

IN THE SUPREME COURT OF OHIO

JOHN DOE,

Petitioner,

v.

MARY RONAN,

and

CINCINNATI PUBLIC SCHOOLS,

and

OHIO DEPARTMENT OF EDUCATION,

Respondents.

On Certified Questions of Law from the
United States District Court Southern
District of Ohio

Supreme Court of Ohio
Case No. 09-2104

District Court
Case No. 1:09cv243

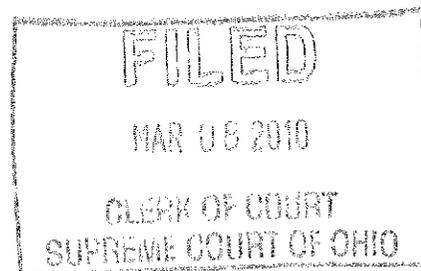
**BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF
OHIO FOUNDATION IN SUPPORT OF PETITIONER JOHN DOE**

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the American Civil Liberties Union of Ohio Foundation (ACLU of Ohio) is a non-profit, non-partisan membership organization devoted to protecting basic constitutional rights and civil liberties for all Americans. It is in defense of these basic liberties and for the reasons set out in the following Brief that amicus curiae, the ACLU of Ohio, urges the Court to recognize the substantial constitutional questions at issue in this case, and to hold that the 2007 version of Ohio Revised Code Sections 3319.39 and 3319.391 and Ohio Administrative Code Section 3301-20-01 that led to John Doe's termination without due process violates the Retroactivity Clause, Section 28, Article II of the Ohio Constitution.

STATEMENT OF FACTS

Amicus Curiae ACLU of Ohio adopts Appellant Doe's statement of facts and hereby incorporates it by reference.

SUMMARY OF ARGUMENT

John Doe was a good employee of the Cincinnati Public Schools for twelve years. He had positive reviews and was even promoted. Then, in 2007, state law changed to require all public school employees, both current employees and new applicants, to undergo background checks. One of two things happened to employees whose background checks revealed a criminal record. Most would be given an opportunity to prove they were rehabilitated and should still be eligible for employment. However, the new law included a list of past offenses where the employee would not be allowed to prove rehabilitation and would just be summarily terminated. Doe fell

within the latter. The law later changed so that Doe would not have been automatically terminated, but it was too late, as he'd already been fired. Section 28, Article II of the Ohio Constitution, the Retroactivity Clause, prohibits retroactive application of a law that infringes on substantive rights. The law at issue here infringed on Doe's substantive rights by divesting him of his employment without due process. Several other states have found similar automatic employment bans to infringe on due process. Thus, the law that divested Doe of his employment without due process violated his rights under the Retroactivity Clause.

ARGUMENT

Introduction

The so-called "war on drugs" has led many in society to assume "once a drug offender, always a drug offender." Indeed, many laws and policies presume the truth of this assumption. Rather than giving someone who has a history of overcoming an addiction a chance to start over, more and more we've seen laws penalizing people and infringing their rights, sometimes in perpetuity, for mistakes long past. The law at issue in the instant case is a prime example.

Ohio Revised Code Sections 3319.39 and 3319.391, as amended by 2007 Am.Sub.H.B.No.190, __ Ohio Laws, Part __, __("H.B. 190"), and its implementing regulations, Ohio Administrative Code Section 3301-20-01, created a scheme by which certain types of ex-offenders were forever banned from any employment in schools, regardless of whether they had custody or care of schoolchildren. Nearly all of the offenses that permanently banned one from employment were offenses of violence, sexually oriented offenses, offenses against children, theft offenses, or other crimes that victimized people. Yet, drug offenses – non-violent and often victimless – were also included in the list of offenses for which one would be forever banned

from any employment. Arbitrarily, this legislation created an irrebutable presumption that people with drug offenses cannot be rehabilitated. Yet, people with other offenses would face a rebuttable presumption, and they could prove that they had been rehabilitated and thus be employment eligible. The state, once again, has made an assumption that “once a drug offender, always a drug offender.” The inherent invalidity and unfairness of this assumption couldn’t be any more untrue than in the instant case of John Doe.

In the intervening years since John Doe’s termination under the 2007 scheme, the state has changed the regulations, enacting new Ohio Administrative Code Section 3301-20-03, which has lessened the absolute ban to include only drug offenses that have occurred within the last ten years. Prospective employees with older convictions can avail themselves of the process to prove rehabilitation in order to be eligible for employment. Of course, this does not help John Doe and those like him who were all automatically terminated under the 2007 scheme. This waffling back and forth on the part of the State strongly suggests the State’s own ambivalent attitude about whether drug offenses can be rehabilitated.

However, the instant case does not require this Court to opine on the wisdom of those decisions about which past offenses were to be considered capable or not of rehabilitation under the 2007 version of R.C. 3319.39 and OAC 3301-20-01, or the revised 2009 list of offenses in OSC 3301-20-03. Rather, this Court is simply asked whether imposing an absolute ban on continued employment, divesting then-current employees of their jobs, without cause and without any kind of due process (that was provided to others), violated those employees’ rights under the Retroactivity Clause, Section 28, Article II of the Ohio Constitution. Amicus urges this Court to answer that question in the affirmative.

Proposition of Law No. 1: The Retroactivity Clause of the Ohio Constitution prohibits imposition of an employment ban on employees with a past conviction absent due process.

The principle underlying the Retroactivity Clause, Section 28, Article II of the Ohio Constitution and its federal parallel the Ex Post Facto Clause, Article I, Section X of the United States Constitution, is that one's relationship to the law ought to be certain. These two clauses ensure that the government cannot change the rules on a person after the fact. However, that is precisely what happened in the instant case.

John Doe had been employed by the Cincinnati Public Schools for over a decade, without any problem; but then his employment was suddenly terminated in 2007, when the state adopted a new law divesting him of his job for a single conviction – a conviction that occurred nearly thirty-five years ago. Over 12 years ago, John Doe gained employment in the Cincinnati Public Schools (“CPS”) as a Safe and Drug Free School Specialist and was later promoted to be a Due Process Hearing Specialist. (Pl.’s Am. Compl. ¶ 7). John Doe did not have to undergo a criminal background check as part of the initial hiring process. Throughout his employment, John Doe was a valued employee of CPS, without incident. John Doe received “acceptable” or “accomplished” job evaluations. (Pl.’s Am. Compl. ¶ 9). John Doe was automatically terminated as a result of the new 2007 law which required current and future school employees to undergo criminal background checks every five years and barred new or continued employment of people with certain past convictions. R.C. 3319.391.

In 2006, the Ohio legislature enacted R.C. 3319.39 which restricted employment at public schools for people with criminal records, if they were in a position “responsible for the care, custody, or control of a child,” unless that individual could demonstrate that they had been rehabilitated. The Ohio Department of Education (“ODE”) promulgated regulations that enumerated the criteria to prove rehabilitation and offenses capable of rehabilitation. Ohio

Administrative Code 3301-20-01. John Doe was not affected by the 2006 law, as his employment did not require direct care for schoolchildren.

In 2007, the legislature revised this scheme by amending R.C. 3319.39 and enacting R.C. 3319.391 which no longer limited the scope of the law to people employed in public schools that were “responsible for the care, custody or control of a child,” and made the law applicable to all school employees. 2007 Am.Sub.H.B.No.190, __ Ohio Laws, Part __, __ (“H.B. 190”). Thereafter the ODE revised the regulations in Ohio Admin. Code 3301-20-01. The new regulations gave school officials the discretion not to deny employment to current or prospective employees who had positive criminal background checks if they could demonstrate rehabilitation and spelled out criteria to consider in determining if someone had been rehabilitated. OAC 3301-20-01. However, employees convicted of offenses of violence, drug abuse, theft or sexual-oriented offenses were automatically and conclusively barred from employment and were excluded from proving rehabilitation. The result was that Doc’s employment was terminated, without any chance to prove rehabilitation, despite the fact that he had been a model employee for over a decade.

In 2009, the ODE changed the rules once again and revised the criteria for which past offenses led to an automatic employment ban and which were eligible for the process to demonstrate rehabilitation, by creating new Ohio Administrative Code Section 3301-20-03. The new 2009 rules limited the reach-back for past drug offenses that are automatically barred from employment. *Id.* Specifically, it now says drug offenses older than ten years old are no longer automatically banned and may be able to prove rehabilitation. *Id.* Under this new regulatory scheme, Doe would not have been automatically discharged and may have been able to

demonstrate rehabilitation and maintain his job. Unfortunately, however, the 2007 scheme had already divested Doe of his job, and those similarly situated, without any due process.¹

The 2007 requirements that then-current school employees, like John Doe, undergo background checks to determine their continued employment and exclusion from being able to prove rehabilitation amounts to a retroactive application of the law.

Ohio law prohibits retroactivity. Section 28, Article II, of the Ohio Constitution states that "[t]he General Assembly shall have no power to pass retroactive laws." *See Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106.

The 2007 scheme created by H.B 190 and ODE's implementing regulations is expressly retroactive and triggers constitutional scrutiny under the retroactivity clause. "A statute is retroactive if it penalizes conduct that occurred before its enactment." *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747 ¶ 7. Retroactive application is limited. "[T]he issue of whether a statute may constitutionally be applied retrospectively does not arise unless the General Assembly has specified that the statute so apply." *State v. Rush* (1998), 183 Ohio St.3d 53, 60, 697 N.E.2d 634, quoting *Sturm v. Sturm* (1992), 63 Ohio St.3d 671, 673, 590 N.E.2d 1214, 1215, fn. 2, citing *Van Fossen*, 36 Ohio St.3d at 106. This principle is also codified in the Ohio Rules of Construction, which state that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." Ohio R.C. 1.48. H.B. 190 says that, "for each person to whom this division applies who is hired prior to that date, the employer shall request a criminal records

¹ Under the 2009 O.A.C. 3301-20-03, if Doe had been presently employed by CPS he would not have faced automatic dismissal, like under the 2007 regulations. However, Doe and those like him were all terminated under the 2007 regulations and are unable to avail themselves of the 2009 regulations. Even if Doe sought reemployment at CPS under the new regulations, there is no guarantee that he would be able to obtain his old position or for that matter any position at all. Nor would reemployment compensate Doe for the loss of his employment in 2007 and violation of his constitutional rights to due process and non-retroactivity.

check by a date prescribed by the department of education and every five years thereafter.” H.B. 190 (A)(1). Since, the legislature was clear in the retrospective application of the law, it triggers review under the Retroactivity Clause of the Ohio Constitution.

In analyzing whether a statute may constitutionally be applied retroactively, the threshold question is whether it affects substantive rather than procedural rights. *State v. Cook* (1998), 83 Ohio St.3d 404, 410-411, 700 N.E.2d 570; *Kunkler v. Goodyear Tire & Rubber Co.*(1988), 36 Ohio St.3d 135, 137. A retroactively applied statute is substantive if it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *State v. Williams*, 2004-Ohio-4747 ¶ 7, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106, 522 N.E.2d 489, quoting *Cincinnati v. Seasongood* (1889), 46 Ohio St. 296, 303, 21 N.E. 630. Remedial laws, which as the name implies are laws that only affect the remedy, may be applied retroactively. *State v. Cook* (1998), 83 Ohio St.3d 404, 410-411, 700 N.E.2d 570. Laws that only relate to procedure have been found to be remedial in nature. *Id.* While this Court has held that ex-offenders have no expectation of finality with regard to past convictions, *Cook*, 83 Ohio St.3d at 412, citing *State v. Matz* (1988), 37 Ohio St.3d 279, 281, this Court also held that the statute at issue in *Cook* imposed only *de minimis* procedural requirements and did not infringe on the defendant’s substantive rights. *Cook*, 83 Ohio St.3d at 412-414. Not so in this case, as Doe’s substantive rights were infringed upon, and the harm that resulted was far more than *de minimis*.

The application of the 2007 scheme created by H.B. 190 posed new and additional burdens on Doe by unconstitutionally divesting him of his livelihood without due process. Other states have held that employment bans that automatically disqualify current or future employees

for past acts are unconstitutional. Our sister states of Massachusetts, Pennsylvania, and Michigan have all recognized constitutional problems with employment bans similar to what Ohio adopted that led to Doe's termination.

