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## H.B. 190: Policing School Districts, but at What Expense?

Andrew Schoenling  
*University of Dayton*

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### Cover Page Footnote

The author would like to thank his family and friends for all of their continued support throughout the course of his legal education. He would also like to thank the attorneys and staff of The Ohio Justice and Policy Center for introducing him to this troubling legal dilemma.

# H.B. 190: POLICING SCHOOL DISTRICTS, BUT AT WHAT EXPENSE?

*Andrew Schoenling\**

I. INTRODUCTION .....	249
II. BACKGROUND .....	251
A. <i>Substitute House Bill 190: The Beginning of the Change</i> .....	251
B. <i>H.B. 190's Effects: Amending Ohio Revised Code Section 3319.39 and Enacting Section 3319.391</i> .....	254
C. <i>Ohio Administrative Code Section 3301-20-01: The Rehabilitation Standards</i> .....	256
D. <i>House Bill 428: Some Steps in the Right Direction</i> .....	259
E. <i>Revisiting the Regulations: Ohio Administrative Code Section 3301-20-03</i> .....	261
F. <i>Pending Class Action Suits: Seeing the Effects of H.B 190 and H.B. 428</i> .....	262
II. ARGUMENT .....	264
A. <i>Inherent Textual Ambiguities</i> .....	264
B. <i>State and Federal Constitutional Issues</i> .....	265
1. <i>Violation of the Contracts Clause</i> .....	265
2. <i>Violation Against State Retroactivity Prohibition</i> .....	267
3. <i>Violation of Ex Post Facto Restriction</i> .....	268
4. <i>Violation of Equal Protection</i> .....	269
5. <i>Violation of Due Process</i> .....	270
6. <i>Doe v. Ronan: Testing the Constitutional Limits</i> .....	271
C. <i>Solutions: Looking at Other States' Systems</i> .....	273
III. CONCLUSION .....	276

## I. INTRODUCTION

In our society of complex legislative systems and statutory modification, many times legislators lose sight of the effect that they can have on an individual's life. As a result, it can be beneficial when looking at proposed legislation to put yourself in the shoes of those whose lives it will impact. Imagine this: You are forty years old. For the past twenty years you have been happily employed by an Ohio public school district. During this time you have received nothing but praise and admiration from your employer as a result of your exemplary work performance. Then one day,

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\* Andrew Schoenling is a 2011 graduate of The University of Dayton School of Law and would like to thank his family and friends for all of their continued support throughout the course of his legal education. He would also like to thank the attorneys and staff of The Ohio Justice and Policy Center for introducing him to this troubling legal dilemma.

you receive a knock at your door. Your supervisor steps in and informs you that, unfortunately, he will have to let you go immediately. You ask why. Your supervisor informs you that as a result of new legislation, he will have to discontinue your employment because twenty-two years ago you pleaded guilty to the sale of marijuana. You are distraught and confused. You informed your supervisor of this charge when he hired you. You satisfied all of the requirements of your punishment promptly. You have been a model citizen and employee for over two decades, as well as the primary breadwinner for your family. You ask, “what am I going to do now; why has this happened with little to no warning?” All your employer can say is, “that’s just the way it is.” As shocking and troubling as this scenario is, this is exactly what is happening to many public school district employees across Ohio.

Through the passage of Ohio House Bill 190, and the newly enacted Revised Code section 3319.391, the state legislators have taken it upon themselves to bend their constitutional privileges past the breaking point at the expense of their constituency. In our society, many of us go through rough patches in our lives. Unfortunately, it is during these times that some people feel as if they have no other options, and in their darkest moments they break the law. However, many of them may have had the opportunity to turn their lives around and become a vital member of not only their larger communities but also of their close-knit community, consisting of their friends and family. Sadly, House Bill 190, enacted through Revised Code section 3319.391, has taken this opportunity away from many individuals by depriving them of their employment. Worse, their employment has been terminated due to a past conviction without taking into account the time that has passed or the lives that the employees have led since that moment of weakness. Something must be done about this, now.

This Comment will begin in Section II with an examination of the background of the new additions to the Revised Code by tracking the development of the Bill into law. Specifically, it will look at how a bill that began as a restructuring of the school calendar turned into one severely restricting the hiring practices of public schools throughout Ohio. In doing this, Section II will begin with an examination of Substitute House Bill 190 and how it amended old sections of the Code while at the same time enacting new ones. Next, it will discuss the ineffective rehabilitation standards that are currently in place. Then, it will proceed to examine the Ohio Legislature’s first attempt at modification in the form of Substitute House Bill 428. Finally, it will bring to light some of the effects of this legislation by noting some of the pending class action suits currently being filed in response.

Section III will examine and evaluate the relevant arguments in

opposition to the new legislation. In particular, Section III will examine the legislative arguments that also arise in connection with the modification to the Revised Code and its inherent flaws. Also, Section III will discuss the constitutionality of the new legislation by raising several arguments against its continued existence in its current state. In connection with that discussion, Section III will discuss a recent Ohio Supreme Court case and its decision as to the constitutional validity of the new legislation. Finally, Section III will propose possible solutions to the problems raised by the new legislation by looking at how other states handle background checks in a school setting. Section IV will conclude the Comment by looking at the probable outcomes if nothing is done, and recommend alternative strategies to restructure the laws in order to conform to the overall public policies and purposes given by the legislature for the adoption of these bills.

## II. BACKGROUND

In examining the newly enacted Ohio Revised Code section 3319.391, it is useful to start at the beginning and trace the steps that were taken in its development from two bills into current law. First, this section will examine Substitute House Bill 190, which created and enacted section 3319.391, specifically looking at the development of this Bill as it passed through both houses and the fiscal impact that will likely result. Second, this section will look at Substitute House Bill 428, which demonstrated the legislature's first realization that modification of section 3319.391 may be needed, and the steps that were taken.

### *A. Substitute House Bill 190: The Beginning of the Change*

Substitute House Bill 190 began its life when it was introduced in the Ohio House of Representatives on April 26, 2007.<sup>1</sup> As introduced, the Bill did not deal with background checks or any other employee restrictions in even the slightest detail.<sup>2</sup> In fact, the only topic that was given any detail was elementary state achievement tests.<sup>3</sup> Specifically, as introduced, the Bill only sought to revise the scheduling of these tests, as well as the procedure for submitting the results of these tests to the applicable state scoring companies.<sup>4</sup>

House Bill 190 stayed in this same form and substance for much of its early development. In fact, little to no changes were made from the time it was introduced until it was passed by the House on June 26, 2007.<sup>5</sup> The

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<sup>1</sup> OHIO LEGIS. SERV. COMM'N, H.B. 190: AS REPORTED BY H. EDUCATION, H.127, Reg. Sess., at 3 (2007).

<sup>2</sup> See OHIO LEGIS. SERV. COMM'N, H.B. 190: AS INTRODUCED, H.127, Reg. Sess., at 1 (2007).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> OHIO LEGIS. SERV. COMM'N, H.B. 190: AS PASSED BY THE HOUSE, H.127, Reg. Sess., at 4 (2007).

only noticeable changes made were that more detail was provided on the achievement tests and the lists of sponsors in support of the Bill grew.<sup>6</sup> Thus, it is clear that as this Bill progressed through the House the last thing on any of the representatives' minds was revisiting and expanding upon the current background check requirements that were already in place. However, this would soon change as the Bill began to make its way through the State Senate.

As the Bill made its way through the Senate, it was primarily examined and amended by the collective of the Senate Education Committee.<sup>7</sup> The Committee examined the Bill for some time, not reporting it until October 31, 2007.<sup>8</sup> During this time, it is clear that substantial amending occurred, altering the once achievement-test-based Bill to resemble the employment-restricting Bill that eventually became law. Presumably, it was in the Senate Education Committee that the topic of school district background checks was first brought to light.

As reported by the Senate Education Committee, the most important change was that the Bill “[r]equire[d] school districts, educational service centers, community schools, STEM schools, and chartered nonpublic schools to request criminal records checks for *all* job applicants and employees, *not merely those whose duties entail the care of children.*”<sup>9</sup> The new amendments also “[r]equire[d] private contractors hired by those employers to request criminal records checks for job applicants and employees who will work in schools.”<sup>10</sup> In addition, the amendments required that these checks re-occur subsequently in five-year increments, unless the employee is currently subjected to other subsequent records checks occurring after the date of employment.<sup>11</sup> Finally, the amendments required both the initial and subsequent checks to involve checks of both FBI and state records.<sup>12</sup> It is also interesting to note that the Senate Committee declared an emergency without giving further detail to what the “emergency” dealt with.<sup>13</sup> This “emergency” would later lead to, and aid in, the swift enactment of the final Bill and its effective date.

