

# Recent Developments

## The Ban on Welfare for Felony Drug Offenders: Giving a New Meaning to “Life Sentence”

Cynthia Godsoe†

### INTRODUCTION

One of the most troubling, and least discussed, provisions of the new federal welfare law is the lifetime ban on benefits to anyone convicted of a drug-related felony. Section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“Welfare Act”) denies both welfare benefits and federally-funded food stamps to any individual convicted of a felony involving “the possession, use or distribution of a controlled substance.”<sup>1</sup> This provision will further impoverish vast numbers of women, particularly women of color, who are already disadvantaged by addiction and a criminal history. The ban also will harm children and other family members being cared for by or living with the women deemed ineligible. Section 115 fails to address the causes of drug abuse and drug-related crime in our society, and is likely to worsen recidivism rates among drug offenders.

In this article, I will briefly outline Section 115 and its moral bases, as well as how several states, particularly California, are applying this measure. Next I will describe the likely impact of this provision, particularly on women already disadvantaged by addiction, poverty, and/or racism. I will then list some steps that practitioners, including prosecutors, public defenders, and other advocates, can take to try to minimize the application of this devastating provision to individuals. Finally, I will outline a potential equal protection challenge to Section 115.

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† J.D. cand., Harvard Law School.

1. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 115, 21 U.S.C.A. § 862a (West Supp. 1997) [hereinafter Welfare Act].

### SECTION 115'S APPLICATION AND ITS MORAL BASES

Section 115 was proposed by Senator Phil Gramm of Texas and was amended to the Welfare Act with bipartisan support.<sup>2</sup> It denies cash benefits and food stamps to individuals convicted of drug-related felonies based on conduct occurring after the Welfare Act's enactment.<sup>3</sup> Because the amount of assistance to a family is determined by the number of eligible individuals in the family unit, a determination that one member is ineligible will greatly reduce the amount of benefits available to the entire family.

States may opt out of Section 115 completely, or they may limit the ban on benefits to a lesser time period.<sup>4</sup> Some states, such as Minnesota, have chosen to do so.<sup>5</sup> Others, such as California, Illinois, and New Jersey have enacted lifetime bans similar to the one laid out in Section 115.<sup>6</sup> In addition, California will require other family members of the banned individual to receive their rent and utility benefits in a voucher or vendor payment instead of in a cash form.<sup>7</sup> The available benefits for individuals in this situation will thus vary widely from state to state.

Senator Gramm has described his amendment as "asking a higher standard of behavior of people on welfare."<sup>8</sup> This comment reflects the opinion that people are completely morally responsible for using and selling drugs, rather than influenced by addiction, poverty, and other health-related and social factors. It also reflects a misguided belief that denial of benefits will reduce drug abuse and drug-related crime.

State governments adhere to similar moral judgments in their adoption of Section 115. For instance, in California, the legislation's sponsor, Democrat State Senator Adam Schiff, framed the need for such legislation in terms of an individual's worthiness for assistance:

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2. See 142 CONG. REC. S8498-99 (daily ed. July 23, 1996).
  3. This timeline is the result of amendments in the Balanced Budget Act of 1997. See Pub. L. No. 105-33 § 5516(a) (1997). Previously, benefits were denied to people convicted of a felony after the Welfare Act's enactment, even if the conduct involved occurred before the Act's enactment date.
  4. See Welfare Act § 115(d)(1).
  5. See *No Welfare for California Drug Offenders* (National Public Radio broadcast, Aug. 23, 1997) (transcript # 97082311-214) [hereinafter *No Welfare*] (stating that Connecticut, Oregon, and Minnesota will continue to offer benefits to those convicted of felony drug offenses); see, e.g., Act effective July 1, 1997, ch. 35, art. 4, 1997 Minn. Sess. Law Serv. 378, 465-66 (West) (to be codified at MINN. STAT. § 256D.024) (stating that benefits are banned for five years after a sentence for felony drug conviction is completed, unless the person in question is in a drug treatment program, has successfully completed such a program, or has been assessed not to need one).
  6. See, e.g., A.B. 1260, Reg. Sess. (Cal. 1997) (adding § 11251.3 to the California Welfare and Institutions Code, which prohibits those convicted of felony drug offenses from receiving aid under the chapter, and § 170.12, which makes those convicted of felony drug offenses ineligible for non-health care benefits).
  7. See *id.* (adding § 11251.3 to the California Welfare and Institutions Code, effective January 1, 1998).
  8. *Legislators Debate Effects of Welfare Reform Bill* (Cable News Network broadcast, Aug. 22, 1996) (transcript # 229-12).

