, *Access-to-Justice Challenges for Expungement in Tennessee*, 30 FED. SENT’G REP. 277, 277 (June 2018).

<sup>63</sup> *E.g.,* Chien, *supra* note 38, at 580–81; Radice, *supra* note 31, at 1319–20.

<sup>64</sup> *E.g.,* Suvall, *supra* note 39, at 1200; *cf.* Heather J. Garretson, *Legislating Forgiveness: A Study of Post-Conviction Certificates as Policy to Address the Employment Consequences of a*

Dr. Michelle’s story illustrates many, though not all,<sup>65</sup> of these challenges as well. First, collateral sanctions and limitations on eligibility for relief can each be harsh. Recall that Dr. Michelle was (without a CQE) automatically barred from obtaining a teaching license because of her 1992 aggravated-assault conviction—no discretion, no exceptions.<sup>66</sup> And recall as well that she couldn’t seal that conviction because, under current Ohio law, such convictions are never sealable no matter how much time has passed (and no matter how successful the person with the conviction has been since).<sup>67</sup>

Second, achieving nominally available remedies can be prohibitively burdensome. Even with the benefit of an advanced education and a lawyer, the process for achieving a teaching license for Dr. Michelle was arduous and took more than a year and a half. The availability of free legal assistance for obtaining second-chance remedies is limited, however,<sup>68</sup> and it is unlikely that someone in need of a second-chance remedy would at the same time be able to afford a lawyer for a lengthy undertaking.<sup>69</sup> And even if Dr. Michelle herself could have navigated the process *pro se* if need be given her educational background, there are many deserving applicants who don’t come to the table with multiple graduate degrees.

Third, even theoretically valuable remedies can be victims of poor promotion. In Dr. Michelle’s case, the state Board of Education at least recognized that it had the power to grant Dr. Michelle a license once she had a CQE, but it still was not willing to do so outright. Sometimes, meanwhile, agency members or other state employees are not familiar with what a CQE is in the first place.<sup>70</sup> This lack of

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*Conviction*, 25 B.U. PUB. INT. L.J. 1, 27 (2016) (noting that some defense attorneys are “completely unaware of certificates”).

<sup>65</sup> For example, Dr. Michelle’s story does not reflect the “uptake gap” that Chien documents. See Chien, *supra* note 38. Perhaps thanks in part to Dr. Michelle’s strong educational and professional background, she was informed about and eager to seek all remedies to which she was entitled.

<sup>66</sup> See *supra* note 3 and accompanying text.

<sup>67</sup> See *supra* note 2 and accompanying text. To be clear, sealing a conviction does not always relieve someone of a collateral sanction (and might not have done so in this case). *E.g.*, OHIO REV. CODE § 2953.32(D) (2021) (permitting inspection of sealed records for specified purposes, including certain types of government-conducted background checks). Even so, it remains another “second chance” remedy that was off-limits.

<sup>68</sup> My services were free to Dr. Michelle because the Ohio Justice & Policy Center, a private nonprofit, does not charge clients for services. While Dr. Michelle had a constitutional right to counsel when she faced charges back in 1992, see *Gideon v. Wainwright*, 372 U.S. 335 (1963), she—like millions of other litigants—had no constitutional right to counsel in seeking a civil remedy. See, e.g., Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers*, 125 HARV. L. REV. 78, 92 (2011).

<sup>69</sup> See, e.g., Prescott & Starr, *supra* note 28, at 2505–06; Michael Zuckerman, *Is There Such a Thing as an Affordable Lawyer?*, THE ATLANTIC (May 30, 2014), <https://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/> [https://perma.cc/S42T-S5U8].

<sup>70</sup> See *supra* note 64 and accompanying text. Anecdotally, this problem seems even more common with respect to employers.

information looks not like a failure of public policy, but rather a failure to spread the word about good public policy. Where the legislature decided to create the CQE remedy and a court concluded that an applicant merits one, it seems a waste for that remedy to be less effective simply because members of the executive branch have not been brought up to speed.

