

**THE SOMEWHAT SUSPECT CLASS:
TOWARDS A CONSTITUTIONAL FRAMEWORK FOR EVALUATING
OCCUPATIONAL RESTRICTIONS
AFFECTING PEOPLE WITH CRIMINAL RECORDS**

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Introduction

Few groups today are as despised as people with criminal records. They are one group whom it is still permissible to hate. Politicians compete to be the toughest on crime and to invent new ways to restrict the rights of former offenders. Many individuals with criminal records are literally disenfranchised. And countless federal and state laws target individuals with criminal

¹ I am grateful to the Wayne State Journal of Law in Society for its generous invitation both to participate in the Journal's Symposium on the Overpopulated Prison System and to contribute to this volume. I am indebted to Gabriel Chin, Margaret Love, Charles Pazdernik, Noah Zatz, and the Journal's editors, who provided helpful comments on earlier drafts of this article. The Soros Justice Fellowship Program of the Open Society Institute provided critical financial and intellectual support for my work on criminal records issues; those practical experiences led me to seek a constitutional framework for analyzing record-based restrictions. I am also deeply grateful to my clients at Legal Aid of Western Michigan who remind me on a daily basis of the impact that legal theories have on people's lives.

records. While some of this condemnation is deserved, and many of these laws are appropriate, the result is that people with criminal records are politically powerless, second-class citizens.

Despite the inferior status of former offenders, courts have consistently refused to find that people with criminal records are a suspect class.² Indeed, it is a throwaway line in many judicial opinions that record-based laws are subject only to rational basis review, a standard which, as typically applied, is highly deferential to legislative judgments.³ Since rational basis review merely requires that laws be rationally related to a legitimate government purpose,⁴ laws will be upheld under this standard unless “a classification rests on grounds wholly irrelevant to the achievement of the State’s objective.”⁵ It is only when a suspect class is involved and there is a danger that the law will reflect animus, that a closer fit between the law and the governmental interest is required.

Given that people with criminal records are not a suspect class, it would seem likely that laws restricting the rights of people with criminal records would almost always survive equal protection challenges. In fact, in a surprising number of cases related to occupational restrictions, the courts have used rational basis review to invalidate laws that limit the employment opportunities of people with criminal records.⁶ The pattern that emerges from the cases is that courts are willing to strike down laws which categorically bar large groups of former offenders from particular occupations, but will generally uphold laws where the relationship between the offense and the restricted occupation is more carefully tailored. Given that rational basis review is generally assumed to be toothless, it is astonishing to find so many cases where courts have rejected legislative assumptions about the dangers posed by former offenders.

² See, e.g., *Baer v. City of Wauwatosa*, 716 F.2d 1117, 1125 (1983) (“[F]elons are not yet a protected class under the Fourteenth Amendment.”); *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970) (“[A] classification based on criminal record is not a suspect classification.”); *Kindem v. City of Alameda*, 502 F. Supp. 1108, 1111 (N.D. Cal. 1980) (“[E]x-felons are not thought to constitute a suspect class.”); *Furst v. New York City Transit Authority*, 631 F. Supp. 1331, 1336-37 (E.D.N.Y. 1986) (noting that felons are not a suspect class, and that therefore rational basis review applies); *Hill v. Gill*, 703 F. Supp. 1034, 1037 (D.R.I. 1989) (“In this case, it is clear that the class in question (i.e. persons convicted of felonies) is not a protected one.”); *Darks v. Cincinnati*, 745 F.2d 1040, 1042 (6th Cir. 1984) (“The parties agree that the constitutional validity of this classification must be measured by the rational basis test.”). But see *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa) (considering plaintiffs’ argument that strict scrutiny would apply if a no-felon policy had a disproportionate racial impact, but deciding that the evidence did not support a finding of racial discrimination); *Miller v. Carter*, 547 F.2d 1314, 1321 (7th Cir. 1977) (Campbell, J., concurring) (noting that the Supreme Court has defined a suspect class as one “saddled with such disabilities . . . as to command extraordinary protection from the majoritarian political process,” and finding that significant societal disabilities derive solely from the fact that a person has a criminal record, but deciding that, in light of Supreme Court’s reluctance to expand the number of suspect classes, people with criminal records do not constitute a suspect class); *FW/PBS, Inc. v. Dallas*, 837 F.2d 1298, 1305 (5th Cir. 1988) (discussing possible standards for review under the First Amendment of ordinance barring individuals convicted of certain sex-related crimes from operating sexually oriented businesses, suggesting that the ordinance would survive strict scrutiny, noting that courts have not required compelling necessity to justify other occupational restrictions even when intertwined with First Amendment rights, and concluding that “the City need only show that conviction and the evil to be regulated bear a substantial relationship”).

³ See, e.g., *FCC v. Beach Communications Inc.*, 508 U.S. 307, 314 (1993) (stating that under rational basis review, legislation “must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”).

⁴ *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 74-175 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

⁵ *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

⁶ See cases discussed in Section III, *infra*.

