

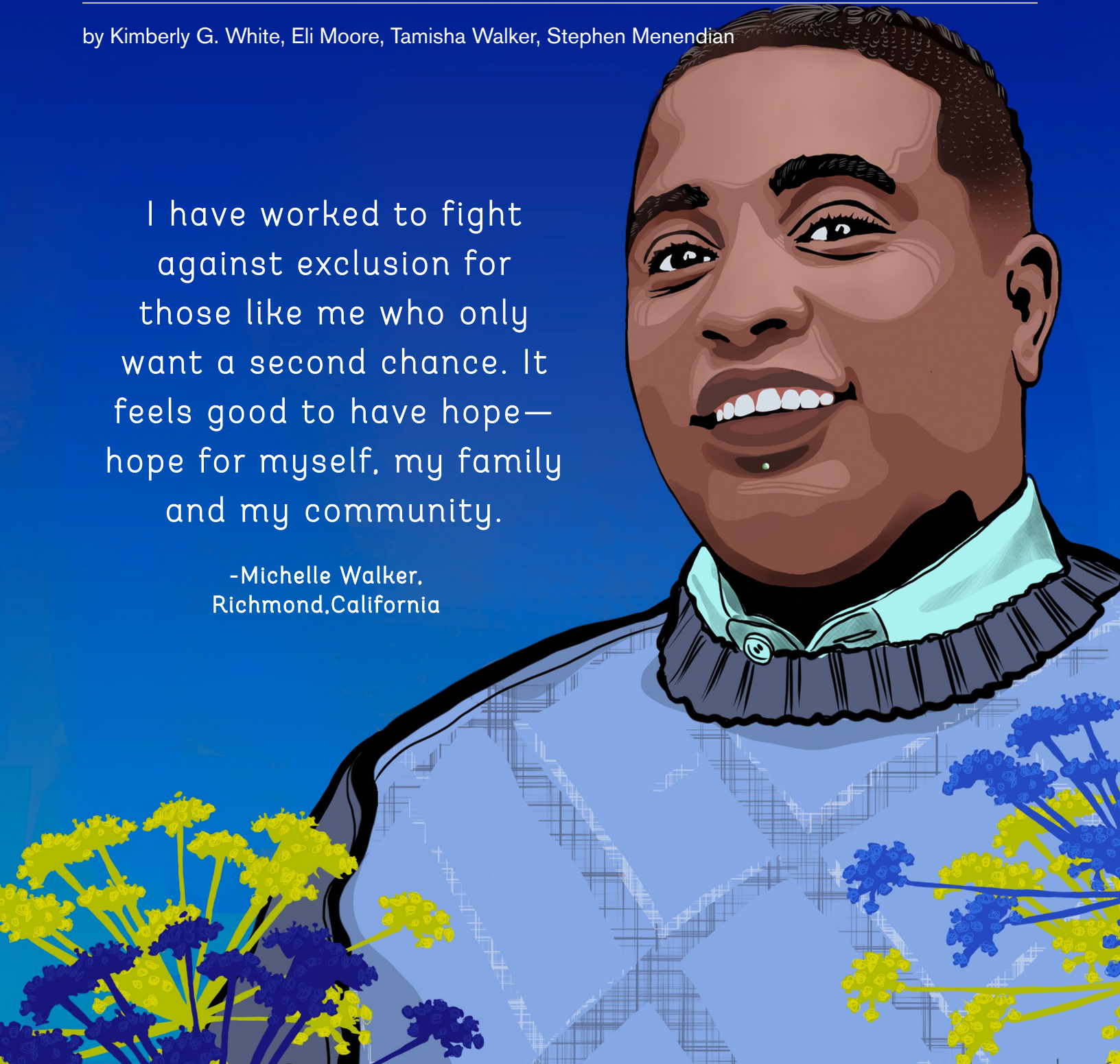
# Ending Legal Bias Against Formerly Incarcerated People

## Establishing Protected Legal Status

by Kimberly G. White, Eli Moore, Tamisha Walker, Stephen Menendian

I have worked to fight against exclusion for those like me who only want a second chance. It feels good to have hope—hope for myself, my family and my community.

-Michelle Walker,  
Richmond, California



# This brief is part of the **Bold Policy Series** published by the Haas Institute for a Fair and Inclusive Society at UC Berkeley.