In *Cronin v. O'Leary*, 2001 WL 919969 (Mass. Super. 2001) the Superior Court of Massachusetts addressed the issue of imposing retroactive employment bars on current employees based on newly instituted background checks. Two employees were terminated at the Executive Office of Health and Human Services ("EOHHS") in Massachusetts after EEOHS established new regulations requiring background checks. Both were shown to have past drug convictions and were automatically terminated. In *Cronin*, the Massachusetts Superior Court noted that when a person experiences:

"a deprivation of a tangible interest, like employment, and stigma resulting from the denial of such employment based on the applicant's dishonesty, immorality or propensity for future crime, and the applicant is foreclosed, not merely from a single position, but a number of employment opportunities in his field, the combination of these three elements rises to the level of a deprivation of a liberty interest."

Id. at 3. Ultimately, the Massachusetts Superior Court held that the regulations violate due process because "they impose a lifetime mandatory conclusive presumption that [the plaintiffs], because of their prior convictions, pose an unacceptable risk." *Id.* at 10.

A similar issue arose in *Nixon v. Pennsylvania*, 839 A.2d 277 (Pa. 2003). Pennsylvania passed a law requiring that applicants seeking employment in adult nursing homes or those who had been employed in adult protective services for less than one year undergo a criminal background check. *Id.* at 281. If the results of the background check established that the applicant or current employee had been convicted of "third degree murder, aggravated assault,

kidnapping, arson, burglary, robbery, forgery, felony drug crimes or endangering the life of children” then those applicants or employees were not hired or retained. *Id.* Specifically, the court noted that the protection of the elderly was not carried out when people that had convictions and had been employed for two years were distinguished from people with convictions that had only been employed in the Commonwealth for less than one year. *Id.* at 289. Therefore, the court held that the law violated the substantive due process rights of current and potential employees by arbitrarily infringing on their rights to gain employment, since there was no rational relationship between the law and the protection of elder adults. *Id.* at 290.

In 2002, the Michigan legislature enacted a law that required “background checks on new employees of nursing homes, county medical care facilities and homes for the aged.” State of Michigan Dept. of Comm. Health Declaratory Rule 2005/001 1-2 (citing HB 4057, 2002 PA 303, MCL 333.20173(4) and (5)). The Michigan Department of Community Health was asked for a declaratory ruling to advise whether the statute was retroactive. *Id.* The Declaratory Ruling concluded that the statute was prospective in nature and applied only to new hires, not existing employees who may seek to transfer or be promoted within the field. *Id.* at 5. The ruling also discussed why making the statute retroactive would incur undesirable results. *Id.* at 5. The ruling noted that the legislature considered making the statute retroactive, but the legislature decided that the cost of doing so would be prohibitive because of how many people were currently employed in this field. *Id.* Further, the ruling determined that “as a matter of public policy, it would be counterproductive to interpret the statute so that an individual with a criminal record who is already employed in the health care industry would lose the right to work in the field simply because of a job transfer or a temporary break in employment.” *Id.*

The above decisions recognize that there is a substantive liberty issue at stake when a new law or policy is applied to a current employee, to require a new level of scrutiny, and then impose an automatic and absolute bar on employment without process. Yet, that is precisely what happened to John Doe.

The 2007 scheme created by H.B. 190 "takes away or impairs vested rights acquired under existing laws... [and] attaches a new disability," *State v. Williams*, 2004-Ohio-4747 ¶ 7, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106, by automatically divesting Doe of his employment without any due process. The regulations promulgated by ODE arbitrarily took away Doe's employment, for a 30-year-old drug offense under one derivation of the regulations (the 2007 scheme). Then, after Doe's termination ODE changed the regulations again such that the new regulations would not have automatically led to Doe's termination and may have permitted him to avail himself of some kind of process to demonstrate rehabilitation (the 2009 scheme). The many changes that the law has undergone in such a short time frame render the law meaningless by repudiating any concept of finality with regard to employment eligibility. Furthermore, the 2007 regulations promulgated under H.B. 190 make no attempt to establish a rational relationship between the categories of past deeds that lead to an automatic employment bar versus those that do not lead to an automatic bar (or why that changed from the 2007 scheme to the 2009 scheme). Rather, the 2007 scheme simply treated Doe and other similarly situated individuals as if they are beyond the realm of rehabilitation, which is demonstrably untrue as, prior to the passage of H.B. 190, Doe had an unblemished record with CPS.

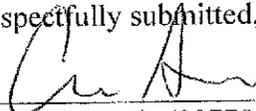
The Retroactivity Clause prohibits retroactive application of a law if it impairs or burdens substantive rights. Due process is a substantive legal right. The 2007 statutory and regulatory

scheme caused Doe to be automatically terminated from otherwise successful employment without due process that the same scheme has afforded to others. This is repugnant to the Retroactivity Clause, and therefore retroactive application of the 2007 scheme violates the Ohio Constitution.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to find that the statutory scheme that led to John Doe's termination violates the Retroactivity Clause of the Ohio Constitution.

Respectfully submitted,



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Not Reported in N.E.2d

Not Reported in N.E.2d, 13 Mass.L.Rptr. 405, 2001 WL 919969 (Mass.Super.)

(Cite as: Not Reported in N.E.2d, 2001 WL 919969 (Mass.Super.))

Cronin v. O'Leary
Mass.Super.,2001.

Superior Court of Massachusetts.

Christine CRONIN, Robert Roe ^{FNI}, Nury Nieves, and John Christian, Plaintiffs,

FNI. A pseudonym.

v.

William D. O'LEARY, as he is Secretary of the Executive Office of Health and Human Services,
Defendant.

No. 00-1713-F.

Aug. 9, 2001.

*MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT*

GANTS.

*1 The plaintiffs, Christine Cronin, Robert Roe, Nury Nieves, and John Christian, filed suit on April 24, 2000 claiming that a rule issued by the Executive Office of Health and Human Services ("EOHHS") known as Procedure No. 001 was issued in violation of the Massachusetts Administrative Procedure Act, G.L. c. 30A, §§ 1, 3, 5, and 6, deprived them of liberty and property without due process of law, and violated their right to equal protection and substantive due process. The plaintiffs now move for partial summary judgment as to these claims.

The motion for partial summary judgment appears to seek a resolution of all claims, but it is "partial" because the complaint was brought as a putative class action and the plaintiffs have not yet sought certification of the class. Rather, the plaintiffs have chosen to seek summary judgment only on behalf of the named plaintiffs, not the putative class, assuming that, if they were to prevail, EOHHS would comply with the law set forth by the Court and render moot the need for a class action. See *Doe v. Registrar of Motor Vehicles*, 26 Mass.App.Ct. 415, 425 n. 18 (1988). Consequently, for all practical purposes, this motion is brought simply by four individual plaintiffs, albeit with possible repercussions to other members of the putative class.

BACKGROUND

The facts of this case have proven to be a moving target since this motion was filed. At the time this motion was filed, Procedure No. 001 was in effect simply as EOHHS's written standardized policy on criminal background checks, issued by then-EOHHS Secretary Gerald Whitburn on

May 14, 1996, effective on May 20, 1996. It had not been promulgated as a regulation under G.L. c. 30A, and therefore did not satisfy the requirements set forth under G.L. c. 30A before a regulation may become final and take effect. However, by December 29, 2000, all but one of the agencies that comprise EOHHS had filed with the Secretary of State's office emergency regulations intended to replace Procedure No. 001; the only EOHHS agency that did not file emergency regulations-the Division of Health Care Finance and Policy-has no need for such regulations because it neither has contact with human service clients nor contracts with vendors who have such contact. The plaintiffs concede that "the issuance of the regulations grants plaintiffs the relief they sought on their Administrative Procedure Act claim, and that the Court therefore need not rule on that claim." Plaintiffs' Reply to Defendant's Supplemental Opposition to Plaintiffs' Motion for Partial Summary Judgment at 2. That leaves the constitutional claims.

In considering the constitutional claims, it is important first to examine the now-defunct Procedure No. 001 and the emergency regulations that replaced them. Under Procedure No. 001, any person under consideration for hire or as a volunteer to provide services to any state agency within EOHHS must disclose on the application form whether he or she has a criminal record and the applicant must undergo a check for criminal offender record information (known as a "CORI" check) with the Criminal History Systems Board.^{FN2} There were three categories of disqualification established under Procedure No. 001:

FN2. Procedure No. 001, on its face, also covered candidates for "positions funded by grants ... and vendor agency positions," but EOHHS conceded that the Procedure had no legal effect on the hiring of employees by human service providers which contract with EOHHS agencies unless specifically included in the provider contract.

- *2 1. Those convicted of certain crimes, mostly crimes involving violence, sexual assault, or drug trafficking, were mandatorily disqualified from being hired for their entire lifetime;
2. Those convicted of other, generally less serious crimes were mandatorily disqualified from being hired for ten years after their date of release from any form of custody, whether that be prison, probation, or parole; and
3. Those convicted of other, still less serious crimes could be hired, but only with the written authorization of the Hiring Authority based on clear and convincing evidence of the applicant's fitness for employment.

Under Procedure No. 001, two of the plaintiffs-Christine Cronin and Nury Nieves-were disqualified from employment with any EOHHS agency until 2006 and 2009 respectively as a result of prior narcotics convictions that were among those in the ten-year mandatory disqualification category. The other two plaintiffs-Robert Roe and John Christian-as a result of a manslaughter and armed robbery conviction respectively, were disqualified for life.

The new emergency regulations differ in at least two significant ways from Procedure No. 001.

Not Reported in N.E.2d

Not Reported in N.E.2d, 13 Mass.L.Rptr. 405, 2001 WL 919969 (Mass.Super.)

(Cite as: Not Reported in N.E.2d, 2001 WL 919969 (Mass.Super.))

First, while Procedure No. 001 according to its terms mandatorily disqualified those in the first two categories from all paid employment in any EOHHS agency, the new regulations limited the disqualifications to those positions “where there is potential unsupervised contact with program clients.” See, e.g., 105 C.M.R. § 950.105(1) (regarding the Department of Public Health, an EOHHS agency). “Potential unsupervised contact” is defined in the new regulations as “[a] reasonable likelihood of contact with a person who is receiving or applying for [EOHHS services] when no other CORI cleared employee is present.” 105 C.M.R. § 950.005. “A person having only the potential for incidental unsupervised contact with clients in commonly used areas such as elevators, hallways and waiting rooms shall not be considered to have the potential for unsupervised contact for purposes of the regulations.” *Id.* However, a person who has the potential for contact with clients in bathrooms and other isolated areas that are accessible to clients shall be considered to have the potential for unsupervised contact. *Id.* Therefore, even for those still mandatorily disqualified, the scope of positions for which the applicant is disqualified is somewhat narrowed.^{FN3}

FN3. Under Procedure No. 001, “potential unsupervised contact with persons receiving services” was defined as “Contact with a person who is receiving or applying for EOHHS agency services when no other supervisory staff person is present. A person who has access to areas where clients may be unsupervised, such as elevators, bathrooms, and waiting rooms, shall be considered to have the potential for unsupervised contact.” Under the language of Procedure No. 001, the mandatory disqualification for *paid* EOHHS employees was not limited to those positions with “potential unsupervised contact with persons receiving services;” only the disqualification for *volunteers* was limited to those positions with the potential for unsupervised contact. However, from information in the record, it appears that, in practice, EOHHS did not disqualify applicants with prior convictions from paid positions unless the applicant had the potential in that position for unsupervised contact with agency clients. If this was indeed the practice, then the regulations still narrowed the scope of the disqualification but only through its slightly narrower definition of “potential unsupervised contact with persons receiving services.”

Second, the new regulations realign the list of convictions into four categories, of which only one category mandates disqualification:

1. Convictions for certain crimes of violence, sexual assault, and drug trafficking, including the crimes of manslaughter and armed robbery of which plaintiffs Roe and Christian had been convicted, continue to carry lifetime mandatory disqualification;

2. Convictions for serious, but lesser, crimes carry a ten year “presumptive disqualification,” meaning that, for ten years from the date of release from all custody (including probation and parole), the individual is barred from employment with any EOHHS agency or vendor in any position where there is the potential for unsupervised contact with agency clients unless *either* (a) the applicant’s probation officer, parole officer, or another criminal justice official concludes in writing that the applicant is appropriate for the position and does not pose an unacceptable risk

to the persons served by the program *or* (b) where these persons are unavailable or have too little information to provide an assessment, a designated forensic psychiatrist or psychologist has made an assessment of the applicant and concluded in writing that the applicant is appropriate for the position and does not pose an unacceptable risk to the persons served by the program. If such assessments are received, then the disqualification is no longer mandatory but discretionary with the hiring official. 105 C.M.R. § 950.005.