Though these changes seem minor, they are actually quite expansive. Prior to these amendments, the old law would only require records checks in two instances. First, the State Board of Education was

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<sup>6</sup> *Id.* at 1.

<sup>7</sup> OHIO LEGIS. SERV. COMM’N, H.B. 190: AS REPORTED BY SENATE EDUC. COMM., S.127, Reg. Sess., at 15 (2007).

<sup>8</sup> OHIO LEGIS. SERV. COMM’N, H.B. 190: AS PASSED BY THE GEN. ASSEMBLY, Reg. Sess., at 12 (2007).

<sup>9</sup> OHIO LEGIS. SERV. COMM’N, H.B. 190: AS REPORTED BY SENATE EDUC. COMM., Reg. Sess., at 2 (emphasis added).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3.

previously required to do a criminal records check of “each person applying for or renewing an educator license or permit, an educational aide permit, or a pupil-activity program permit (for extracurricular coaches).”<sup>14</sup> Second, “[i]ndividuals *applying for employment* . . . [had to] submit to a criminal records check if applying for a position *that is responsible for the care, custody, or control of children*.”<sup>15</sup> Under the prior law, the records checks were mainly concerned with those individuals whose job duties entailed physical interaction and control of the children. Furthermore, the prior law did not seem as concerned with those individuals who were already employed, and this avoided any ex post facto or retroactive constitutional issues. Also, under the prior law, accompanying FBI checks were not mandatory, as seen in the “may” versus “must” language.<sup>16</sup>

Interestingly, the next stage saw the Bill reported by the Senate Education Committee and unanimously passed by the Senate as a whole on the same day. The aforementioned amendments were all included, modifying the requirements for records checks.<sup>17</sup> Finally, the following language was added to make things clear:

[T]he act explicitly prohibits an employer from hiring *or continuing to employ* any person whose criminal records check reveals a conviction of or plea of guilty to any crime that disqualifies an individual for employment with a public or chartered nonpublic school, unless the person meets the State Board’s rehabilitation standards.<sup>18</sup>

Also, due to the Senate-declaring it an emergency, the Bill became effective November 17, 2007.<sup>19</sup> This was after the House concurred in the Senate amendments by a ninety-six to one vote on November 7, 2007.<sup>20</sup>

These new legislative decisions not only caused major changes to the law, but also had a potential financial impact as well. From the time Substitute House Bill 190 was introduced until it passed the House, the Bill involved no direct fiscal impact on either the state or the local school districts.<sup>21</sup> However, this was no longer the case after the Bill made its way through the Senate Education Committee’s amendments. After revision to the prior records check requirements, “[t]he Attorney General’s Bureau of Criminal Identification and Investigation (BCII) [will] likely experience an annual revenue gain for performing additional records checks of school

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<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 8 (emphasis added).

<sup>16</sup> *Id.* at 9.

<sup>17</sup> *Id.* at 8-10.

<sup>18</sup> *Id.* at 10 (emphasis added).

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.* at 15.

<sup>21</sup> OHIO LEGIS. SERV. COMM’N, H.B. 190: FISCAL NOTE AND LOCAL IMPACT STATEMENT, AS REPORTED BY HOUSE EDUC. COMM., H.127, Reg. Sess., at 1 (2007).

employees.”<sup>22</sup> This is due to the fact that, effective January 1, 2008, BCII increased its fee for state criminal records checks from \$15 to \$22.<sup>23</sup> Likely, this was in anticipation of the increased inflow of these requests that they would be receiving. On top of that, individuals would also have to pay an additional \$24 for the FBI records check.<sup>24</sup> Therefore, as a result of Substitute House Bill 190, the state is ultimately getting increased cash inflow, while its citizens and institutions are forced to expel additional money. However, the legislature attempts to justify this fact by stating that “[a]ny gain in revenue [to] the BCII would *likely* be offset by an increase in expenditures related to performing these criminal records checks.”<sup>25</sup>

*B. H.B. 190’s Effects: Amending Ohio Revised Code Section 3319.39 and Enacting Section 3319.391*

Substitute House Bill 190 had its first major effect on Ohio law by amending Ohio Revised Code section 3319.39. The Bill’s major impact came in the form of expanding the class of individuals required to undergo a records check. As noted before, the Bill deleted the language from section 3319.39 requiring the individual to be “a person responsible for the care, custody, or control of a child” before a records check is mandated.<sup>26</sup> Now, the statute reads, “the appointing or hiring officer of the board of education of a school district . . . shall request the superintendent of the [BCII] to conduct a criminal records check with respect to any applicant who has applied . . . for employment *in any position*.”<sup>27</sup> The Bill also added, “[t]he appointing or hiring officer shall request that the superintendent include information from the federal bureau of investigation in the criminal records check.”<sup>28</sup> This new provision clearly reviewed and deleted the former discretionary language of section 3319.39, dealing with FBI checks.<sup>29</sup>

The largest effect of H.B. 190 came in the form of the newly enacted Ohio Revised Code section 3319.391.<sup>30</sup> The legislature clearly intended this new section to reach those non-licensed individuals that previously did not have to endure the records check requirement. This is evident from the opening language that “[t]his section applies to *any person* hired by a school district . . . in any position that does not require a ‘license.’”<sup>31</sup> The statute then went on to say, as to individuals hired on or

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<sup>22</sup> OHIO LEGIS. SERV. COMM’N, H.B. 190: FISCAL NOTE AND LOCAL IMPACT STATEMENT, AS ENACTED, H. 127, Reg. Sess., at 1 (2007).

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1 (emphasis added).

<sup>26</sup> H.B. 190, 127th Gen. Assemb., Reg. Sess. (Ohio 2007).

<sup>27</sup> OHIO REV. CODE ANN. § 3319.39(A)(1) (West 2005 & Supp. 2010) (emphasis added).

<sup>28</sup> *Id.*

<sup>29</sup> H.B. 190.

<sup>30</sup> *Id.*

<sup>31</sup> OHIO REV. CODE ANN. § 3319.391 (West 2005 & Supp. 2010) (emphasis added).



after its effective date, “the employer shall request a criminal records check in accordance with section 3319.39 of the Revised Code and . . . every fifth year thereafter.”<sup>32</sup> Furthermore, for those applicable individuals hired before the effective date, “the employer shall request a criminal records check by a date prescribed by the department of education and every fifth year thereafter.”<sup>33</sup> Under the new division (A)(2), section 3319.391 also applies to “any person hired to work in a school district . . . who is employed by a private company under contract with the district.”<sup>34</sup> These contractor employees had to undergo the same records checks as new employees, i.e. prior to hiring and every five years subsequent.<sup>35</sup>

The most important subsection to come out of the newly created section 3319.391 would have to be subsection (C), which makes the following provision:

Any person who is the subject of a criminal records check under this section and has been convicted of or pleaded guilty to any offense described in division (B)(1) of section 3319.39 of the Revised Code shall not be hired or shall be released from employment . . . unless the person meets the rehabilitation standards adopted by the department under division (E) of that section.<sup>36</sup>

The key problem arising from this new subsection is that, now, individuals who have worked for the school for years, even those not charged with “the care, custody, or control of a child,” must undergo a records check, and if they are found to have been convicted of or pleaded guilty to a disqualifying offense, then they must be fired.

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<sup>32</sup> *Id.* at § 3319.391(A) amended by H.B. 428, 127th Gen. Assemb., Reg. Sess. (Ohio 2008).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* § 3319.391(A)(2) amended by H.B. 428, 127th Gen. Assemb., Reg. Sess. (Ohio 2008).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 3319.391(C). The disqualifying offenses under section 3319.39(B)(1) include:  
A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.22, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, or 3716.11 of the Revised Code, a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, a violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date, a violation of section 2925.11 of the Revised Code that is not a minor drug possession offense, or felonious sexual penetration in violation of former section 2907.12 of the Revised Code.

*Id.* § 3319.39(B)(1)(a).

