PRWORA § 115: The Devastating Impact of a Little-Known Provision

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I. Introduction

Six years ago, Congress enacted the Personal Responsibility and Work Opportunity Act of 1996 and dismantled a sixty-year old social welfare program.[1] Aid to Families with Dependent Children (AFDC) was replaced with Temporary Assistance for Needy Families (TANF). Unlike AFDC, TANF imposes work requirements, as well as

[1] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (PRWORA).

strict time limits on recipients. A little-known provision of PRWORA, § 115,[2] contains language that subjects convicted drug felons to a lifetime ban from receiving:

> (1) assistance under any State program funded under part A of title IV of the Social Security Act [42 U.S.C.A. § 604 et seq.],[3] or
> (2) benefits under the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977 [7 U.S.C.A. § 2012(h)]) or any State program carried out under the Food Stamp Act of 1977 [7 U.S.C.A. § 2011 et seq.].[4]

No other class of felons is subject to this ban. One could be convicted of murder in the first degree, for example, and upon release could obtain government assistance. For someone carrying a conviction for even a small amount of drugs, however, government assistance is not possible unless the state wherein they reside has opted out[5] of § 115. Currently, only nine states have completely opted out of § 115.[6] Ten states have made benefits contingent upon successful drug treatment, and ten states have instituted a partial denial or a denial for a limited term.[7] Twenty-two states have not opted out of or modified § 115 in any way, thereby denying benefits entirely.[8] If a state opts out of § 115, it is not able to spend any of the TANF grant on drug felons and

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[2] Codified at 21 U.S.C. § 862a (2001).

[3] This provision sets out the parameters of the TANF program.

[4] 21 U.S.C. § 862a (2001).

[5] Section 115 contains an "opt out" provision, meaning that states can modify or eliminate its effects through an act of the state legislature. 21 U.S.C. § 862a(d)(1)(A) (2001).

[6] Patricia Allard, Lifetime Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses, (Washington, D.C: The Sentencing Project, February, 2002), p.3.

[7] Ibid.

[8] Ibid.

therefore must cover these costs from other sources of revenue. This is not a heavy burden on the states, as most states have enough financial resources to cover any lapse in coverage resulting from § 115.[9]

This paper addresses the rationale for § 115 and seeks to understand whether these justifications for the policy have been satisfied in practice. I conclude that the reasons for § 115 are at best unclear and that the policy reasons as far as they can be ascertained, are not served by its implementation. These policy goals could be better served, and with a greater benefit to the targeted population, by other programs. Perhaps most important, I call for a study comparing the recidivism rates of states that have yielded to and states that have opted out of § 115. The lack of government assistance during the critical transition period post-incarceration likely leads to an increased rate of recidivism. During the transitional period individuals are vulnerable and most in need of assistance. Ironically, some of the states that have partially opted out of § 115 deny benefits during this period and reinstate them only after this probationary period has expired. This probation period is the time when they are most likely to regress into the practices that subjected them to penalties originally. The final portion of the paper contains potential avenues for opposing § 115, including legal challenges.

II. Legislative History

Due to the severe impact of § 115, one might assume that substantial discussion and deliberations preceded its enactment, and expect that political support came primarily

[9] See http://www.welfareinfo.org/unspentTANFissuenote.htm for an interesting discussion of the use of TANF funds and alternate sources of spending for states.

from conservative legislators. Nothing could be further from the truth. Gramm Amendment No. 4935 created § 115 and was passed with bipartisan support after only two minutes of deliberation.[10] The record reflects that twenty-nine Democratic Senators voted in favor of Amendment No. 4935, including such traditionally liberal legislators as Senators Boxer (D-CA) and Feinstein (D-CA). This strong bipartisan support is stunning considering the wide-ranging effects of the provision.