This article explores when and why courts use rational basis review to protect the employment rights of people with criminal records, and then attempts to develop a jurisprudential framework for analyzing the constitutionality of record-based occupational restrictions. I focus on occupational restrictions because they are one of the most important limitations imposed on people with criminal records; many other restrictions – such as the inability to access government benefits or subsidized housing – often only come into play because a former offender cannot make a living. Moreover, occupational restrictions also present a good example of record-based legislation subject to review primarily under the Equal Protection and Due Process clauses of the Constitution. By contrast, certain other collateral consequences,⁷ such as felony disenfranchisement⁸ or jury disqualification,⁹ implicate additional constitutional provisions. Finally, although employment restrictions are both pervasive in the law¹⁰ and critically important to those affected by them, they have received little scholarly or political attention.¹¹

In Part I, I provide an overview of the social and statutory factors that affect the opportunity of people with criminal records to work. Part II reviews the Supreme Court cases dealing with record-based occupational restrictions. Because the Court's jurisprudence on occupational restrictions is limited, and because the Court's general jurisprudence on collateral consequences affects the analysis of occupational restrictions, this discussion includes a few selected cases outside the employment area.¹² In Part III, I survey and draw lessons from the

⁷ The American Bar Association's Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons defines a "collateral sanction" as "a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence." AMERICAN BAR ASSOCIATION, STANDARDS ON COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 1 (2004). The ABA distinguishes a "collateral sanction" from "discretionary disqualification," which mean "a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction." *Id.* at §19-1.1(b). Although two of the most important Supreme Court cases in this area – *Barsky v. Board of Regents*, 347 U.S. 442 (1954), and *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) – concern discretionary disqualifications, I am primarily concerned with occupational restrictions that operate automatically, and provide no opportunity for the affected individual to demonstrate fitness.

⁸ See *Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding felon disenfranchisement statute on grounds that Section 2 of the Fourteenth Amendment contemplates disenfranchisement for "rebellion or other crime").

⁹ See Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 74-87 (2003) (discussing challenges to laws excluding felons from jury service based on the Sixth Amendment's cross section requirement).

¹⁰ See Section I, *infra*.

¹¹ By contrast, certain other restrictions, notably felon disenfranchisement, have received considerable attention. See, e.g., Gabriel Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment*, 92 GEORGETOWN L.J. 259 (2004); Alec Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045 (2002); George Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895 (1999); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004). While felony disenfranchisement has a substantial impact on the overall political process, for individuals with criminal records themselves, the right to work is almost always more important than the right to vote. See Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1638 (2004) ("Voting may be of great symbolic importance, but employment puts bread on the table.").

¹² The non-employment Supreme Court cases discussed focus on equal protection and due process cases. I do not discuss cases dealing with other constitutional provisions, such as those implicated by felony disenfranchisement.

lower court cases where occupational restrictions have been challenged on equal protection grounds.

In the subsequent sections I seek to account for the judicial concern about occupational restrictions on people with criminal records and provide a framework for analyzing such restrictions. Part IV assesses the ways in which people with criminal records are similar to and different from traditional suspect classes. Part V explores rational basis with “bite,” and considers the role animus plays in equal protection analysis. Part VI looks at the economic interests affected by occupational restrictions. Part VII considers whether the irrebuttable presumption doctrine provides a viable analytical framework that can account both for the former offenders’ interests and for the legitimacy of government regulation based on criminal records. Finally, Part VIII sets out three principles to guide judicial review of record-based occupational restrictions.

I. Restrictions on the Employment of People with Criminal Records

While there is no good national data on the unemployment and underemployment of people with criminal records, the research unequivocally demonstrates that having a criminal record greatly reduces one’s employment opportunities.¹³ The difficulty of finding and maintaining employment is one of the biggest obstacles that former offenders face. This is particularly true for individuals of color.¹⁴

Ensuring that people with criminal records have a stable, adequate, and legal source of income is important for many reasons. At the most basic level, former offenders deserve the opportunity to make an honest living and support themselves and their families. Unemployment is not supposed to be part of the punishment for criminal conduct. Moreover, there are tremendous social and economic costs to restricting the employability of people with criminal records. If former offenders cannot find employment, someone else – usually the government – will end up paying the cost of feeding their children and covering their medical bills. In addition, employment is closely linked to reduced rates of recidivism.¹⁵ Many researchers

¹³ For example, one California study showed that only 21 percent of the parolee population has a full time job. See JEREMY TRAVIS, AMY SOLOMON & MICHELLE WAUL, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 32 (2001) (citing research). Another researcher has estimated the “wage penalty” of incarceration as 10-20 percent. *Id.* See also Greg Ip, *For Many, a Prison Record Poses Major Obstacle to Advancement*, WALL STREET JOURNAL, June 22, 2005, at A6; JAMES LYNCH & WILLIAM SABOL, PRISONER REENTRY IN PERSPECTIVE 18 (2001); U.S. DEP’T OF LABOR, FROM HARD TIME TO FULL TIME: STRATEGIES TO HELP MOVE EX-OFFENDERS FROM WELFARE TO WORK (2001).

¹⁴ Paul von Zielbauer, *Study Shows More Job Offers for Ex-Convicts Who are White*, N.Y. TIMES, June 17, 2005, at B5 (reporting study in New York City which found that for every ten white men without convictions who got a job offer or callback for an entry-level position, seven white men with prison records also did, but for every ten black men without criminal convictions who got such a job or callback, only three black men with prison records did); National Employment Law Project, *Employment Screening for Criminal Records: Attorney General’s Recommendations to Congress; Comments of the National Employment Law Project to the U.S. Attorney General Office of Legal Policy* (visited Nov. 21, 2005) available at <http://www.nelp.org/docUploads/AGCommentsNELP%2Epdf>, at 6 (finding that those occupations most likely to be subject to record-based employment prohibitions are the same occupations that traditionally employ disproportionately more people of color).