We don't have the budget to do all the things that we would like to do. And if we're going to be spending welfare dollars on those with drug convictions, that means less money to put into, frankly, those who are probably a better prospect at placing into jobs.<sup>9</sup>

This reframing of public benefits as available only to the "deserving needy" cuts off the very people who need it the most. It will likely have devastating repercussions in entrenching an abandoned underclass of drug offenders with no resources and opportunities, and no options save a return to crime.

### THE SOCIETAL COSTS AND LIKELY DEVASTATING IMPACT ON WOMEN OF SECTION 115

#### 1. The Women Victims of the Failed War on Drugs

The number of people arrested, convicted, and incarcerated for drug offenses has risen astronomically in the last two decades. More than 300,000 people are convicted each year of drug-related felonies.<sup>10</sup> The percentage of federal prisoners who are sentenced for drug offenses has risen from 16.3% in 1970, to 24.9% in 1980, to 59.5% in 1997 to date.<sup>11</sup> Drug trafficking convictions in state courts rose 116.0% in six years, from 1986 to 1992.<sup>12</sup> In California, people convicted of drug felonies constitute approximately 25.8% of the total state prison population.<sup>13</sup> Drug offenders are receiving longer and harsher sentences than before, making them even more disadvantaged when they are released.<sup>14</sup>

This massive increase in people convicted of and sentenced for drug-related offenses is directly attributable to the highly misguided and inef-

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9. *No Welfare*, *supra* note 5.

10. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 1982-1993, 9 (1996) (reporting that federal drug convictions between 1989 and 1994 ranged from 15,799 to 20,458); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 1992, tbl.1.13 (1996) [hereinafter STATE COURT SENTENCING] (stating that 280,232 individuals were convicted of drug felonies in state courts in 1992).

11. See Federal Bureau of Prisons, *Quick Facts* (last modified Dec. 27, 1997) <<http://www.bop.gov/fact1297.html>>. The percentage of prisoners in state custody for drug offenses has also risen greatly—from 8.6% in 1985 to 22.0% in 1995. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995, at 10 (1997).

12. See James R. Brown, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 72 (1997).

13. See Data Analysis Unit, Cal. Dep't of Corrections, Tbl.2: Institution Population Characteristics, Felons and Non-Felons (June 30, 1996) (on file with author).

14. The average sentence length for individuals convicted of federal drug felonies rose from 47 months in 1980 to 82 months in 1992. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FACT SHEET: DRUG DATA SUMMARY 2 (1995). California state courts have greatly increased the number of women convicted for drug offenses who are incarcerated—from 54.2% in 1978 to 87.6% in 1988. See Shawn Marie Boyne, *Women in Prison with AIDS: An Assault on the Constitution?*, 64 S. CAL. L. REV. 741, 751 (1991).

fective "war on drugs" begun during the Reagan administration.<sup>15</sup> The federal government increased spending on drug enforcement at an exponential rate, both in absolute terms and as a portion of the total drug budget.<sup>16</sup> This policy has failed to reduce drug-related crime, and has not begun to solve the drug addiction problem in American society.<sup>17</sup> The United States retains the highest rate of drug abuse of any industrialized country.<sup>18</sup> The "war on drugs" has had a disproportionate impact on racial minorities and other disadvantaged groups in society, thus resulting in the prosecution of only some "types of" illegal drug users.<sup>19</sup> Moreover, by focusing on the criminal justice system alone, the government has ignored the vast impact of drug abuse in the workplace and at home,<sup>20</sup> and has failed to implement treatment programs—the only proven solution, and far cheaper than criminal prosecution and incarceration.<sup>21</sup>

Women, particularly women of color, constitute a disproportionately high percentage of those arrested, convicted, and imprisoned for drug offenses, especially when compared to their low rates of violent and non-drug-related criminal activity.<sup>22</sup> Drug-using women are the fastest growing category of people being incarcerated—from 1983 to 1994 the number of women arrested for drug offenses increased 91.8%.<sup>23</sup> In Cali-

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15. See Brown, *supra* note 12, at 71–78.