While the challenges just discussed are largely applicable across different types of second-chance reforms, Dr. Michelle's case also illustrates policy-specific challenges and opportunities that are specific to different branches of government. First, consider the legislature, which is generally the prime actor when it comes to collateral sanctions. The Ohio General Assembly created the barrier in the first place by enacting what was (at the time) a mandatory barrier to earning a teaching license regardless of how much time has passed or what a person is like today.<sup>71</sup> Since that time, it bears noting, the legislature has significantly improved the situation for people in Ohio with criminal records.<sup>72</sup>

Similarly, the legislature has the power to create better remedies. First, it can lower barriers to record sealing and increase the effects of such remedies (for example, by decreasing or eliminating the instances in which a sealed record can still be used to deny someone a license)—both changes that could have helped Dr. Michelle. Second, when it creates a remedy like the CQE, it can fund efforts to spread the word about the remedy, ensuring that courts and agencies are aware of the remedy and why it is consistent with state policy.<sup>73</sup>

Legislatures can do something else, too: give agencies discretion to tailor collateral sanctions. As noted above, while the Ohio Board of Education had no such discretion with regard to an aggravated-assault conviction like Dr. Michelle's, many Ohio agencies do have delegated authority to blunt the effects of collateral barriers by, for example, creating tiered lookback windows.<sup>74</sup> This authority fits with what administrative-law scholars identify as "one of the traditional justifications for delegating rulemaking authority to agencies": greater experience and expertise.<sup>75</sup> Neither the legislature nor the agency may be the ideal decision makers, but a board of education likely has a better sense of who should be in the classroom than the state legislature does.

Agency-defined exceptions generally provide a more tailored approach to collateral sanctions. Take the administrative rules for when someone is eligible to

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<sup>71</sup> See *supra* note 3 and accompanying text.

<sup>72</sup> See *House Bill 263*, OHIO LEGISLATURE, <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-263> [<https://perma.cc/9LKZ-42ZG>] (last visited Feb. 28, 2022); Nick Sibilla, *Ohio Governor Signs New Law That Lets Ex-Offenders Obtain Licenses to Work*, INSTITUTE FOR JUSTICE (Jan. 11, 2021), <https://ij.org/press-release/ohio-governor-signs-new-law-that-lets-ex-offenders-obtain-licenses-to-work/> [<https://perma.cc/R3NN-M5SA>].

<sup>73</sup> See *supra* note 64 and accompanying text.

<sup>74</sup> See *supra* note 5.

<sup>75</sup> F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 322 (2021).

work in a position serving adults with developmental disabilities, which are illustrative. The legislature authorizes the agency (the Department of Developmental Disabilities) to create exceptions to its general prohibition,<sup>76</sup> and the agency in turn has promulgated a series of segmented lookback windows (that is, waiting periods from when the applicant was discharged from incarceration and any other supervision) that are adjusted to fit the offense.<sup>77</sup> There is a permanent exclusion, for example, for people convicted of aggravated murder or patient abuse and neglect, and a ten-year exclusion for people convicted of involuntary manslaughter or aggravated robbery.<sup>78</sup> Other offenses trigger a seven-year or five-year exclusion, or no exclusion at all.<sup>79</sup> The lookback window for aggravated assault, for instance, is seven years<sup>80</sup>—Dr. Michelle would have been eligible around the year 2000. Where exactly to set the lines is debatable (what in public policy isn't?), but it is hard to deny that the Department of Developmental Disabilities' approach is more surgical than the state legislature's with regard to teaching licenses.

Regardless of whether agencies have this kind of discretion, they can adopt internal policies that are more responsive to the problems of overly punitive collateral consequences. Dr. Michelle's case is highly illustrative here: once she had a CQE, the Board of Education was empowered to grant her a full, unconditional license, but it did not choose to do so until she obtained a pardon. Instead, the Board was wary of outright granting a license in 2021 to a woman with a Ph.D., a strong track record in postgraduate education and community service, and a CQE whose only significant conviction occurred in 1992. A more second-chance-friendly internal policy would have yielded a different result.

Finally, the executive branch can launch its own programs to improve second-chance outcomes. In Dr. Michelle's case, the Governor's Expedited Pardon Project made the difference: she was able to obtain a full gubernatorial pardon roughly a year after receiving a CQE, and the Board of Education granted her license immediately after she received that pardon. While the pardon power itself is old, the EPP renovates it by creating a quicker pathway for people who meet certain criteria, such as avoiding any new convictions for ten years and demonstrating community involvement.<sup>81</sup>

Dr. Michelle's case does reveal one quirk in the way that these criteria work—specifically, the automatic exclusions for certain offenses. Recall that a number of offenses, including domestic violence, render someone categorically ineligible for the EPP.<sup>82</sup> In many cases, these exclusions may seem reasonable—chief executives

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<sup>76</sup> OHIO REV. CODE §§ 5123.081(A)(4), (B)(2) (2019).

<sup>77</sup> OHIO ADMIN. CODE § 5123-2-02(E) (2019).

<sup>78</sup> Compare *id.* § 5123-2-02(E)(1)(a)(i), (vii), with *id.* §§ 5123-2-02(E)(1)(b)(i), (xi).