There was also bipartisan opposition to Amendment No. 4935, though the reasons for opposition differed. Senator Kennedy (D-MA) spoke on the myriad harms that would result from the passage of Amendment No. 4935. He recognized that this amendment was strongly opposed by the Conference of Mayors and the National League of Cities. He also pointed out that the amendment "would undermine the whole notion of providing drug treatment as an alternative sentence to a first-time drug offender if the individual requires Federal assistance to obtain the treatment" and "would make drug addicts ineligible for any of the effective drug treatment programs that are being developed by the States and the Federal Government."[11] Perhaps most offensively, Senator Kennedy noted that non-emergency health care, including prenatal care, would be refused to anyone convicted of a drug offense. Fortunately, and most likely as a result of Senator Kennedy's comments, the amendment was later amended and drug treatment and prenatal care are expressly provided for in the current version of the Act.[12] However, § 115 has effectively barred some families from receiving Medicaid benefits for which they would

[10] S. Res. 4935, 104th Cong. (1996) (enacted).

[11] Ibid.

[12] 21 U.S.C. § 862a(f)(4) & (6) (2001).

otherwise be eligible. Despite all the persuasive evidence Senator Kennedy was able to fit into his allotted minute, only eighteen Democrats and seven Republicans voted in opposition of the amendment.

The Republican who spoke in opposition to Amendment No. 4935 did not agree with Senator Kennedy's reasons for opposing the amendment, and voted against it on other grounds. Senator Mack (R-FL) stated, "[p]ersonally, I agree with the idea of not giving Government benefits to drug dealers, (sic) however, I do not think the Federal Government should continue to tell the States how to run their welfare programs."[13] Senator Mack clearly misunderstood the thrust of the amendment. Senator Mack stated that he felt drug *dealers* should be denied government benefits, while the text of the amendment obviously deprives benefits even in a case of simple possession. Second, he opposed the amendment in defense of a State's right to administer its welfare program without interference from the Federal government. Senator Mack's reasoning reinforces the conclusion that the Senate was overwhelmingly in favor of depriving benefits to drug offenders, while not denying benefits to any other class of criminal.

Amendment No. 4935 states no policy goals. One must look to Senator Gramm's testimony on the Senate floor in order to discern his motives. Senator Gramm stated, "if we are serious about our drug laws, we ought not to give people welfare benefits who are violating the Nation's drug laws."[14] Senator Gramm also noted two provisions in the amendment that he felt mitigated any negative effect of the bill. First, he stated, "[w]hat an individual does does not affect the eligibility of that individual's children or other

[13] 142 Cong. Rec. S8493-02 (July 23, 1996).

[14] Ibid.

family members."[15] While superficially true, this provision neglects the obvious reality that diminution in benefits to a household sufficiently impoverished to receive government benefits will necessarily affect the entire household. It seems absurd that Senator Gramm would expect a single mother head of household who was deprived benefits to allocate government resources solely to her children and provide for herself purely through alternate sources of income, yet this can be his only logical assumption.

III. Impact of § 115

A. Need for a Transitional Income

Normally, when a prisoner nears the end of his or her incarceration, he or she will work with various members of the prison staff, as well as with representatives of agencies outside the prison, such as a probation officer or a social worker, to coordinate a release plan. This release plan ensures a place for the inmate to go, often a halfway house, and sets forth the terms of probation. If a prisoner was eligible for welfare benefits or food stamps before incarceration, the staff members involved may work to have these benefits reinstated. If the staff member is not willing to work with an inmate, the inmate can contact his or her local benefits office upon release to have benefits reinstated.

For the drug offender, unlike any other class of offender, welfare and food stamps are not options. The lack of welfare and food stamps places this particularly vulnerable class of felons at a severe disadvantage. Federal prisoners are released to the jurisdiction in which they were sentenced, which for most offenders is their home jurisdiction.

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[15] Ibid.

Return to the community where the offender committed the drug crime poses several obvious and inherent risks.

The first risk is the exposure to the climate of drugs and crime that created problems for the offender in the first place. The temptation to renew old acquaintances and friendships, most often with significant connections to the drug trafficking community, is difficult to resist. Second, the draw created by the lure of easy money to be made through drug trafficking is also very tempting. Almost all of the literature relating to drug treatment post-incarceration, including government sources, acknowledges the difficulties of staying clean upon release from prison, and the importance of a stable environment.[16] Financial resources are an integral component of a stable environment, especially immediately post-incarceration before one finds a job. Financial means are also an integral component for effective drug treatment.