16. See *id.* at 70 (stating that President Bush spent 70.0% of the federal drug budget on enforcement alone, and that resources for domestic law enforcement increased 9.3% in 1997 to \$8.3 billion).

17. See *id.* at 77–78. Ironically, the "war on drugs" has resulted in a diversion of resources from violent crimes and massive prison overcrowding. See STATE COURT SENTENCING, *supra* note 10, at 60 (stating that 27% of state courts sentenced a greater proportion of drug traffickers than violent offenders to prison, and 12% of state courts gave drug traffickers substantially longer prison sentences on average than violent offenders). California, for instance, added more prisons to the nation's largest prison system in 1990, while cutting its education budget by \$2 billion. See David C. Leven, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 645–46 (1993).

18. Twenty-six million Americans used illegal drugs in 1991, and 5.5 million of them are estimated to need treatment for serious drug problems. See Stacey L. Best, *Fetal Equality?: The Equality State's Response to the Challenge of Protecting Unborn Children*, 32 LAND & WATER L. REV. 193, 197 n.21 (1997).

19. In 1989, close to 75% of imprisoned drug offenders were African-American or Hispanic, despite the estimation by the National Institute on Drug Abuse that three quarters of regular illegal drug users are White. See Scott Burris, *Prisons, Law and Public Health: the Case for a Coordinated Response to Epidemic Disease Behind Bars*, 47 U. MIAMI L. REV. 291, 298 n.36 (1992). This disproportion in the approach to White and minority drug abusers is also evident in access to treatment—almost half of state funded treatment slots are occupied by Whites, despite their low rate of incarceration for drug abuse. See Leven, *supra* note 17, at 645–46 (1993).

20. One commentator argues that President Clinton has shifted the focus of the "war on drugs" slightly to focus more on workplace issues, citing the astonishing statistic that 70% of drug abusers go to work every day. See Kenneth J. Vanko, *In Search of Common Ground: Leveling the Playing Field for Chemically Dependent Workers Under the Americans with Disabilities Act of 1990*, 1996 U. ILL. L. REV. 1257, 1294–97.

21. The average cost to society for six months is \$21,000 for an untreated addict, \$20,000 for an incarcerated addict, and \$1750 for an addict in methadone maintenance treatment. Every one dollar spent on treatment saves society seven dollars in criminal justice and health care costs. See *id.* at 1295.

22. See Brown, *supra* note 12, at 74. Women constitute only 7.1% of federal prisoners as of August 30, 1997. See Federal Bureau of Prisons, *supra* note 11.

23. See Brown, *supra* note 12, at 74.

foria, 39.7% of the women in prison are incarcerated for drug offenses,<sup>24</sup> and in New York, the proportion has been as high as 66.4%.<sup>25</sup> Women of color have been particularly impacted by the increase in drug-related convictions; African-American women constituted about half of the female prison population in federal and state jurisdictions in 1995.<sup>26</sup>

These women tend to be disadvantaged in multiple ways, which increases Section 115's impact on them. First, most women convicted of drug crimes are addicts.<sup>27</sup> The majority of women arrested for all crimes test positive for drugs, leading to the conclusion that many women engage in criminal activity to support their addiction.<sup>28</sup> Second, most of these women are victimized in other ways or have disabilities hindering their capacity to support themselves financially. Many drug-abusing women are mentally ill.<sup>29</sup> They are disadvantaged by a lack of education and the skills necessary for employment.<sup>30</sup> Over half of them have been physically abused either as children or as adult victims of domestic violence.<sup>31</sup>

The vast majority of people receiving benefits are women with children,<sup>32</sup> so Section 115 will have a disproportionately high impact on poor women convicted of drug felonies. Women with greater income, or men without dependent children, are not eligible for assistance and thus will not be affected by the new legislation. The majority of drug-abusing women are parents<sup>33</sup> and, like most women in the general population, hold the major responsibility for child custody. One very significant harm of

24. See Data Analysis Unit, California Dep't of Corrections, *supra* note 13.

25. See Leven, *supra* note 17, at 647.

26. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *supra* note 11, at 93.