<sup>79</sup> See *id.* § 5123-2-02(E)(1)(c)–(e).

<sup>80</sup> See *id.* § 5123-2-02(E)(1)(c)(iii).

<sup>81</sup> See *supra* notes 16–19 and accompanying text.

<sup>82</sup> See *supra* notes 20–22 and accompanying text.

may simply not wish to provide an accelerated track to pardon offenses that, in their view, are particularly troubling. But the law as practiced rarely hews to an imagined archetypal case forever. Consider, for example, one small tweak on Dr. Michelle's case: imagine that her boyfriend in 1992 had been a "household member" rather than simply someone she spent a lot of time with.<sup>83</sup> If that had been the case, Dr. Michelle could have easily been convicted of domestic violence and therefore been ineligible for the EPP, even if the domestic-violence conviction had been only a misdemeanor.<sup>84</sup> Given that the EPP already entails substantial discretion, it could better guard against that kind of mismatch—essentially, a false negative—by treating disfavored offenses as presumptive rather than absolute bars.

### III. RATIONAL-BASIS CHALLENGES TO IRRATIONAL COLLATERAL SANCTIONS

One way to think about each of the policies discussed above is that they seek to weed out collateral sanctions that don't make much sense. For example, when the Department of Developmental Disabilities allows someone to work with developmentally disabled adults despite having gotten off probation for cocaine possession six years before,<sup>85</sup> it acknowledges that there isn't a particularly good reason to automatically bar that person from the job. Similarly, when a court grants an applicant a CQE that would enable her to become a teacher despite a single aggravated-assault conviction from several decades before, it acknowledges that categorically barring her from that job for the rest of her life doesn't make much sense. These policies and remedies don't require that anyone be hired—the court that granted Dr. Michelle a CQE couldn't force a local school district to give her a job—but they do eliminate needless agency and employer hand-tying.

Some of these remedies, of course, are automatic: when the legislature or agency limits the sweep of a particular sanction, they do so for all applicants. Other remedies, such as most record sealing, certificates, and pardons, are available only when an individual applies—a delivery mechanism that all but ensures an uptake gap given the individual burdens it imposes.<sup>86</sup> Despite these burdens, however, seeking each of these remedies is still generally more efficient than filing a lawsuit. In a sense, by creating these mechanisms, states create offramps for restrictions that could (or should) lead to lawsuits, allowing some simpler process—a record-sealing hearing, a CQE, a pardon—to eliminate the need for one.

What happens, however, when none of these offramps are available? Litigation remains an option. And one type of litigation that deserves renewed consideration is

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<sup>83</sup> See OHIO REV. CODE § 2919.25 (2020).

<sup>84</sup> See *id.* Domestic violence in Ohio can be charged as low as a fourth-degree misdemeanor, the lowest non-minor misdemeanor charge available. See *id.* § 2919.25(D)(2). Because the EPP does not tailor eligibility to offense degree, someone can be eligible despite a number of first-degree felonies but categorically ineligible with the wrong fourth-degree misdemeanor.

<sup>85</sup> See OHIO ADMIN. CODE § 5123-2-02(E)(1)(d)(xxxv) (2019).

<sup>86</sup> See Chien, *supra* note 38, at 528–29.

constitutional challenge under the Equal Protection Clause or the substantive component of the Due Process Clause (and/or their state corollaries). While the standard for such challenges would almost certainly be rational-basis scrutiny, that test still requires that a collateral sanction be rational. And as previous successful challenges (as well as Dr. Michelle's case) demonstrate, that is a bar that collateral sanctions sometimes fail to meet.

#### A. *The Much-Maligned Rational Basis Test*

When there is neither a protected classification nor a fundamental right at stake, a government policy or activity must satisfy the rational basis test to pass muster under the Equal Protection Clause and the substantive component of the Due Process Clause, respectively.<sup>87</sup> To satisfy this test, the government's rule or action at issue must be rationally related to a legitimate government interest.<sup>88</sup>

Generally, scholars have criticized the rational-basis test as a rubber stamp.<sup>89</sup> This critique exists in the collateral sanctions literature too.<sup>90</sup> But the test, as the Supreme Court itself has said, is not "toothless,"<sup>91</sup> and scholars such as Katie Eyer, Jane Bambauer, and Toni Massaro have noted that there are good reasons to take the court at its word.<sup>92</sup> A full accounting is outside the scope of this Essay (and addressed more in a different piece, which I draw from), but I note three reasons that the rational basis test is potentially valuable in this context.