*C. Ohio Administrative Code Section 3301-20-01: The Rehabilitation Standards*

Under the guidance of section 3319.39(E), “[t]he department of education shall adopt rules . . . specifying circumstances under which the board or governing authority may hire a person who has been convicted of an offense . . . but who meets standards in regard to rehabilitation set by the department.”<sup>37</sup> Instead of taking the opportunity to develop new rehabilitation standards, the Department of Education chose to continue to use the already existing standards found in Ohio Administrative Code section 3301-20-01.<sup>38</sup> The purpose behind this section was to “ensure the safety and well-being of students, and . . . establish rehabilitation standards.”<sup>39</sup> Under those standards, a district can employ an individual despite the presence of a disqualifying offense if all of the following conditions are met:

- (1) The conviction was not one of the non-rehabilitative offenses defined in paragraph (A)(10) of this rule.
- (2) If the conviction is not listed in paragraph (A)(10) of this rule the following rehabilitation criteria shall apply:
  - (a) At the time of the offense, the victim . . . was not a person under eighteen years of age or enrolled as a student in a district.
  - (b) If the offense was a felony, at least five years have elapsed since the applicant was fully discharged from imprisonment, probation, or parole or the applicant has had record . . . sealed or expunged . . . . If the offense was a misdemeanor, at least five years have elapsed since the date of conviction or the applicant has had the record . . . sealed or expunged . . . .
  - (c) The applicant has not plead guilty to, been found guilty by a jury or court of or convicted of the commission of [any of the disqualifying offenses] . . . two or more times in separate criminal actions, with the

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<sup>37</sup> *Id.* § 3319.39(E).

<sup>38</sup> OHIO LEGIS. SERV. COMM’N, H.B. 190: AS PASSED BY THE GEN. ASSEMBLY, H. 127, Reg. Sess., at 9 (2007).

<sup>39</sup> OHIO ADMIN. CODE 3301-20-01 (2008 & Supp. 2010).

exception of two or more misdemeanor theft related convictions as defined in sections 2913.02, 2913.03, 2913.04, 2913.11 and 2913.51 of the Revised Code . . . [Convictions/guilty pleas connected to/resulting from the same act] or resulting from offenses committed at the same time, shall be counted as one [conviction/plea] . . . A sealed or expunged conviction shall not be counted for purposes of this paragraph.

(d) The applicant provides written confirmation of his/her efforts at rehabilitation and the results of those efforts . . . .

(e) A reasonable person would conclude that the applicant's hiring or licensure will not jeopardize the health, safety, or welfare of the persons served by the district. Evidence that the applicant's hiring or licensure will not jeopardize the health, safety, or welfare of the persons served by the district shall include, but not be limited to the following factors:

- (i) The nature and seriousness of the crime;
- (ii) The extent of the applicant's past criminal activity;
- (iii) The age the applicant when the crime was committed;
- (iv) The amount of time that has elapsed since the applicant's last criminal activity;
- (v) The conduct and work activity of the applicant before and after the criminal activity;
- (vi) Whether the applicant has completed the terms of his probation or deferred adjudication;
- (vii) Evidence of rehabilitation;

(viii) Whether the applicant fully disclosed the crime to the state board, the department and the district;

(ix) Whether employment or licensure will have a negative impact on the local education community;

(x) Whether employment or licensure will have a negative impact on the state-wide education community; and

(xi) Any other factors the state board, district, or superintendent considers relevant.<sup>40</sup>

Though these seem to be appropriate rehabilitation standards, the real problem comes into play with division (E)(1) and its reference to paragraph (A)(10)'s non-rehabilitative offenses. That paragraph breaks down the grouping of non-rehabilitative offenses into four categories. These categories cover what the department describes as "violent offenses,"<sup>41</sup>

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<sup>40</sup> *Id.* 3301-20-01(E) (emphasis added).

<sup>41</sup> These violent offenses include the following categories:

[S]ections 2903.01 (aggravated murder), 2903.02 (murder), 2903.03 (voluntary manslaughter), 2903.04 (involuntary manslaughter), 2903.041 (reckless homicide), 2903.11 (felonious assault), 2903.12 (aggravated assault), 2903.15 (permitting child abuse), 2905.01 (kidnapping), 2905.02 (abduction), 2905.05 (criminal child enticement), 2905.11 (extortion), 2909.02 (aggravated arson), 2911.01 (aggravated robbery), 2911.02 (robbery), 2911.11 (aggravated burglary), 2917.01 (inciting to violence), 2917.02 (aggravated riot), 2917.03 (riot), 2917.31 (inducing panic), 2921.03 (intimidation), 2921.04 (intimidation of attorney, victim or witness in criminal case), 2921.34 (escape), 2923.122 (illegal conveyance or possession of deadly weapon or dangerous ordnance or illegal possession of an object indistinguishable from a firearm in school safety zone), 2923.123 (illegal conveyance of deadly weapon or dangerous ordnance into courthouse, illegal possession or control in a courthouse), 2923.161 (improperly discharging firearm at or into a habitation; school related offenses), 2923.21 (improperly furnishing firearms to minor), 2923.17 (unlawful possession of dangerous ordnance; illegally manufacturing or processing explosives) of the Revised Code; divisions (B)(1), (2), (3), or (4) of sections 2919.22 (endangering children), 2909.22 (soliciting or providing support for act of terrorism), 2909.23 (making terroristic threat), 2909.24 (terrorism), 2917.33 (unlawful possession or use of a hoax weapon of mass destruction), 2927.24 (contaminating substance for human consumption or use; spreading false report), 3716.11 (placing harmful objects in food/confection), 2921.05 (retaliation), 2919.12 (unlawful abortion), 2919.121 (performing or inducing unlawful abortion upon minor), or 2919.13 (abortion manslaughter) of the Revised Code, section 2919.23 (interference of custody) of the Revised Code that would have been a violation of section 2905.04 (child stealing) of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date, or any municipal ordinance or law of this state, another state, or the

“[t]heft offenses and other offenses against public administration,”<sup>42</sup> “drug abuse offenses,”<sup>43</sup> and “sexually-oriented offenses.”<sup>44</sup> To put things in context, of the approximately fifty disqualifying offenses listed in division (B)(1) of section 3319.39, thirty-six have been deemed by the Department of Education as being “non-rehabilitative.” This means that an employee found to have been convicted of a disqualifying offense will automatically be fired 72% of the time without taking anything more than the conviction into account. It was in this important and critical act of classifying these offenses as “non-rehabilitative” that the state legislature opened the doors to a number of constitutional concerns and questions that will be addressed in Section III.

#### *D. House Bill 428: Some Steps in the Right Direction*

Ohio Substitute House Bill 428 was introduced on January 9, 2008, just two months after Substitute House Bill 190 was passed.<sup>45</sup> It signified

United States that is substantially equivalent to the offenses listed in this paragraph.

*Id.* 3301-20-01(A)(10)(a).

<sup>42</sup> These theft offenses and other offenses against public administration include “sections 2911.12 (burglary), 2913.44 (personating an officer), 2921.41 (theft in office), 2921.11 (perjury), or 2921.02 (bribery) of the Revised Code or any municipal ordinance or law of this state, another state, or the United States that is substantially equivalent to the offenses listed in this paragraph.” *Id.* 3301-20-01(A)(10)(b).

<sup>43</sup> These drug abuse offenses include the following categories:

[S]ections 2925.02 (corrupting another with drugs), 2925.03 (trafficking in drugs), 2925.04 (illegal manufacture of drugs or cultivation of marihuana), 2925.041 (illegal assembly or possession of chemicals for the manufacture of drugs), 2925.05 (funding of drug or marihuana trafficking), 2925.06 (illegal administration or distribution of anabolic steroids), 2925.13 (permitting drug abuse), 2925.22 (deception to obtain a dangerous drug), 2925.23 (illegal possession of drug documents), 2925.24 (tampering with drugs), 2925.32 (trafficking in harmful intoxicants; improperly dispensing or distributing nitrous oxide), 2925.36 (illegal dispensing of drug samples), or 2925.37 (possession of counterfeit controlled substances) of the Revised Code or any municipal ordinance or law of this state, another state, or the United States that is substantially equivalent to the offenses listed in this paragraph.

*Id.* 3301-20-01(A)(10)(c).