**What ideas exist that can rise to the scale of entrenched and emergent social problems and injustices? This new Bold Policy Ideas series focuses on that question with a new series of brief reports that elevate policy ideas that, if adopted, would have a wide-reaching transformative effect on structural problems—problems that are perpetuated by multiple institutions and powerful financial incentives. Bold policy ideas can encapsulate new narratives that expand current public debates as they illuminate a long-term vision.**

**We are perhaps too accustomed to filtering our ideas and solutions to focus only on those that seem politically feasible. While this can make sense given the imperative to have a tangible impact on the lives of people facing deep injustice and exclusion, as well as to meet our communities' immediate needs for protection and care, we also need to create space for publicly exploring ideas and policies that may seem far-fetched in the short-term or within a certain political environment. Envisioning, discussing, and sharpening these ideas not only contributes to long-term goal setting, but can also inform the sequencing of our short-term goals.**

**Our Bold Policy Idea series aims to open space for these conversations by examining innovative ideas arising from research and advocacy created with community groups, scholars, and others working towards a more fair and just society.**

## Authors

**Kimberly G. White** is a PhD student at University of Pennsylvania and recently completed her J.D. at Berkeley Law. She was the 2018-2019 Coblenz Civil Rights Legal Fellow at the Haas Institute and is interested in the impact of legal systems on oppressed people and the use of double-consciousness as a mechanism for navigating the world.

**Eli Moore** is Director of the California Community Partnerships Program at the Haas Institute, where his work focuses on urban planning, political economy, race, and human geography. Eli holds masters degrees in Geography and International Relations from Syracuse University. He co-founded the Safe Return Project.

**Tamisha Walker** is a founding member and Executive Director of Safe Return Project, an organization committed to the freedom and liberation of people impacted by criminalization and incarceration. Tamisha has nine years of community organizing experience in cities impacted by trauma and economic inequality, and is a well-known advocate on issues related to mass incarceration and racial disparities in the criminal justice system since her release from incarceration in 2009. She received a BA in psychology from California State University East Bay.

**Stephen Menendian** is the Assistant Director and Director of Research at the Haas Institute. Stephen's research focuses on the mechanisms of inter-group inequality, "othering," structural racism, and the design of effective equity interventions as permitted by law. Stephen developed and co-authored the Haas Institute's amicus brief in the Supreme Court case *Texas Department of Housing and Community Affairs v. the Inclusive Communities Project*, cited by the Court in a landmark decision recognizing disparate impact claims under the Fair Housing Act.

## Acknowledgments

The authors are grateful for the insights shared by various advocates, legal experts, and formerly incarcerated community leaders that shaped this brief. Without the organizing of a movement to transform mass incarceration and racial inequities, and the practice of participatory research and engaged scholarship, ideas like this would rarely come to light or have the possibility of becoming reality.

## Cover Illustration

Kate Deciccio of Safe Return project member Michelle Walker

## Report Citation

White, Kimberly, and Eli Moore, Tamisha Walker, Stephen Menendian. "Ending Legal Bias Against Formerly Incarcerated People." Haas Institute for a Fair and Inclusive Society, University of California, Berkeley. September 2019. [haasinstitute.berkeley.edu/boldpolicyideas](https://haasinstitute.berkeley.edu/boldpolicyideas)

## Contact

460 Stephens Hall  
Berkeley, CA 94720-2330  
Tel 510-642-3326  
[haasinstitute.berkeley.edu](https://haasinstitute.berkeley.edu)

Author Contact:  
[elimoore@berkeley.edu](mailto:elimoore@berkeley.edu)

## Introduction

**WHETHER APPLYING FOR** a job or apartment accessing public services or taking care of their children, formerly incarcerated people face tremendous challenges when returning to their communities. Instead of a smooth integration back into society, formerly incarcerated people often encounter a seemingly endless succession of barriers, and public and private discrimination, which are compounded when the person is a member of a marginalized or historically disadvantaged group. These challenges not only make it difficult for formerly incarcerated people to re-integrate, but also to meet basic needs or fulfill communal obligations.

With growing recognition of these challenges, formerly incarcerated people (FIPs) and their allies have won major changes to policies and practices over the last decade, removing some of the barriers to employment,<sup>1</sup> housing,<sup>2</sup> voting rights,<sup>3</sup> and more.

But FIPs still face countless types of institutionalized discrimination and legal disadvantages. Grassroots leaders from the Safe Return Project, an organization of formerly incarcerated people in Contra Costa County, California, have raised the concern that if these wins only remove barriers one by one, it will take generations to restore peoples' full rights and freedom.

This policy brief explores a mechanism for broadly advancing the rights of FIPs across the board, as an alternative to incremental approaches which seek to overturn legalized disadvantages or remove barriers in individual domains. Specifically, we explore the possibility of establishing FIPs as a protected status under municipal, state, and federal law.