First, there is low-hanging fruit: some restrictions are actually irrational. Take the extremely broad prohibition in *Barletta v. Rilling*,<sup>93</sup> in which the Connecticut

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<sup>87</sup> See, e.g., *Harris v. McRae*, 448 U.S. 297, 318, 322, 324 (1980) (analyzing both types of challenges under this test).

<sup>88</sup> See *id.* at 324; see also, e.g., Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 282 (2015) (discussing due-process challenges); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1327 (2018) (discussing equal-protection challenges). As I have noted elsewhere, "while due-process challenges are often levelled at legislation, they can just as validly be targeted at executive action." See Michael L. Zuckerman, *When a Prison Sentence Becomes Unconstitutional*, 111 GEO. L.J. \_\_\_, \_\_\_ n.161 (forthcoming 2022) (manuscript at 27 n.161) (on file with author).

<sup>89</sup> See Eyer, *supra* note 88, at 1318–19.

<sup>90</sup> See Chin, *supra* note 30, at 1809 (describing the test as "far from exacting"); Archer & Williams, *supra* note 35, at 551 ("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.").

<sup>91</sup> *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

<sup>92</sup> See Bambauer & Massaro, *supra* note 88; Eyer, *supra* note 88; see also Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975 (2017); Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014); Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215 (2019); Zuckerman, *supra* note 88, at \_\_\_–\_\_\_ (manuscript at 52–55).

<sup>93</sup> *Barletta v. Rilling*, 973 F. Supp. 2d 132 (D. Conn. 2013).

legislature banned anyone convicted of a felony from obtaining a license to trade in precious metals.<sup>94</sup> While the State legitimately wanted to discourage crime, protect legitimate businesses, prevent fraud, and increase public safety, the ban was, in the District Court's words, "so far-reaching that its service of these goals [was] diluted to the point of coincidence."<sup>95</sup> Or take the limits on Dr. Michelle's licensing specifically. While I am glad that Dr. Michelle was able to obtain a teaching license more quickly and easily than she likely would have been if we had been forced to file a civil-rights lawsuit, I never met anyone who argued that a categorical ban from the classroom was, in fact, rational as applied to her.<sup>96</sup> In some cases, rational basis challenges can succeed because the barrier at issue is simply and obviously irrational.

Second, rational basis lawsuits have the virtue of requiring the government to give reasons for its actions. As developed at more length elsewhere, this forcing mechanism can generate progress for social movements even if they don't win a sweeping victory in a given case.<sup>97</sup> The same-sex marriage cases particularly illustrate the power of this approach: they "put on public display the states' inability to assert a single objectively reasonable, secular and constitutionally adequate basis for discriminating against same-sex couples."<sup>98</sup> Requiring the other side to stand up in court and state its reasons on the record can help lay bare whether those reasons actually stand up to basic scrutiny.

The same approach has value in the collateral-sanctions context. Take the 1980 case *Kindem v. City of Alameda*,<sup>99</sup> in which the plaintiff was fired for having been convicted of a marijuana-related felony as a juvenile, roughly eleven years prior.<sup>100</sup> In firing the plaintiff, the City stressed that "the dismissal was no reflection on plaintiff or the work he had performed" and that, in fact, "the City had been very pleased with plaintiff's work and attitude" and had even received "several unsolicited calls from citizens commending plaintiff's work."<sup>101</sup> The only reason the plaintiff was fired was the categorical policy.<sup>102</sup>

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<sup>94</sup> *Id.* at 137.

<sup>95</sup> *Id.*

<sup>96</sup> The State, for example, did not object to Dr. Michelle's CQE application or her pardon application. *Cf. Chunn v. State, ex rel. Miss. Dep't of Ins.*, 156 So. 3d 884, 886 (Miss. 2015) ("[T]he issue is not whether the State has a legitimate interest in prohibiting *some* felons from engaging in this profession. Rather, the question is whether the State has, in this case and as applied to Chunn, articulated a legitimate governmental interest for prohibiting a person whose only crime was thirty years ago, for possession of marijuana.").

<sup>97</sup> See Bambauer & Massaro, *supra* note 88, at 300–01; see also Zuckerman, *supra* note 88, at — (manuscript at 53–54).

<sup>98</sup> Bambauer & Massaro, *supra* note 88, at 300; see also Eyer, *supra* note 88, at 1344–46.

<sup>99</sup> *Kindem v. City of Alameda*, 502 F. Supp. 1108 (N.D. Cal. 1980).

<sup>100</sup> *Id.* at 1110–11.

<sup>101</sup> *Id.* at 1111.

<sup>102</sup> *Id.* at 1111, 1113.