This problem is especially serious for individuals affected by Post Incarceration Syndrome (PICS). PICS is a affliction that affects mentally ill and drug addicted individuals upon release. The severity of the symptoms is directly related to the coping skills prior to incarceration, the length of incarceration, the restrictive nature of the incarceration environment, the number and severity of institutional episodes of abuse, the number and duration of episodes of solitary confinement, and the degree of involvement

[16] The importance of a stable environment post-incarceration that allows for effective drug-treatment is almost universally accepted. See the Federal Bureau of Prison's February 9, 1998 press release (available online at http://www.bop.gov/ipapg/ipatriad.html; and the National Institute for Drug Abuse's Principles of Drug Addiction Treatment (available online at http://www.nida.nih.gov/PODAT/PODATIndex.html). Even the White House acknowledges the need for a holistic approach to drug treatment. See its Principles of Treatment at http://www.whitehousedrugpolicy.gov/treat/bestpractice.html (specifically subsection 3).

in educational vocational, and rehabilitative programs.[17] For individuals afflicted with PICS, it is all the more important that they have a financial bridge between their release from prison and the time they find a job.

Even some of the states that have partially opted out of § 115 deny benefits to individuals immediately post-incarceration. North Carolina, for example, denies benefits for the first six months after release from incarceration, at which point the state reinstates benefits if no violations occurred during the six-month period.[18] In Louisiana, the term is one year.[19] The obvious irony of these waiting periods is overwhelming.

While drug felons are still technically eligible for job training programs and drug treatment programs,[20] such programs are of little utility absent a place to spend the night and the ability to obtain a meal. As stated by a Pennsylvania woman affected by the ban, "[t]hey [drug treatment counselors] tell you not to get a job the first six months on your recovery. What are you supposed to do if you can't get welfare?"[21] The paradox is clear; depriving drug felons of government assistance post-incarceration has the opposite effect from the one intended.

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[17] This information provided by a study paid for by the Center for Substance Abuse Treatment and the Substance Abuse and Mental Health Services Administration (SAMHSA), which can be found online at http://dhmh.state.md.us/adaa/html/addiction_exchange/addex3[4].htm. See the SAMHSA website at www.samhsa.gov for further information related to this topic.

[18] Allard, p.3.

[19] Ibid.

[20] 21 U.S.C. § 862a(f)(5)-(6) (2001).

[21] Amy E. Hirsch, "*Some Days are Harder Than Hard*": Welfare Reform and Women with Drug Convictions in Pennsylvania, (New York, N.Y.: The Center on Crime, Communities and Culture, October, 1999), p. 87.

B. Impact on Children[22]

The problems created by a lack of transitional income have a critical impact on the children involved. Despite Senator Gramm's assertion that § 115 will not negatively affect children, a negative impact is inevitable. Numerous recent studies show that a stressful or hectic life at home may have many negative outcomes, including but not limited to problems with social interaction, attention-deficit problems and cognitive deficiencies.[23]

Children exposed to stressful environments at home are more likely to have problems at home and at school than other children. A recent study found that 15% of children ages 6 to 11 who lived in stressful home environments had serious emotional and behavioral problems, while only 4% of other children had similar issues.[24] This same study showed that 31% of children living in stressful family situations had problems in an educational environment, while only 17 % of other children experienced these problems.[25]

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[22] This section is heavily indebted to a similar section in Allard, p. 13.

[23] Kristin Anderson Moore and Sharon Vandivere (Child Trends), "Stressful Family Lives: Child and Parent Well-Being", *New Federalism, National Survey of America's Families*, (Washington, D.C.: The Urban Institute, June 2000), p. 1 and Kristin Anderson Moore and Sharon Vandivere (Child Trends) and Jennifer Ehrle (The Urban Institute), "Turbulence and Child Well-Being," *New Federalism, National Survey of America's Families*, (Washington, D.C.: The Urban Institute, June 2000), p. 2-3; Office of Juvenile Justice and Delinquency, "Family Disruption and Delinquency," Juvenile Justice Bulletin, (Washington, D.C.: U.S. Department of Justice, September 1999), p. 4.