This brief begins by reviewing “collateral consequences” of incarceration—the plethora of barriers that are triggered by a criminal conviction and restrict formerly incarcerated people from accessing resources necessary for their wellbeing. Next, we set out the legal context for advancing “protected legal status” for FIPs, which could prevent private individuals, corporations, and government bodies and agencies from enacting laws or taking actions that discriminate against them. We then explore the potential for adopting this protection at various levels or branches of government. Through this analysis, we hope to contribute to awareness of the potential benefits of achieving such a policy change, pathways to establishing the policy, and challenges that could be faced along the way.

**Unlike other groups, formerly incarcerated people cannot invoke fundamental rights as the basis for receiving heightened scrutiny.**

## Collateral Consequences

Thirty percent of the adult population in the United States has a criminal record.<sup>4,5</sup> In addition to the stigma of conviction, those released after conviction of a crime face substantial sanctions and restrictions that limit their ability to successfully reintegrate into society and achieve self-sufficiency and freedom.<sup>6</sup> Some of the consequences of conviction may include being barred from obtaining certain occupational licenses and jobs, eviction from public housing, being rendered ineligible for government contracts, “forfeiture of pension benefits, enrollment on a public registry, and ineligibility for welfare benefits.”<sup>7</sup> Furthermore, criminal conviction may limit the rights and liberties guaranteed to citizens under the Constitution.<sup>8</sup> It is legal to bar people with convictions from holding “an office of public or private trust,” joining the military, becoming a public service volunteer, or serving on a jury.<sup>9</sup> A criminal conviction may also sever parental legal rights, eliminate unrestricted travel, and “the right to live in certain parts of town.”<sup>10</sup> Noncitizens face the possibility of deportation.<sup>11</sup>

Governmental bodies impose collateral consequences in multiple ways: through statutes that automatically penalize people with convictions, through the Constitution, and through administrative

rules.<sup>12</sup> Some examples of consequences imposed via constitution or statute include preclusions on voting and owning firearms that exist in most states.<sup>13</sup> Collateral sanctions sometimes have time limits and may be conditional, but usually the sanctions endure indefinitely.<sup>14</sup> Often the collateral sanctions are not tied to “any measurable risk.”<sup>15</sup>

The pervasive use of background checks facilitates the almost entirely unregulated discrimination by individuals and businesses against people with criminal records.<sup>16</sup> With the preponderance of companies selling data on individuals, a person’s criminal records are more accessible, making it harder to break free from the stigma of incarceration.<sup>17</sup> Collateral sanctions used to mostly affect only those who had been convicted of felonies, but increasingly people face consequences after less serious interactions with the legal system, even an arrest without conviction.<sup>18</sup>

Collateral consequences have existed in the US since the colonial era, but over the past 20 years, these consequences have worsened in terms of severity and frequency.<sup>19</sup> Collateral consequences have contributed to the production of a class of people defined primarily through their criminal record.<sup>20</sup> Under the existing criminal justice regime, people with criminal records are perpetually indebted and marginalized. The National Inventory of Collateral Consequences of Conviction has documented over 40,000 such barriers across the country.<sup>21</sup>

The legal restrictions and social stigma that formerly incarcerated people endure hinder the ability of them, as well as their communities, to move forward. Collateral sanctions contribute to recidivism rates, increasing the rate of re-arrest and re-incarceration.<sup>22</sup> The consequences also affect people who are connected to the formerly incarcerated person, including their family, friends, and “business associates.”<sup>23</sup>

Collateral sanctions have been rightly denounced as a “secret sentence” that forces people into a kind of “internal exile.”<sup>24</sup> They also result in negative public safety consequences and severe racial inequities.<sup>25</sup> African American, Latinx, Native American, and certain Asian American groups are overrepresented in the number of people arrested, charged, convicted, and sentenced.<sup>26</sup> The likelihood of imprisonment of a man born in the US in 2001 is one in 17 for a white man, one in six for a Latino man, and one in three for a Black man, with similar racial disparities existing for women.<sup>27</sup> Incarceration also disproportionately affects people who are disabled,<sup>28</sup> transgender and gender-nonconforming,<sup>29</sup> and low-income.<sup>30</sup> For these communities, coming home after incarceration means facing both the barriers of having a past conviction, compounded by the barriers erected because of other parts of their identity.