27. See Telephone Interview with Malika Sazar, Director of the Family Rights & Dignity Project of the San Francisco Coalition on Homelessness (Nov. 1997). At least one study has found that women become addicted to drugs more quickly than men. See Best, *supra* note 18, at 197 n.21.

28. See Brown, *supra* note 12, at 74. A study of Manhattan arrestees found that 83% of women arrested for all crimes tested positive for some illegal drug (versus 78% of men). See NATIONAL INSTITUTE OF JUSTICE, 1996 DRUG USE FORECASTING: ANNUAL REPORT ON ADULT AND JUVENILE ARRESTEES 35 (1997). It is also interesting to note that most substance abuse treatments are modeled for men, and thus may not work as effectively for women. See Boyne, *supra* note 14, at 749 n.38.

29. See Brown, *supra* note 12, at 74.

30. This is in addition to the discrimination which all women, particularly women of color, face in the labor market. See, e.g., MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 809 (1994) (discussing the gender wage gap and citing U.S. Bureau of Labor statistics showing the median weekly earnings of full-time White, Black, and Hispanic female wage salary workers to have been \$355, \$308, and \$280 in 1990, whereas the earnings of White, Black, and Hispanic men were \$497, \$360, and \$322).

31. See, e.g., Leven, *supra* note 17, at 647. See also Myrna S. Reader, *Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences: "Gender Neutral" Sentencing Wreaks Havoc in the Lives of Women Offenders and Their Children*, CRIM. JUST., Fall 1993, at 20 (arguing that mandatory sentencing guidelines disproportionately harm women due to many factors, including their family responsibilities and the high rate of male abuse underlying women's criminal activity).

32. In 1996, 89% of families on welfare were headed by a single mother. See Welfare Act § 101(5), 110 Stat. 2110 (1996) (congressional finding).

33. See JEAN WELLISCH ET AL., U.S. DEP'T OF JUSTICE, DRUG ABUSING WOMEN OFFENDERS: RESULTS OF A NATIONAL SURVEY 2 (1994).

the hugely increased incarceration rate for women is that so many of them risk having their children placed in foster care or even losing their parental rights while serving their sentences.<sup>34</sup>

## 2. The Societal Costs of Section 115

The Welfare Act's lifelong ban on benefits for felony drug offenders is likely to both increase recidivism among this group<sup>35</sup> and fail to reduce drug abuse and the many societal harms which accompany it. 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.<sup>36</sup> Thus, it will only maintain, if not further, the cycle of substance abuse and poverty which entraps a huge proportion of America's urban underclass.<sup>37</sup>

The emphases on personal responsibility and morality underlying Section 115 and the equivalent state measures<sup>38</sup> ignore the economic realities of the urban poor, the group most likely to be arrested for drug offenses. California State Senator John Burton, a recovered substance abuser, describes the motivations underlying the California statute: "The problem is that people are basically political cowards. . . . [I]t's a very stupid mean-spirited approach that's not going to stop drug abuse and not going to reduce the cost of welfare."<sup>39</sup> Cutting individuals off from assistance when they need it most—upon release from prison or during criminal probation—virtually compels them to return to drugs for lack of any other options. As Latosha McGee, convicted of a drug felony in Califor-

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34. See CAL. WELF. & INST. CODE § 300(g) (West 1984) ("The minor has been left without any provision for support; the minor's parent has been incarcerated or institutionalized and cannot arrange for the care of the minor . . ."). A parent's incarceration is implicitly taken into account in child welfare cases, when it is not explicitly listed as a statutory factor, in assessing the child's home life and supervision. Many of these dependency factors also disproportionately impact lower-income parents. See, e.g., CAL. WELF. & INST. CODE § 300 (West 1984) (establishing dependency jurisdiction in cases where a child is (a) "in need of proper and effective parental care or control . . . or has no parent or guardian willing to exercise or capable of exercising such care and control . . . (b) not provided with the necessities of life or . . . not provided with a home or suitable place of abode . . . (d) [has] a home [which] is an unfit place for him by reason of neglect"). A parent cannot perform these functions while incarcerated, and may not have a relative or friend to whom she can entrust the care of her children.
35. It seems probable that cutting off drug abusers from any public benefits will make it more likely that they will resort to crime to survive.
36. See Recent Legislation, *Welfare Reform—Punishment of Drug Offenders—Congress Denies Cash Assistance and Food Stamps to Drug Felons—Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, § 115, 110 Stat. 2105 (To Be Codified at 42 U.S.C. § 862A), 110 HARV. L. REV. 983, 984 (1997) (stating that people living in poverty and unemployment with little hope of a change in circumstances are most vulnerable to the lure of drugs).
37. Incarceration apparently does not reduce crime rates. The prison population in California increased nearly 450% from 1980 to 1990, but crime still increased at a faster rate than the overall California population. See Leven, *supra* note 17, at 649.
38. See *supra* text accompanying notes 8–9.
39. *No Welfare*, *supra* note 5.

