

DRUG POLICY ALLIANCE

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Collateral Consequences: Denial of Basic Social Services Based Upon Drug Use

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INTRODUCTION

Individuals and their families who are convicted of drug felonies or have drug use histories face a wide spectrum of punitive policies that limit their access to social services. The purpose of this memo is to describe four of the most egregious and far-reaching “collateral consequences.”

Low-income persons in general, and formerly incarcerated persons in particular, are likely to require the assistance of a large number of public services. Unfortunately, federal law severely restricts persons with drug convictions and drug histories from accessing these necessary services. For example:

- ? “One strike” housing policies make it difficult to obtain and remain in public housing if you or a houseguest have a drug conviction or have used drugs;
- ? An amendment to the Higher Education Act of 1998 suspends eligibility for grant, loan, or work assistance for students convicted of drug-related offenses;
- ? The Personal Responsibility and Work Opportunity Reconciliation Act, passed in 1996, permanently bars those with drug-related felony convictions from receiving federal cash assistance and food stamps during their lifetime, unless their state opts out; and
- ? State foster care systems act aggressively to terminate parental rights of incarcerated women and of parents who test positive for drugs.

People who have experienced a drug felony conviction also face a myriad of additional obstacles, including barriers to employment, licensing, voting, and business loans. Individuals can also be deported if they have been convicted of a drug offense, sometimes being sent back to a country where they have never lived.

Not surprisingly, these policies disproportionately affect poor people of color, with the burden falling most harshly on women. Though African-Americans comprise 13 percent of the population and 13 percent of drug users, they comprise 55 percent of those convicted of drug offenses. According to U.S. Department of Justice statistics, from 1986 to 1996 the number of women sentenced to state prison for drug crimes increased tenfold, from 2,370 to 23,700.

HOUSING

Background

Under current federal law, there are several mechanisms whereby a person can lose or be unable to access housing because of a drug conviction or drug use by the individual leaseholder, a housemate, or even a guest.

Public Housing

Eligibility criteria:

The Housing Opportunity Program Extension Act of 1996, codified at 42 U.S.C.A. § 1437d(s) and § 1437d(t) allows public housing agencies the authority to:

- a. access criminal records of the applicant or current tenant
- b. access records from drug treatment facilities where that information is *solely related to whether the applicant is currently engaging in the illegal use of a controlled substance.*

Thus, public housing authorities may deny admission—based on an applicant’s past drug conviction--to both project-based public housing and programs such as the Section 8 Tenant Based Housing Assistance Program which pays private landlords the difference between the fair market value of a unit and the rent that is affordable to a tenant with limited income. In the case of drug treatment history, the authority must infer current drug use before eviction. Although denials of eligibility can be appealed, it is a labor-intensive and complicated process.

Evictions:

One Strike Evictions.

The “one-strike” policy permits each public housing agency to include lease provisions that:

provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, or any drug-related criminal activity *on or off such premises*, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.¹

42 U.S.C. §1437d.

Consequently, any “violent or drug-related criminal activity,” permits housing authorities to forgo normal grievance procedures and sue for eviction in court directly.² This applies to both public housing and Section 8 housing.³

¹ 42 U.S.C. 1437d(1)(6).

² HUD must issue a determination that the local eviction court procedures satisfy the required elements of due process. See [42 U.S.C. §1437d\(k\)](#); [24 C.F.R. § 966.51](#). However one court has found that the state court eviction process can meet due process for termination of Section 8 assistance without an informal

These policies are likely to become more entrenched in light of the March 26, 2002 U.S. Supreme Court decision in *U.S. Department of Housing and Urban Development v. Rucker*, (U.S. Supreme Court Nos. 00-1770 and 00-1781) upholding a local Public Housing Authority's right to evict entire families based on the one-strike policy, regardless of any prior knowledge on the part of the leaseholder.

Civil Asset Forfeiture.

The 1988 revision of federal civil asset forfeiture law, Section 881, permitted the forfeiture of leasehold interests, such as apartments. The Civil Asset Forfeiture Reform Act of 2000 amended § 881 to provide for the forfeiture of "all real property...(including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment."⁴ Thus, federal civil forfeiture law, along with 42 U.S.C.A § 1437, provides the statutory basis for the federal government to seize housing units that are not public housing from tenants with drug charges.

Challenges to existing law

Most legal challenges to these housing policies have failed. In addition to *Rucker*, in *Campbell v. Minneapolis Public Housing Authority*, an 8th Circuit case, the court held that questions about drug and alcohol abuse on housing applications and the release requirement did not violate anti-discrimination laws (168 F.3d 1069 (1999)). Future efforts should focus on attempts to work with local public housing authorities on using what discretion they have in developing their leases to be as non-punitive as possible, their enforcement of those lease provisions, and developing alternative strategies for addressing the concerns of public housing communities regarding drug sales in a productive way. Public education efforts in collaboration with public housing tenants' organizations, coupled with State and Federal legislative advocacy is critical to realizing any gains in this area.

HIGHER EDUCATION

Background

In 1998, the Higher Education Act was amended to prohibit anyone with a drug conviction from receiving federal financial aid for post-secondary education. The amendment is codified at 20 U.S.C. 1091(r)(l).