¹⁵ See, e.g., Harold L. Votey, *Employment, Age, Race & Crime: A Labor Theoretic Investigation*, 7 J. QUANTITATIVE CRIMINOLOGY 123, 124-25 (1991) (reviewing literature on relationship between employment and crime).

believe that “the number one factor which influences the reduction of recidivism is an individual’s ability to gain ‘quality’ employment.”¹⁶

Several factors contribute to the difficulties former offenders face in the job market. To be sure, people with criminal records typically have a limited education and few job skills.¹⁷ While former offenders may be able to find unskilled or semi-skilled jobs when the economy is doing well and unemployment rates are low, in tougher economic conditions people with criminal records will often have a more difficult time competing with other low-skill workers.¹⁸ Moreover, the low-wage/low-skill jobs that are most likely to be open to former offenders are also those jobs most likely to be affected by economic downturns.¹⁹

In any event, employers are reluctant to hire people with criminal records. This reflects both the stigma attached to criminal convictions and inflated fears about lawsuits alleging negligent hiring.²⁰ For example, one study conducted in five major cities showed that two-thirds of employers would not knowingly hire a former offender.²¹ The considerable increase in the number of employers conducting criminal background checks has exacerbated this problem.²² Particularly in states which have posted criminal records on the world wide web, it has become cheap, quick and simple to obtain such background information on prospective employees. Unsurprisingly, “criminal background checks are becoming standard operating procedure in the business world,”²³ with approximately 80 percent of large employers now conducting them.²⁴ Moreover, many jurisdictions require prophylactic criminal background checks in a variety of fields. For example, 1.5 million background checks were conducted pursuant to state laws in 2004 in California alone, accounting for one in ten California workers.²⁵ While such background screening requirements are not necessarily coupled with mandatory prohibitions on employment, they have a similar effect, since employers who conduct checks frequently decide not to hire a

¹⁶ Saxonhouse, *supra* note 11, at 1611 (citing research of the Safer Foundation). *See also* TRAVIS, *supra* note 13, at 31 (noting that by one estimate, a 10 percent decrease in wages is linked to a 10-20 percent increase in criminal activity); Nicholas Freudenberg, Jessie Daniels, Martha Crum, Tiffany Perkins, and Beth Richie, *Coming Home from Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families and Communities*, 95 AMERICAN JOURNAL OF PUBLIC HEALTH 1725, 1729 (2005) (finding that although only one-third of young men released from jail in New York City had found formal jobs within 15 months of release, the likelihood of rearrest was reduced by two-thirds for those who had found employment within one year of release).

¹⁷ U.S. DEP’T OF LABOR, *supra* note 13, at 3-4.

¹⁸ *See* LYNCH, *supra* note 13, at 18 (discussing impact of macroeconomic conditions on employment of former offenders).

¹⁹ *Id.*

²⁰ To establish negligent hiring liability, a plaintiff must prove that “(1) the employer owed the [plaintiff] a duty of reasonable care; (2) the employer breached the duty; and (3) the breach proximately caused the third party’s harm.” Stephen Befort, *Pre-Employment Screening and Investigation: Navigating Between a Rock and Hard Place*, 14 HOFSTRA L.J. 365, 376 (1997). *See also* Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1301 (2002) (providing overview of negligent hiring concerns in the context of the employment of people with criminal records and noting that the key question is whether the nature of the harm caused to the plaintiff was reasonably foreseeable). Because negligent hiring cases turn on the foreseeability of the harm, there must be a close relationship between the employee’s record and the type of harm produced for negligent hiring to be established.

²¹ TRAVIS, *supra* note 13, at 31.

²² National Employment Law Project, *supra* note 14, at 2.

²³ James Mosher, “Trust No One: Criminal Background Checks Becoming Standard Practice,” DAILY RECORD, June 10, 2005.

²⁴ National Employment Law Project, *supra* note 14, at 2.

²⁵ *Id.*

person once that individual's record becomes known.²⁶ Certainly background screening can be helpful in identifying applicants whose records makes them unsuitable for a particular position. However, such screening also discloses records which should not be disqualifying, but which, in practice, are treated as disqualifying by employers.

The fact that people with criminal records are legally barred from working in a large number of different fields exacerbates the already considerable barriers such persons experience in seeking employment. These employment prohibitions are contained either in laws that restrict former offenders' access to occupational licenses or in laws that prohibit private employers from hiring individuals with (certain) criminal records.

Legal prohibitions on the employment of former offenders are contained in a range of state and federal laws, and vary considerably in scope. It is thus impossible to quantify precisely the impact such laws have had on the employability of people with criminal records. But it is clear that the impact is substantial. A significant number of states bar persons with felony convictions from some or all public employment.²⁷ The federal government prohibits persons with felony convictions from joining the Armed Forces or holding a variety of other federal jobs.²⁸ People with criminal records have difficulty obtaining occupational licenses in "the majority of regulated occupations."²⁹ Numerous laws prohibit the employment of former offenders in fields ranging from child care to nursing, and from real estate to law.³⁰ For example, federal restrictions apply to workers employed in nearly the entire transportation industry (including aviation, port and ground transportation workers),³¹ private security officers,³² nursing home and home health care workers,³³ and workers who have "responsibility for the safety and well-being of children, the elderly, or individuals with disabilities."³⁴ State legislatures have also been very active in passing legislation barring people with criminal records

²⁶ Nora Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 156 (1999) (noting that "ever more employers are mandated to require ex-offenders to reveal their convictions, which usually will result in the denial of jobs to these applicants").

²⁷ Bureau of Justice Statistics, U.S. Dep't of Justice, STATE COURT ORGANIZATION 1998, at 308-11 tbl. 49, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf> (last visited May 14, 2005). Seven states absolutely bar individuals with felony convictions from public employment. Other states have a variety of provisions which can involve time-limited bans, bans based on particular convictions, bans for certain public sector employment (e.g. law enforcement), bans on holding public office, or bans that are lifted upon completion of sentence.