While acknowledging that the City had an interest in “securing a competent, trustworthy workforce,”<sup>103</sup> the Court ruled that the firing violated plaintiff’s rights under both the Equal Protection Clause and the substantive component of the Due Process Clause.<sup>104</sup> When forced to offer a reason to justify the firing beyond the blanket policy, the City had nothing more to offer.<sup>105</sup> And while not every collateral sanction will leave the government so tongue-tied, some will nevertheless reveal that the government has not made a genuine “attempt to fit the classification to the legitimate governmental interests implicated”<sup>106</sup> or is basing its judgment on “irrational prejudice”<sup>107</sup> rather than an actual risk calculation.

Third, and relatedly, challenges like these can educate courts and build momentum even if they do not achieve walk-off victories. Indeed, as Eyer notes, rational basis review has often “helped pave the way” for social movements, including the movement challenging “the interlocking legal frameworks that result in the mass criminalization of racial minorities, coupled with a regime of pervasive legitimized criminal records discrimination,”<sup>108</sup> as well as the gay-rights movement<sup>109</sup> and the libertarian-economic movement.<sup>110</sup> And whenever plaintiffs win and the “sky does not fall,” it adds “momentum that allows courts to learn from the cases” and build “confidence that can eventually lead to more sweeping decisions.”<sup>111</sup> In short, the prospect of rational basis serving as a valuable tool for plaintiffs seeking to challenge overly restrictive collateral sanctions is far from fanciful. Rather, it is a tool that plaintiffs and attorney should seriously consider when faced with barriers that strike them as lacking a decent justification.

#### B. What a Plaintiff Would Want to Show

While a full explication of the trends in the rational basis victories that collateral sanctions plaintiffs have already won is beyond the scope of this Essay, I distill in this section four key trends that seem especially helpful in light of prior second-chance-friendly rulings. These four trends are (1) overinclusiveness, (2)

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<sup>103</sup> *Id.* at 1111.

<sup>104</sup> *Id.* at 1113–14.

<sup>105</sup> *See id.* at 1111, 1113.

<sup>106</sup> *Id.* at 1113.

<sup>107</sup> *Cf.* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985); *cf. also* *People v. Lindner*, 535 N.E.2d 829, 833 (1989) (striking down Illinois provision that mandated suspension of driver’s license upon conviction of various sex offenses, given lack of connection to ensuring safe, legal operation of motor vehicles).

<sup>108</sup> Eyer, *supra* note 88, at 1346; *see also id.* at 1347 n.136 (collecting a number of cases, including *Barletta*, cited above).

<sup>109</sup> *Id.* at 1344–46.

<sup>110</sup> *Id.* at 1351–56.

<sup>111</sup> Zuckerman, *supra* note 88, at \_\_\_\_ (manuscript at 54); *see* Bambauer & Massaro, *supra* note 88, at 300–01, 328–30.



underinclusiveness, (3) irrelevant targeting, and (4) eminently rehabilitated plaintiffs. I will also say a brief word about (5) recidivism empirics.

### 1. Overinclusiveness

Plaintiffs will benefit from pointing to a lack of tailoring (that is, overinclusiveness or overbreadth) in the collateral sanctions scheme at issue. In addition to *Barletta*<sup>112</sup> and *Kindem*,<sup>113</sup> both discussed above, another good exemplar of this problem is *Smith v. Fussenich*,<sup>114</sup> in which Connecticut barred all people with felonies from serving as licensed private detectives or security guards.<sup>115</sup> The District Court struck this provision down under the Equal Protection Clause (and signaled that it might fail under substantive due process as well) on the grounds that the State's method of pursuing its goals was too indiscriminate.<sup>116</sup> While the State could understandably want to keep people with "bad character" out of the profession, doing so without considering "the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation" was simply too broad an exclusion.<sup>117</sup>

Such overbroad provisions still exist. Even if they do not sweep in all people with felonies, they still often impose consequences that are, as Joy Radice puts it, "unrelated to a person's specific criminal misconduct."<sup>118</sup> In other words, "hundreds of consequences can impact someone convicted of a minor crime and someone convicted of a violent felony in just the same way and with the same force"<sup>119</sup>—the essence of an untailored approach. This is essentially the type of law that Dr. Michelle was facing before she got her CQE: she was banned from teaching in a K-12 school for life because of her aggravated-assault conviction from 1992, with no regard for her rehabilitation, age at the time of the offense, or other (substantial) mitigating circumstances.<sup>120</sup>

### 2. Underinclusiveness

Plaintiffs may also wish to highlight any underinclusiveness in the statutory or regulatory scheme—for example, sweeping in some people with convictions but

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<sup>112</sup> See *supra* notes 93–95 and accompanying text (ban on all people with felonies trading in precious metals in Connecticut).