*3 3. Convictions for still lesser crimes, some of which were under the discretionary disqualification category under Procedure No. 001, carry a five year “presumptive disqualification” that is identical to the ten year “presumptive disqualification” in everything but its duration. *Id.*

4. Convictions for the least serious crimes are under the discretionary disqualification category, meaning that they may result in disqualification from the position in the discretion of the hiring official. *Id.*

Under the new regulations, plaintiffs Cronin and Nieves are now subject to presumptive disqualification, not mandatory disqualification. As a result, these two plaintiffs now ask this Court not to decide this summary judgment motion as to them, since it is not yet clear how the methods for rebutting the presumptive disqualification will be applied. This Court agrees that, in view of the absence of an amended complaint and a more developed record, the constitutionality of the presumptive disqualification provisions is not ripe for decision.

That leaves the constitutional claims of Roe and Christian as to the mandatory lifetime disqualifications in Procedure No. 001 that have been continued in the emergency regulations. This Court concludes, based on the affidavits of Roe and Christian that demonstrate that they are seeking employment in EOHHS human service positions for which they are mandatorily barred for the remainder of their lives, that they have legal standing to bring this action and that their constitutional claims are ripe for decision. As a result, this Court shall examine their constitutional claims alleging that their lifetime mandatory disqualification is in violation of procedural due process. If that determination is not dispositive of the case, the Court will examine whether the lifetime bar violates the equal protection clause or substantive due process.

DISCUSSION

Procedural Due Process

1. Do Roe and Christian Have a Constitutionally Protected Liberty or Property Interest?

For the mandatory lifetime disqualification in Procedure No. 001 and the new regulations to violate procedural due process, Roe and Christian must first demonstrate that they have a constitutionally protected liberty or property interest that EOHHS is depriving them of without due process. With respect to a possible property interest, it is plain that neither Roe nor Christian

have any entitlement to a job with EOHHS or its vendors. Without such an entitlement, they cannot have a constitutionally-protected property interest in such employment. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). As the United States Supreme Court declared, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

However, the absence of a property interest in employment does not necessarily mean that Roe and Christian have not been deprived of a liberty interest. See, e.g., Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953, 962 (D.C.Cir.1980). In Board of Regents v. Roth, the Supreme Court recognized that the "liberty" guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract [and] to engage in any of the common occupations of life..." 408 U.S. at 572 quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The denial of employment, in the absence of an entitlement to such employment, standing alone, is not sufficient to constitute a liberty interest. Board of Regents v. Roth, 408 U.S. at 572-573. Nor is stigma derived from defamation by the government, standing alone, sufficient to constitute a liberty interest. Paul v. Davis, 424 U.S. 693, 701 (1976); Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d at 965. When, however, there is:

- *4 1. the deprivation of a tangible interest, such as employment, *and*
2. stigma resulting from the denial of such employment based on the applicant's purported dishonesty, immorality, or propensity for future criminality, *and*
3. the applicant is foreclosed, not merely from a single position, but from a significant number of employment opportunities in his field,

the combination of these three elements rises to the level of a deprivation of a constitutional liberty interest. See Board of Regents v. Roth, 408 U.S. at 572-574; Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d at 964-966.

These three elements are all present with respect to the mandatory lifetime disqualification imposed earlier by Procedure No. 001 and now by the EOHHS regulations. The regulations explicitly provide that the reason for the mandatory disqualification is "due to the unacceptable risk posed by the nature of the crime to persons receiving services." 105 C.M.R. § 950.005. Quite plainly, EOHHS is stating that it is barring Roe and Christian (and all others convicted of the listed crimes) from any EOHHS position in which they potentially may have unsupervised contact with persons receiving services because they pose an unacceptable risk of doing harm to those persons.^{EM} The consequence of this conclusive presumption of "unacceptable risk" is not simply denial of a single position; it bars them from every position with an EOHHS agency or a service provider funded by EOHHS in which there is a risk that they may be left alone with an agency client, even for a minute, even in the bathroom. For Roe, who has a masters degree in

social work, and Christian, who is certified as an alcoholism and drug abuse counselor, this mandatory disqualification effectively bars them from thousands of social service jobs and significantly impairs their ability to pursue their careers in social work and counseling. See Connecticut v. Gabbert, 526 U.S. 286, 291-292 (1999); Hampton v. Mow Sun Wong, 426 U.S. 88, 102 & n. 23 (1976).

FN4. EOHHS contends that there can be stigma only if it publicly disseminates the fact of disqualification. This Court finds that there need not be a public declaration for there to be stigma. Here, the regulation itself declares that persons, like Roe and Christian, with certain prior convictions pose an unacceptable risk of doing harm to agency clients. In other words, the regulation declares that Roe and Christian are too dangerous to be trusted alone with persons receiving human services. The stigma that arises from such a declaration shall be known throughout EOHHS and the service providers who contract with EOHHS, which for all practical purposes constitutes the vast majority of the human service provider community in Massachusetts. See Larry v. Lawler, 605 F.2d 954, 958 (7th Cir.1978) ("In effect, Larry has been stigmatized throughout the entire federal government. He is deprived of the opportunity to work in any capacity for any branch of the government ."), quoted in Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d at 966 n. 24.

The existence of a liberty interest under these circumstances can perhaps most clearly be seen if one recognizes that the mandatory lifetime disqualification under the EOHHS regulations for those convicted of certain crimes constitutes a lifetime mandatory debarment. Corporations doing business with the federal government have for years been subject to various forms of debarment when they have engaged in wrongdoing, and it is established that debarment from federal procurement deprives a corporation of a liberty interest. See, e.g., Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d at 964-966; Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 321 (6th Cir.1981); Reeve Aleutian Airways, Inc. v. United States, 982 F.2d 594, 598-599 (D.C.Cir.1993). In the seminal case of Old Dominion Dairy Products, Inc. v. Secretary of Defense, Old Dominion was denied two government contracts for which it was the low bidder because it had been debarred from federal defense contracting as a result of a finding that it lacked integrity as a company. *Id.* at 957-959. Old Dominion had no greater entitlement to these government defense contracts than Roe and Christian had to EOHHS employment, but the District of Columbia Circuit found that it had been deprived of a liberty interest because it lost two substantial contracts it otherwise would have received, was denied these contracts expressly because it was deemed to lack integrity, and, as a result of the debarment, was also foreclosed from other contractual opportunities. *Id.* at 962-965. If a corporation has a liberty interest in contractual opportunities lost as a result of debarment by a federal procurement agency, then individuals certainly have a liberty interest in employment opportunities lost as a result of debarment by a state human services agency.

II. What Process is Due?

*5 The existence of a constitutionally protected liberty interest means that some process is due before the government may deprive that person of that interest. In Mathews v. Eldridge, 424 U.S. 319 (1976), the United States Supreme Court declared that the determination of how much process is due requires consideration of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The *Mathews* Court noted, however, that “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Id.* at 334 quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). To the contrary, the Court stated that “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. at 334 quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972). See generally Roe v. Attorney General, 434 Mass. 418, 427 (2001). These procedural protections generally include notice of the charges giving rise to the debarment, an opportunity to rebut those charges, and, under most circumstances, a hearing. Transco Sec. Inc. of Ohio, 639 F.2d at 321.

In determining what process is due, this Court must look to the due process analysis conducted by the Supreme Judicial Court with respect to the registration of sex offenders. Under G.L. c. 6, § 178E, every person convicted of designated sex offenses was required to register in person at their local police station. Roe v. Attorney General, 434 Mass. at 421. A board was created to assess each sex offender's level of dangerousness and risk of sexual recidivism, and assign each offender to one of three risk categories—level one (low), level two (moderate), and level three (high). *Id.* If a sex offender were assigned to level one, the police maintained a record of his registration which was available for review by anyone age 18 or over. *Id.* If a sex offender were assigned to level two or three, not only did the police maintain a record of registration that was available for public review, but the police had to institute a community notification plan to warn designated persons and entities of the sex offender's residence in their community. *Id.* at 421-422.

In Doe v. Attorney General (“*Doe No. 3*”), the Supreme Judicial Court found that even a level one offender “has sufficient liberty and privacy interests constitutionally protected by art. 12 [of the Massachusetts Declaration of Rights] that he is entitled to procedural due process before he may be required to register and before information may properly be publicly disclosed about him.”^{FN5} 426 Mass. 136, 143 (1997). In determining what process was due, the Attorney General argued that, at most, all that was required was a hearing to ascertain that the individual fell within the legislative classification, that is, that he was indeed the same person convicted of the qualifying sex offense. *Id.* at 144. The Supreme Judicial Court rejected that formulation, and required that the hearing determine not simply whether the individual had been convicted of a

sex offense but whether he “is a threat to those persons for whose protection the Legislature adopted the sex offender act.” *Id.* at 144-145. Even though the Legislature had mandated that *all* persons convicted of qualifying sex offenses register with the police, implicitly enacting legislatively a conclusive presumption that all persons convicted of these crimes pose a threat to the public because of their risk of re-offending, the Supreme Judicial Court held that due process meant rejecting that conclusive presumption and giving the sex offender the opportunity to rebut at a hearing any presumption that he constitutes a threat to the public. See *id.* at 144-146. The Court declared, “There is ... nothing inherent in the crime of indecent assault and battery, or in the circumstances (on the record before us) of the plaintiff, that indicates that either a person convicted of that crime, or the plaintiff himself, is a threat to those persons for whose protection the Legislature adopted the sex offender act.” *Id.* at 144-145. The Court continued, “[I]t is contrary to the principle of fundamental fairness that underlies the concept of due process of law to deny the plaintiff a hearing at which the evidence might show that he is not a threat to children and other vulnerable persons whom the act seeks to protect and that disclosure is not needed when balanced against the public need to which the sex offender act responded.” *Id.* at 146.^{FN6}

FN5. The Supreme Judicial Court expressly rested its decision regarding the requirements of procedural due process on the Massachusetts Constitution, and left open whether such a result would also be dictated by the due process clause of the Fourteenth Amendment to the United States Constitution. *Doe No. 3*, 426 Mass. at 144 & n. 8; *Doe v. Attorney General*, 430 Mass. 155, 163 (1999) (“*Doe No. 4*”).

FN6. It is important to emphasize that the Supreme Judicial Court held that the right of a sex offender to a hearing focused on present dangerousness rather than simply proof of the earlier conviction derives from procedural due process, not equal protection. *Doe No. 3* at 140-146. Indeed, the plaintiff in *Doe No. 3* did not even argue that registration violated the equal protection clause. Specifically, the plaintiff did not contend that, either facially or as applied to him, there was no rational relation between his conviction and the registration requirement. *Id.* at 140-141.

*6 In the next *Doe* case, *Doe v. Attorney General*, (“*Doe No. 4*”), the Attorney General argued that the conclusive legislative presumption of dangerousness, while perhaps not appropriate for all sex offenders, is certainly appropriate for a sex offender adjudicated delinquent of the crime of rape of a child, in violation of G.L. c. 265, § 23, 430 Mass. 155, 163-164 (1999). The Supreme Judicial Court also rejected this contention, stating, “Because we can envision situations, some of which we have suggested, where the risk of reoffense by one convicted under G.L. c. 265, § 23, may be minimal and the present danger of that person to children not significant, the general legislative category does not adequately specify offenders by risk so as to warrant automatic registration of every person convicted under that statute.” *Id.* at 164-165. In essence, even those convicted of rape of a child are entitled to a hearing to rebut the presumption that they pose a present danger to children before they must register as a sex offender. See *id.*

The Supreme Judicial Court recognized the possibility that a conclusive presumption may be

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justifiable in situations “where the danger to be prevented is grave, and the risk of reoffense great,” such as with “those convicted of repeated crimes of violence against young children.” *Id.* at 165. See also *Roe v. Attorney General*, 434 Mass. at 423. However, the Court noted, “[B]ecause the deprivation of protected liberty interests in those cases will occur without an opportunity to be heard, the burden will be on the sex offender registry board to demonstrate, through appropriately promulgated regulations, that the offender is in a category that poses a grave threat to children and other vulnerable populations and that the risk of reoffense in those circumstances is compelling.” *Doe No. 4* at 165. Indeed, even if the sex offender registry board empirically could demonstrate that certain carefully-defined categories of convicted sex offenders posed a high risk of sexual recidivism, the Court recognized that there still may not be a conclusive presumption of dangerousness for persons within these categories because “due process may require some opportunity to show that for some reason—a long passage of time without reoffense, for example—the offender should be exempted from some or all of the regulations.” *Id.* at 165 n. 18.