A student who has been convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance shall not be eligible to receive any grant, loan, or work assistance under this subchapter [[20 U.S.C.A. § 1070](#) et seq.] and part C of subchapter I of [chapter 34 of Title 42](#) [[42 U.S.C.A. § 2751](#) et seq.] during the period

grievance procedure or HUD approval. *Colvin v. Housing Authority of Sarasota, Florida*, 71 F.3d 864 (11th Cir. 1996).

³ 42 U.S.C. 1437f.

⁴ 21 U.S.C. § 881(a)(7) (2000).

beginning on the date of such conviction and ending after the interval specified below:

Under the law, a student who has been convicted of any offense under any federal or state law involving the possession or sale of a controlled substance is not eligible to receive any grant, loan, or work assistance during the period beginning on the conviction date. The period of ineligibility lasts one year for a first possession offense, two years for a second offense and permanently for a third. In the case of a conviction for sales, a first offense leads to two years of ineligibility and a second conviction leads to a permanent ban on receiving federal aid. A student whose eligibility has been suspended may resume eligibility early if he or she satisfactorily completes a drug rehabilitation program complying with certain criteria, even if they are not addicted to drugs. They would also qualify for aid if the conviction is reversed and set aside.

Ineligibility applies to all forms of federal financial aid, including grants, student loans, and work-study. According to the bill's author, Congressman Mark Souder (R-IN), the bill was intended to apply only to students who are convicted while they are in college, not students who were convicted before they got to school. Nonetheless, all students with drug convictions, regardless of when they occurred, have lost benefits under this provision.

In addition, federal law also denies a tax credit to students and their families if the student has been convicted of a drug felony. The "Hope Credit" normally allows \$1500 in tax credits, but permanently excludes students with any prior drug felony conviction. In the 2001-2002 school year, 48,629 students were formally denied aid for some or all of the school year. To date, approximately 92,841 students have been denied access to financial aid because of this provision.

Challenges to existing law

Representative Barney Frank (D-MA) has introduced a bill--H.R. 685--that would repeal this policy as one of its three major priority areas. The bill currently has 39 co-sponsors. In addition to these efforts, student governments and schools have begun to protest this policy. As of April 2002, Hampshire, Swarthmore College and Yale University have agreed to replace the federal aid lost under this policy.

WELFARE REFORM AND FOOD STAMPS

Background

Under Section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act, passed in 1996, any individual with a drug felony conviction for conduct after August 22, 1996 (exact date differs by state) is permanently barred from receiving cash benefits or food stamps.⁵

⁵ The following Federal benefits cannot be denied: Emergency medical services under Title XIX of the Social Security Act, short-term, non-cash, in-kind emergency disaster relief, public health assistance for immunizations, public health assistance for testing and treatment of communicable diseases if the Secretary

An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance shall not be eligible for--

(1) assistance under any State program funded under part A of title IV of the Social Security Act, or

(2) benefits under the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977 or any State program carried out under the Food Stamp Act of 1977.

The ban is codified at 21 U.S.C. Sec. 862a and applies only to drug convictions and not to other kinds of felonies.

Each state can “opt out” of enforcing this ban, or modify its enforcement. As of March 2002, 21 states have the full ban in place—denying to people with felony drug convictions benefits for life. Eleven states and the District of Columbia have completely opted out of the ban, and 18 other states have modified the ban either by allowing benefits dependent upon drug treatment, denying benefits only for sales convictions, or by placing a time limit on the ban. California, the state with the largest number of persons incarcerated for drug offenses, has maintained a full ban on Temporary Assistance for Needy Families (TANF) and food stamp benefits.

This ban has severely impacted many individuals, and especially women of color who are disproportionately represented in the welfare system. According to The Sentencing Project (TSP) in its recent report “Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses,” over 92,000 women (38,000 in California) living in states where the full ban is in place have been sentenced to drug felonies between 1996 and 1999 and are likely to be affected by the provision. Nearly half of the estimated total of potentially affected women is African-American and Latina. These estimates fail to include women in states with a partial ban, men impacted by the ban or anyone who has suffered a felony drug conviction since 2000.

State legislatures continue to reconsider their implementation of the ban, with varied outcomes. For example, in New Mexico, House Bill 11, which passed in 2002 (sponsored by Representative Joe Thompson (R-Albuquerque)), waives the federal ban on benefits for drug offenders who have successfully completed their sentences. In California, Governor Davis has vetoed three bills to modify the ban

Challenges to existing law

The release of “Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses” in February 2002 has led to a growing momentum to repeal the ban at the federal level. This is due in part to the fact that the TANF program, created by the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, is up for reauthorization in September 2002. A coalition of groups has been formed to advocate

of Health and Human Services determines that it is necessary to prevent the spread of such disease, prenatal care, job training programs, and drug treatment programs.

for the elimination of the ban. Current coalition members include The Sentencing Project, Drug Policy Alliance, Food Research and Action Council, Legal Action Center, NAACP Legal Defense Fund, MALDEF, the Open Society Institute, La Raza, Women of Color Resource Center, and representatives from local Pennsylvania, DC, and New York groups working specifically on this issue.