²⁸ Susan M. Kuzma, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION (2000), available at http://www.usdoj.gov.pardon/collateral_consequences.pdf (last visited May 24, 2005).

²⁹ *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1002 (1970).

³⁰ See Kuzma, *supra* note 28; TRAVIS, *supra* note 13, at 31; Sharon Dietrich, *Criminal Records and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for their Families*, in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 13, 15 (Amy Hirsch et al. eds., 2002); Bruce E. May, *Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N. DAK. L. REV. 187, 193 (1995) (citations omitted) ("Countless federal, state, and municipal laws single out the ex-felon for possible exclusion from the majority of regulated occupations.").

³¹ USA Patriot Act of 2001, 49 U.S.C. §5103a (hazmat drivers); Aviation and Transportation Security Act of 2001, 40 U.S.C. §44936 (unescorted access to airport security areas); Maritime Transportation Security Act of 2002 (46 U.S.C. §70105 (secured areas of ports).

³² Private Security Officer Employment Authorization Act of 2004, P.L. 108-458, Title VI, Subtitle E, Section 6402.

³³ P.L. 105-277, Div. A, Title I, Section 101(b).

³⁴ 42 U.S.C. 5119a(a)(1).

from employment in particular fields. For example, a recent survey found some 291 record-based employment restrictions in the Ohio Code alone.³⁵

More and more occupations are becoming restricted.³⁶ Indeed, since the late 1990s and again since September 11, 2001, there has been a major expansion of state and federal laws denying employment in key entry-level jobs, with many of the new laws imposing lifetime felony disqualifications even for nonviolent offenses.³⁷ Evidence for this expansion can be found in the sharp increase in legislatively-mandated FBI background checks. Since 2002, the FBI (which cannot release background check information without statutory authorization, unlike private companies and many state record repositories) has been conducting more criminal background checks for civil purposes than for law enforcement purposes.³⁸ Indeed, the number of civil requests nearly doubled in the last ten years.³⁹

Record-based employment disqualifications are imposed by operation of law, without any consideration of their appropriateness for the individual involved.⁴⁰ By contrast, the criminal consequences of a conviction are, at least to some extent, tailored to individual circumstances.⁴¹ As a result, record-based restrictions are frequently quite overbroad, affecting individuals whose actual conduct provides no basis to believe they would be dangerous or untrustworthy if employed in the field in question. In addition, lengthy or lifetime restrictions do not account for the capacity of people – whose prior conduct might indeed be concerning – to change. Recent “desistance” research supports the common-sense conclusion that, the longer it has been since someone committed a crime, the less likely it is that the individual will reoffend. For example, one expert found that individuals who remain crime-free for ten years after conviction are no more likely to commit another offense than a person with no record.⁴² Similar research regarding young offenders showed that if a person who was arrested at age 18 reaches

³⁵ See Kimberly Mossoney & Cara Roecker, *Ohio Collateral Consequences Project: Executive Summary*, 36 U. TOL. L. REV. 611 (2005). The survey found an additional 113 restrictions in the areas of civil rights, political rights, and property rights.

³⁶ See, e.g., Demleitner, *supra* note 26 (discussing increase in governmental regulation and describing wide range of occupational exclusions), at 156; Kathleen M. Olivares, Velmer S. Burton, Jr. & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, FED. PROB. Sept. 1996, at 13 (reporting that between 1986 and 1996, states had generally become more restrictive of the rights of persons convicted of felonies); AMERICAN BAR ASSOCIATION, *supra* note 7, at 8 (“The collateral consequences of conviction have been increasing steadily in variety and severity for the past 20 years, and their lingering effects have become increasingly difficult to shake off.”).

³⁷ Maurice Emsellem, “‘Smart on Crime’ Agenda to Promote Public Safety While Addressing Occupational Barriers for People with Criminal Records,” Congressional Briefing 6 (June 9, 2005) (on file with author); MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 4 (2005) (forthcoming in hardcover and available on-line at <http://www.sentencingproject.org/rights-restoration.cfm>) (collateral penalties have grown more numerous and more disabling since September 11, 2001).

³⁸ National Employment Law Project, *supra* note 1422, at 2.

³⁹ *Id.* The number of civil requests exceeded nine million in 2004, of which nearly five million were conducted specifically for employment and licensing purposes. *Id.*

⁴⁰ AMERICAN BAR ASSOCIATION, *supra* note 7, at 7 (noting that collateral consequences may take effect automatically without judicial consideration of their appropriateness in the particular case).

⁴¹ The fact that criminal defendants are entitled to individualized consideration in sentencing does not mean that every sentence will be just. It does, however, mean that in imposing criminal sanctions, courts must consider the appropriate sentence for the specific individual, subject to sentencing guidelines, mandatory minimums, and similar constraints.

⁴² See National Employment Law Project, *supra* note 1422, at 8 (citing research by Jeffrey Fagan analyzing longitudinal data from Essex County, New Jersey).

age 24 without committing any more crimes, he or she is no more likely than someone with no prior record to commit a crime.⁴³

Very few jurisdictions have enacted laws to protect the employment rights of people with criminal records, in effect allowing employers to deny jobs to people with criminal records, regardless of the age of the conviction of the individual's work history or personal circumstances.⁴⁴ The American Bar Association has recently developed Standards on Collateral Sanctions and Discretionary Disqualifications of Convicted Persons.⁴⁵ These Standards suggest, among other things, that collateral sanctions and discretionary disqualifications be limited to those specifically warranted by the conduct constituting the underlying offense; that certain collateral sanctions be prohibited; that collateral sanctions be a factor in determining the appropriate sentence; that the defendant be fully informed of the collateral sanctions applicable to the offense charged; and that a mechanism be provided for obtaining relief from collateral sanctions and discretionary disqualifications.⁴⁶ Of course these Standards are aspirational, not legally binding. While they provide an important normative framework for analyzing record-based restrictions, they do not themselves serve as a basis for challenging laws which fail to meet the requirements they set out.