Since, as the Supreme Judicial Court has declared in *Doe No. 3* and *Doe No. 4*, procedural due process forbids, in all but the most limited circumstances, a mandatory conclusive presumption that a convicted sex offender poses so substantial a threat to the public as to warrant his registration with the police, and since procedural due process requires that convicted sex offenders be given the opportunity to rebut the inference that they pose a threat to the public, *then* procedural due process under Article 12 of the Massachusetts Declaration of Rights must also forbid, in all but the most limited circumstances, a mandatory conclusive lifetime presumption that a person convicted of certain serious crimes poses an “unacceptable risk” to persons receiving social services. With both sex offender registration and debarment from EOHHS social service employment, the Commonwealth of Massachusetts sought to deprive an individual of a liberty interest based solely on his prior conviction, relying on the conclusive presumption that his prior conviction meant that he posed a danger to others. If the Commonwealth cannot require a convicted sex offender to register with his local police department without giving him the opportunity to rebut the inference that he poses a danger to the public, then the Commonwealth also cannot bar a convicted criminal from EOHHS social service employment without giving him the opportunity to rebut the inference that he poses a danger to persons receiving or applying for EOHHS services. *Cf. In the Matter of an Application for Admission to the Bar of the Commonwealth*, 431 Mass. 678, 681 (2000) (prior conviction is not an absolute bar to admission to the Bar; “No offense is so grave as to preclude a showing of present moral fitness.”) quoting *Matter of Prager*, 422 Mass. 86, 91 (1996); and *Matter of Allen*, 400 Mass. 417, 421-422 (1987).

*7 Even if EOHHS “could, consistent with due process, promulgate narrowly tailored regulations to identify categories of offenders who posed a grave danger and high risk of reoffense,” for whom individual hearings “might not be necessary,” *Roe v. Attorney General*, 434 Mass. at 423, EOHHS's recent emergency regulations do not meet these criteria. Nor is it apparent that individuals convicted of the crimes for which Roe and Christian were convicted—manslaughter and armed robbery respectively—pose so grave a danger and so high a risk of

reoffense as to warrant a lifetime mandatory conclusive presumption of dangerousness.^{FN7} Even if persons convicted of these crimes empirically could be shown to pose an unacceptable risk of future danger, it is not apparent that this risk would endure for their entire lifetime.

FN7. Moses was guilty of manslaughter for the killing of one of Pharaoh's taskmasters (although he was never tried or convicted), but I doubt that EOHHS would contend that, as a result of his prior criminal conduct, he posed an "unacceptable risk" to the Israelites he led out of Egypt.

It is important to recognize that procedural due process under Article 12 of the Massachusetts Declaration of Rights does not prevent EOHHS from rejecting a job applicant because of a prior criminal conviction. Rather, it simply means that EOHHS must provide the applicant with a fair opportunity to rebut the inference that, because of his prior criminal conviction, he poses an "unacceptable risk" to those receiving social services from EOHHS.

Therefore, this Court allows the motion for partial summary judgment brought by plaintiff Roe and Christian to the extent that this Court declares that Procedure No. 001 and the EOHHS emergency regulations violate procedural due process under Article 12 of the Massachusetts Declaration of Rights in that they impose a lifetime mandatory conclusive presumption that Roe and Christian, because of their prior convictions, pose an unacceptable risk to those applying for and receiving social services from EOHHS.^{FN8} Roe and Christian, as a matter of procedural due process, are entitled to a fair opportunity to rebut the inference that, because of their prior convictions, they pose an unacceptable risk to EOHHS clients. Roe and Christian shall be given that fair opportunity by EOHHS no later than October 12, 2001.^{FN9}

FN8. In view of this result, this Court need not decide whether Procedure No. 001 or the emergency regulations violate the equal protection clause or substantive due process.

FN9. This Court will permit EOHHS to determine precisely how, consistent with procedural due process, it will give Roe and Christian a fair opportunity to rebut the inference that they pose an unacceptable risk to EOHHS clients. Of course, Roe and Christian retain the right to challenge before this Court whether the opportunity they are given satisfies the dictates of procedural due process.

ORDER

For the reasons stated above, the plaintiffs Roe's and Christian's motion for partial summary judgment is *ALLOWED* to the extent that:

1. This Court declares that Procedure No. 001 and the EOHHS emergency regulations violate procedural due process under Article 12 of the Massachusetts Declaration of Rights to the extent that they impose a lifetime mandatory conclusive presumption that Roe and Christian, because of their prior convictions, pose an unacceptable risk to those applying for and receiving social

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services from EOHHS. Roe and Christian, as a matter of procedural due process, are entitled to a fair opportunity to rebut the inference that, because of their prior convictions, they pose an unacceptable risk to EOHHS clients.

2. Roe and Christian shall be given that fair opportunity by EOHHS no later than October 12, 2001.

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▷Nixon v. Com.
Pa.,2003.

Supreme Court of Pennsylvania.

Earl NIXON, Reginald Curry, Kelly Williams, Marie Martin, Theodore Sharp, and Resources for Human Development, Inc., Appellees

v.

The COMMONWEALTH of Pennsylvania, Department of Public Welfare of the Commonwealth of Pennsylvania, Department of Aging of the Commonwealth of Pennsylvania, and Department of Health of the Commonwealth of Pennsylvania, Appellants.

Argued April 8, 2003.

Decided Dec. 30, 2003.

Background: Potential employees filed motion for summary relief alleging that amendment to Older Adults Protective Services Act (Act 13), that disqualified certain persons with criminal records from employment in facilities catering to older adults, violated Pennsylvania Constitution. Departments of Aging, Public Welfare, and Health filed demurrers. On original jurisdiction, the Commonwealth Court, No. 359 M.D. 2000, Smith, J., 789 A.2d 376, found that Act 13 violated state Constitution's guarantee of right to work. Departments appealed as of right.

Holding: The Supreme Court, No. 004 M.D. Appeal Dkt. 2002, Nigro, J., held that Act 13 did not have real and substantial relationship to Commonwealth's interest in protecting elderly individuals from victimization, and thus, Act 13 violated employees' due process right to pursue particular occupation.

Affirmed.

Castille, J., concurred and filed opinion.

Cappy, C.J., concurred in result and filed opinion in which Newman, J., joined.

Eakin, J., dissented and filed opinion.

****279*388** John G. Knorr, D. Michael Fisher, Calvin Royer Koons, Harrisburg, for Department of Public Welfare, et al.

Sharon M. Dietrich, David Jon Wolfsohn, Philadelphia, Janet Fran Ginzberg, Peter Houghton LeVan, Philadelphia, Seth F. Kreimer, for Earl Nixon, et al.

Harold I. Goodman, Philadelphia, for Pennsylvania Alliance for Retired Americans, et al.

Christine S. Dutton, for PA Ass'n of County Affiliated Homes, et al.

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Before CAPPY, C.J., and CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN and LAMB, JJ.

OPINION OF THE COURT

Justice NIGRO.

This case involves an appeal from the December 11, 2001 opinion and order of the Commonwealth Court declaring the criminal records chapter, 35 P.S. §§ 10225.501-10225.508,^{FN1} of the Older Adults Protective Services Act (the "OAPSA"), 35 P.S. §§ 10225.101-10225.5102,^{FN2} unconstitutional as applied to Appellees Earl Nixon, Reginald Curry, Kelly Williams, Marie Martin, and Theodore Sharp (the "Employees"). We affirm the Commonwealth Court's decision, although for different reasons.

FN1. Act of December 18, 1996, P.L. 1125, No. 169, *amended* by Act of June 9, 1997, P.L. 160, No. 13.

FN2. Act of November 6, 1987, P.L. 381, No. 79 (35 P.S. §§ 10211-10224), *amended* by Act of December 18, 1996, P.L. 1125, No. 169 (*recodified as amended* at 35 P.S. §§ 10225.101-10225.5102).

***389** In November 1987, the General Assembly enacted the OAPSA, declaring as follows:

It is declared the policy of the Commonwealth of Pennsylvania that older adults ****280** who lack the capacity to protect themselves and are at imminent risk of abuse, neglect, exploitation or abandonment shall have access to and be provided with services necessary to protect their health, safety and welfare. It is not the purpose of this act to place restrictions upon the personal liberty of incapacitated older adults, but this act should be liberally construed to assure the availability of protective services to all older adults in need of them. Such services shall safeguard the rights of incapacitated older adults while protecting them from abuse, neglect, exploitation and abandonment. It is the intent of the General Assembly to provide for the detection and reduction, correction or elimination of abuse, neglect, exploitation and abandonment, and to establish a program of protective services for older adults in need of them.

35 P.S. § 10225.102. In furtherance of this stated objective, the OAPSA establishes a network of agencies in areas throughout the Commonwealth to provide protective services for older adults,^{FN3} as well as patients in any of the facilities covered by the OAPSA ("covered facilities").^{FN4} *See* ***390** 35 P.S. §§ 10225.103, 10225.301, 10225.304. The OAPSA further provides that any person may report to these area agencies that an older adult is in need of services, and the agency must promptly investigate the matter and provide protective services to the older adult if necessary.^{FN5} 35 P.S. §§ 10225.302-10225.304.

FN3. An "older adult" is defined by the OAPSA as any person in the Commonwealth

who is 60 years of age or older. See 35 P.S. § 10225.103.

FN4. The facilities covered by the OAPSA include a wide range of for-profit and non-profit business organizations that serve individuals who are elderly, disabled, infirm, or otherwise unable to live independently. The OAPSA defines a “facility” as a domiciliary care home, a home health care agency, a long-term care nursing facility, an older adult daily living center, or a personal care home. See 35 P.S. § 10225.103. These terms are more specifically defined in various other statutes. *See id.*

A domiciliary care home is “a protected living arrangement in the community which provides a safe, supportive homelike residential setting for three or less adults who are unrelated to the domiciliary care provider, who cannot live independently in the community, and who are placed by an area agency.” 71 P.S. § 581-2. A home health care agency is “[a]n organization or part thereof staffed and equipped to provide nursing and at least one therapeutic service to persons who are disabled, aged, injured or sick in their place of residence.” 35 P.S. § 448.802a. A long-term nursing facility is “[a] facility that provides either skilled or intermediate nursing care or both levels of care to two or more patients, who are unrelated to the licensee, for a period exceeding 24 hours.” *Id.* An older adult daily living center includes “[a]ny premises operated for profit or not-for-profit in which older adult daily living services are simultaneously provided for four or more adults who are not relatives of the operator.” 62 P.S. § 1511.2. A personal care home includes “any premises in which food, shelter and personal assistance or supervision are provided for a period exceeding twenty-four hours for four or more adults who are not relatives of the operator, who do not require the services in or of a licensed long-term care facility but who do require assistance or supervision in such matters as dressing, bathing, diet, financial management, evacuation of a residence in the event of an emergency or medication prescribed for self administration.” 62 P.S. § 1001.

FN5. In 1997, the General Assembly added a mandatory reporting chapter to the OAPSA, requiring that employees and administrators in covered facilities report suspected abuse of patients to area agencies, as well as to law enforcement officials in cases of sexual abuse, serious bodily injury, or a suspicious death. See 35 P.S. §§ 10225.701-10225.707, Act of June 9, 1997, P.L. 160, No. 13.

In December 1996, the General Assembly amended the OAPSA by adding a ****281** criminal records chapter. See 35 P.S. §§ 10225.501-10225.508. This chapter required any applicant seeking employment in a covered facility as well as any employee who had worked at a covered facility for less than two years to submit a criminal records report to the facility. See 35 P.S. § 10225.502(a); *see also* 35 P.S. § 10225.508 (Pa.Stat.1996-1997). The chapter also prohibited covered facilities from hiring applicants or retaining employees whose reports revealed that they had been convicted of certain violent or sexual crimes, including first and second degree murder, rape, various degrees of sexual assault and indecent assault, and sexual abuse of children. See 35

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P.S. § 10225.503 (Pa.Stat.1996-1997). In addition, the chapter prohibited the hiring or retention of persons whose records revealed that they had been convicted of other enumerated crimes, including *391 third degree murder, aggravated assault, kidnapping, arson, burglary, robbery, forgery, felony drug crimes, and endangering the welfare of children, within ten years of the time that the background check was conducted. *See id.* The chapter, however, was not to take effect until July 1, 1998.