Unlike criminal codes, which are generally consistent from state to state, collateral consequences are managed in a more haphazard way.<sup>31</sup> Crossing from one state to another can dramatically change a person’s access to services, voting, and other life essentials. Because they exist in federal and municipal codes as well as through agency rules, it’s difficult to accurately ascertain “all of the penalties and disabilities that apply to a particular offense.”<sup>32</sup> Even the administrators of the criminal justice system are often unaware of the potential collateral consequences attached to particular crimes.<sup>33</sup> Such general obliviousness to sanctions that encumber the lives of people who face incarceration challenges the portrayal of a fair, informed, and accountable justice system.<sup>34</sup>

Various policies have been proposed and adopted to remove or more selectively apply certain types of barriers affecting people with past criminal convictions. This brief reviews and analyzes

**Removing barriers to employment, housing, and voting rights are important for formerly incarcerated people but if these wins only remove barriers one by one, it will take generations to restore peoples’ full rights and freedom.**

**What if it was illegal to discriminate against someone solely based on a past conviction they had already made up for? For people who are returning home there is an overwhelmingly long list of benefits and services for which they are ineligible—things which allow people to be engaged and participating members of our communities and our political and economic system.**

legal research related to the establishment of protected class status for people with past convictions. Such a status would create the legal basis for people to challenge any discrimination based on their status as having a previous conviction. The research brief intends to help think through the creation of different avenues for establishing protected legal status: through the equal protection clause, state courts, and local legislation.

## Legal Context of Equal Protection

Federal, state, and municipal law extend legal protections to particular groups in a variety of ways. We will begin by examining the Federal Constitution's Equal Protection Clause under the Fourteenth Amendment, and how that clause has been interpreted and applied.

Enacted in the wake of the Civil War, the Fourteenth Amendment's main purpose was to either restore or unequivocally affirm the citizenship status and rights of freed slaves and their descendants, overturning a key ruling of the infamous *Dred Scott* decision in the process, which held that persons of African descent were not, and could never become, US citizens. Despite these avowed purposes, the language of the amendment was framed more broadly, in generally universalistic terms.<sup>35</sup> In addition to explaining how federal and state citizenship is acquired, Section 1 provides due process and equal protection rights to all persons in the jurisdiction of the United States, as well as the privileges and immunities of citizenship to all citizens.

The Equal Protection Clause, which states that "no state shall...deny to any person equal protection of law," dominates Fourteenth Amendment jurisprudence. It is not only one of the most litigated provisions of the constitution, but it is also one of the most significant. Despite this, the provision is not exactly free of ambiguity. As University of Pennsylvania Law Professor Kermit Roosevelt so eloquently observed:

"Although the Equal Protection Clause assumedly means what it says—that is, we ought not interpret it inconsistently with its words—it does not very clearly say what it means.

Three things, however, are clear: First, the clause imposes some kind of duty having to do with equality. Second, that which must be equalized is denominated as protection. Third, the bearer of the equalization duty is the state."<sup>36</sup>

The prevailing interpretation of the Equal Protection Clause has not only changed over time, but the judicial standards and tests which have evolved to manage its application have changed as well. In the post-Reconstruction era until the early twentieth century, the prevailing meaning or interpretation of the was that it prohibited legislation that was "stigmatizing" or "intended to oppress."<sup>37</sup> While dominant for the first century of interpretation, this view on the clause no longer prevails. In general, the Equal Protection Clause has been interpreted by the Supreme Court in the last 50 years to protect individuals from intentional governmental discrimination or "hostile legislation,"<sup>38</sup> and does not extend to so-called "disparate impact claims," in which discrimination may be inadvertent or unintentional.<sup>39</sup>

More critically to this discussion, beginning in the middle of the twentieth century, the Supreme Court began to distinguish between particular types of legislation and classes of people that might be subject to greater judicial scrutiny. In reviewing an executive order issued by President Franklin Roosevelt implementing the internment of residents of Japanese descent, the Supreme Court explained in *Korematsu* that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."<sup>40</sup>

In subsequent decades, the Court clarified that racial, ancestry, religious affiliation, and national origin classifications are subject to "strict scrutiny," while gender-based classifications are subject to intermediate scrutiny, and other classifications, such as those based on disability, may be subject to "rational basis review." In the 1970s, the Supreme Court more regularly rejected demands

to extend suspect class status to other groups.<sup>41</sup> The court denied claims for suspect status from people who were poor, pregnant women, the elderly, and people with disabilities.<sup>42</sup> Within this schema, race and gender are "protected groups," which triggers heightened judicial scrutiny, while formerly incarcerated status does not.

## Defining Protected Legal Status through Constitutional Protection

There are some doctrinal barriers that get in the way of people with criminal records being treated as a class deserving heightened scrutiny under the equal protection doctrine.<sup>43</sup> Unlike racial groups who receive heightened scrutiny within the Court in part because they cannot choose their race, people who are formerly incarcerated are considered responsible for becoming a part of that class and have been thought to be "morally culpable."<sup>44</sup>

There is no historical basis for supposing that the Equal Protection Clause was intended or has been understood to provide heightened judicial scrutiny to disabling legislation impacting FIPs, or similar state action. Another barrier is Section 2 of the Fourteenth Amendment, which states that citizenship privileges, including the right to vote, may be abridged for people who have committed crimes.<sup>45</sup> Moreover, the Thirteenth Amendment's provision abolishing slavery explicitly excepts "punishment for a crime" to the prohibition against slavery and involuntary servitude. These barriers may be surmountable and importantly, not having adequate judicial protection for politically powerless groups violates the equal protection doctrine.<sup>46</sup> If we examine the origins of strict scrutiny more carefully, a strong argument for extending heightened protection in that manner emerges.