nia, says: "with no resources out there, it's easy to go back to what we know."<sup>40</sup>

The long-term costs of the increased drug abuse, criminal prosecutions, and incarceration likely to result from the ban will likely be *more* expensive for the states than the diminished number of welfare recipients. Incarceration does *not* reduce recidivism among drug offenders; only treatment does that.<sup>41</sup> Recidivism is costly because it leads to increased judicial and prison costs, as well as the enormous burdens of drug-related crime on society. More-over, the criminal background checks that state and local welfare offices are now required to run will greatly increase the administrative costs of the welfare system.<sup>42</sup>

The prohibition on benefits may be limited to drug offenders, but it will certainly harm their families as well. It will be very difficult for the state to monitor the separation of a mother's finances from those of her children. Since women will be one of the groups most affected by this ban, and many of them have children, a great number of children will be impacted.<sup>43</sup> Fewer food stamps and less benefits for one (particularly the sole custodial adult as so many women are) means less for all. The other potential outcome is that the state will intervene in separating even more families because of poverty and a lack of public benefits. Women who have been convicted of a drug felony are now doubly at risk of losing their custodial rights based on both their criminal and economic statuses.<sup>44</sup>

#### STEPS FOR PRACTITIONERS TO TAKE

There are several steps that advocates can take to diminish the effects of Section 115. The most important step right now is to inform judges and lawyers on both sides of the criminal justice system about the new provision and accompanying state laws. Without this step, defense attorneys risk greatly harming their clients by accepting a felony plea without realizing the lifelong impact of their actions. Prosecutors and judges must also be aware of this additional penalty when making decisions

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40. *Id.*

41. See Brown, *supra* note 12, at 81-82 (citing the statistic that 90% of incarcerated drug offenders will likely return to drugs and crime within three years if they do not receive substance abuse treatment).

42. See *id.*; see also *Legislators Debate Effects of Welfare Reform Bill*, *supra* note 8 (interview with Dr. Roger Lum, Director of the Alameda County Department of Social Services in Oakland, California, complaining that his office was receiving no extra funding for this new burdensome procedure).

43. See Welfare Act § 101(5), 110 Stat. at 2110.

44. Under the Welfare Act, there is an incentive for states to place children in foster care if their parents cannot economically support them, since foster care benefits are still guaranteed for each individual child. Section 115 increases that incentive in the case of parents who are banned from benefits for life, since they will not only be unable to economically care for their children, but will also handicap the entire household through their ineligibility for assistance.

about charges and sentences, so as not to risk violating their ethical responsibilities and imposing excessive punishments.

Cooperation among police, prosecutors, public defenders, and judges,<sup>45</sup> in finding effective ways to treat substance abusers, and reduce drug-related crime is a key element to reducing the devastating impact of Section 115. Advocates are currently working with district attorney offices on developing a variety of alternative charging and sentencing structures to avoid the ban, including misdemeanor and non-drug felony charges (such as conspiracy).<sup>46</sup>

A very promising alternative to drug felony charges is diversion from the criminal justice system to drug courts.<sup>47</sup> Drug courts were primarily created out of a recognition that the "war on drugs" was not effectively combating drug abuse and drug-related crime. These specialty courts focus on long-term treatment and hands-on judicial involvement, sometimes entailing twenty to thirty courtroom visits for one drug offender.<sup>48</sup> They are particularly appropriate for the very high number of women arrested for drug possession, as they are geared towards non-violent offenders and sometimes non-trafficking drug offenses. An individual usually has her charges dismissed or mitigated if she successfully completes the treatment program.<sup>49</sup> Diversion has been markedly more successful in reducing recidivism than the regular criminal justice system thus far, and very cost-effective.<sup>50</sup>