Approximately one year before the criminal records chapter was to take effect, the General Assembly amended certain provisions of the chapter. *See* Act of June 9, 1997, P.L. 160, No. 13. Among other things, the amendments changed section 508 to require only new applicants and those employees who had been at a facility for less than a year before the effective date of the Act to submit criminal record reports.^{FN6} *See* P.S. § 10225.508(1). In addition, the amendments removed the ten-year limitation period on the second category of offenses listed in section 503(a) of the chapter, so as to permanently prohibit a covered facility from hiring or retaining those persons whose criminal records established that they had been convicted of any one of the enumerated crimes. *See* P.S. § 10225.503(a). Specifically, section 503, as amended, provides:

FN6. Section 508 states:

This chapter shall apply as follows:

- (1) An individual who, on the effective date of this chapter, has continuously for a period of one year been an employee of the same facility shall be exempt from section 502 [the section requiring that employees submit to criminal records checks] as a condition of continued employment.
- (2) If an employee is not exempt under paragraph (1), the employee and the facility shall comply with section 502 within one year of the effective date of this chapter.
- (3) If an employee who is exempt under paragraph (1) seeks employment with a different facility, the employee and the facility shall comply with section 502.
- (4) An employee who has obtained the information required under section 502 may transfer to another facility established and supervised by the same owner and is not required to obtain additional reports before making the transfer.

35 P.S. § 10225.508.

a) General rule.-In no case shall a facility hire an applicant or retain an employee required to submit [criminal records reports] if the applicant's or employee's criminal history *392 record information indicates the applicant or employee has been convicted of any of the following offenses:

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(1) An offense designated as a felony under ... The Controlled Substance, Drug, Device and Cosmetic Act.

(2) An offense under one or more of the following provisions of 18 Pa.C.S. (relating to crimes and offenses):

Chapter 25 (relating to criminal homicide).

Section 2702 (relating to aggravated assault).

****282** Section 2901 (relating to kidnapping).

Section 2902 (relating to unlawful restraint).

Section 3121 (relating to rape).

Section 3122.1 (relating to statutory sexual assault).

Section 3123 (relating to involuntary deviate sexual intercourse).

Section 3124.1 (relating to sexual assault).

Section 3125 (relating to aggravated indecent assault).

Section 3127 (relating to indecent exposure).

Section 3301 (relating to arson and related offenses).

Section 3502 (relating to burglary).

Section 3701 (relating to robbery).

A felony offense under Chapter 39 (relating to theft and related offenses) or two or more misdemeanors under Chapter 39.

Section 4101 (relating to forgery).

Section 4114 (relating to securing execution of documents by deception).

Section 4302 (relating to incest).

Section 4303 (relating to concealing death of child).

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Section 4304 (relating to endangering welfare of children).

Section 4305 (relating to dealing in infant children).

Section 4952 (relating to intimidation of witnesses or victims).

Section 4953 (relating to retaliation against witness or victim).

A felony offense under section 5902(b) (relating to prostitution and related offenses).

*393 Section 5903(c) or (d) (relating to obscene and other sexual materials and performances).

Section 6301 (relating to corruption of minors).

Section 6312 (relating to sexual abuse of children).

Id. The criminal records chapter, with these amendments, went into effect on July 1, 1998.

On August 8, 2000, the Employees and Appellee Resources for Human Development, Inc. ("RHID"), a nonprofit corporation that administers several residential service programs that are considered covered facilities under the OAPSA, filed a petition for review in the nature of a complaint in equity in the Commonwealth Court. The Employees and RHD argued in the petition that the criminal records chapter: (1) violated the Employees' right to substantive due process guaranteed under Article I, section 1 of the Pennsylvania Constitution by unreasonably and arbitrarily infringing on their right to pursue a lawful occupation; (2) violated the Employees' right to procedural due process guaranteed under the Pennsylvania Constitution by irrebuttably presuming them to be disqualified for employment in the covered facilities; and (3) violated RHD's right to substantive due process by unreasonably interfering with its right to employ qualified employees. The Employees and RHD requested as a remedy a declaration that the criminal records chapter was unconstitutional as applied to the Employees. They also sought a preliminary and permanent injunction to enjoin Appellants, the Commonwealth of Pennsylvania, the Department of Aging, the Department of Public Welfare, and the Department of Health (the "Commonwealth Parties"),^{FN7} from enforcing the criminal records chapter against the Employees, or, alternatively, from enforcing it against RHD or any other covered facility that wanted to employ the Employees.^{FN8}

^{FN7}. The Department of Aging, the Department of Public Welfare, and the Department of Health are the agencies responsible for administering and enforcing the OAPSA. See 35 P.S. §§ 10225.504, 10225.505(a)(3).

^{FN8}. In addition to requesting injunctive relief in their petition for review, the Employees and RHD filed a separate petition for a preliminary injunction with an attached memorandum of law.

394** The Employees and RHD filed multiple declarations in support of their petition for review and separate petition for a preliminary injunction. Each of the Employees filed declarations averring to their work history in the health care field, their criminal records, and their inability to continue to work in covered facilities due to the criminal records chapter.^{FN9} The ***395** associate director of RHD also submitted a declaration averring that because of the criminal records chapter, RHD had to lay off twenty-five employees, including two of the Employees.^{FN10} See Memo. of Law in Support *284** of Plaintiffs' Petition for Preliminary Injunction, Exh. J, Declaration of Dennis Roberts, at 2-3.

^{FN9}. Earl R. Nixon averred in his declaration that he worked in the health care field for about ten years as a direct care specialist and resident manager in a facility for mentally retarded patients, a resident manager in a retirement community, and the manager of an assisted living facility. In 2000, Mr. Nixon left his job as manager of the assisted living facility and, since that time, he has not been able to obtain a position in Pennsylvania in the health care field because he was convicted in 1971 of possession of a controlled substance. Mr. Nixon now works as a manager for a senior citizen's complex in Michigan. See Memo. of Law in Support of Plaintiffs' Petition for Preliminary Injunction ("Memo."), Exh. A, Declaration of Earl R. Nixon.

Reginald Curry averred in his declaration that he worked for over twenty years as a counselor for juvenile delinquent children, for six years as a resident counselor for mentally retarded patients, and for three years as a paratransit driver for seniors. After spending the next seven years outside of the health care field, Mr. Curry returned to the field in 1998 as a driver for patients with mental health and retardation issues. One year later, Mr. Curry was laid off from this position because his criminal record indicated that he had been convicted of larceny in 1973 for stealing \$30.00. Mr. Curry now works for RHD assisting homeless persons in shelters. See Memo., Exh. B, Declaration of Reginald Curry.

Kelly Williams averred in her declaration that she spent several years working as a nursing assistant in a correctional facility and later obtained a degree in phlebotomy and worked for a physician group. In 1999, she took a position as a phlebotomist for a hospital, which required her to travel to nursing homes to draw patients' blood. Six months later, Ms. Williams was laid off from that position due to a 1976 conviction for armed robbery. Ms. Williams is now working for a large medical group. See Memo., Exh. D, Declaration of Kelly Williams.

Marie Martin averred in her declaration that she began working in the health care field in 1991, first as a private duty nurse and then as a nursing assistant in a rehabilitation and nursing center. In 1997, she started working as a residential staff member at a home for mentally disabled adults. She was later laid off from this position because she had been convicted of several drug felonies in 1988. She now works for a nursing center in

New Jersey. *See* Memo., Exh. F, Declaration of Marie Martin.

Theodore Sharp averred in his declaration that he has worked as a case manager in a facility for mentally ill patients since 1992. Although he was convicted of possession of drugs in California in 1975, Mr. Sharp has not lost his job because he held it for more than a year before the criminal records chapter was enacted. The criminal records chapter nevertheless prohibits Mr. Sharp from ever working at another covered facility. *See* Memo., Exh. H, Declaration of Theodore Sharp.

FN10. The Employees and RHD also filed declarations from some of their former or present supervisors, a professor of public health at Columbia University, the president of a drug and alcohol service organization, and the director of a mental health association. The supervisors who submitted declarations averred that certain of the Employees had worked for them, that they were satisfied with the Employees' work, and that they would rehire the Employees if they could. *See* Memo., Exh. C, Declaration of Cheryl Murray (regarding Reginald Curry), Exh. E, Declaration of Dr. Paul Belser (regarding Kelly Williams), Exh. G, Declaration of Barbara Kling (regarding Marie Martin), and Exh. I, Declaration of Sharon Brown (regarding Theodore Sharp). The professor of public health averred that based on his studies, he did not believe that the Employees were likely to commit additional crimes. *See* Memo., Exh. K, Declaration of Jeffrey Fagan, Ph.D. The president of the drug and alcohol service organization attested that she believes that people who have recovered from addiction can be capable and trustworthy employees. *See* Memo., Exh. L, Declaration of Deb Beck. The director of the mental health association averred that he has hired persons with criminal records and has found them to be effective employees and good role models for the association's clients who are fighting addiction. *See* Memo., Exh. M, Declaration of Joseph Rogers.

On August 31, 2000, Judge Dan Pellegrini of the Commonwealth Court held a hearing on the petition for a preliminary injunction. During the hearing, the Commonwealth Parties stipulated to the factual averments in the petition for review and petition for a preliminary injunction, including the relevant background of each Employee and RHD. *See* N.T., 8/31/2000, at 3, 6. They also agreed that the only issue in dispute was the constitutionality of the criminal records chapter. *See id.* After hearing arguments, Judge Pellegrini denied the request for a preliminary injunction, finding that because the criminal records chapter had been in place for three years prior to the hearing, the Employees and RHD were not at risk of suffering immediate harm if an injunction was not granted. *Id.* at 6-7. Nevertheless, Judge Pellegrini *396 directed the Commonwealth Parties to file their preliminary objections to the petition for review and advised the parties that the Commonwealth Court would schedule an expedited argument on the preliminary objections. *Id.* at 21.

As directed, the Commonwealth Parties subsequently filed preliminary objections, essentially claiming that the Employees and RHD had failed to state a claim for which relief could be granted. The Employees and RHD then filed a motion for summary relief pursuant to

Pennsylvania Rule of Appellate Procedure 1532(a), asserting that their right to relief was clear. After hearing argument, a divided *en banc* Commonwealth Court entered an opinion and order, overruling the Commonwealth Parties' preliminary objections, granting the Employees and RHD's motion for summary relief, and declaring the criminal records chapter unconstitutional as applied to the Employees.^{FN11} See *Nixon v. Commonwealth*, 789 A.2d 376, 382 (Pa.Comm.2001).

FN11. While the Commonwealth Court majority stated that the chapter was unconstitutional as applied to the "Petitioners," without distinguishing between the Employees and RHD, it appears that it only meant to declare the chapter unconstitutional as applied to the Employees. First, as noted previously, the Employees and RHD only sought a declaration that the chapter was unconstitutional as applied to the Employees. See *supra* p. 282. Moreover, in finding the chapter unconstitutional, the majority focused its analysis almost exclusively on the chapter's application to the Employees. See *Nixon*, 789 A.2d at 382.

In assessing the constitutionality of the chapter, the majority observed that the right to engage in a common occupation is protected by Article I, section 1 of the Pennsylvania Constitution and as such, may only be restricted by legislative action that is reasonably related to a legitimate state purpose. See *id.* at 380. The majority then questioned whether the General Assembly's use of the criminal **285 records chapter advanced any legitimate state purpose, citing to this Court's decision in *Secretary of Revenue v. John's Vending Corp.*, 453 Pa. 488, 309 A.2d 358 (1973), for the proposition that "remote convictions [are] irrelevant to predicting future behavior."^{FN12} *397 *Nixon*, 789 A.2d at 381. The majority further opined that the criminal records chapter, in effect, continually punishes convicted criminals, which is in tension with our societal intention to send criminals to prison to be rehabilitated.^{FN13} *Id.* at 382. Given these considerations, and emphasizing that the Commonwealth Parties had conceded during the preliminary injunction hearing that the Employees "would make excellent *398 care workers for older Pennsylvanians," see N.T., 8/ 31/00, at 15, the majority concluded that the criminal records chapter violated the Employees' constitutional right to engage in an occupation because "no rational relationship exists between the classification imposed on the [Employees] and a legitimate governmental purpose." *Nixon*, 789 A.2d at 382.