<sup>113</sup> See *supra* notes 99–105 and accompanying text (ban on all people with felonies working for City of Alameda).

<sup>114</sup> *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977).

<sup>115</sup> *Id.* at 1078.

<sup>116</sup> *Id.* at 1080.

<sup>117</sup> *Id.*

<sup>118</sup> Radice, *supra* note 31, at 1320.

<sup>119</sup> *Id.*

<sup>120</sup> Cf. *Smith*, *supra* note 114, at 1080.

leaving others who are similarly situated unrestricted. One clearcut example of this problem comes from *Lewis v. Alabama Department of Public Safety*,<sup>121</sup> in which the plaintiff was excluded from the State's "list of wrecker operators" that state troopers may call to tow a vehicle.<sup>122</sup> The State excluded the plaintiff pursuant to a rule that no one "convicted of a felony or misdemeanor involving force, violence or moral turpitude" could be placed on the list.<sup>123</sup> Two things were odd about the State's line-drawing. First, the way the Supreme Court of Alabama defined "moral turpitude" yielded a bizarre breakdown of which crimes were disqualifiers and which crimes were not.<sup>124</sup> For instance, people convicted of certain morality crimes totally unrelated to towing (for example, adultery or, in the plaintiff's case, passing bad checks) would be excluded, whereas people convicted of crimes highly related to towing (for example, driving under the influence) could be included because they weren't crimes of moral turpitude.<sup>125</sup> If Alabama had really wanted to exclude people in a rational way, it would have excluded drunk drivers before adulterers.

Second, the State also drew irrational temporal lines. Specifically, the State screened would-be tow operators when these operators applied to be on the wrecker call list, but then the State stopped screening once an operator was on the list.<sup>126</sup> Accordingly, "someone who committed armed robbery within a few days of being placed on the list . . . would remain on the list,"<sup>127</sup> whereas someone convicted of a disqualifying offense even years before applying "would be automatically barred."<sup>128</sup> Again, if the State had really wanted to protect the sanctity of its tow operations, it would have done continuing diligence. The fact that it did not betokened an underinclusive and irrational exclusionary scheme.<sup>129</sup>

### 3. Irrelevant targeting

A third pattern worth looking for—particularly if people with a particular type of convictions have been singled out—is whether that targeting fits with any policy-based, utilitarian purpose. The one state interest that the Supreme Court has made clear is inconsistent with a true "collateral" consequence for ex post facto purposes

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<sup>121</sup> 831 F. Supp. 824 (M.D. Ala. 1993).

<sup>122</sup> *Id.* at 824–25.

<sup>123</sup> *Id.* at 825.

<sup>124</sup> *Id.* at 826.

<sup>125</sup> *Id.* at 826–27.

<sup>126</sup> *Id.* at 827.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 828.

<sup>129</sup> See also *Nixon v. Commonwealth*, 839 A.2d 277, 289–90 (2003) (striking down, under Pennsylvania Constitution, law prohibiting people with disqualifying conviction from working in elder-care facilities unless they had already been working at the facilities for more than a year).

is retribution.<sup>130</sup> While the rational-basis analysis is doctrinally different, a case in which a certain group is targeted for no apparent purpose other than retribution may trigger related rational-basis concerns.

Though the court does not address the issue in exactly these terms, an illustrative example is *People v. Lindner*,<sup>131</sup> in the which the Illinois Vehicle Code mandated that any driver's license be suspended if the holder was convicted of certain sex offenses.<sup>132</sup> Though the State pointed speculatively to others, the Illinois Supreme Court read the statute in context as evincing a clear state interest in motor vehicle safety.<sup>133</sup> That interest made sense for all the other mandatory revocation provisions, which had something to do with motor vehicles, but it made little sense as applied to sex offenses.<sup>134</sup>

This scheme was not, it bears noting, especially overinclusive or underinclusive—it targeted relevant traffic offenses and one other relatively small group of offenses: sex offenses. But there was no strong practical connection between the public interest (motor-vehicle safety) and the targeting: “[k]eeping off the roads drivers who have committed offenses not involving vehicles is not a reasonable means of ensuring that the roads are free of drivers who operate vehicles unsafely or illegally.”<sup>135</sup> Targeting people convicted of sex offenses and no one else was “arbitrary.”<sup>136</sup>