<sup>44</sup> These sexually-oriented offenses include the following categories:

[S]ections 2907.02 (rape), 2907.03 (sexual battery), 2907.04 (unlawful sexual conduct with a minor), 2907.05 (gross sexual imposition), 2907.06 (sexual imposition), 2907.07 (importuning), 2907.21 (compelling prostitution), 2907.22 (promoting prostitution), 2907.23 (procuring), 2907.24 (soliciting; after positive HIV test), 2907.241 (loitering to engage in solicitation; solicitation after positive HIV test), 2907.25 (prostitution; after positive HIV test), 2907.31 (disseminating matter harmful to juveniles), 2907.311 (displaying matter harmful to juveniles), 2907.32 (pandering obscenity), 2907.321 (pandering obscenity involving a minor), 2907.322 (pandering sexually oriented matter involving a minor), 2907.33 (deception to obtain matter harmful to juveniles), 2907.34 (compelling acceptance of objectionable materials), or 2907.323 (illegal use of a minor in nudity-oriented material or performance) of the Revised Code, a violation of former section 2907.12 (felonious sexual penetration) of the Revised Code or any municipal ordinance or law of this state, another state, or the United States that is substantially equivalent to the offenses listed in this paragraph.

*Id.* 3301-20-01(A)(10)(d).

<sup>45</sup> OHIO LEGIS. SERV. COMM’N, H.B. 428: AS PASSED BY THE GEN. ASSEMBLY, H. 127, Reg. Sess., at 28 (2008).

that, just two months after section 3319.39 was modified and section 3319.391 was enacted, the legislature already realized a need for modification. Unfortunately, the modifications were minor; although, they did relax some of the records checks requirements slightly. Mainly, the amendments sought to accomplish three things: (1) ease the requirements placed upon the record checks of contractors working in the schools; (2) set the date for schools to perform the five-year re-checks; and (3) provide for situations in which supplemental FBI record checks would no longer be needed.<sup>46</sup> The Bill was officially passed by both houses on May 28, 2008.<sup>47</sup>

To change the records check requirements for contractor employees working in schools, the legislature, first, deleted the former division (A)(2)<sup>48</sup> of section 3319.391.<sup>49</sup> In order to replace the deleted language, the legislature chose to enact section 3319.392.<sup>50</sup> Section 3319.392 is limited, at first, by only applying to the following:

[A]n employee of a private company under contract with a school district . . . to provide essential school services and who will work . . . in a position that does not require a license . . . and that involves routine interaction with a child or regular responsibility for the care, custody, or control of a child.<sup>51</sup>

“Essential school services” are those necessary for operation and which would need to be supplied by an employee, if not for the private contract.<sup>52</sup> Then, new section goes on to say that no school shall permit an applicable contract employee to work; however, it provides the following exceptions:

(1) The person’s employer presents proof of both of the following to the designated official: (a) the person has been the subject of a criminal records check . . . within the five-year period immediately prior to the date on which the person will begin work . . . . (b) The criminal records check indicates that the person has not been convicted of or pleaded guilty to any offense described in division (B)(1) of section 3319.39 of the Revised Code. (2) During any period of time in which the person will have routine interaction with a child or regular responsibility for the care, custody, or control of a child, the designated official has arranged for an employee of the district . . . to be in the same room . . .

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<sup>46</sup> *See id.* at 18-19, 22.

<sup>47</sup> *Id.* at 28.

<sup>48</sup> *See supra* Part II.B.

<sup>49</sup> H.B. 428, 127th Gen. Assemb., Reg. Sess. (Ohio 2008).

<sup>50</sup> *Id.*

<sup>51</sup> OHIO REV. CODE ANN. § 3319.392(B) (West 2005 & Supp. 2010).

<sup>52</sup> *Id.* § 3319.392(A)(2).

or, if outdoors, to be within a thirty-yard radius . . . or to have visual contact with the child.<sup>53</sup>

Thus, in this case, the legislature chose some instances in which to limit required records checks and other instances in which to completely eliminate them.

The legislature's second task was to alter section 3319.39 to specify instances in which a supplemental FBI records check would no longer be required.<sup>54</sup> Specifically, they amended division (A)(1) of that section to state the FBI checks would not be required under the following circumstances:

(a) The applicant is applying to be an instructor of adult education. (b) The duties of the position . . . do not involve routine interaction with a child or regular responsibility for the care, custody, or control of a child . . . [or, if they do, the applicant will be supervised by a district employee]. (c) The applicant presents proof that the applicant has been a resident of this state for the five-year period immediately prior to the date upon which the criminal records check is requested or provides evidence that within that five-year period the superintendent has requested information about the applicant from the federal bureau of investigation in a criminal records check.<sup>55</sup>

It is interesting to note that, in limiting the FBI checks, the legislature chose to reinsert the "care, custody, or control" language that it had previously removed from other relevant sections of the Revised Code. Finally, as noted before, the legislature amended section 3319.391 to provide September 5th as the date on which subsequent five year checks must be completed.<sup>56</sup>

*E. Revisiting the Regulations: Ohio Administrative Code Section 3301-20-03*

In order to respond to the fact that background-checks legislation is now applicable to both licensed and non-licensed employees, the Department of Education passed promulgated section 3301-20-03 on August 27, 2009.<sup>57</sup> This new section was designed specifically to deal with the employment of non-licensed individuals with certain convictions.<sup>58</sup> The language of this new section is largely the same as that of section 3301-20-

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<sup>53</sup> *Id.* § 3319.392(C).

<sup>54</sup> H.B. 428.

<sup>55</sup> OHIO REV. CODE ANN. § 3319.39(A)(1).

<sup>56</sup> OHIO REV. CODE ANN. § 3319.391(A) (West 2005 & Supp. 2010).

<sup>57</sup> OHIO ADMIN. CODE 3301-20-03 (2008 & Supp. 2010).

<sup>58</sup> *Id.*

03, i.e. it contains a list of rehabilitation standards allowing for continued employment so long as the disqualifying offense is not non-rehabilitative.<sup>59</sup>

However, there are some major differences in determining what is a “non-rehabilitative offense.” Namely, this new section, again, describes other violent offenses, including crimes such as burglary and assault, but makes them non-rehabilitative only if they were committed within twenty years of the applicant’s hire or background check.<sup>60</sup> Furthermore, this new section would make drug offenses, such as trafficking, non-rehabilitative only if committed within the past ten years.<sup>61</sup> Similarly, theft offenses are only non-rehabilitative if committed within a ten-year period.<sup>62</sup> Finally, “other offenses” such as domestic violence and child endangerment are only non-rehabilitative if committed within the past five years.<sup>63</sup>

While the Department of Education had the right idea to relax the list of non-rehabilitative offenses for non-licensed school district employees, its method for doing so seems completely arbitrary. For example, under its new regulations, if I am a non-licensed employee undergoing a background check in 2010, then I would have to be fired if I was found to have sold narcotics in 2000 or found guilty of assault in 1990, but not if I was convicted of child endangerment or domestic violence in 2004. It seems entirely counterintuitive that in a school setting a charge of child endangerment or domestic violence should be viewed more leniently than past drug trafficking or assault.

While, assumingly, trying to relax the standards, the Department has simply taken an extremely harsh rubber stamp approach dictating disqualification, no matter when the crime was committed, and replaced it with a new rubber stamp system guided by seemingly random timelines. Furthermore, this new regulation did nothing to alter the already existing section 3301-20-01’s unjust application to licensed employees. Accordingly, despite its best intentions, the Department of Education did not adequately address the problem with the new section 3301-20-03.

*F. Pending Class Action Suits: Seeing the Effects of H.B 190 and H.B. 428*

Despite H.B. 428’s attempts to relax and limit the necessity of criminal records checks, there are still a number of pending class action suits underway at this moment that involve long-time school employees being released from their employment. These terminations are done primarily through the newly enacted section 3319.391. Furthermore, these cases have

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<sup>59</sup> *Id.* 3301-20-03(D).

<sup>60</sup> *Id.* 3301-20-03(A)(6)(d).

<sup>61</sup> *Id.* 3301-20-03(A)(6)(e).

<sup>62</sup> *Id.* 3301-20-03(A)(6)(f).

<sup>63</sup> *Id.* 3301-20-03(A)(6)(g).



primarily involved individuals being released without cause or without taking into account their rehabilitation, due in large part to the non-rehabilitative offenses listed in Ohio Administrative Code section 3301-20-01.