Title VII of the Civil Rights Act does provide some legal protection from employer policies that discriminate against people with criminal records.⁴⁷ Although the underlying purpose of this legislation was not to protect people with criminal records, but rather to protect racial minorities, record-based employment policies that have a disparate impact on people of color fall under the statute.⁴⁸ Such record-based restrictions must be justified by "business necessity," which requires consideration of the nature and age of the conviction, as well as its relationship to the job in question.⁴⁹ Under this standard, suits challenging record-based restrictions have enjoyed some success, though relatively few such cases have been brought.⁵⁰

⁴³ *Id.* (citing research by Robert Brame, Megan Kurylchek, and Shawn Bushway based on data tracking a cohort of offenders from the Philadelphia area).

⁴⁴ Legal Action Center, *AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS* 8 (2004). See also Sheri-Ann Lau, *Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*, 22 HAWAII L. REV. 709 (2000) (surveying state laws providing protections from discrimination based on arrest or conviction records); Thomas Hruz, *The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQUETTE L. REV. 779 (2002) (criticizing Wisconsin's statute which prohibits discrimination based on conviction records except where the offenses substantially relate to the position in question).

⁴⁵ AMERICAN BAR ASSOCIATION, *supra* note 7.

⁴⁶ *Id.* at 1-2.

⁴⁷ 42 U.S.C. §2000e *et seq.*

⁴⁸ See, e.g., *Policy Statement on the Issue of Criminal Records Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. §2000e *et seq.* (1982) (Feb. 4, 1987), in II EEOC Compliance Manual § 604 (explaining that because a policy denying employment based on criminal records has a disparate impact on African-Americans and Hispanics, such a policy would violate Title VII); *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment* (July 29, 1987), in II EEOC Compliance Manual App. § 604-B (explaining how statistics should be used to prove disparate impact in cases involve record-based restrictions).

⁴⁹ *Policy Statement on the Issue of Criminal Records Under Title VII, supra* note 48, at 2.

⁵⁰ See, e.g., *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975) (holding that railroad's policy of refusing employment to persons with criminal convictions violated Title VII because it had a disparate impact on racial minorities and was not justified by business necessity); *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified on other grounds*, 472 F. 2d 631 (9th Cir. 1972) (holding that a policy of denying employment to persons who had been arrested was unlawful under Title VII because it disproportionately affected African-American applicants and was not justified by business necessity); *Carter v. Gallagher*, 452 F.2d 315, 326 (8th Cir.

However promising Title VII might be as an approach to discriminatory employer policies, it provides an inadequate framework for assessing legally-mandated occupational barriers. After all, an employer can easily argue that the “business necessity” test is met if there is a state or federal law barring the employment of people with criminal records in the occupation at issue.⁵¹ Thus, to assess, and potentially to redress, the discriminatory impact of such legislative disqualifications, we need more than a statutory framework. We need a constitutional framework.

II. *The Supreme Court’s Approach*

The Supreme Court has charted a somewhat erratic course in evaluating record-based restrictions. In the first decision squarely to address the question of occupational restrictions – the 1898 case of *Hawker v. New York* – the Court upheld a law criminalizing the practice of medicine by persons with felony convictions.⁵² The defendant argued that depriving him of his right to practice medicine was additional punishment that violated the ex post facto clause. The Court, however, concluded that persons with felony records are “excluded from obtaining [a medical] license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class.”⁵³ The Court explained that:

It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule – one having no relation to the subject-matter, but is only appealing to a well recognized fact of human experience. So if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of res judicata and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.⁵⁴

The Court rejected the argument that a person’s character may have changed since the time of the conviction:

1971) (Title VII case holding that conviction record may not be an absolute bar to employment as a firefighter); *Dozier v. Chupka*, 395 F. Supp. 836, 850 (S.D. Ohio 1975) (consideration of prior arrests and convictions in hiring of firefighter had a disparate impact on African-Americans). *But see EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734 (D. Fla. 1989) (employer policy not to hire persons with felony, theft, or larceny conviction did not have a disparate impact on Hispanics); *Richardson v. Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), *aff’d mem.*, 468 F.2d 951 (5th Cir. 1972) (dismissing Title VII case brought by bellman who was discharged for prior theft conviction and finding that hotel had a legitimate business need to restrict security-sensitive positions to individuals who had not committed serious crimes).

⁵¹ Note, however, that Title VII would arguably preempt state occupational disqualifications that have a disparate impact on people of color.

⁵² 170 U.S. 189 (1898). For a comprehensive analysis of *Hawker*, see Gabriel Chin, *Are Collateral Sanctions Premised on Conduct or Conviction: The Case of Abortion Doctors*, 30 FORDHAM URBAN L.J. 1685 (2003).

⁵³ *Hawker*, 170 U.S. at 197.

⁵⁴ *Id.* at 196.