Notably, the State itself pointed to “punishment,” “deterrence,” and relative incapacitation (“keeping sex offenders near home”) as other potential rational bases of the statute.<sup>137</sup> The court rejected these arguments too, finding them to be themselves rationally unrelated to the offense and the existing, statutorily prescribed penalties, such as imprisonment.<sup>138</sup> While the court was willing to assume for the sake of argument that these asserted bases could support the suspension (noting, however, that “summary suspension of a license before trial” was “an administrative function and not a punishment”),<sup>139</sup> the upshot of the court's reasoning was that traditional purposes of punishment cannot bootstrap a rational basis.<sup>140</sup> If suspending someone's license after a sex-offense conviction was not a rational means of

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<sup>130</sup> See Kaiser, *supra* note 37, at 357. Compare Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (asking whether a sanction “will promote . . . retribution and deterrence”) and Smith v. Doe, 538 U.S. 84, 102 (2003) (concluding that sanction was not “retributive”), with United States v. Ursery, 518 U.S. 267, 292 (1996) (stating that deterrence “may serve civil as well as criminal goals”).

<sup>131</sup> *Lindner*, 535 N.E.2d 829 (1989).

<sup>132</sup> *Id.* at 830.

<sup>133</sup> *Id.* at 832–833.

<sup>134</sup> *Id.* at 832.

<sup>135</sup> *Id.* at 833.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 833–34.

<sup>138</sup> See *id.*

<sup>139</sup> *Id.* at 833.

<sup>140</sup> See *id.* at 833–34.

imposing retribution, deterrence, or incapacitation, then wanting to advance those goals was not itself a rational basis. In other words, singling out a group for extra punishment that's unrelated to the crime qualifies as irrational.

#### 4. Eminently rehabilitated plaintiffs

Not surprisingly, courts also seem to look for eminently rehabilitated plaintiffs in concluding that a collateral sanction fails rational-basis scrutiny as applied. In addition to *Kindem* (the case in which the well-liked janitor was fired because of a juvenile marijuana-conviction from more than ten years before),<sup>141</sup> another probative example is *Chunn v. State, ex rel. Mississippi Department of Insurance*.<sup>142</sup> In *Chunn*, the plaintiff had worked as a licensed bail-bond agent for more than two decades before the State revised the law to prohibit anyone convicted of a felony from obtaining or renewing a license.<sup>143</sup> That was bad news for the plaintiff because he had pleaded guilty to possession of marijuana in neighboring state some thirty years before.<sup>144</sup> The State asserted an interest in ensuring that only trustworthy people worked in the bail-bond field, but the Supreme Court of Mississippi was unpersuaded.<sup>145</sup> While the statute covered some felonies that would entail a lack of trustworthiness, it swept too broadly beyond those offenses: "For instance, a person convicted of manslaughter for overloading a boat could not, under the statute in question, serve as a bail agent."<sup>146</sup>

It is certainly possible to read *Chunn* as an overbreadth case; the court in *Chunn* cited several related cases to that effect, including two discussed above.<sup>147</sup> But the court also hammered home the facts of the case to a striking degree.<sup>148</sup> The case is a

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<sup>141</sup> *Kindem*, 502 F. Supp. at 1110–11.

<sup>142</sup> *Chunn*, 156 So. 3d at 884.

<sup>143</sup> *Id.* at 885.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 886.

<sup>146</sup> *Id.*

<sup>147</sup> See *id.* at 887–88 (citing *Kindem*; *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974); *Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1973); and *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977)).

<sup>148</sup> See *id.* at 886 ("Before proceeding with this analysis, we pause to point out that the issue is not whether the State has a legitimate interest in prohibiting *some* felons from engaging in this profession. Rather, the question is whether the State has, in this case and as applied to Chunn, articulated a legitimate governmental interest for prohibiting a person whose only crime was thirty years ago, for possession of marijuana—which, interestingly, is now legal in numerous states for medical purposes, and in four states for recreational use."); *id.* at 888 ("The State has provided a single line of explanation of the State's rational basis for a law that prevents Chunn—whose only crime was possession of marijuana, thirty-three years ago—from continuing to work as a bail agent."); *id.* at 889 ("Chunn—who has possessed a bail-agent license for twenty years—is one of the 'many qualified ex-felons . . . being deprived of employment due to the broad sweep of the statute' referenced in *Smith*." (citation omitted)).

good reminder that collateral sanctions that jump out unnecessarily heavy-handed are solid candidates for a rational-basis challenge.