For example, *Walter v. Fairfield City Schools* involved at least two identified plaintiffs who had worked for the district for twenty-two years and six years respectively.<sup>64</sup> The first plaintiff was the head custodian, and in 1971 had been convicted for the sale of marijuana, with the conviction eventually expunged in 1981.<sup>65</sup> Due to section 3319.391, this plaintiff was informed of his impending termination and was forced to retire ahead of schedule, resulting in significant economic loss.<sup>66</sup> The second plaintiff had been convicted thirty-five years earlier, at the age of eighteen, for burglary, a fact that he had disclosed to the district upon his hiring.<sup>67</sup> This plaintiff refused to resign his position, and, as a result, was terminated.<sup>68</sup>

*Doe v. Cincinnati Public Schools Board of Education* involves similar tragic circumstances.<sup>69</sup> In that case, the plaintiff had been employed by the defendant for eleven years, initially as a “Safe & Drug Free School Specialist” and then as a “due process hearing specialist.”<sup>70</sup> The plaintiff was convicted of the unlawful sale of narcotics in 1976, and served three years in a correctional facility, during which time he was rehabilitated, obtained a B.S. in psychology, and became a licensed social worker and certified chemical dependency counselor.<sup>71</sup> Despite his years of service and successful life-changing turnaround, this plaintiff, like those in *Walter*, was notified that he would be fired in November of 2008.<sup>72</sup>

These examples represent just a few of the numerous class action suits being filed right now in opposition to H.B. 190 and section 3319.391 of the Revised Code. They are representative of the fact that after the enactment of this damaging legislation, many rehabilitated former offenders were forced out of their jobs due to the legislature’s determination that their crimes were “non-rehabilitative.” Surely, as time passes, the number of such suits will continue to grow until action is taken to prevent these unnecessarily harmful consequences.

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<sup>64</sup> Complaint ¶¶ 1-2, *Walter v. Fairfield City Sch.*, No. 109CV00462, 2009 WL 2863604 (S.D. Ohio July 2, 2009).

<sup>65</sup> *Id.* ¶¶ 8, 10.

<sup>66</sup> *Id.* ¶ 10.

<sup>67</sup> *Id.* ¶¶ 12-14.

<sup>68</sup> *Id.* ¶ 15.

<sup>69</sup> See Complaint ¶¶ 7-26, *Doe v. Cincinnati Pub. Sch. Bd. of Educ.*, No. 1:09-CV-243, 2009 WL 1947484 (S.D. Ohio Apr. 24, 2009).

<sup>70</sup> *Id.* ¶ 7.

<sup>71</sup> *Id.* ¶¶ 19-23.

<sup>72</sup> *Id.* ¶ 12.

## II. ARGUMENT

Taken as a whole, the Revised Code and Administrative Rules surrounding H.B. 190 cannot stand as written. Not only does the current wording in many cases reach unconstitutional results, but the wording itself is at points vague and ambiguous. The most important area that needs to be addressed is the rehabilitation standards that are currently in place. While the Department of Education was given a chance to revise and edit these rules, it has consistently used the same outdated and ineffective rules. The biggest issue within these standards is the fact that the Department sees it fit to declare some offenses non-rehabilitative. Effectively, through this act, it has determined that individuals falling within the disqualifying offenses will automatically be terminated roughly 72% of the time without taking into consideration their lives led and the time passed since the conviction.

In sum, something must be done now, or else we will be forcing truly rehabilitated individuals that are benefiting their surrounding community out of their positions without any rational cause. This could lead to a destruction of their home environments, as well as a rise in recidivism in the justice system by giving the individuals no other option but to possibly revert back to crime.

This Section will now examine the inherent textual problems in the legislation, followed by an examination of the constitutional issues that it will raise. In order to develop possible solutions, this Section will also examine similar systems currently in place in other states and see how their approaches have avoided the constitutional problems found within Ohio's system.

### *A. Inherent Textual Ambiguities*

The first problem presented by the newly enacted section 3319.39 is its ambiguous language when read together with Ohio Administrative Code section 3301-20-01. Under section 3319.391, those convicted of a disqualifying offense shall be released from employment, "unless the person meets the rehabilitation standards adopted by the department [of education] under [R.C. § 3319.39](E)."<sup>73</sup> However, the Board of Education disregarded the duty to adopt new rules, and there have not been any new standards for rehabilitation of licensed employees that have been put in place since the 2007 legislation.<sup>74</sup> Instead, without statutory authorization, the Board applied the old rule in the form of Ohio Administrative Code section 3301-20-01.<sup>75</sup> These rules have not been amended since 2004, quite some time before section 3319.391 was even thought of, and before

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<sup>73</sup> OHIO REV. CODE ANN. § 3319.391(C) (West 2005 & Supp. 2010).

<sup>74</sup> OHIO ADMIN. CODE 3301-20-01 (2008 & Supp. 2010).

<sup>75</sup> *Id.*

employees were being terminated for past convictions.<sup>76</sup>

Furthermore, the plain meaning of the language of the Board's old rule does not even apply to current employees. The language used throughout the rule clearly states that it applies only to applicants.<sup>77</sup> The rule itself plainly states that an "'applicant' does not include a person currently employed by a district."<sup>78</sup>

As is apparent, the plain meaning of the text indicates that by extending Ohio Administrative Code section 3301-20-01 to those individuals affected by section 3319.391, the State is exceeding its own rules. The use of the language between the statute and the regulation is inherently ambiguous and misleading because they seem to apply to two different classes of people. This shows that new rehabilitation standards must be formed not only to avoid the constitutional issues but because, as written, the text and its application are in opposition.

#### *B. State and Federal Constitutional Issues*

One of the key concerns raised by the new legislation and the corresponding regulations is the host of constitutional issues that they present on both the state and federal levels. For the purposes of this section, it is important to note at the outset that under 42 U.S.C. § 1983 individuals have a private cause of action if they are deprived, under the color of state law, of rights secured to them by the Constitution.<sup>79</sup> Therefore, as the state undertakes to terminate employees under section 3319.391 and in accordance with the regulations imposed by the Board of Education, said employees will be able to enforce the denial of their constitutional rights directly against the state actors under a § 1983 claim—because the Board of Education is a state actor acting under a state law to condone their actions. Therefore, if something is not done now, then the State will continue to see a multitude of lawsuits brought for impairment of the following constitutional guarantees.

##### 1. Violation of the Contracts Clause

The Constitution of the United States dictates that "[n]o State shall . . . pass any . . . law impairing the Obligation of Contracts."<sup>80</sup> This idea is further captured under the Ohio Constitution, which states, "[t]he general assembly shall have no power to pass . . . laws impairing the obligation of contracts."<sup>81</sup> It has been established that to demonstrate a violation of the

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<sup>76</sup> *Id.*

<sup>77</sup> *See id.*

<sup>78</sup> *Id.* 3301-20-01(A)(1)(a).

<sup>79</sup> 42 U.S.C. § 1983 (2006).

<sup>80</sup> U.S. CONST. art I, § 10.

<sup>81</sup> OHIO CONST. art. II, § 28.

contracts clause the proponent must show “that a change in state law has operated as a substantial impairment of a contractual relationship.”<sup>82</sup> Once it has been determined that a “substantial impairment” exists, then the court is to investigate whether or not the impairment was “reasonable and appropriate in the service of a legitimate and important public purpose.”<sup>83</sup> Courts have also found it important to note that when the law in question directly affects the state’s own obligation, “complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state’s self-interest is at stake.”<sup>84</sup>

Section 3319.391 is clearly impairing the written contracts between the Ohio Public School districts and their employees. In many cases it is causing the automatic forfeiture of the employee’s position without any real consideration into his or her character or rehabilitation. It seems apparent that this is exactly the type of substantial impairment that the courts have chosen to address. Therefore, the question must turn on the appropriateness of this impairment in the furtherance of a legitimate state interest.

There can be no doubt that the legislature’s interest in providing the utmost protection for students in public schools is legitimate. However, the impairment imposed by this new statute can hardly be deemed rational and appropriate. The legislature may have created what it believed was a reasonable solution, but, as previously mentioned, one should be wary to resort solely to the legislature’s notion in a state-interested impairment such as this one.

Looking at the facts of some of the aforementioned suits, the irrationality should become readily apparent. In many cases, individuals are being forced out of work after years of faithful and well-reviewed service, having never threatened the safety or well-being of any members of the student body. Also, they are being terminated without any consideration of the totality of the circumstances in each individual case.<sup>85</sup> Finally, the fact that this rubber stamp approach is ultimately requiring termination for an incident that, in many cases, occurred years before the individual’s employment even began and numerous years before the law was passed, should cause the impairment to be seen as unreasonable.

In conclusion, as written, section 3319.391 and the corresponding regulations are raising serious concerns about the impairment of the contracts clauses of both the state and federal Constitutions. This demonstrates the need for change in the law.