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of good moral character. But the legislature has power in cases of this kind to make a rule of universal application.⁵⁵

Justice Harlan, in dissent, argued that depriving an offender of his occupation long after he had been punished for his offense did violate the *ex post facto* clause. While the majority viewed the matter as a regulatory one, Harlan understood it as a deprivation of one's "property in the right to earn [a] living."⁵⁶ Such a deprivation, imposed long after the conviction itself, was an impermissible additional punishment. (Although Harlan did not discuss it explicitly, his opinion also sounds in substantive due process.) He further contended that a criminal record could not constitute conclusive proof of a person's unfitness to practice medicine:

Assuming, for the purpose of the argument, that the legislature may require for the continuance in the practice of medicine that the practitioner shall possess professional knowledge and skill and also good moral character, it is obvious that such a requirement must relate to a present status or condition of a person coming within the terms of the act.⁵⁷

Harlan argued that the law did not deal with a person's present moral character, but made a prior conviction conclusive evidence of the person's unfitness to practice medicine. He further noted that the law included "any and all felonies – not only those committed in connection with the profession of medicine and surgery."⁵⁸

As an *ex post facto* case, *Hawker* turned on the question of whether occupational restrictions affecting convicted persons serve punitive, or regulatory, purposes. The Court held that where collateral consequences are regulatory in nature, they do not violate the *ex post facto* clause. In reaching this conclusion, however, the *Hawker* court used sweeping language that also undermines arguments based on equal protection.⁵⁹ The court concluded that there is a rational relationship between prior criminal behavior and professional disqualification, and further concluded that the state may rely on a conviction to presume bad moral character, even if that presumption is not universally valid.

The underlying facts here highlight the problem with the Court's reasoning. Hawker was convicted of performing an abortion, conduct which is now legal (although the legality of that conduct is the subject of much controversy). Changing societal norms and evolving constitutional doctrine around abortion make the court's assumptions about the relationship between Hawker's character and his conviction seem dated. The very conduct which was the basis for the conclusion that Hawker lacked good moral character was later found to be constitutionally protected.

In subsequent decisions the Court has been more sympathetic to constitutional claims by convicted persons. For example, in the 1942 case of *Skinner v. Oklahoma*,⁶⁰ the Court struck down Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds because it impermissibly distinguished between embezzlers and thieves. The Court emphasized that as a

⁵⁵ *Id.* at 197.

⁵⁶ *Id.* at 205 (Harlan, J., dissenting) (quotation marks omitted).

⁵⁷ *Id.* at 204 (Harlan, J., dissenting) (quotation marks omitted).

⁵⁸ *Id.* at 205 (Harlan, J., dissenting) (quotation marks omitted).

⁵⁹ *But see Smith v. Fussenich*, 440 F. Supp. 1077, 1081 (D. Conn. 1977) (distinguishing *Hawker* as an *ex post facto* case, and questioning whether *Hawker* remains good law).

⁶⁰ 316 U.S. 535 (1942).

general matter, a state “is not constrained in the exercise of police power to ignore experience which marks a class of offenders or a family of offenses for special treatment.”⁶¹ However, strict scrutiny was appropriate here because sterilization “involves one of the basic civil rights of man.”⁶² Therefore, “[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”⁶³

The majority’s reasoning is a mix of equal protection and fundamental rights. The Court saw no equal protection violation where legislation merely distinguishes between different classes of convicted persons. Rather, the Court’s concern stemmed from the significance of the interest affected. Yet, the Court’s decision turned not on due process, but on equal protection. Where such a significant interest is at stake, the state cannot treat embezzlers and thieves differently, as their offenses are essentially the same. Strikingly, the majority’s reasoning would appear to permit the sterilization of habitual offenders, so long as it is done equitably across offense classes.

In a concurring opinion, Chief Justice Stone pointed out that very fact, arguing that if sterilization of some offenders is permissible, it is doubtful that the Equal Protection Clause requires it to be applied either to all offenders or to none. According to Stone, if the judiciary must accept the legislature’s determinations regarding the inheritability of criminal tendencies, then the judiciary must also presume that the legislature can determine that some criminal tendencies are more likely to be transmitted than others.

[T]he real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process. There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned and where the presumption is resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action.... [T]he State does not contend – nor can there be any pretense – that either common knowledge or experience, or scientific investigation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable. In such circumstances, inquiry whether such is the fact in the case of any particular individual cannot rightly be dispensed with.... A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process.⁶⁴

Both Chief Justice Stone and the majority emphasized the importance of the interest at stake and conceded the ability of the state to sterilize individuals if it could be scientifically demonstrated that criminal tendencies are inheritable. But while the majority saw the case in terms of equity between classes of offenders (i.e. equal protection), Chief Justice Stone viewed

⁶¹ *Id.* at 540.

⁶² *Id.* at 541.

⁶³ *Id.*

⁶⁴ *Id.* at 544-45 (Stone, C.J., concurring) (citations and footnote omitted).

the issue as ensuring that the liberty of each individual was protected through individualized hearings (i.e. due process).

Justice Jackson, in a separate concurring opinion, argued that both equal protection and due process were at issue. He suggested, without deciding, that

[p]erhaps to employ a broad and loose scheme of classification would be permissible if accompanied by the individual hearings indicated by the chief justice. On the other hand, narrow classification with reference to the end to be accomplished by the Act might justify limiting individual hearings to the issue whether the individual belonged to a class so defined.⁶⁵

For Jackson, then, the issue was the fit between the state's classification and the state's goal. The less accurate the fit, the more likely that individualized hearings would be required.