FN12. In *John's Vending Corp.*, this Court considered whether the Secretary of Revenue properly revoked John's Vending's wholesale cigarette license pursuant to a statute that provided that a license could not be issued to a corporation if a 50% shareholder had been convicted of a crime involving moral turpitude. John's Vending's license had been revoked because a 50% shareholder had been convicted of possessing and selling alcohol as well as possessing and selling opium derivatives between fifteen and twenty years earlier. In considering whether the revocation was proper, this Court initially noted that it was reasonable for the General Assembly to include a provision in the statute concerning the character of the persons being licensed to sell cigarettes. 309 A.2d at 361. We then found, however, that the General Assembly could not have intended the statute to apply

to John's Vending as there was "no material relevance between the past derelictions of [the 50% shareholder] and his present ability to perform the duties required by the position." *Id.* We pointed out that because nearly twenty years had expired since the shareholder's convictions and he had held a license for twelve years without incident, it was "ludicrous to contend that these prior acts provide[d] any basis to evaluate his present character." *Id.* at 362. Accordingly, we found that where "prior convictions do not in anyway reflect upon the [applicant's] present ability to properly discharge the responsibilities required by the position, ... the convictions cannot provide a basis for the revocation of the wholesaler's license." *Id.*

As the Commonwealth Court majority recognized, the interest sought to be protected under the statute, *i.e.*, ensuring the integrity of those selling cigarettes, is incomparable to the interest sought to be protected under the instant statute. *See Nixon*, 789 A.2d at 381; *see also id.* at 383 (noting that interest sought to be protected by OAPSA is "vastly superior" to that sought to be protected in *John's Vending*) (Flaherty, J. dissenting). Moreover, *John's Vending* is distinguishable from the instant case because it involved an issue of statutory construction, rather than a constitutional challenge.

FN13. In opining as such, the majority relied on its recent decision in *Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Commw. 2000), *aff'd per curiam*, 566 Pa. 616, 783 A.2d 763 (2001), in which it declared unconstitutional a section of the Voter Registration Act that barred felons from registering to vote for five years after their release from prison. However, in *Mixon*, the court declared the section unconstitutional predominantly due to the fact that, for no rational reason, it permitted criminals who were registered before their incarceration to vote, but denied the same right to criminals who had not registered to vote prior to their incarceration. *See* 759 A.2d at 451. As such, the court relied only secondarily on the penalizing effect of the section. *See id.*

Judge Flaherty, joined by Judge McGinley, dissented. According to Judge Flaherty, the criminal records chapter's prohibition on "the employment of individuals who have in the past displayed the inability to make sound judgments, is a reasonable means of achieving the state purpose of protecting the aged and disabled." *Id.* **286 at 385. Judge Flaherty further found that although the restrictions imposed by the criminal records chapter "may be inequitable as applied to [the Employees]," the General Assembly had decided not to take any risks by creating exceptions for persons such as the Employees, and the court was "not permitted to legislate judicial exceptions." *Id.*

The Commonwealth Parties appealed to this Court as of right pursuant to 42 Pa.C.S. § 723.^{FN14} They now argue that the Commonwealth Court erred in finding the criminal records chapter unconstitutional because the chapter's employment restrictions are rationally related to the General Assembly's legitimate interest in protecting the Commonwealth's vulnerable citizens, and in particular, the elderly. We disagree.

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FN14. This provision directs that this Court has “exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court.” 42 Pa.C.S. § 723.

[1][2] Initially, we reiterate the well-established rule that a law is presumed to be constitutional and may only be found to be unconstitutional if the party challenging the law can prove that it “clearly, palpably, and plainly” violates the Constitution. See Consumer Party of Pa. v. Commonwealth, 510 Pa. 158, 507 A.2d 323, 331-32 (1986) (citing Pennsylvania Liquor Control Bd. v. The Spa Athletic Club, 506 Pa. 364, 485 A.2d 732, 735 (1984)); see also 1 Pa.C.S. § 1922(3). Furthermore, in determining the constitutionality of a law, this Court may *399 not question the propriety of the public policies adopted by the General Assembly for the law, but rather is limited to examining the connection between those policies and the law. See Finucane v. Pennsylvania Milk Marketing Bd., 136 Pa.Cmwlth. 272, 582 A.2d 1152, 1154 (1990); see also Parker v. Children's Hosp. of Phila., 483 Pa. 106, 394 A.2d 932, 937 (1978) (“the power of judicial review must not be used as a means by which the courts might substitute [their] judgment as to the public policy for that of the legislature”).

[3]Article I, section 1 of the Pennsylvania Constitution provides: “All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. This section, like the due process clause in the Fourteenth Amendment of the United States Constitution, guarantees persons in this Commonwealth certain inalienable rights. See Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634, 636-37 (1954); see also Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). While the General Assembly may, under its police power, limit those rights by enacting laws to protect the public health, safety, and welfare, any such laws are subject to judicial review and a constitutional analysis. Gambone, 101 A.2d at 636; Krenzelak v. Krenzelak, 503 Pa. 373, 469 A.2d 987, 993 (1983).

[4][5] The constitutional analysis applied to the laws that impede upon these inalienable rights is a means-end review, legally referred to as a substantive due process analysis. See Adler v. Montefiore Hosp. Ass'n of Western Pennsylvania, 453 Pa. 60, 311 A.2d 634, 640-41 (1973); see also Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 500-05, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). Under that analysis, courts must weigh the rights infringed upon by the law against the interest sought to be achieved by it, and also scrutinize**287 the relationship between the law (the means) and that interest (the end). See Adler, 311 A.2d at 640-41; *400 In re Martorano, 464 Pa. 66, 346 A.2d 22, 26 (1975); see also Moore, 431 U.S. at 500-05, 97 S.Ct. 1932; Lawrence v. Texas, 539 U.S. 558, ----, 123 S.Ct. 2472, 2477, 156 L.Ed.2d 508 (2003); Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of the government.”). Where laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply a strict scrutiny test. See Stenger v. Lehigh Valley Hosp. Center, 530 Pa. 426, 609 A.2d 796, 799-802 (1992) (acknowledging right to

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privacy as fundamental right protected under Pennsylvania Constitution); *see also* Roe v. Wade, 410 U.S. 113, 163, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (women's right to terminate pregnancy is a fundamental interest protected under right of privacy); Griswold v. Connecticut, 381 U.S. 479, 485-86, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (recognizing right to marital privacy in the home as fundamental); Lawrence, 539 U.S. at ----, 123 S.Ct. at 2474 (reaffirming fundamental privacy rights). Under that test, a law may only be deemed constitutional if it is narrowly tailored to a compelling state interest. *See*, Stenger, 609 A.2d at 802; *see also* Roe, 410 U.S. at 163, 93 S.Ct. 705; Griswold, 381 U.S. at 485-86, 85 S.Ct. 1678.

[6][7] Alternatively, where laws restrict the other rights protected under Article 1, section 1, which are undeniably important, but not fundamental, Pennsylvania courts apply a rational basis test. *See* Adler, 311 A.2d at 640-41; Pa. State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487, 490-91 (1971); Pennsylvania Medical Society v. Foster, 147 Pa.Cmwlth. 528, 608 A.2d 633, 637-38 (1992); *see also* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (recognizing that most interests are not absolute and are subject to rational basis test). According to that test, which was defined by this Court almost a century ago, a law "must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the *401 objects sought to be attained." ^{FN15}*288 Gambone, 101 A.2d at 637; *see also* Adler, 311 A.2d at 640; Pastor, 272 A.2d at 490-91; Foster, 608 A.2d at 637.

^{FN15}. The Commonwealth Parties argue that the rational basis test to be applied here should be much more deferential to the General Assembly. According to the Commonwealth Parties, a court must uphold a statute as rational if it can conceive of any plausible reason for the statute. *See* Commonwealth Parties' Brf. at 15 (citing to Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993); FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); Martin v. Unemployment Comp. Bd. of Review, 502 Pa. 282, 466 A.2d 107, 111-12 (1983); U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 178, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980); Middleton v. Robinson, 728 A.2d 368, 374 (Pa.Super.1999)). Furthermore, the Commonwealth Parties maintain that a statutory classification is not unconstitutional merely because it is not made with mathematical nicety or will result in some inequity. *See* Commonwealth Parties' Brf. at 16 (citing to Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); Mathews v. Diaz, 426 U.S. 67, 83-84, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976); Fritsch v. Wohlgemuth, 19 Pa.Cmwlth. 83, 338 A.2d 706, 708 (1975); Gondelman v. Commonwealth, 520 Pa. 451, 554 A.2d 896, 901 (1989)). However, as is clear from a review of the cases cited by the Commonwealth Parties, those principles concern the rational basis test used in equal protection challenges and in due process challenges brought under the United States Constitution. With regard to substantive due process challenges brought under the Pennsylvania Constitution, the rational basis test is that announced by this Court in Gambone. Although the due process guarantees provided by the Pennsylvania Constitution are substantially coextensive with those provided by the Fourteenth

Amendment, a more restrictive rational basis test is applied under our Constitution. *See Pastor*, 272 A.2d at 490-91 (explaining that Pennsylvania courts have analyzed due process challenges under rational basis test “more closely” than the United States Supreme Court). Needless to say, under the rational basis test applied under our Constitution, deference is still given to the General Assembly in that laws are presumed constitutional and the General Assembly therefore does not need to present evidence to sustain their constitutionality. *See O'Donnell v. Casey*, 45 Pa.Cmwlt. 394, 405 A.2d 1006, 1009-10 (1979).

[8] As the Commonwealth Court below recognized, one of the rights guaranteed under Article I, section 1 is the right to pursue a lawful occupation. *See Adler*, 311 A.2d at 640-41; *Gambone*, 101 A.2d at 636-37. Moreover, we agree with the Commonwealth Court that the criminal records chapter infringes upon Employees' right to continue in their lawful health care occupations. The right to engage in a particular occupation, however, is not a fundamental right. *See e.g., *402 Gambone*, 101 A.2d at 636-37; *Pirillo v. Takiff*, 462 Pa. 511, 341 A.2d 896, 900-01 (1975); *see also Murgia*, 427 U.S. at 312-13, 96 S.Ct. 2562. Therefore, the criminal records chapter is subject to a rational basis test. *See Adler*, 311 A.2d at 640-41 (citing *Gambone*, 101 A.2d at 636-37).

[9] The Commonwealth Parties argue that the criminal records chapter is constitutional under the rational basis test because barring convicted criminals from working in covered facilities is a reasonable means of achieving the Commonwealth's crucial interest in protecting the elderly, disabled, and sick from being victimized. There is no question that protecting the elderly, disabled, and infirm from being victimized is an important interest in this Commonwealth and that the General Assembly may enact laws that restrict who may work with these individuals. Further, barring certain convicted criminals from working with these citizens may be an effective means of protecting such citizens from abuse and exploitation. However, the criminal records chapter does not create an absolute bar on the employment of convicted criminals.^{FN16} Rather, the immediate effect of the chapter was merely to prohibit the employment of convicted criminals who were not then working in a covered facility or who had obtained a new job in a covered facility less than a year before the effective date of the chapter, *i.e.*, July 1, 1998. *See *40335 P.S. § 10225.508* (requiring criminal record checks of all applicants and all employees who worked at a covered facility for less ****289** than a year, but exempting from checks any employees who worked at a covered facility for more than a year). As such, the chapter no doubt permitted innumerable individuals with disqualifying criminal records to continue working with the purportedly protected population solely because they had maintained a job in a covered facility for the year preceding the effective date of the chapter. Moreover, many of these same individuals no doubt continue to work with the elderly, disabled, and infirm today, in spite of the General Assembly's apparent conclusion that convicted criminals pose an unacceptable risk to that population.

^{FN16} Given that the chapter does not create an absolute bar, we need not address in this case the issue of whether such a bar would be constitutionally permissible. However, we

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note that the courts that have addressed the rationality of this type of ban have been divided. *Compare* *Upshaw v. McNamara*, 435 F.2d 1188 (1st Cir.1970) (upholding Massachusetts law prohibiting the appointment of convicted felons to the police force as reasonably related to legitimate State interest); *Hill v. Gill*, 703 F.Supp. 1034 (D. R.I.1989) (upholding regulation making certain convicted felons and misdemeanants ineligible for certification as a school bus driver), *aff'd*, 893 F.2d 1325 (1st Cir.1989); *with* *Smith v. Fussenich*, 440 F.Supp. 1077 (D.Conn.1977) (finding statute barring all convicted felons from employment as security guards and private detectives was not rationally related to State's interest in preventing offenders from working in a business that affects public welfare, morals, and safety); *Butts v. Nichols*, 381 F.Supp. 573 (S.D.Iowa 1974) (finding statute prohibiting convicted felons from working in civil service position did not bear a rational relationship to the statute's goal of protecting the public trust).