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45. One federal judge poignantly expressed the effect that presiding over drug cases has had on him: "I need a rest from the oppressive sense of futility that these drug cases leave . . . I simply cannot sentence another impoverished person whose destruction has no discernible effect on the drug trade. . . I am just a tired old judge who has temporarily filled his quota of remorselessness." Leven, *supra* note 17, at 655-56 (quoting Senior Eastern District of New York Judge Jack Weinstein).
  46. See Telephone Interview with Judy Appell, Staff Counsel, and Malika Sazar, Director, Family Rights and Dignity Project of the Coalition on Homelessness (Nov. 1997).
  47. Drug cases are sometimes also diverted to mentoring courts that work with drug traffickers on education and employment training in an attempt to decrease the level of economically-inspired drug trafficking. See Telephone Interview with Malika Sazar, *supra* note 27 (reporting that women are not often referred to the "male-modeled" mentoring courts since the mentoring courts require that the defendant is not a drug user, and most women arrested for drug offenses are).
  48. See Brown, *supra* note 12, at 83-86.
  49. Failure to complete the treatment sometimes results in a return to trial, or an automatic guilty plea. Sometimes the drug court judge finds the defendant guilty of the crime charged but places her on probation in lieu of a prison sentence. This latter option is not a very good one in terms of avoiding the welfare ban repercussions of a felony drug conviction, and thus should be discouraged.
  50. For instance, a preliminary study of Florida's Broward County found that 90% of the first drug court participants had not been re-arrested. See Brown, *supra* note 12, at 93. This compares to a national rearrest rate of 21% within one year of release for drug offenders, and an average arrest rate of 1.5 times per year for cocaine abusers who are not incarcerated. *Id.* at 77. Drug courts save on police and trial court expenses, as well as over \$20,000 on each defendant not sent to prison. *Id.* at 92-93.

### A POTENTIAL EQUAL PROTECTION CHALLENGE TO SECTION 115

Equal protection<sup>51</sup> provides one strong ground for a potential constitutional challenge to Section 115.<sup>52</sup> Neither drug abusers, lower-income people, nor those eligible for public benefits are a protected category.<sup>53</sup> Thus, distinctions concerning these groups receive only the barest of judicial scrutiny for "rationality." The state, however, cannot impose totally irrational distinctions among people who are eligible for public benefits and those who are not.<sup>54</sup>

In *United States Department of Agriculture v. Moreno*,<sup>55</sup> the U.S. Supreme Court struck down a provision of the Food Stamp Act which excluded households containing unrelated individuals as a violation of equal protection. The Court found that the section was "wholly without any rational basis," and did not further, in fact was "clearly irrelevant" to, the Act's aim to improve nutrition among low-income citizens and strengthen agriculture.<sup>56</sup> Moreover, the Court held that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," finding that the provision at hand was enacted to prevent "hippie communes" from receiving food stamps.<sup>57</sup> Finally, Justice Brennan pointed out that the Act served only to deny benefits to those unrelated persons too poor to rearrange their households, and not to all unrelated persons living together.<sup>58</sup>