The Court returned to the issue of occupational restrictions in 1954 in *Barsky v. Board of Regents*, which concerned whether a physician's license could be suspended as a result of a conviction for failing to comply with a subpoena of the United States House of Representatives.⁶⁶ The physician, who was the chairman of the Joint Anti-Fascist Refugee Committee, a group founded to help Spanish refugees from the Franco government, had withheld the requested documents on the advice of counsel and out of concern that the information, if disclosed, could endanger the lives of individuals in Spain whose relatives had contributed to the Committee.⁶⁷ The statute at issue provided that if a physician is convicted of a crime, that physician's license "may be revoked, suspended or annulled or such practitioner reprimanded or disciplined ... after due hearing."⁶⁸ The physician was "given an extended hearing" before a subcommittee of the New York State Department of Education's Medical Committee on Grievances, which recommended a three month license suspension.⁶⁹ After a series of appeals and an additional hearing, the Board of Regents imposed a six month suspension.⁷⁰

The physician argued that, while the state has a legitimate right to regulate the practice of medicine, the standard adopted by New York exceeded reasonable supervision of the profession and deprived him of his property rights in his license and practice, without due process.⁷¹ The Court disagreed, upholding the statute on the grounds that New York had adopted a discretionary scheme that allowed it to "match[] the measure of the discipline to the specific case."⁷² It explained:

This statute is readily distinguishable from one which would require the automatic termination of a professional license because of some criminal conviction of its holder. Realizing the importance of high standards of character and law observance on the part of practicing physicians, the State has adopted a flexible procedure to protect the public against the practice of medicine by those convicted of many more kinds and degrees of crime than it can well list specifically. It accordingly has sought to attain its justifiable end by making the conviction of any crime a violation of its professional medical standards, and then leaving it to a

⁶⁵ *Id.* at 546 (Jackson, J., concurring).

⁶⁶ 347 U.S. 442 (1954).

⁶⁷ *Id.* at 444; *id.* at 457 (Black, J., dissenting).

⁶⁸ *Id.* at 445 (quoting New York Education Law, §6514(2)).

⁶⁹ *Id.* at 446.

⁷⁰ *Id.*

⁷¹ *Id.* at 451.

⁷² *Id.* at 448.

qualified board of doctors to determine initially the measure of discipline to be applied to the offending practitioner.⁷³

The Court continued by discussing the hearing procedures available under the statute, which allowed the accused to appear personally or by counsel, to produce witnesses and evidence, to cross-examine witnesses, to examine the evidence against him, and to have subpoenas issued.⁷⁴ Finally, the Court rejected the notion that the Board of Regents or the various recommending committees had made an arbitrary or capricious decision, or had relied upon irrelevant evidence.⁷⁵

In its reasoning the Court distinguished automatically imposed disabilities, focused on the ability of the state to tailor professional sanctions to an individual's specific circumstances, and emphasized the procedural protections available. Its analysis thus suggests that blanket restrictions on the employment rights of former offenders are problematic. Although the Court observed in a footnote that several New York laws provided for automatic termination in the event of a felony conviction, the Court did not comment on the validity of such restrictions.⁷⁶ The Court did state in dicta that the practice of medicine is:

a privilege granted by the State under its substantially plenary power to fix the terms of admission. The issue is not before us but it has not been questioned that the State could make it a condition of admission to practice that applicants shall not have been convicted of a crime.... It could at least require a disclosure of such convictions as a condition of admission and leave it to a competent board to determine, after opportunity for fair hearing, whether the convictions, if any, were of such a date and nature as to justify denial of admission to practice in light of all material circumstances before the board.⁷⁷

Thus, while *Barsky* clearly stands for the proposition that professional licenses cannot automatically be suspended or revoked for a misdemeanor conviction, it is less clear whether *a priori* disqualifications or automatic disqualifications based on felony convictions are invalid.

The case generated three dissents. Justice Black stressed that although *Barsky* had been convicted of a crime, the offense was committed out of a desire to preserve the constitutional rights of his organization, and in no way reflected on *Barsky's* abilities as a physician.⁷⁸ While the state has the power to regulate the practice of medicine, the right to practice medicine is "a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property right."⁷⁹ Therefore, *Barsky's* license could not be suspended without due process. Justice Black would have held that the due process afforded to *Barsky* was constitutionally deficient because of the admission of certain types of evidence at *Barsky's* initial hearing,⁸⁰ and because the Regents' discretion was neither guided by legislative standards nor subject to

⁷³ *Id.* at 452.

⁷⁴ *Id.*

⁷⁵ *Id.* at 455.

⁷⁶ *Id.* at 452 note 11. Indeed, the statute at issue provided that "[w]hensoever any practitioner of medicine, osteopathy or physiotherapy shall be convicted of a felony ... the registration of the person so convicted may be annulled and his license revoked by the department." *Id.* at 449 n.9 (quoting New York Education Law §6514(1)).

⁷⁷ *Id.* at 451.

⁷⁸ *Id.* at 458 (Black, J., dissenting).

⁷⁹ *Id.* at 459 (Black, J., dissenting).

⁸⁰ At the initial hearing in 1951, evidence had been introduced that the Joint Anti-Fascist Refugee Committee had been listed as a subversive organization by the U.S. Attorney General. *Id.* at 460 (Black, J., dissenting). The same year, the Supreme Court held in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), that the Attorney General's list was unlawful. See *Barsky*, 347 U.S. at 460 (Black, J., dissenting).

judicial review.⁸¹ Justice Black was concerned that this lack of guidance and review would lead to inappropriate sanctions: “Should [the Regents] see fit to let a doctor repeatedly guilty of selling narcotics to his patients continue to practice, they could do so and at the same time bar for life a doctor guilty of a single minor infraction having no bearing whatever on his moral or professional character.”⁸² Under the New York scheme, “a doctor’s right to practice rests on no more than the will of the Regents ... [but] ‘the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails.’”⁸³ Justice Black, then, accepted the premise that the state could use a hearing process to impose a professional sanction based on a criminal conviction, but believed that New York’s procedure for disciplining doctors was constitutionally defective in allowing for sanctions to be imposed that were not appropriately tailored to the conviction at issue.