While the General Assembly is free to distinguish among ex-criminals, the distinction must satisfy the *Gambone* rational basis test by having a real and substantial relationship to the interest the General Assembly is seeking to achieve. *See* *Mixon*, 759 A.2d at 451 (citing to *Owens v. Barnes*, 711 F.2d 25, 26 (3d Cir.1983), cert. denied, 464 U.S. 963, 104 S.Ct. 400, 78 L.Ed.2d 341 (1983)). Here, it is clear that no such real and substantial relationship exists. If the goal of the criminal records chapter is, as the Commonwealth Parties allege, to protect the Commonwealth's vulnerable citizens from those deemed incapable of safely providing for them, there was simply no basis to distinguish caretakers with convictions who had been fortunate enough to hold a single job since July 1, 1997, *i.e.*, a year before the effective date of the chapter, from those who may have successfully worked in the industry for more than a year but had not held one continuous job in a covered facility since July 1, 1997.^{FN17}

FN17. The criminal records chapter also makes a distinction in barring from employment only those convicted criminals who have been convicted of certain specified crimes, while permitting all other convicted criminals to be employed in covered facilities. *See* 35 P.S. § 10225.503. However, we do not question the rationality of this distinction here.

The only conceivable explanation for the distinction between individuals who had completed a one year tenure in a covered *404 facility and those who had previously had successful tenures in covered facilities, but had not been at one facility since July 1, 1997, is that the General Assembly determined that those persons convicted of the disqualifying crimes who had been working at a covered facility for more than a year presented less of a risk because they had proven that they were not likely to harm the patient population and had established a degree of trust with their patients and management. However, if convicted criminals who had been working at a covered facility for more than a year as of July 1, 1998, were capable of essentially rehabilitating themselves so as to qualify them to continue working in a covered facility, there should be no reason why other convicted criminals were not, and are not, also capable of doing the same. In fact, according to the factual backgrounds provided by the Employees, many of the Employees worked successfully in covered facilities for years. *See supra* n. 9. Similarly, almost

all of them gained the trust of their former supervisors at the covered facilities where they worked, as is apparent by the fact that their supervisors submitted declarations in which they averred that they would rehire the Employees if they could under the OAPSA.^{FN18} See *supra* n. 10. Thus, it would seem that these Employees, like those convicted **290 criminals who had worked at a covered facility for more than a year as of July 1, 1998, have essentially rehabilitated themselves and should be able to continue working in covered facilities.

FN18. We note that declarations were submitted by former supervisors of all of the Employees but Earl Nixon. Nevertheless, we find that Mr. Nixon established that he was capable of being trusted at a covered facility based on his substantial history of working in covered facilities. See *supra* n. 9.

Accordingly, we hold that the criminal records chapter, particularly with regard to its application to the Employees, does not bear a real and substantial relationship to the Commonwealth's interest in protecting the elderly, disabled, and infirm from victimization, and therefore unconstitutionally infringes on the Employees' right to pursue an occupation. See Gambone, 101 A.2d at 637 (striking down law as unconstitutional*405 for arbitrarily interfering with appellec's right to pursue business "under the guise of protecting the public interests"); see also Mixon, 759 A.2d at 451-52 (finding no rational basis to support statute barring criminals who were not registered to vote from registering and voting for five years after their release, but permitting released criminals, who were already currently registered, to vote); Curtis v. Kline, 542 Pa. 249, 666 A.2d 265, 269-70 (1995) (finding no rational basis to support statute requiring separated, divorced, or unmarried parents to provide for their children's post-secondary education, but not requiring the same of intact parents). Thus, we affirm the Commonwealth Court's order declaring the criminal records chapter unconstitutional as applied to the Employees and thereby permit the Employees to seek employment in a covered facility.^{FN19}

FN19. In his concurring opinion, Chief Justice Cappy states that this Court should not rely on the one year exemption created in section 508(1) to find the criminal records chapter unconstitutional as applied, because the Employees and RHD did not specifically argue that this exemption was irrational in their pleadings. However, in conducting a due process analysis to determine if the chapter's restrictions on the Employees' right to employment are indeed rational, as the Commonwealth Parties argue, it is necessary to look at the entire effect of the restrictions and thus, the rationality of the one year exemption was appropriate for consideration. Moreover, as acknowledged by Chief Justice Cappy, the Employees and RHD directly argued during the preliminary injunction hearing that the Act was irrational based on the one year exemption. See N.T., 8/31/2000, at 8. ("Then the Act itself, and this is one of the reasons we think the Act is irrational, is it has a grandfathering clause, so even though the Commonwealth says my clients and others are such a great threat that we can't have them working with the most vulnerable people of society, it's okay for them to work with the most vulnerable people of society if they were still at a job they were at for 365 days of the year before July 1, 1998, i.e., the effective date of the Act."). Thus, that argument was part of the record before this Court.

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Chief Justice CAPPY files a concurring opinion in which Justice NEWMAN joins.
Justice CASTILLE files a concurring opinion.
Justice EAKIN files a dissenting opinion.

***406CONCURRING OPINION**

Chief Justice CAPPY.

I concur in the result reached by the majority. As the equal protection approach taken by the majority was not discussed by the Appellees before our Court or raised in the filings below,^{FN1} I do not **291 believe that we should strike down the subject statute as unconstitutional on this basis.

FN1. Specifically, the grounds on which the majority bases its approach were not raised by Appellees in their original Petition for Review, the Petition for Preliminary Injunction, or the Memorandum of Law submitted therewith. While mention of this argument was orally made in the hearing before Judge Dan Pellegrini regarding the Petition for Preliminary Injunction, Transcript of Proceedings, August 31, 2000, p. 8, it was not thereafter raised in the briefs to our Court. Thus, I do not believe that our Court should strike a statute on a basis that was not urged by the complaining parties. Furthermore, the General Assembly could simply eliminate the distinction that leads the majority to find the statute unconstitutional by applying the prohibition on employment to all employees and not just those who have not held a continuous job in a covered facility since July 1, 1997. As set forth herein, I believe that there is a more fundamental infirmity with the statute that would lead us to conclude that the statute is unconstitutional, and one that was clearly raised by Appellees.

I do believe, however, that the statute is infirm on the basis articulated by Mr. Justice Castille in his concurring opinion—that is, the *lifetime* ban on employment has no rational relationship to the legitimate goal of protecting our older adults from harm. As stated by Appellees, “[I]t is not as if the General Assembly made a reasoned but imperfect attempt to draw a line at some rational point; rather, it chose not to draw *any* line in favor of an outright, permanent, and absolute ban.” Appellees’ Brief at 31. It is this absolute ban that renders the statute constitutionally defective. Thus, I join that portion of Mr. Justice Castille’s concurring opinion that would affirm the Commonwealth Court on this basis.

Justice NEWMAN joins this concurring opinion.

***407CONCURRING OPINION**

Justice CASTILLE.

I agree that the statute is unconstitutional as applied to appellees and I join Mr. Justice Nigro’s learned Majority Opinion in its entirety. I write separately only to briefly note my view that, in addition to the constitutional infirmity in the legislation so well articulated by the Majority, the

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lifetime ban which arises from the broad class of prior convictions covered by the amended Older Adults Protective Services Act (OAPSA), 35 P.S. § 10225.101 et seq., has no rational relationship to the legitimate, desired end of protecting the elderly, disabled and infirm from victimization.

There unquestionably are certain criminal offenses which are of such severity that all reasonable persons might agree that a lifetime ban from this type of employment is both rational and, indeed, required. Some debts to society cannot be entirely repaid. But it is difficult to discern a rational basis for automatically deeming an ancient conviction for theft (see appellee Curry) or for simple possession of a controlled substance (see appellees Nixon and Sharp), for example, as eternally and retroactively prohibiting otherwise qualified care workers from continued employment in these facilities.

In this regard, I would contrast the current version of the statute with the previous version, which imposed a ten-year limitation upon the criminal background check. A ten-year restriction on collateral effects of certain convictions is not unknown in the law. Thus, for example, the Rules of Evidence permit impeachment by evidence of convictions of *crimen falsi* but limit the impeachment to situations where not more than ten years have elapsed "since the date of the conviction or of the release of witness from the confinement imposed for that conviction, whichever is the later date," with an exception permitted if the probative value of the conviction substantially outweighs its prejudicial effect. Pa.R.E. 609(b).

To be deemed rationally related to the undeniably legitimate interest the General Assembly sought to further, the legislation in this area can be, and should be, much more finely *408 tuned. Finer tuning, including **292 perhaps some form of time limitation for certain crimes (or graduated time restrictions tied to the particular type of crime) would seem particularly called for here. In this regard, I note the helpful amicus brief jointly filed by no less than twelve diverse organizations, including senior citizen organizations, organizations advocating the interests of abused women, and labor organizations. Amici note:

OAPSA's lifetime bar on employment based upon a single criminal conviction at any time in an individual's life has prevented fine caregivers like the petitioners from providing services to needy Pennsylvanians, even where those convictions are decades old and have no bearing on the individual's present character or ability to perform such jobs.... OAPSA [also] lacks any mechanism to consider the circumstances surrounding an individual's offense or the individual's post-conviction efforts at rehabilitation.

These deficiencies in OAPSA's criminal record provisions have grave consequences for all affected parties. Rehabilitated workers are prevented from earning a living. Service providers, many of which are already faced with a shortage of qualified applicants for jobs that often pay low wages and involve difficult work, are deprived of the opportunity to employ persons whom they believe to be good caregivers. Vulnerable adults are deprived of the excellent care that could be provided by the appellees in this action and many other ex-offenders like them.

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Brief of Amici Curiae Pennsylvania Alliance for Retired Americans et al., 12. The overly-blunt means chosen to effectuate this well-intentioned legislation may operate to create unnecessary dangers for the very citizens it was designed to protect. I am confident that the General Assembly will revisit this area and find more pointed means to achieve its worthy objective.

DISSENTING OPINION

Justice EAKIN.

The majority concludes the General Assembly's preclusion of employment of certain enumerated convicts in designated *409 elder care facilities has "no real and substantial relationship" to the provisions of the criminal records chapter of the Older Adults Protective Services Act (OAPSA), and therefore finds this legislation unconstitutional. I find such provisions precisely effectuate the stated and important governmental interest of protecting older adults incapable of safeguarding themselves. I respectfully dissent.

The majority notes the General Assembly's reasoning:

It is declared the policy of the Commonwealth of Pennsylvania that older adults who lack the capacity to protect themselves and are at imminent risk of abuse, neglect, exploitation or abandonment shall have access to and be provided with services necessary to protect their health, safety and welfare....It is the intent of the General Assembly to provide for the detection and reduction, correction or elimination of abuse, neglect, exploitation and abandonment, and to establish a program of protective services for older adults in need of them.

Majority Opinion, at 279-80 (citing 35 P.S. § 10225.102). Following such acknowledgment, the majority then concedes:

There is no question that protecting the elderly, disabled, and infirm from being victimized is an important interest in this Commonwealth and that the General Assembly may enact laws that restrict who may work with these individuals. *Further, barring certain convicted criminals from working with these citizens **293 may, in fact, be an effective means of protecting such citizens from abuse and exploitation.*

Id., at 288 (emphasis added). It is only because there is not a ban on existing employees that the majority finds this legislation fails constitutional muster. However, under "rational basis" review,^{FNI} the legislature is not required to substantiate *410 the entire scheme, nor does it have the "obligation to produce evidence to sustain the rationality of a statutory classification." Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Indeed, "[i]t could be that '[t]he assumptions underlying these rationales [are] erroneous, but the fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [legislative] choice from constitutional challenge.'" *Id.*, at 333, 113 S.Ct. 2637 (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 320, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). Even unexpected, inequitable results do not form the basis of constitutional infirmity. See Gondelman v. Commonwealth, 520

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Pa. 451, 554 A.2d 896, 901 (1989). Further, this Court, in *Gondelman*, adopted the United States Supreme Court's rational basis rationale when dealing with unintended, or potentially unjust, results: "The problems of government are practical ones and may justify, if they do not require, rough accommodations illogical, it may be, and unscientific. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* (quoting *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)) (internal citations omitted).