Six years before the *Korematsu* decision, the Supreme Court first articulated the notion of heightened judicial scrutiny by presenting, in a famous footnote, a more detailed schemata for reviewing constitutional claims. In *United States v. Carolene Products Co.*, the Supreme Court ruled that federal legislation regulating economic activity would be subject to rational basis review, but in a footnote, provided a roadmap for constitutional adjudication:

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments....

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment...

Nor need we enquire...whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."<sup>47</sup>

The first part of this three-part analysis suggests that any law which contravenes the Bill of Rights should be subject to strict scrutiny review. The second and third parts, however, implicate FIPs. The second suggests that courts have a critical role to protect democratic political processes and should closely scrutinize legislation which restricts access to the political process. In other words, courts have a critical role in making sure that the rules of the game are fair. This has direct implications for legislation which permits collateral consequences for FIPs with respect to political participation, such as felon disenfranchisement.

The third and final part directly implicates FIPs when it suggests two elements that constitute a particular condition: "discreteness" and "insularity." The court suggests that, to the extent that a minority group is "discrete and insular," the Constitution may call for greater judicial scrutiny, especial-

ly if prejudices against that group make it harder to thwart oppressive or disabling legislation. Thus, if FIPs are discrete and insular, then disabling legislation, such as that which permits discrimination in housing, employment or voting, would fall within the scope of footnote 4's ambit.

Within society broadly or the political community more narrowly, FIPs are a "discrete" class. They are easily identifiable based upon public records and suffer discrete and specific collateral consequences as a result of that status. The insularity element is less obvious, but nonetheless applicable. Not only are FIPs, like most groups, unevenly distributed and clustered within society, but they suffer a unique insularity within the political community due to their legalized disadvantages.

On the foregoing basis, a strong argument, rooted in *Carolene Products* footnote 4, could be made to a federal court that FIPs are deserving of heightened judicial scrutiny, and there is a good chance that some, if not many, federal judges would be receptive to it. The possibility of success for this line of argument depends on the degree to which the reviewing court credits footnote 4 as a valid paradigm within Constitutional law. In the famous *Bakke* decision, Justice Powell seemed to reject footnote 4 as a predicate for equal protection analysis: "this Court [has never] held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious," declaring that by the mid-1970s, the United States had become "a Nation of minorities."<sup>48</sup> Nonetheless, this famous footnote in Constitutional law may still have sway among some jurists, and could be repackaged in this context to make a compelling case for heightened protections for FIPs.

While the courts have not offered rigorous scrutiny through the Equal Protection Doctrine for people with convictions, some courts have stricken some collateral sanctions because the laws were vague, inconsistent, or deprived "opportunity to demonstrate rehabilitation."<sup>49</sup> But, usually, when it concerns government benefits or when the law targets people who've committed specific offenses, the courts have upheld the legality of collateral sanctions through the use of rational basis review.<sup>50</sup> When the courts have struck down narrow and specific collateral sanctions, they have done so on a due process "liberty interest in employment."<sup>51</sup> In the rare case where courts have nullified laws that are tailored to specific conviction histories, the "criminal conviction is often, but not always, minor, non-existent, or old."<sup>52</sup> Overall, the courts rarely use heightened scrutiny when considering laws affecting people with criminal convictions.<sup>53</sup>

Formerly incarcerated people do not receive the benefit of being treated as a suspect class and, unlike other groups, cannot invoke fundamental rights as the basis for receiving heightened scrutiny either.<sup>54</sup> Most of the consequences of collateral sanctions—limited access to housing and employment—would not rise to the level of a fundamental right because they are considered "economic" and "social" infringements.<sup>55</sup> But, even for rights that the Supreme Court deemed fundamental, such as the right to vote, heightened scrutiny does not apply to formerly incarcerated people. Despite the Supreme Court's declaration that the right to vote is a fundamental right and that encroachments on that right triggers strict scrutiny, that reasoning does not apply to formerly incarcerated people.<sup>56</sup> In *Richardson v. Ramirez*, the court held that disenfranchisement of people with convictions, even those who had completed their sentences, did not violate the Equal Protection Clause because section 2 of the clause permits the imposition of voting restrictions on people who have been convicted of crimes.<sup>57</sup>