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<sup>82</sup> *Quick Commc’ns, Inc. v. Michigan Bell Tel. Co.*, 515 F.3d 581, 587 (6th Cir. 2008) (quoting *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 313 (6th Cir. 1998)).

<sup>83</sup> *United States v. Cnty. of Muskegon*, 298 F.3d 569, 584 (6th Cir. 2002).

<sup>84</sup> *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25-26 (1977).

<sup>85</sup> *See supra* Part II.E.

## 2. Violation Against State Retroactivity Prohibition

Section 3319.391, as enacted through H.B. 190, is also likely to be found unconstitutionally retroactive. Under the Ohio Constitution, “[t]he general assembly shall have no power to pass retroactive laws . . . .”<sup>86</sup> The Ohio Supreme Court has even gone on record stating that the protection provided by this section is greater than that provided by the federal Ex Post Facto Clause.<sup>87</sup> Courts have developed a two-part test to determine if the statute is retroactive.<sup>88</sup> The first step is a judicial determination as to whether there was a clear indication on the part of the General Assembly that they intended the statute to apply retrospectively.<sup>89</sup> If the first question is answered affirmatively, then the court must determine whether the statute is substantive or remedial.<sup>90</sup> If this final question is answered with a finding that the statute is substantive, then it will be found to be unconstitutionally retroactive.<sup>91</sup>

Looking at the text of the statute, it seems readily clear that the legislature intended a retroactive application. The statute plainly states, “[f]or each person to whom this division applies who is hired prior to November 14, 2007, the employer shall request a criminal records check.”<sup>92</sup> The statute then goes to say that “[a]ny person who . . . has been convicted of or pleaded guilty to any offense described in division (B)(1) of section 3319.39 of the Revised Code shall not be hired or shall be released from employment.”<sup>93</sup> Taking these sections together, the plain meaning of this language clearly denotes that the legislature intended a retroactive application.

Section 3319.391 is a substantive law because it affects a vested right. As the Ohio Supreme Court stated, “[u]pon principle, every statute, which 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, must be deemed retrospective.”<sup>94</sup> Ohio courts have already determined employees of the city have a vested right in their public employment.<sup>95</sup> As employees of city public school districts, those affected by this law possess the same vested right in their employment within the school system.

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<sup>86</sup> OHIO CONST. art. II, § 28.

<sup>87</sup> *Van Fossen v. Babcock & Wilcox Co.*, 522 N.E.2d 489, 498 (Ohio 1988).

<sup>88</sup> *Id.* at 494-95.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 496.

<sup>92</sup> OHIO REV. CODE ANN. § 3319.391(A) (West 2005 & Supp. 2010).

<sup>93</sup> *Id.* § 3319.391(C).

<sup>94</sup> *State ex rel. Matz v. Brown*, 525 N.E.2d 805, 807 (Ohio 1988) (quoting *Herrick v. Lindley*, 391 N.E.2d 729, 732 (Ohio 1979)).

<sup>95</sup> *See Fraternal Order of Police Youngstown Lodge No. 28 v. Hunter*, 360 N.E.2d 708, 714-18 (Ohio Ct. App. 1975).

The existence of this vested right and the judicially accepted definition previously stated make it clear that section 3319.391 is a substantive law. Therefore, it is obvious that in satisfying the judicially developed two-part test, section 3319.391 is unconstitutionally retroactive.

### 3. Violation of Ex Post Facto Restriction

Section 3319.391 is also unconstitutional as a clear example of an ex post facto law. The United States Constitution prohibits any passage of ex post facto laws.<sup>96</sup> The U.S. Supreme Court has stated that the ex post facto clause was designed to prohibit legislative enactments that “change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed.”<sup>97</sup> The Supreme Court has also stated that, “[i]f the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is ‘so punitive either in purpose or effect as to negate [an] intention to deem it civil.’”<sup>98</sup>

Based on the foregoing principles, if the legislature intended to punish those who are employed or seeking employment in the school districts for past offenses, then there is no need for further investigation, and the statute is unconstitutional as against the ex post facto prohibition. However, it is unlikely that this is what the legislature intended, and, indeed, there is no documented proof to that fact. Section 3319.391 is still unconstitutional because of its punitive effect. Courts have developed a process to determine if the statute has a punitive effect and look to whether the imposed obligations are traditionally regarded as punishment, operate as a disability or restraint, further traditional notions of punishment, bear a rational connection to a non-punitive purpose, or are excessive in relation to the alternative purposes assigned.<sup>99</sup>

Section 3319.391 clearly has a punitive effect, overriding any attempt to deem it civil. It is clearly punishing to those affected by it in that it prevents them from working in any school district within the state. In the same sense, it is more obviously operating as an overwhelming disability or restraint. The statute clearly furthers traditional notions of punishment, which is defined by its plain meaning as the act of punishing or “impos[ing] a penalty on for a fault.”<sup>100</sup> Those affected committed a fault when they committed the original disqualifying offense in the past, and the State is

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<sup>96</sup> U.S. CONST. art. I, § 10.

<sup>97</sup> *Miller v. Florida*, 482 U.S. 423, 429 (1987).

<sup>98</sup> *Smith v. Doe*, 538 U.S. 84, 92 (2003) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

<sup>99</sup> *Allen v. Illinois*, 478 U.S. 364, 369 (1986); *Ward*, 448 U.S. at 247-48 n.7.

<sup>100</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 947 (10th ed. 1993).

imposing a clear penalty by disqualifying them from further employment with their established employer. The procedures set forth are also extremely excessive in the furtherance of the goal of child safety. By deeming the majority of the disqualifying offenses as non-rehabilitative and ending any further inquiry into whether the individual is actually going to affect the safety of the students, the state is exceeding its goal. Per se, rubber stamp rules do not necessarily have the best interest of the children in mind, and, certainly, do not have the best interest of the employees in mind.

In summary, section 3319.391 clearly has a punitive effect. It is adding a new punishment to crimes that did not exist when they were committed, and is, therefore, an unconstitutional violation of the ex post facto prohibition.

#### 4. Violation of Equal Protection

Section 3319.391 is also unconstitutional as a violation of constitutionally guaranteed equal protection under the law. Courts have noted that if classifications in statutes “neither proceed[] along suspect lines nor infringe[] fundamental constitutional rights, [the classifications] must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>101</sup> Furthermore, the state “may make reasonable classifications . . . provided the classification is not unreasonable, arbitrary or capricious.”<sup>102</sup>

In this case, even under the lowest scrutiny of rational basis review, the Department of Education has made an irrational classification between those that can rehabilitate and those that cannot. The state likely deemed it rational that those convicted of certain crimes were more dangerous to the student body than those convicted of others. However, when looking at the list of crimes it hardly seems rational to say that one convicted of assault can rehabilitate but someone convicted of inducing panic may not.<sup>103</sup> Furthermore, when discussing the relationship between a crime committed many years ago and behavior today, the U.S. Supreme Court has even said that the relationship is “so attenuated as to render the distinction arbitrary or irrational.”<sup>104</sup>

When looking at recidivism in general, there is also data available that helps to eliminate any rational basis for the proposition that someone convicted of a crime many years ago is more likely to commit further crimes

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<sup>101</sup> *F.C.C. v. Beach Commc'ns., Inc.*, 508 U.S. 307, 313 (1993).

<sup>102</sup> *Gilday v. Bd. of Elections of Hamilton Cnty., Ohio*, 472 F.2d 214, 217 (6th Cir. 1972).

<sup>103</sup> See OHIO REV. CODE ANN. § 3319.39(B)(1)(a) (West 2005 & Supp. 2010); OHIO ADMIN. CODE 3301-20-01 (A)(10) (2008 & Supp. 2010).