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51. Equal protection claims against state governments rely on the 14th Amendment of the U.S. Constitution. This language has been implicitly incorporated into equal protection challenges against the federal government which lie under 5th Amendment due process. Courts apply three different levels of scrutiny to statutes or state action challenged on equal protection grounds based upon the characteristic or group identity allegedly being used to discriminate. Strict scrutiny is applied against protected categories such as race, ethnicity, and national origin; intermediate scrutiny is applied to gender discrimination; and rational review is applied to all other categories. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d. ed. 1988).
  52. The potential constitutional challenges to the Welfare Act as a whole are beyond the scope of this discussion. It is worth noting, however, that federal and state governments are not required to provide a welfare structure for their citizens, but if they do so at all, they must meet a minimum level of procedural due process in the distribution of benefits. See *Goldberg v. Kelly*, 405 U.S. 134 (1972) (holding that a state cannot terminate an individual's welfare benefits without first providing a quasi-judicial administrative hearing). A possible, but most certainly unsuccessful, argument for the unconstitutionality of Section 115 would posit the criminal justice system's finding of a felony drug offense as an insufficient proxy for the constitutionally required administrative hearing under *Goldberg*, thus leaving Section 115 violative of procedural due process.
  53. Even if drug-abusers are deemed to be disabled—as *recovering* drug-abusers are, for instance, under the Americans with Disabilities Act, 42 U.S.C. § 12114 (1994), and the regulations implementing the Fair Housing Act, 24 C.F.R. § 100.201(a)(2) (1994)—they do not earn more than rational review. Cf. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (holding in part that mental retardation is not a suspect or quasi-suspect classification).
  54. See *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).
  55. *Id.*
  56. *Id.* at 538.
  57. *Id.* at 534.
  58. See *id.* at 538. This holding has been interpreted as part of a line of cases requiring that distinctions for purposes of welfare eligibility be related to need. See TRIBE, *supra* note 51, at 1645-46. However, the U.S. Supreme Court has upheld other distinctions among people eligible and non-eligible for benefits that may be based upon prejudice against certain groups, and do not appear

Section 115 arguably falls squarely within the *Moreno* category of unconstitutional eligibility distinctions. First, denying people convicted of a felony benefits on the basis of their conviction is totally unrelated to need, and is based upon a distinction between criminals and the "deserving poor." This distinction is irrational and cuts against the original purpose underlying public assistance—help for those in need.<sup>59</sup> Many former felons need financial assistance after incarceration, when they reenter a changed job market lacking skills and stigmatized by a criminal record. Moreover, the mandate of "personal responsibility"<sup>60</sup> for one's actions underlying recent welfare reform cannot have any practical significance unless it is accompanied by some of the measures necessary to achieve this, such as substance abuse treatment, child care, and employment training.

More irrational still is Section 115's singling out of drug offenders alone for a lifetime denial of benefits. Common sense dictates that there are many categories of felonies, from murder to fraud, that pose greater economic and social costs to the community than many drug felonies. To deny an addict benefits forever based upon a marijuana possession conviction, for instance, seems particularly absurd when no other criminal activity is so punished.<sup>61</sup> Although no legislative history directly demonstrates a congressional animosity to drug users, the comments quoted above of the section's sponsor, Senator Gramm, and of state bill sponsors such as California Senator Schiff, clearly reveal the provision, and similar state legislation, to be an attack against the politically unpopular and easily scapegoated group of people convicted of drug offenses. Like the Food Stamp Act provision at issue in *Moreno*, Section 115 only increases the punishment of the most needy of the intended targets, the drug abusers and offenders who require public assistance, rather than all people convicted of drug offenses. As such, Section 115 appears not to survive even a rational level of equal protection scrutiny.

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to be strongly related to need. *See, e.g., Lyng v. Castillo*, 477 U.S. 635 (1986) (upholding Congressional amendments to the Food Stamp Act Program which deemed parents, children, and siblings living together to be a single household and thus ineligible for increased food stamps for members of households proving that they did not eat together).

59. For the proposition that the U.S. welfare system was originally created to help those in economic need and has historically been framed in terms of economic need, see, for example, JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 8-10 (1994).

60. This term applies as it is embodied in the new Welfare Act's name. *See supra* note 1.

61. The highest percentage category of drug offense convictions in 1995 (9.7%) was for the possession of marijuana. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS*, 1995, at tbl.5.40.

### CONCLUSION

Section 115 unfairly punishes poor drug abusers, many of whom are women, by denying them public benefits for life. It has no rational punitive purpose nor is it economically efficient. As this article has attempted to demonstrate, Section 115, and similar state provisions, will increase recidivism among drug offenders, while failing to combat drug abuse and the related poverty. This is likely to particularly impact the group who have the most need for public assistance and is the fastest-growing group of people being arrested for drug crimes—poor women, and often women of color. The Welfare Act's treatment of drug abuse as a criminal and moral problem fails to recognize the many societal causes and effects of drug abuse. The problem cannot be solved until legislators honestly consider the extent and nature of drug abuse in all segments of society and endorse effective means to address it.