Beyond grounding the claims of FIP in *Carolene Products* footnote 4, people with convictions may be able to receive heightened scrutiny if they establish these two claims: 1) that it is an immutable characteristic and 2) the history of class-based discrimination.<sup>58</sup> One could argue that because the existence of a formerly incarcerated class is contingent on "governmental action for its creation and existence, government policy determines the class's immutability."<sup>59</sup> Most states do not permit formerly incarcerated people to "clean up their criminal convictions."<sup>60</sup> But, of the states that do permit alterations, the criminal record often is not completely erased and might be viewable to private employers or other parties.<sup>61</sup> For the small number of states that allow people to clear their conviction



history “those states impose significant administrative and evidentiary hurdles to legally available remedies.”<sup>62</sup> So, because of the obstacles to alterations, possessing a criminal record meets the criteria for an “unalterable classification.”<sup>63</sup>

In addition to the obstacles preventing formerly incarcerated people from erasing their conviction histories, “the lack of significant relevance between [formerly incarcerated people’s] criminal histories and their individual responsibility, and the impermeability of the class all support the conclusion that [formerly incarcerated people] are an immutable class.”<sup>64</sup> There is a history of treating formerly incarcerating people as dangerous to justify the imposition of perpetual punishment and other discriminatory measures, which is analogous to the history of discrimination that vulnerable groups, such as racial minorities, have endured.<sup>65</sup>

## Protection Through New Local and State Laws

Although a grand federal strategy may seem enticing and more impactful, local legislative remedies to expand existing civil rights protections to FIPs may be easier to accomplish.<sup>66</sup> States and municipalities are broadly permitted to enact laws declaring particular groups as “protected.” For example, the city of Seattle extends protected status far beyond the traditional groups, to parental status, source of income, veterans, political ideology, and sexual orientation.<sup>67</sup> These municipal protections prohibit discrimination on these bases or among these groups. A simple municipal ordinance could extend similar protections to FIPs.

Another promising example is the City of Philadelphia’s Fair Practices Ordinance, which was a civil rights act passed in 1963 that barred discrimination based on race, ethnicity, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, age, disability, marital status, familial status, genetic information, or domestic or sexual violence and victim status in housing, employment, and public accommodations.<sup>68</sup> An expanded version of Philadelphia’s Fair Practices Ordinance could codify protections for formerly incarcerated people, providing local protected legal status.<sup>69</sup>

Protecting legal status under local law is also promising because it is consistent with anti-discrimination law theory.<sup>70</sup> In the past, formerly incarcerated people invoked civil rights law under the disparate impact theory—noting the disproportionate effects a law has on a discriminated group—but there is an enormous bar to showing disparate impact.<sup>71</sup> If Philadelphia were to expand its Fair Protection Ordinance to include FIPs as a protected class, it would expand civil rights for that community in significant ways.<sup>72</sup> If FIPs were a protected class under the ordinance, they could sue to redress their grievances when they are discriminated against in housing, employment, and in public accommodations because of their criminal record.<sup>73</sup>

One state policy mechanism that may be expanded upon for this purpose is the Uniform Collateral Consequences of Conviction Act, which aims to provide “immediate relief from all such barriers after a period of law-abiding conduct.” The policy does not prohibit discrimination against formerly incarcerated people, but rather “establishes parameters to guide a discretionary decision to disqualify where a collateral sanction either does not apply or has been relieved.”<sup>74</sup> These parameters require that the consideration of a criminal record must be related to a specific job duty, among other things. A model version of the law has been proposed by the Uniform Law Commission and so far, Vermont, Ohio, and North Carolina are the only states that have adopted the Uniform Collateral Consequences of Conviction Act in part or as a whole.<sup>75</sup>

## Winning Protections through State Courts

A third way to help restore full rights to FIPs is through the systematic dismantling of the collateral consequences of incarceration, with a focus on litigation through the state courts rather than federal courts.<sup>76</sup> A litigation strategy tailored to each state could help eradicate collateral consequences since state law is more favorable than federal law. Litigation also has the benefit that even if it is

unsuccessful, the public exposure of the litigation could help galvanize broader support for FIPs and increased political pressure.<sup>77</sup>

A state-based impact litigation strategy could take the form of affirmatively bringing lawsuits to challenge laws that discriminate on the basis of criminal record. Congress has largely shifted responsibility for taking care of the poor to the states.<sup>78</sup> The Supreme Court has not offered protections for the poor: it has held that the Constitution does not provide an affirmative right to subsistence, that employment is not a fundamental right, and presumes that economic regulations are Constitutional.<sup>79</sup> However, “at least forty-two states have given relevant provisions in their own constitutions a more expansive interpretation than that accorded to similar provisions of the US Constitution.”<sup>80</sup>