FN1. Citing *Pa. State Bd. of Pharmacy v. Pastor*, 441 Pa. 186, 272 A.2d 487 (1971), the majority suggests this Court has scrutinized substantive due process claims under our Constitution "more closely" than the United States Supreme Court has under the federal constitution; therefore, federal rational basis case law is no longer valid. Majority Opinion, at 287, n. 15. A complete reading of *Pastor* reveals this Court has at times departed from the federal reasoning only as it relates to "local economic legislation" because "state courts may be in a better position to review local economic legislation than the Supreme Court.... Thus Pennsylvania, like other state 'economic laboratories,' has scrutinized regulatory legislation *perhaps more closely* than would the Supreme Court of the United States." *Pastor*, at 490 (citations omitted) (emphasis added). This case does not pertain to economic restrictions levied against local businesses in need of more state protection than afforded under the federal constitution. Consequently, the federal authority pertaining to rational basis review in this area is still viable.

Here, appellees claim they are being denied employment based upon distant convictions, and such discrimination bears no relation to a valid state concern. Relying on this Court's holding in *Secretary of Revenue v. John's Vending Corp.* 453 Pa. 488, 309 A.2d 358 (1973), appellees argue they have been "rehabilitated," and the remoteness of these dated convictions do not represent their current propensity to re-offend. However, as noted by Judge Flaherty, writing for the Commonwealth Court dissent:

*411 Moreover, unlike *John's Vending* where the Court agreed that 'the legislature did not intend to bring his convictions within the purview of [the] statute', the legislature, by amending [OAPSA] in 1997 and removing the ten year look back period imposed in 1996, has clearly stated its intention that anyone convicted of any of the enumerated crimes at any time in their life, is precluded from working for facilities covered by the Act.

Nixon v. Commonwealth, 789 A.2d 376, 384 (Pa.Cmwlt.2001) (Flaherty, J., joined by McGinley, J., dissenting). Clearly, *John's Vending* is inapplicable here. Further, some drug and deviant convictions, as proscribed by the Act, will assuredly forever**294 block appellees from other endeavors and potential employments. See Pa. Const. art. 2, § 7 (prohibition against public office holder for conviction of "infamous crime"); *Hunter v. Port Authority of Allegheny County*, 277 Pa.Super. 4, 419 A.2d 631, 638 (1980) ("a bar against the employment of convicted felons as police officers would probably be reasonable since 'a person who has committed a felony may be thought to lack the qualities of self-control or honesty that this sensitive job requires.'").

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Just because the General Assembly has not subjected some tenured workers to summary termination does not mean the restrictive hiring mechanism now in place has no relation to fulfilling the General Assembly's objective. In actuality, and as referenced by the majority, this legislation will certainly detect and reduce the number of potentially dangerous staff members working with older Pennsylvanians. Erecting a hiring roadblock to the inflow of proven criminal offenders is not unconstitutional simply because others already beyond the roadblock were not forced out. Eventually, this legislation will eliminate those with convictions for the enumerated offenses from working in any covered institution. Wisdom often comes late, to court and legislature alike, and the failure to enact it when petitioners were hired does not make it less wise. This legislation is a rational means to a rational end.

This legislation is similar to other legislative efforts to begin "cleansing" certain at-risk facilities. *See* 41223 Pa.C.S. § 6344(c)(2) (regarding prospective child-care personnel: "In no case shall an administrator hire an applicant if the applicant's criminal history record information indicates the applicant has been convicted of one or more of the following offenses"); and 24 Pa.C.S. § 1-111 (public or private school employment prohibition for applicants with convictions of enumerated offenses). It has a proper and rational basis supporting the underlying goal of more security for Commonwealth seniors. Accordingly, I would find this legislation constitutional and offer my dissent.

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STATE OF MICHIGAN
DEPARTMENT OF COMMUNITY HEALTH
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

JANET OLSZEWSKI
DIRECTOR

Declaratory Ruling 2005/001

Western Michigan Legal Services, on behalf of Katina Sherrills (Ms. Sherrills), has requested a declaratory ruling from the Michigan Department of Community Health (MDCH) pursuant to MCL 24.263 and Administrative Rule 325.1211, on the interpretation of the Public Health Code's (the Code) prohibition of a health facility's employment of individuals with certain criminal convictions. I granted Ms. Sherrills' request on the following question:

Does Section 20173 of the Code (MCL 333.20173), apply to an individual who is employed by, under independent contract to, or granted clinical privileges in a health facility or agency by the effective date of the amendatory act, but who subsequently seeks to transfer his or her employment either to another employer or to another facility or agency through the same employer?

Ms. Sherrills' lawyer submitted a letter in support of her position on this issue.¹

Ms. Sherrills has worked as a certified nurse's aide since approximately 1995, providing care to elderly patients in various facilities. Up until July 2004, Ms. Sherrills worked for two health agencies: Spectrum Health Worth Home Care, where she had been employed since 2002, and Health Partners, where she had been employed since 1998. Both agencies assigned her, on as-needed basis, to various nursing homes, group homes, brain injury units, rehabilitation units and private care patients. Since 1999, Ms. Sherrills' employers had assigned her to work at the Spectrum Continuing Care Center, a nursing care facility.

In approximately 1994, Ms. Sherrills was convicted of welfare fraud, a felony.

In 2002, the legislature amended Part 201 of article 17 of the Code to require background checks on new employees of nursing homes, county medical care facilities and homes for the

¹ The Women's Resource Center of Grand Rapids also provided a brief letter concerning this issue.

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aged. (HB 4057, 2002 PA 303, MCL 333.20173(4) and (5)). Additionally, the legislature prohibited health facilities, after May 10, 2002, from employing individuals with certain criminal convictions. Section 20173(1) of the Code states, in pertinent part:

Except as otherwise provided in subsection (2), a health facility or agency that is a nursing home, county medical care facility, or home for the aged shall not employ, independently contract with, or grant clinical privileges to an individual who regularly provides direct services to patients or residents in a health facility or agency after the effective date of the amendatory act that added this section if the individual has been convicted of one or more of the following:

- (a) A felony or an attempt or conspiracy to commit a felony within the 15 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract.

* * *

(2) . . . This subsection and subsection (1) do not apply to an individual who is employed by, under independent contract to, or granted clinical privileges in a health facility or agency before the effective date of the amendatory act that added this section.

MCL 333.20173(1) and (2). The effective date of this amendment was May 10, 2002.

Due to Spectrum Continuing Care Center's apparent inability to provide Ms. Sherrills with sufficient hours of work, Ms. Sherrills requested a transfer to one of the other Spectrum Health Facilities where there was a shortage of nurse's aides. Spectrum Health has refused to allow Ms. Sherrills to transfer to one of the open positions because it maintains that she is disqualified for a transfer under the criminal record provisions of Section 20173.

It is my role to implement Part 201 in accordance with the legislative intent, as expressed by the plain language of the statute. If the language is ambiguous, then Part 201 must "be liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111. However, statutes should be construed to prevent absurd results,

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injustice, or prejudice to the public interest. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

According to the House Legislative Analysis Section's summary of this legislation, the legislature passed section 20173 in an effort to increase protection for the elderly and disabled by requiring criminal history checks on "new" employees in nursing homes, county medical care facilities, and homes for the aged, thus enabling facilities to screen out potential employees with a history of abuse and/or other criminal conduct. House Legislative Analysis, HB 4057, September 6, 2002.

By exempting those individuals who were "employed by, under independent contract to, or granted clinical privileges in a health facility or agency before the effective date" from the requirements of Sections 20173(1) and (2), the legislature drew a clear distinction between individuals employed after the effective date, who are ineligible to work if they have a felony or specified misdemeanor, and individuals employed prior to the effective date, who are effectively "grandfathered in" even if they have a criminal conviction.

In interpreting and enforcing the statute, I must assume that the legislature intended the meaning it has plainly expressed. The statute must be enforced as written. *In re Certified Questions*, 416 Mich 558, 567; 331 NW2d 456 (1982). Acts must be considered in their entirety, and no statutory provision may be treated as superfluous or without meaning. *Danto v Michigan Bd of Medicine*, 168 Mich App 438, 442; 425 NW2d 171 (1988). "We must suppose every word employed in a statute has some force and meaning, and was made use of for some purpose." *Potter v Safford*, 50 Mich 46, 48; 14 NW 694 (1883).

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A plain reading of the statute demonstrates that individuals in Ms. Sherrills' situation should not be denied the right to work in their profession simply because the facility where they are currently employed can no longer provide them with sufficient hours or because they happen to move from one contracting agency to another. Section 20173(2) states: "This subsection and subsection (1) do not apply to an individual who is employed by, under independent contract to, or granted clinical privileges in a health facility or agency before the effective date of the amendatory act that added this section." MCL 333.20173(2) (emphasis added). In this case, Ms. Sherrills was employed as a nurse's aide by a health facility or agency before May 10, 2002, when the act became effective.

Section 20173 is not employer-specific. Rather, the legislature, by specifically exempting individuals already employed in the health care industry, sought to protect those individuals who have already pursued a career in that industry. The legislature's distinction reflects an awareness that there are many skilled and dedicated health care workers who were employed in the health care industry prior to the effective date of this act, but who have criminal records.

While the legislature certainly intended to enhance the Code's protections afforded to the elderly and disabled, it would be incongruous to deprive ex-offenders of their livelihood simply because either by choice, or circumstances, they seek employment with a health facility or agency other than the one they were employed by prior to May 10, 2002. Indeed, the purpose of a statutory "grandfather clause," such as subsection (2), is to provide an exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction.

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The statute's requirement of background checks is similarly "grandfathered" in that such checks are necessary only for new employees. The House Legislative Analysis Section's analysis of that aspect of HB 4057 is instructive.² The legislature considered requiring criminal background checks of all employees, current and new hires. Similar bills in previous legislative sessions would have required such checks. However, the cost of conducting background checks on all employees was "considered to be prohibitive considering the large number of people currently working in nursing homes, county medical care facilities and homes for the aged." House Legislative Analysis HB 4057, September 6, 2002. Thus, the legislature limited mandating background checks to new employees only, *i.e.*, employees employed after the effective date of the amendment, May 10, 2002. Since the legislature intended to apply the requirement of background checks only to those employees hired after the bill's effective date, it is axiomatic that it intended to similarly apply the restriction against hiring employees with certain criminal convictions only to those hired after the bill's effective date. In accord with fundamental principles of statutory application in relation to basic precepts of due process, the legislature chose to regulate the future, not the past.

Further, as a matter of public policy, it would be counterproductive to interpret the statute so that an individual with a criminal record who is already employed in the health care industry would lose the right to work in the field simply because of a job transfer or temporary break in employment. For example, a nurse who left a job in Grand Rapids for one in Detroit in order to marry or be closer to ailing parents, or even due to illness, would no longer be able to work in the

² The analysis is silent insofar as arguments, pro and con, concerning the prohibition on hiring employees with criminal convictions.

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industry. Similarly, a nurse who was subjected to racial or sexual discrimination by his/her current employer, might be reluctant to seek other employment, since changing jobs would mean giving up his/her profession entirely. Conversely, a practitioner who is highly regarded because of his/her superior skills could not accept an offered promotion at another facility, as the promotion would cost him/her the right to work in the very field in which he/she had excelled. The public interest would be ill served by depriving the health care industry and elderly nursing home residents of otherwise well qualified and experienced care providers.

Significantly, my interpretation of this statute does not prevent employers from considering an individual's criminal record when making hiring or transfer decisions. An employer covered under Section 20173 may still decide that an individual's criminal record is such that a hire or transfer is inappropriate. The statute already protects nursing home residents against the possibility that their caretakers will engage in criminal behavior in the future, since it requires employees to report immediately upon arrest or conviction of one of the specified offenses. MCL 333.20173(11). This further underscores the forward-looking nature of the amendment.

Consequently, it is my ruling that subsections (1) and (2) of Section 20173 of the Public Health Code do not apply to an individual who is employed by, under independent contract to, or granted clinical privileges in a health facility or agency before the effective date of the amendatory act, but who subsequently seeks to transfer his or her employment either to another employer or to another facility or agency through the same employer.

January 21, 2005
Date

Janet Olszewski
Janet Olszewski, Director