[24] Anderson Moore, "Stressful Family Lives: Child and Parent Well-Being," p.2.

[25] Ibid.

While individuals subject to the lifetime ban implemented by § 115 work to provide for their children, themselves, and to pay fines and court costs, they will be less able to provide the attention their children need. At a point when family members have been separated for significant amounts of time, the government should facilitate the reunion between parent and child and ease the burden placed on the child through the misdeeds of the parent in the past. Instead, § 115 has the opposite effect, requiring parents to sacrifice time spent with their children in order to provide for both themselves and their children, and creating tension at home that will inevitably have negative repercussions on the children involved.

C. Inadvertent Loss of Medicaid Eligibility

When Congress enacted PRWORA, it separated eligibility for Medicaid from receipt of cash assistance by requiring that families who met the AFDC income requirements and the family composition rules in effect on July 16, 1996, be considered eligible for Medicaid, even if they did not meet the new requirements imposed by TANF.[26] This separation of government programs was intended to preserve access to medical care for poor families with dependent children, but unfortunately eligible families and their children are losing coverage.[27]

Despite the fact that § 1931 requires states to set up independent Medicaid eligibility criteria, many states have not done so and equate eligibility for Medicaid with eligibility for cash assistance. For example, Indiana requires that TANF-eligible adults

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[26] PRWORA, *supra*, §1931.

[27] Claudia Schlosberg and Joel D. Ferber, Access to Medicaid Since the Personal Responsibility and Work Opportunity Reconciliation Act, first published in the *Clearinghouse Review*, January/February 1998 and now available online at http://www.healthlaw.org/pubs/med1998accessmedicaid.html.

must apply for and receive TANF-funded aid in order to receive Medicaid.[28] Massachusetts denies approximately 900 TANF applications each month and has no procedural mechanism in place to assure that the applications are forwarded to the Medicaid agency for separate consideration. Massachusetts's welfare agents also improperly terminated Medicaid benefits when cash assistance benefits were terminated until this practice was stopped by a moratorium regarding redetermination of Medicaid eligibility for individuals under 65.[29]

This problem needs to be addressed by each and every state legislature. It is the duty of the legislature to protect the citizens it represents, and the accidental deprivation of something as important as health care must be guarded against. It is unclear how many drug felons have been deprived of Medicaid benefits as a direct correlation to their ineligibility for TANF, and this determination would be the basis for an interesting study. One hopes that the inadvertent deprivation of Medicaid benefits was a casualty of the chaotic period of change within government agencies following welfare reform, and that this issue is no longer a problem.

D. Need for Research Studies

This brings me to the need for a comprehensive study of all of the issues. We need to know whether the deprivation of benefits created by § 115 has resulted in any decrease in drug offenses in the jurisdictions that have not opted out of § 115. If the lack

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[28] Ibid, p. 3.

[29] Ibid, p.3, citing telephone interview with Neal Cronin, Massachusetts Law Reform Institute (Oct. 10, 1997). Citation also noted "Massachusetts also has revised its computer coding system so that no termination of cash assistance can result in a Medicaid closing until after the state makes a separate determination of Medicaid eligibility."

of a transitional income leads to an increase in the recidivism rate of drug offenders, then the current policy is counterproductive. Moreover, I believe that § 115 will have a detrimental effect on the living situation in homes where deprived residents reside, resulting in a negative impact on the very children Senator Gramm assured the Senate would not be affected in any way.