<sup>104</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

today. For example, a recent study conducted by the National Institute of Justice compared recidivism rates of first time offenders with the probability of arrest for those who have no criminal record.<sup>105</sup> When looking at eighteen-year-old first time offenders, the chance of another arrest goes down as time passes, and within eight years is equal to that of the general population.<sup>106</sup> According to the study, as more time passes, the first-time offender is actually less likely to commit another offense than a member of the public is to commit a first offense.<sup>107</sup>

In addition to these considerations, there are a number of courts across the country that have rejected broad rules that bar employment because of criminal convictions. One court held that a broad exclusion denying city employment for felons violated equal protection because it was “not tailored along any lines to conform to what might be considered legitimate government interests.”<sup>108</sup> A statute in Iowa that denied civil service positions to felons was struck down on equal protection grounds because the court could not accept the “across-the-board prohibition.”<sup>109</sup>

Similarly, a Connecticut statute denying felons positions as private detectives or security guards was struck down as against equal protection.<sup>110</sup> The court reasoned that “[t]he critical defect . . . is [the rule’s] over breadth . . . the statutes across-the-board disqualification fails to consider probable and realistic circumstances in a felon’s life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances.”<sup>111</sup>

Section 3319.391 and Ohio Administrative Code section 3301-20-01 are making these same across-the-board restrictions. Although there are rehabilitation standards stated, by making the list of non-rehabilitative offenses so arbitrarily over-inclusive the Board is being far too broad in its employment ban.

For all of the foregoing principles, section 3319.391, in conjunction with the administrative rules, is unconstitutional as a violation of equal protection.

## 5. Violation of Due Process

Section 3319.391 is also an unconstitutional violation of both

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<sup>105</sup> Alfred Blumstein & Kiminori Nakamura, ‘Redemption’ In An Era of Widespread Criminal Background Checks, 263 NAT’L INST. OF JUSTICE 10, 11 (2009), <http://www.ncjrs.gov/pdffiles1/nij/226872.pdf>.

<sup>106</sup> *Id.* at 12.

<sup>107</sup> *Id.*

<sup>108</sup> *Kindem v. City of Almaeda*, 502 F. Supp. 1108, 1112 (N.D. Cal. 1980).

<sup>109</sup> *Butts v. Nichols*, 381 F. Supp. 573, 580 (S.D. Iowa 1974).

<sup>110</sup> *Smith v. Fussenich*, 440 F. Supp. 1077, 1081 (D. Conn. 1977).

<sup>111</sup> *Id.* at 1080.



procedural and substantive due process rights. To achieve success on a substantive due process claim involving a non-fundamental right, a plaintiff has the burden of proving that the government's action "shock[ed] the conscious."<sup>112</sup> In regards to this standard, the U.S. Supreme Court has stated that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."<sup>113</sup>

For the various reasons explained previously, the actions and distinctions made by the government are so irrational as to clearly shock the conscious. The state's action was intended to injure those affected by denying them gainful employment and its total irrationality renders it unjustifiable under any government interest.

Under the procedural aspect of the Due Process Clause of the Constitution, certain processes must be provided before the government can deprive an individual of life, liberty, or property.<sup>114</sup> Public employment has been officially recognized as a protected property interest under the Due Process Clause.<sup>115</sup>

Applying this concept to the current situation, school district employees have a property interest in their continued employment. Section 3319.391 is depriving them of that without any process whatsoever; those terminated in accordance with its guidance are provided with no process by which to challenge the firing.<sup>116</sup> The statute describes no procedures for appealing or fighting a termination, making the decision final and leaving the dismissed without recourse.<sup>117</sup> Accordingly, those fired are being denied any sort of procedural due process.

Because section 3319.391 denies those convicted of an enumerated offense, especially those convicted of a "non-rehabilitative offense," of both substantive and procedural due process, it should be found unconstitutional as a violation of the Due Process Clause of the Constitution.

#### 6. *Doe v. Ronan*: Testing the Constitutional Limits

To date, there has only been one case to reach a decision as to the constitutionality of Revised Code section 3319.391, and that was *Doe v. Ronan*, which was decided October 26, 2010.<sup>118</sup> That case involved John Doe, a petitioner convicted of drug trafficking in 1976, whose July 2008

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<sup>112</sup> Ellsworth v. City of Lansing, No. 99-1045, 2000 WL 191836, at \*4 (6th Cir. Feb. 10, 2000).

<sup>113</sup> Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998).

<sup>114</sup> See U.S. CONST. amend. V.

<sup>115</sup> Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985).

<sup>116</sup> See OHIO REV. CODE ANN. § 3319.391 (West 2005 & Supp. 2010); OHIO ADMIN. CODE 3301-20-01 (2008 & Supp. 2010).

<sup>117</sup> See OHIO REV. CODE ANN. § 3319.391.

<sup>118</sup> *Doe v. Ronan*, 937 N.E.2d 556, 564 (Ohio 2010).

contract with Cincinnati Public School was terminated in November of that year as a result of Revised Code section 33919.391.<sup>119</sup> This case worked its way through the court system, and reached the Ohio Supreme Court on two certified questions as to Revised Code section 3319.391's retroactivity and impairment of contracts.<sup>120</sup>

As for the contract clause issue, the court noted several rules to guide its decision. First, "contracts entered into *on or after* the effective date of [a statute] are subject to the provisions of that statute."<sup>121</sup> With this in mind the court stated, "[w]hen an employment contract . . . is made pursuant to these statutes, the contract must be construed as though the statutes are incorporated into the contract and become implied terms and conditions of any contract or contractual right."<sup>122</sup> Accordingly, the court found that Doe was only conditionally employed until satisfaction of section 3319.391's background check, as that law was already effective at the time of his contract.<sup>123</sup> In so finding, the court held that the contract did not ever become binding, and, hence, could not have been impaired as a result of Revised Code section 3319.391; therefore, there was no contracts clause issue.<sup>124</sup>

Although the court in this case upheld the law against a contracts clause challenge, the decision was very fact sensitive. In this instance, the contract was entered into after the effective date of Revised Code section 3319.391; therefore, invoking the aforementioned rules of law. However, as mentioned previously, the law is also, and in the future could be, used to terminate individuals whose contracts were entered into prior to the effective date of Revised Code section 3319.391. Had this been the situation in *Ronan*, the court could not have invoked the rules implying the terms of the law into the contract, and the result likely would have changed. Once a case reaches a decision involving a contract entered into prior to Revised Code section 3319.391's effective date, then the true constitutionality will be tested.

As for the retroactivity of the law, the court erroneously determined that Revised Code section 3319.391 is "prospective in application" and "does not go back to the date of the employee's initial hire, terminate that person effective as of the hire date, and eliminate any of that person's accrued benefits."<sup>125</sup> The court, instead, viewed the law as only prohibiting conduct occurring after the effective date, i.e. continuing to employ a

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<sup>119</sup> *Id.* at 559.

<sup>120</sup> *Id.* at 558-59.

<sup>121</sup> *Id.* at 561 (quoting *Aetna Life Ins. Co. v. Schilling*, 616 N.E.2d 893, 896 (Ohio 1993)).

<sup>122</sup> *Id.* at 562.

<sup>123</sup> *Id.* at 563.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 564.

disqualified individual.<sup>126</sup> Accordingly, the court did not find the law unconstitutionally retroactive.<sup>127</sup>

However, Justice Brown wrote a strong dissent more logically analyzing the issue, and he found that the law was unconstitutionally retroactive. To begin, Brown points out that “the majority holds that Doe loses . . . his otherwise viable constitutional right based upon terms of the contract that were added to the contract by [the] court by implication.”<sup>128</sup> Brown, himself, would conclude that “[he] cannot agree to so casually dispose of Doe’s constitutional claims through the use of a legal artifice (contract terms implied in law).”<sup>129</sup>

What was critical and relevant in Brown’s mind was that Revised Code section 3319.391 required termination from valid employment based on an individual’s past conduct.<sup>130</sup> He then went on to point out the established rule that “laws are unconstitutionally retroactive when they impair a vested right based upon prior conduct.”<sup>131</sup> Again, pointing out that public employees have a vested right to continued employment, Justice Brown would have held that Revised Code section 3319.391 violated the constitutional provision prohibiting retroactive laws.<sup>132</sup>

In the end, *Doe v. Ronan* did uphold the law as constitutional. But what we are left with is a fact-sensitive contract clause issue and a poorly decided and strongly dissented retroactivity issue. Ultimately, due to this crippling law, we are left with a good employee out of a job. As the majority, itself, pointed out, “[t]he effect . . . on Doe’s career is *regrettable*. Doe’s past experiences and rehabilitation appear to have made him *especially qualified* for the duties of the position for which he was hired.”<sup>133</sup> However, despite its recognition of the problem, the court was bound by poor lawmaking.

### C. Solutions: Looking at Other States’ Systems

After considering all of the aforementioned problems, it is clear that something must be done to address the negative implications of the current system of background checks used by the Ohio Public School districts. As guidance for addressing these problems, it would aid Ohio’s legislators to look to other states and see how their systems of background checks avoid many of the textual and constitutional problems raised by Ohio’s current

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 567 (Brown, C.J., concurring in part and dissenting in part).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 567-68.