Many civil rights challenges that were unsuccessful in federal courts have survived in state courts.<sup>81</sup> For example, long before *Lawrence v. Texas*, where the Supreme Court rendered laws criminalizing same-gender sex illegal, state courts invalidated laws “criminalizing sodomy under their own constitutions.”<sup>82</sup> Suing in state courts may also prove beneficial because states determine the criteria that bar or permit formerly incarcerated people from entering critical federal programs such as food assistance.<sup>83</sup> Because of these state powers and responsibilities, states might have more robust constitutional and statutory mechanisms to challenge barriers to reentry.<sup>84</sup> Three litigation frameworks might prove the most fruitful: “equal protection challenges, due process challenges, and challenges under state poverty provisions.”<sup>85</sup>

## Conclusion

Based on this analysis of literature and the law, the three strategies of federal court litigation, local ordinances, and state court litigation all offer unique and potentially successful pathways to establishing protected legal status for formerly incarcerated people. Further analysis is needed to determine appropriate action. In the federal courts, the possibility of being declared a “suspect class” may be a barrier after judicial angst settled in during the 1970s about adding new classes to be protected. However, the insularity and discreteness of formerly incarcerated people as a group, and the limiting effect legislation has on their democratic participation, could be argued on the basis of *Carolene Products* footnote 4 to justify heightened judicial scrutiny of laws permitting discrimination against the group.

Local ordinances offer the benefit of testing policies before enacting them on the state level. While local ordinances might provide important benefits to people stigmatized because of their conviction history, they would only be viable where local political will exists, and would leave vast swaths of the country and formerly incarcerated residents unprotected.

While state constitutions vary, suing in state court offers impacted people the ability to sue under three legal theories: equal protection, due process, and state poverty laws. This strategy would be most useful in states that have interpreted their Constitutions broadly and have also shackled formerly incarcerated people with innumerable post-conviction penalties.

It is inhumane and deeply unjust to relegate a class of millions of people to perpetual subordinate status within our society. It is incumbent on all of us, and especially lawyers, to seek the restoration of full human and civil rights for formerly incarcerated people. While any litigative or legislative efforts will take time, they are important mechanisms for making it illegal to discriminate against formerly incarcerated people. The state of being formerly incarcerated is one that is created by the law, so the law can and should be altered. We must also turn to our other institutions and generate a great stirring across the nation to destigmatize having a criminal record. The seas ahead will be tough to navigate, but we are confident that we can turn the tides and shift the collective consciousness of the nation to recognizing the full humanity and rights of formerly incarcerated people. ■