IV. Legal Analysis

Section 115 has already survived a significant legal challenge. In 2000, the Seventh Circuit Court of Appeals ruled in *Turner v. Glickman* that the terms of § 115 were constitutionally sound.[30] Turner was a former food stamp recipient convicted of a felony drug possession charge. When Turner reapplied for food stamps, he was denied benefits due to his conviction. In August of 1998, Turner initiated a class action suit on behalf of himself and all similarly situated plaintiffs challenging the constitutionality of § 115. Turner brought suit on three grounds. He alleged that § 115 facially constituted a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, the equal protection elements of the Fifth and Fourteenth Amendments of the United States Constitution, and the Double Jeopardy Clause of the Fifth Amendment and Fourteenth Amendments of the United States Constitution.

A. Due Process

The Due Process Clauses of the Fifth and Fourteenth Amendments protect individuals against an unreasonable deprivation of a right, be it a liberty right or a property right, without adequate justification by the government. The Supreme Court has

[30] *Turner v. Glickman*, 207 F.3d 419 (7th Cir. 2000).

established a two-tiered system of analyzing claims brought under the Due Process Clauses. In the case of rights that are not considered fundamental, the Supreme Court has merely required that there be a rational relationship between the statute in question and a legitimate state objective. This level of scrutiny is known as the "rational basis" level of review. If a fundamental right is involved, the Court applies a higher level of scrutiny and requires that the state's objective be compelling, not merely legitimate, and also that that the means employed to reach the desired end are necessary, not merely reasonable. This level of scrutiny is known as "strict scrutiny." In *Turner*, the Court of Appeals decided without discussion that the rights implicated by § 115 were not fundamental: "[b]ecause Section 862a does not implicate a fundamental right, substantive due process requires only that the statutory imposition not be completely arbitrary and lacking any connection to a legitimate government interest."[31]

The Supreme Court has on several occasions included rights involving the rearing and bearing of children to be fundamental rights.[32] It seems antithetical that an individual's ability to rear his or her child could be affected by the deprivation of rights created by § 115 and yet this deprivation still not affect a fundamental right. The effect is admittedly tangential, and there is no direct negative effect on the right to rear a child, but

[31] Citing *Washington v. Glucksberg*, 521 U.S. 702 (1997).

[32] See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (announcing a liberty interest "to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children"), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that parent's substantive due process right to educate children was violated by a directive mandating attendance at public schools) and *Troxel v. Granville*, 530 U.S. 57 (2000) (stating that "the interest of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by this Court").

the impact on the parent/child relationship should have been considered. This claim as to the unconstitutionality of § 115 at the very least merits analysis by the court, and yet the *Turner* court eliminated it without discussion. Due to the negative effect the deprivation created by § 115 may have on the children of individuals denied TANF benefits, it seems that this line of legal reasoning may someday return to the courts. If the study called for in section III(D) revealed a negative impact on an individual's ability to rear their children, the study would prove integral in the briefs prepared for the courts and may require the courts to apply a strict scrutiny level of review to § 115.

This argument would be similar in form to the argument set forth in *Moore v. East Cleveland*,[33] where the Supreme Court struck down a zoning ordinance that allowed only members of a single "family" to live together. This regulation prohibited a grandmother from living with her two grandsons, who were first cousins. The grandmother would have been allowed to live with the boys if they had been brothers. The court held that the right of members of an extended family was fundamental, and struck down the regulation. The decision in *Moore* was a plurality opinion, and four of justices dissented, saying that the right of members of an extended family to live together is not a fundamental right. Is difficult to predict whether today's Court would classify the deprivation of rights under § 115 as an infringement on the fundamental right to raise children, though the *Turner* court obviously decided § 115 did not constitute a violation of a fundamental right.

[33] *Moore v. East Cleveland*, 431 U.S. 494 (1977).

B. Equal Protection

The equal protection argument also alleges a deprivation of right, but it concerns the class of people deprived of the right, and not the manner in which the right was deprived. Again, it is very important that the Seventh Circuit chose, without discussion, to relegate the rights eliminated by § 115 to the status of non-fundamental rights.