CHILD WELFARE

Background

In recent years, the child welfare system in some states has increasingly been used to remove children from parents suspected of using drugs—including the children of incarcerated women. As noted above, a large percentage of incarcerated women are in prison because of nonviolent drug offenses.

The Adoption and Safe Families Act of 1997 (ASFA) accelerates the termination of parental rights and prevents individuals with certain convictions from becoming foster or adoptive parents. It states:

in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law)... the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption. (Pub. L. No. 105-89, Sec. 103)

By 1999, all states had passed legislation that mirrored or was tougher than the federal law.

In addition, many states have initiated testing of newborns and terminating parental rights immediately following childbirth if the newborn tests positive for drugs. These policies have a disparate racial and class impact—both because of overwhelming evidence that hospitals test and report black mothers at far higher rates than white mothers and poor mothers who have increased levels of contact with governmental agencies are consequently more likely to be tested. Additionally, this practice is based largely on hospital based policies, where public hospitals that treat low-income patients are more likely to engage in testing and reporting activities.

For an incarcerated woman, the clock on her reunification plan often starts ticking once she is arrested and the same is true if she gives birth while in prison. Significantly, child welfare systems sometimes view a relapse in drug use as evidence of permanent parental unfitness.⁶ Even where experts find a continuing emotional bond between addicted

⁶ Id. at 156.

parents and child as well as the potential for successful drug treatment, some judges do not wait for parents to recover.

Drug testing is systematically a condition of probation for people who have been convicted of drug charges. One positive drug test can send a child into foster care and force a parent to fulfill an often-onerous reunification plans.

Sadly, the combination of policies regarding housing, welfare, and education and the lack of drug treatment facilities in general (especially those with child care and for pregnant women) make it nearly impossible for a low income woman with children to successfully participate in a drug treatment program and fulfill reunification programs within the time frame imposed by the child welfare system.⁷

Challenges to existing law

Currently, this issue has been addressed on a case-by-case basis. Broader challenges have included disputing drug-testing technologies used in the child welfare system, pressing for the expansion of drug treatment services for families in the child welfare system, and advocating for the reform of the foster care and out-of-home care systems. More research on drug testing policies in hospitals and the use of such tests by the child welfare system, as well as research on bias and discrimination in the child welfare system in general is needed in order to support broader litigation efforts

In the realm of criminal charges, there have been a number of challenges to state laws regarding child neglect and abuse with respect to drug use during pregnancy. The high courts of Kentucky, Nevada, and Ohio have declined to extend the use of child neglect statutes to punish women for their conduct during pregnancy, recognizing that the due process guarantee of notice and its prohibition against vague criminal statutes precludes such prosecution. (See *Sheriff v. Encoe*, 110 Nev. 1317, 1319, 885 P.2d 596, 598 (1994); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993); *State v. Gray*, 62 Ohio St.3d 514, 584 N.E.2d 710 (Ohio 1992)). Currently, in the case *State of Missouri v. Rhona Smith*, the State of Missouri has decided to level a child endangerment charge against a woman who used drugs during her pregnancy; a challenge to this indictment is underway.

With the sole exception of the South Carolina Supreme Court, every state court of last resort, as well as all intermediate appellate courts⁸ and numerous trial courts that have

⁷ These policies have led to shockingly disproportionate numbers of black children in state custody. For example, in Chicago, 95 percent of children in foster care are black.

⁸ See, e.g., *Reinesto v. Superior Court*, 182 Ariz. 190, 894 P.2d 733 (Ct. App. 1995) (in dismissing child abuse charges filed against a woman for heroin use during pregnancy, court held that the ordinary meaning of "child" excludes fetuses, and to conclude otherwise, would offend due process notions of fairness and render statute impermissibly vague); *Collins v. State*, 890 S.W.2d 893 (Tex. App. El Paso 1994) (charges brought for substance abuse during pregnancy dismissed because application of the statute to prenatal conduct violates federal due process guarantees); *State v. Dunn*, 82 Wash. App. 122, 916 P.2d 952 (1996) (holding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as a person under eighteen years of age"), review denied, 130 Wash. 2d 1018, 928 P.2d 413 (1996); *State v. Gethers*, 585 So. 2d 1140 (Fla. App. 1991) (dismissing child abuse charges brought for prenatal drug use on ground that such application misconstrues the purpose of the law).

addressed this issue, have rejected the use of child endangerment and similar criminal statutes to punish women for their conduct during pregnancy.

CONCLUSION

In sum, the denial of basic social services and benefits to individuals who are convicted of drug offenses represent the “collateral consequences” of the war on drugs. These consequences not only discriminate against families and communities of color as well as poor communities, but also intensify the struggles individuals face on the road to recovery and rehabilitation by erecting significant barriers.

While various challenges have been made to oppose these policies at the state and national level, a firm commitment to looking at these post-incarceration and conviction policies in their entirety should also serve to understand their broader effects. What is revealed is a pattern of discrimination that only serves to undermine, rather than bolster, a commitment to ensuring the public health and well-being of families and communities affected by the war on drugs.