### 5. Recidivism empirics

In addition to these trends in the cases just discussed, I note that it will be helpful for litigants and advocates to draw on new empirical findings showing that after some period of non-offending, people with past convictions are no riskier than those who have never offended. This empirical grounding may be especially valuable since the most common and obvious government interest in support of a collateral sanction is that it protects against people likely to misuse the opportunities presented by opportunity sought (usually a professional license).<sup>149</sup> If the applicant with a decades-old felony is no more likely to commit another crime than someone with no felonies at all, however, it is irrational to treat the previously-convicted applicant any differently from the never-convicted applicant.

Radice points to two lines of empirical analysis advanced by other researchers that may be especially helpful.<sup>150</sup> One line segments out arrest rates by type of crime and compares against the likelihood of a new arrest for someone never arrested before and finds that eighteen-year-olds “arrested for robbery began to look like their never-arrested counterparts in 7.7 years; those arrested for aggravated assault looked the same after 4.3 years; and those arrested for burglary looked the same after only 3.8 years.”<sup>151</sup> The second line of empirical analysis that Radice notes segments out convergence with the control group by age and number of offenses, finding that “young people with one offense were no more likely than their non-offending counterparts to be convicted of a new crime after ten years; first offenders over forty required only two years of no new offenses to look like the control group with no criminal history; people with one to three convictions converge with non-offenders around thirteen years; and people with four or more convictions converge at the earliest after twenty-three years.”<sup>152</sup> Radice also notes a finding that people who go 7–10 years without any new convictions are on average “no more likely to be convicted of a crime than someone who never had a criminal history.”<sup>153</sup>

To tie these strands together—and bring them back to the client story with which I began this Essay—either of these empirical findings suggests that banning

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<sup>149</sup> *E.g.*, *Chunn*, 156 So.3d at 886; *Nixon v. Commonwealth*, 839 A.2d 277, 289 (2003); *Lewis v. Ala. Dep’t of Pub. Safety*, 831 F. Supp. 824, 826 (M.D. Ala. 1993); *Kindem*, 502 F. Supp. at 1112; *Smith*, 440 F. Supp. at 1080; *see also* *Shimose v. Haw. Health Sys. Corp.*, 345 P.3d 145, 148 (2015).

<sup>150</sup> *See* Radice, *supra* note 31.

<sup>151</sup> Radice, *supra* note 31, at 1340–41 (citing Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327, 349–50 (2009)).

<sup>152</sup> *Id.* at 1341 (citing Shawn D. Bushway, Paul Nieuwebeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 *CRIMINOLOGY* 27, 52 (2011)).

<sup>153</sup> *Id.* at 1340 (citing Bushway et al., *supra* note 152, at 33).

Dr. Michelle from the classroom more than two decades after her single aggravated-assault conviction was irrational. While there are significant reasons to hesitate before using prospective risk assessments to shape punishment and other public policies at a granular level,<sup>154</sup> findings that show a major disconnect between the exclusionary period imposed and what actual data could justify confirm what commonsense already reveals: that locking people out of opportunities long after they have paid their debts to society is sometimes simply irrational.

#### CONCLUSION

I began this Essay in Part I with a story that reflects many, though not all, of the problems posed by overly harsh collateral sanctions. In Part II, I examined a broader array of critiques concerning collateral sanctions and assessed strengths and weaknesses in existing (mostly recent) efforts to mitigate their force. Noting that some of these efforts seek to provide de facto offramps for sanctions that no longer make good sense, I then began Part III by discussing the potential value of rational-basis challenges to collateral sanctions that cannot be addressed through other existing remedies. I concluded Part III by surveying successful rational-basis challenges to collateral sanctions from the past decades and distilling particular trends from these cases—specifically, overinclusiveness, underinclusiveness, irrelevant targeting, eminently rehabilitated plaintiffs—and discussing the confirmatory role that recidivism data can play in supporting these arguments.

Much as there is a tendency in doctrinal research and teaching to overemphasize Supreme Court litigation,<sup>155</sup> there is also a tendency to overemphasize impact litigation more broadly. I first focused on non-impact-litigation remedies because these are, in most cases, going to be the most efficient and effective way of helping a client achieve their goals; few clients, especially those who are struggling to make ends meet because of a criminal record, are going to walk into a clinic hoping to wait around for a few years while creative lawyers swing for the casebooks. That said, the easier paths up the mountain are sometimes blocked off. When they are, creative lawyers should look for ways to ask the government entities that are blocking those paths to provide actual reasoned bases for the obstruction. As collateral-sanctions litigants have demonstrated before, there are situations in which there is no rational basis to be found.

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<sup>154</sup> E.g., Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 304, 343 (2020).

<sup>155</sup> See, e.g., Eyer, *supra* note 88, at 1321.