The Court stated "[b]ecause the statute at issue does not implicate any fundamental rights or involve any suspect classifications,[34] the question before us is whether the stated reasons proffered by the government are a sufficient justification to survive rational basis review."[35] The statement that the statute does not involve any suspect classifications is almost certainly correct. While the statute in question does involve a distinct class of people, the term "suspect classification" refers exclusively to immutable characteristics, most often race and national origin.[36]

However, as mentioned earlier, the same problem exists, in that there is no thought given to what the deprivation of the economic right actually entails. It is not simply a case of a single person having to make do with less. Section 115 results in a person having to make do with absolutely nothing, and if that person happens to have children it diminishes the household income by a significant amount, thereby inevitably

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[34] Citing *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973).

[35] Citing *Heller v. Doe*, 509 U.S. 312 (1993).

[36] See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 256 (1886) (treating as suspect government discrimination against Asian launderers); *Hernandez v. Texas* 347 U.S. 475 (1954) (discrimination against Mexican-Americans on the basis of national origin unconstitutional); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (even racial groups that have not been traditionally discriminated against can constitute a suspect class).

affecting the children in the household. Again, the Supreme Court has held that any infringement upon the ability to bear or rear children is an infringement upon a fundamental right, and the *Turner* court should have at least explained its dismissive relegation of the deprivation of rights contained in § 115 as the deprivation of solely non-fundamental rights.

The most difficult part of the equal protection claim to satisfy is the "purposeful discrimination" component. Purposeful discrimination can be shown in three different ways. First, the challenger to the law can show that the law is facially discriminatory;[37] second, that it is administered in a discriminatory manner;[38] or third that the law has a discriminatory purpose as shown by circumstantial evidence.[39] The *Turner* court never reached the question of whether the law was purposefully discriminatory. It is doubtful that the courts would ever consider this question because in all likelihood the equal protection argument would never get over the hurdle that the class of people affected do not share an immutable characteristic of race or national origin.

C. Double Jeopardy

The Double Jeopardy argument was the third and final claim asserted by Turner. A Double Jeopardy claim asserts that an individual is being punished twice for the same

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[37] See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (statute reading "all white male persons who are twenty-one years of age who are citizens of this state shall be eligible to serve as jurors" is facially discriminatory and therefore violates the equal protections guaranteed by the Constitution).

[38] See *Yick Wo v. Hopkins*, *supra* (law enforced only against Asians is discriminatory in effect even though valid facially).

[39] *Rogers v. Lodge*, 458 U.S. 613 (1982) (evidence that individually would not have been sufficient to prove purposeful discrimination can, in the aggregate, show purposeful discrimination).

crime, and this is prohibited under the Fifth and Fourteenth Amendments of the Constitution. The *Turner* court considered this argument at some length. After a review of the legislative history of the statute, the court decided that the act was not punitive in nature but an additional deterrent.

Given that the mandatory minimum sentences for felony drug possession are already severe, especially relative to other crimes, it is of great import that the court felt that deprivation of government benefits would serve as a significant deterrent to potential offenders.[40] It is relatively easy to comprehend the situation in which a potential criminal, deciding whether to possess drugs in a felonious manner, might consider the heavy mandatory minimum sentences but decide to proceed with the possession. What is difficult to comprehend is that this same individual, who is not deterred by the severe mandatory minimum penalties, would be deterred by the deprivation of benefits. Is it reasonable to assume that this potential offender would decide against possession of the drugs as a result of this additional deterrent? Moreover, the mandates of § 115 are little known, even in public policy circles. How many drug felons are aware of the provision? How many were aware of its existence before the execution of their crimes? Ignorance of the law is no excuse, but to have a "deterrent" that results in such a severe negative impact on an individual's life when the general public does not know of that deterrent is facially inconsistent at best.

In *Turner*, the court determined that there was no punitive intent in the passage of § 115, and that therefore it does not constitute a violation of the Double Jeopardy clauses

[40] For a detailed discussion of mandatory minimum penalties for drug offenses see the website of Families Against Mandatory Minimums at http://www.famm.org.

of the Fifth and Fourteenth Amendments.[41] Due to the high threshold for proving punitive intent,[42] it is unlikely that a Double Jeopardy claim regarding § 115 will be successful.