<sup>132</sup> *Id.* at 568.

<sup>133</sup> *Id.* at 563 (majority opinion) (emphasis added).

scheme. While the following examples are only selective of a few states, they clearly present methods that would better serve the state and protect the rights guaranteed to its citizens.

By looking to the background check system of our southern neighbor, Kentucky, one can already see many simple ways to avoid constitutional problems. For example, under Kentucky's statutes, a public school superintendant is only required to conduct a background check on all "initial hires."<sup>134</sup> If language such as this was employed in Ohio it would help to clear up many of the issues involving unconstitutional retroactivity. No longer would employees hired long before the legislation was even enacted be fired after years of productive, well-received service.

Furthermore, Kentucky only mandates automatic termination for those convicted of the worst violent offenses and felony sex crimes.<sup>135</sup> Michigan, our northern neighbor, follows a similar practice. Under their statutory system, automatic termination is only required if a background check uncovers a violation of a "listed offense."<sup>136</sup> The statute goes on to define a "listed offense" as a violation of an enumerated offense found within the State's sex offender registration act.<sup>137</sup> Again, Michigan has chosen to focus on automatic dismissal for serious sexual offenses. These statutory offenses are a far cry from Ohio's seemingly laundry list of aforementioned "non-rehabilitative offenses" that carry with them mandatory dismissal.<sup>138</sup> By focusing on terminations for truly heinous crimes, as is done in Kentucky and Michigan, Ohio could better meet their burden of showing a rational relationship to the state interest of protecting its student population. This, in turn, would help to protect the legislation from constitutional attacks on equal protection and substantive due process grounds.

While Kentucky's background check requirements focus on initial hires, looking at its analogous procedures for post-hire terminations sheds light on other possible remedies for the constitutional flaws in Ohio's system. Kentucky's statutes detail the procedures to be followed for constructively terminating employees by revoking their required certificates.<sup>139</sup> These guidelines, again, limit the list of disqualifying offenses to felonies and other specific offenses dealing with minors.<sup>140</sup> Another key aspect of Kentucky's system is its use of the discretionary language "may revoke."<sup>141</sup> This discretionary approach, as opposed to

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<sup>134</sup> KY. REV. STAT. ANN. § 160.380(5) (West 2010).

<sup>135</sup> *Id.* § 160.380(3).

<sup>136</sup> MICH. COMP. LAWS ANN. § 380.1230g(8) (2010).

<sup>137</sup> *Id.* § 380.1230g(10).

<sup>138</sup> OHIO ADMIN. CODE 3301-20-01 (A)(10)(b) (2008 & Supp. 2010).

<sup>139</sup> *See* KY. REV. STAT. ANN. § 161.120 (West 2008).

<sup>140</sup> *Id.* § 161.120(1)(a).

<sup>141</sup> *Id.* § 161.120(1).

Ohio's mandatory approach, will allow the school to consider the employee's rehabilitation in all situations, and it makes the conviction, itself, just one aspect of the totality of the circumstances considered in school employment decisions. Again, this discretionary approach would help the statutes pass the constitutional rational basis touchstone.

Kentucky has also done far more to allow the employees an adequate procedure to defend themselves. Under Kentucky's post-hire disciplinary system, before a constructive termination is carried out, the Education Professional Standards Board must first conduct a hearing.<sup>142</sup> Furthermore, the employee may appeal the Board's decision in a state circuit court.<sup>143</sup> By allowing the employee to defend against the decision in a judicial forum, Kentucky has assured that it will avoid procedural due process violations. The same cannot be said in Ohio, where school district employees have no redress from the Board's decision.<sup>144</sup>

Overall, the ideal general approach to constitutionally furthering the state's interest, while protecting those of the employee, can be found in North Carolina's approach:

The local board of education shall review the criminal history it receives on a person. The local board shall determine whether the results of the review indicate that the applicant or employee (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill his or her duties as public school personnel and shall use the information when making employment decisions.<sup>145</sup>

This is truly the best approach that a state could take. This approach epitomizes the best method in that it makes a person's criminal record just one piece of the puzzle. It mandates no automatic terminations, and allows for the achievement of actually balancing the important interests involved. It also leaves open the ability to equally consider the employee's rehabilitation in all circumstances, not just a select few.

In conclusion, Ohio would be better served by modeling its background check system after those of other states. By viewing the results of the checks as just one factor in the total mix, and by implementing due process and retroactive safeguards, the state could still achieve its overall objectives and not raise any constitutional problems.

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<sup>142</sup> *Id.* § 161.120(5)(a).

<sup>143</sup> *Id.* § 161.120(12).

<sup>144</sup> See OHIO REV. CODE ANN. § 3319.391 (West 2005 & Supp. 2010).

<sup>145</sup> N.C. GEN. STAT. § 115C-332(d) (2010).

### III. CONCLUSION

The background check requirements currently in place in Ohio's public school system cannot remain unchanged. Not only does the current system contain numerous textual ambiguities, but it also raises many constitutional problems. By terminating employees based on irrational guidelines, the state is attempting to police schools at the expense of its citizens. These procedures will lead to many negative outcomes, both now and in the future. Primarily, the state is not necessarily keeping the best interests of the students in mind and is perpetuating a system that will likely lead to increased criminal recidivism and other harmful results.

By arbitrarily placing burdens on the schools, the guidelines will, in certain cases, lead to the rejection of certain candidates for positions that will better serve the students' best interests. As already documented in the pending class action suits, the current procedure has led to the discharge of highly qualified individuals. Many of these people have worked to turn their lives around since their convictions and have been employed for the schools for many years, garnering high performance reviews.<sup>146</sup> Yet, the current system would have the state disregard the lives these citizens have led since their convictions and force schools to rubber-stamp their termination. This system places the added burden on schools to turn away what have proven to be qualified employees, and undergo new hiring processes at their own expense.

The students themselves are suffering because the state has taken it upon itself to say that someone convicted of an offense decades earlier is unable to serve the best interests of the students, despite documented evidence to the contrary. Unfortunately, this will lead to the deterioration of the bonds formed between the students and these employees. Once that bond is gone and the students are forced to become accustomed to a new employee, the trust and support that once existed will no longer be present. This could lead to delays or outright stoppages in the students' educational growth and development.

Furthermore, by increasing unemployment through its blanket firings, the state's actions will likely lead to increased recidivism in the criminal justice system. A recent report prepared by the Ohio Department of Rehabilitation and Correction on behalf of Governor Strickland recognized that "an association exists between adult offender unemployment and recidivism."<sup>147</sup> The report further stated that "offenders [sic] themselves consider that securing employment is important to maintaining a crime free

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<sup>146</sup> See *supra* Part II.E.

<sup>147</sup> Coretta Pettway, *Best Practices Tool Kit: Employing Ex-Offenders After Release From Prison*, 2007 OHIO INST. ON CORR. BEST PRACTICES 1.

existence upon release.”<sup>148</sup> Furthermore, a study by the U.S. Sentencing Commission showed that for all except the highest criminal history categories, those who are unemployed have roughly a 13% better chance of recidivating than those who are employed.<sup>149</sup>

This data clearly shows that as school employees are being forced out of their jobs by the current background check requirements, they will have an increased chance of recidivating. This will consequently cause an increased strain on Ohio’s already overworked criminal justice system as individuals that were previously gainfully employed are being forced back into unemployment; thus, increasing the chances that they may falter and incur further convictions. By working to encourage the employment of qualified ex-offenders the state can significantly avoid this excess burden.

In conclusion, it is time for the Ohio legislature to revisit the background check system currently in force and implemented through Ohio Revised Code section 3319.391. The current system has too many inherent flaws for the legislature to stand by and do nothing. Not only is the text of the legislation itself fundamentally flawed, but as it stands it is open to constitutional challenges that may, in the near future, lead to findings of unconstitutional results. Also, the burdens arising from the current scheme extend beyond the actual employees to the students, school system, and State as a whole. If the legislature can take the time to realize their error and revisit the legislation while looking to other states for guidance, then the proper balance can be found promoting the overall welfare of the state for our and future generations.

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<sup>148</sup> *Id.*

<sup>149</sup> U.S. SENTENCING COMM’N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 12 (2004), [http://www.ussc.gov/Research/Research\\_Publications/Recidivism/200405\\_Recidivism\\_Criminal\\_History.pdf](http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf).