## Endnotes

- 1 Avery, Beth, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*. New York: National Employment Law Project, 2019. Accessed 8/6/19. <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>
- 2 Evans, Linda, *Ban the Box in Housing, Education, and Voting: A Grassroots History*. Oakland: Critical Resistance, 2016. Accessed 8/6/19. [criticalresistance.org/wp-content/uploads/2014/04/B2B2\\_Final.pdf](https://www.criticalresistance.org/wp-content/uploads/2014/04/B2B2_Final.pdf)
- 3 The Sentencing Project, *Disenfranchisement News: Nevada & Colorado restore voting rights to people on community supervision*. Washington DC: The Sentencing Project, 2019. Accessed 8/6/19. <https://www.sentencingproject.org/news/7380/>
- 4 U.S. Dept. of Justice Office of the Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006), pg 51.
- 5 Wu, Jawjeong. "Racial/Ethnic Discrimination and Prosecution: A Meta-Analysis." *Criminal Justice and Behavior* 43, no. 4 (April 2016): 437–58. doi:10.1177/0093854815628026.
- 6 Colgate Love, Roberts and Klingele, *Collateral Consequences of Criminal Convictions: Law, Policy & Practice § 1:2. Introduction to the Collateral Consequences of Conviction*, (2018).
- 7 Id.
- 8 Id.
- 9 Id.
- 10 Id.
- 11 Id.
- 12 Id.
- 13 Id.
- 14 Id.
- 15 Id.
- 16 Id.
- 17 Id.
- 18 Id.
- 19 Id.
- 20 Id.
- 21 National Inventory of Collateral Consequences of Conviction (2019). *Collateral Consequences Inventory*. Accessed 6/10/19 online at <https://niccc.csjusticecenter.org/database/results/?page=1>
- 22 Colgate Love, Roberts and Klingele, *Collateral Consequences of Criminal Convictions: Law, Policy & Practice § 1:2. Introduction to the Collateral Consequences of Conviction*, (2018).
- 23 Id.
- 24 Id.
- 25 Id.
- 26 Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2019* (March 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.
- 27 The Sentencing Project, *Criminal Justice Facts*. Washington DC: The Sentencing Project, 2019. Accessed 8/6/19. <https://www.sentencingproject.org/criminal-justice-facts/>
- 28 Vallas, Rebecca, *Disabled Behind Bars The Mass Incarceration of People With Disabilities in America's Jails and Prisons*. Washington DC: Center for American Progress, 2016.
- 29 National Center for Transgender Equality, *LGBTQ People Behind Bars*. Washington DC: National Center for Transgender Equality.
- 30 Rabuy, Bernadette and Daniel Kopf, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned*. Northampton, MA: Prison Policy Initiative, 2015.
- 31 Colgate Love, Roberts and Klingele, *Collateral Consequences of Criminal Convictions: Law, Policy & Practice § 1:2. Introduction to the Collateral Consequences of Conviction*, (2018).
- 32 Id.
- 33 Id.
- 34 Id.
- 35 Bagenstos, Samuel R., *Universalism and Civil Rights (With Notes on Voting Rights after Shelby)* (December 15, 2013). *Yale Law Journal*, Vol. 123, 2014
- 36 Kermit Roosevelt, Richard J. Childress Memorial Lecture 2008, Lecture.
- 37 See *Judicial Supremacy, Judicial Activism: Cooper v. Aaron and Parents Involved*, 52 ST. LOUIS U. L. J. 1191, 1202-1203 (2008), available online at [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1653&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1653&context=faculty_scholarship)
- 38 See *Pace v. Alabama*, 106 U.S. 583 (1883) stating that the purpose of the 14th Amendment's equal protection clause was "to prevent hostile and discriminating state legislation against any person or class of persons."
- 39 See *Washington v. Davis*, 426 U.S. 229 (1976), holding that laws that have a racially discriminatory effect but were not adopted to advance a racially discriminatory purpose are valid under the U.S. Constitution.
- 40 *Korematsu v. United States*, 323 U.S. 214 (1944)
- 41 Bertrall L. Ross II, *Administering Suspect Classes*, 66 *Duke L.J.* 1807, 1811 (2017).
- 42 Id.
- 43 Id. at 1192.
- 44 Id.
- 45 Id.
- 46 Id. at 1193.
- 47 304 U.S. at 52-53 n.4.
- 48 *Regents of the Uni. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978)
- 49 Ben Geiger, *The Case for Treating Ex-Offenders As A Suspect Class*, 94 *Cal. L. Rev.* 1191 (2006), at 1215.
- 50 Id.
- 51 Id. at 1216.
- 52 Id.
- 53 Id.
- 54 Id. at 1217.
- 55 Id.
- 56 Id.
- 57 418 U.S. 24, 56, (1974)
- 58 Ben Geiger, *The Case for Treating Ex-Offenders As A Suspect Class*, 94 *Cal. L. Rev.* 1191, 1218, 1225 (2006).
- 59 Id. at 1218.
- 60 Id.
- 61 Id.
- 62 Id. at 1219.
- 63 Id.
- 64 Id. at 1225.
- 65 Id. at 1227.
- 66 See, e.g., Ben Geiger, *The Case for Treating Ex-Offenders As A Suspect Class*, 94 *Cal. L. Rev.* 1191 (2006); Katrina Liu, *Reentering the City of Brotherly Love: Expanding Equal Employment Protection for Ex-Offenders in Philadelphia*, 22 *Temp. Pol. & Civ. Rts. L. Rev.* 175 (2012).
- 67 "Civil Rights Enforcement," Seattle Office for Civil Rights, accessed August 6, 2019, <https://www.seattle.gov/civil-rights/civil-rights#whatisaprotectedclass>
- 68 Katrina Liu, *Reentering the City of Brotherly Love: Expanding Equal Employment Protection for Ex-Offenders in Philadelphia*, 22 *Temp. Pol. & Civ. Rts. L. Rev.* 175, 175-76, (2012).
- 69 Id.
- 70 Id. at 191.
- 71 Id.
- 72 Id. at 197.
- 73 Id.
- 74 Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *How. L.J.* 753, 785 (2011).
- 75 Id.
- 76 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, 528, (2006).
- 77 Id.
- 78 Id. at 550.
- 79 Id. at 549.
- 80 Id.
- 81 Id.
- 82 Id.
- 83 Id. at 547.
- 84 Id. at 561.
- 85 Id.

## **What ideas exist that can rise to the scale of entrenched and emergent social problems and injustices?**

This **Bold Policy Ideas** series focuses on that question with a set of brief reports that elevate ideas that would have a wide-reaching transformative effect on structural problems—problems that are perpetuated by multiple institutions and powerful financial incentives. Bold policy ideas can encapsulate new narratives that expand our current public debates as they illuminate our long-term vision for justice, liberation, and belonging.

[haasinstitute.berkeley.edu/\*\*boldpolicyideas\*\*](https://haasinstitute.berkeley.edu/boldpolicyideas)