D. Federalism

By now the challenges in the *Turner* case and some potential problems with the court's reasoning are both evident. The *Turner* court did not examine a challenge brought on the grounds of Federalism, as this basis was not brought in the initial stages of the trial.

The federal government has limited powers. The three branches of the federal government can only act under the powers enumerated in the Constitution. An action by a state government is valid unless it specifically contrasts with a limitation set forth by the Constitution. If a state enacts an otherwise constitutionally sound law, the federal government does not have the power to abrogate that law.

Section 115 abrogated existing state welfare policy. Every state provides for certain welfare parameters within its own jurisdiction. As long as those parameters are constitutionally sound, it is not within the federal government's power to change the states' provisions. It is inevitable, however, that by eliminating welfare programs for drug offenders the federal government changed valid state law in an unconstitutional manner.

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[41] See, e.g., *U.S. v. Halper*, 490 U.S. 435, 440 (1989) (prohibiting multiple punishments for the same offense).

[42] See *id.*

The powers given to Congress are enumerated in Article I, §8 of the Constitution. Among the most important are the powers to collect taxes, provide defense for the country, borrow money, regulate commerce among the several states, regulate immigration and bankruptcy, set up post offices, control patents, declare war, and make all other laws that are necessary and proper to act under the foregoing powers. The phrase "necessary and proper" allows Congress a fair amount of latitude in enacting laws, but its ability to do so is not unfettered. Even if Congress is not acting under one of the powers specifically granted it by the Constitution, if it is exercising a power ancillary to one of the enumerated powers, its action will be constitutionally sound.[43]

It is not clear what power Congress was purporting to act under in the passage of § 115. None of the powers listed in the Constitution allow Congress to modify existing programs relating to the citizens of the individual states, and it is difficult to see what implied power Congress could possibly have believed it was acting under. Absent constitutional permission, Congress was acting outside the bounds of its authority in abrogating existing state policy and therefore had no right to pass § 115, which I believe is the strongest argument against the constitutionality of § 115.

The most likely response to this argument is that under *South Dakota v. Dole*,[44] Congress has the right to restrict funding to the states in a manner that ultimately has the same result as direct legislation, even where Congress would not be able to pass a law to ensure the same result. At issue in *Dole* was a law that no states with a drinking age

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[43] See *McCulloch v. Maryland*, 17 U.S. 316 (1819) (Establishing the doctrine of "implied powers," meaning that some powers are implicit in the powers enumerated in the Constitution and that Congress may act under an implicit delegation of authority. This delegation is subject to review by the Supreme Court.).

[44] *South Dakota v. Dole*, 483 U.S. 203 (1987).

under twenty-one would receive federal funds for use in connection with the maintenance of federal highhways. States are highly dependant upon these funds, and therefore the legislation ensured that all states would raise the drinking age to twenty-one. Though Congress could not require all states to raise their drinking age, it could ensure the same result by making dispersal of funds contingent upon compliance. This is similar to the instant situation, as Congress is not mandating deprivation of benefits, but simply refusing to pay for the benefits if states opt out of § 115.

V. Conclusion

Despite the fact that the public is largely unaware of PRWORA § 115, it has had a devastating effect on literally thousands upon thousands of this nation's citizens.[45] Though it received only two minutes of consideration on the Senate floor and was not properly understood by the legislators voting on it, § 115 is with us today. Section 115 is harming families, discouraging effective drug treatment, and often has unintended consequences as severe as the loss of medical coverage.

As set forth above, any legal challenges will be difficult under the current state of the law. Congress receives wide deference, and past case law indicates that as harmful as § 115 is, it may still be constitutionally sound. Fortunately, ours is a representative government, and individuals can contact their legislators on the state level and express the view that Congress should opt out of § 115. Many states have already recognized the harmful and counterproductive effects of § 115 and opted out of it, and hopefully as this issue comes present in the public consciousness many more states will also opt out.

[45] Allard, p.5.

Through protest to representatives in Congress and on the state level, it is my hope that someday people who have committed, in some cases only one single mistake, will not be forced to pay for that mistake and watch their children pay for that mistake, for the rest of their lives.