Justice Frankfurter, in contrast to Justice Black, was not troubled by either the discretion granted to administrative agencies or the lack of judicial review. However, like Justice Black he was concerned about the relationship between an individual’s criminal history and any disqualification imposed. The agency’s discretion must, therefore,

be exercised within the gamut of choices, however extensive, relevant to the purposes of the power given the administrative agency. So far as concerns the power to grant or revoke a medical license, that means that the exercise of authority must have some rational relation to the qualifications required of a practitioner of that profession. It is one thing thus to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State’s deprivation or partial destruction of a man’s professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession.... A license cannot be revoked because a man is redheaded or because he was divorced, except for a calling, if such there be, for which redheadedness or an unbroken marriage may have some rational bearing.⁸⁴

Justice Frankfurter doubted that the Regents could have explicitly suspended Barsky for being a member of an organization that had been listed by the U.S. Attorney General as subversive. Since that may, however, have been the actual basis for the suspension, he would have returned the case to the New York authorities for reconsideration.⁸⁵

Finally, Justice Douglas forcefully insisted that the right to work “was the most precious liberty that man possesses.”⁸⁶ The Justice argued that while a person does not have an affirmative right to any particular job, skill or profession, the state may also not deprive individuals of a job, skill, or profession, once acquired, making the question “not what government must give, but rather what it may not take away.”⁸⁷ At the same time, the Justice worried about the slippery slope. If a man has no constitutional right to be a policeman,

⁸¹ *Id.* at 462 (Black, J., dissenting).

⁸² *Id.* at 463 (Black, J., dissenting).

⁸³ *Id.* at 463-34 (Black, J., dissenting) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 n.13).

⁸⁴ *Id.* at 470 (Frankfurter, J., dissenting).

⁸⁵ *Id.* at 471 (Frankfurter, J., dissenting).

⁸⁶ *Id.* at 472 (Douglas, J., dissenting).

⁸⁷ *Id.* at 473 (Douglas, J., dissenting).

[b]y the same reasoning a man has no constitutional right to teach, to work in a filling station, to be a grocery clerk, to mine coal, to tend a furnace, or to be on the assembly line. By that reasoning a man has no constitutional right to work.⁸⁸

Justice Douglas also emphasized that the mere fact that Barsky had a criminal conviction did not make him unfit to practice medicine, especially since his crime was based on a justifiable mistake concerning whether he had a constitutional right to withhold the subpoenaed documents. The underlying conduct simply did not provide a “constitutional ground for taking away a man’s right to work.”⁸⁹

The most interesting thing about *Barsky* is the level of implicit agreement between the majority and the dissenters. While the dissenters gave the physician’s professional interests more weight, the majority did not contest that the right to work, or more specifically the right to one’s medical license, is constitutionally protected. The dissenters likewise agreed that the right to work is subject to regulation, and that physicians may lose their licenses, so long as they are given due process when deprived of those licenses. The majority and dissenters thus both focused on procedural due process, with the majority emphasizing the extensive protections accorded to Barsky and the dissenters questioning the evidence admitted and the mechanisms employed.

Underlying the issue of procedural due process was a concern which, though not framed in these terms, reflects substantive due process: whether Barsky could be deprived of his license based on a conviction for conduct that was, at least according to the dissenters, irrelevant to his fitness to practice medicine. All three dissents, while assuming that criminal conduct can form the basis for professional disqualification, questioned the relationship between Barsky’s conviction and the deprivation of his license. The majority, in response, did not argue that there was a rational relationship between Barsky’s conduct and his medical license or address the substantive due process issue. Instead, the majority’s answer – which pointed out that the statute did not require automatic disqualification, but rather created a flexible, discretionary procedure in which discipline could be imposed on a case-by-case basis in light of the offense in question – was grounded in procedural due process. The majority, unlike the dissenters, was content to let the medical experts decide the substantive question of whether Barsky’s conviction was sufficiently related to his medical work to justify a license suspension.

While *Barsky* suggests that it is impermissible to revoke licenses automatically based on criminal convictions, *Barsky* did not resolve the question of how criminal records should be considered in the initial granting of licenses. That question arose in the 1957 case of *Schwartz v. Board of Bar Examiners of New Mexico*, which, oddly, did not cite *Barsky* or *Hawker*.⁹⁰ In *Schwartz* a unanimous Court found a constitutional violation where a bar applicant was denied admission based on his prior arrests, membership in the Communist party, and use of aliases.⁹¹ The Court explained that states cannot exclude individuals from the practice of law, or any other occupation, in a manner that violates due process or equal protection.⁹² While states can establish qualifications for entry into particular professions, “any qualification must have a rational connection with the applicant’s fitness or capacity to practice [his profession].”⁹³ In

⁸⁸ *Id.* at 472 (Douglas, J., dissenting).

⁸⁹ *Id.* at 474 (Douglas, J., dissenting).

⁹⁰ 353 U.S. 232 (1957).

⁹¹ Justice Whittaker did not participate in the decision. *Id.* at 232.

⁹² *Id.* at 238-39.

⁹³ *Id.* at 239.

rejecting the argument that an arrest record automatically demonstrated the lack of “good moral character” required to practice law, the Court observed that the plaintiff had never been convicted of these offenses and that the arrests had occurred decades earlier.⁹⁴ However, the Court added that even if one assumed that the alleged offenses had been committed, “[i]n determining whether a person’s character is good the nature of the offense[s] which he ha[d] committed must be taken into account.”⁹⁵ The Court noted that Schware’s arrest for “criminal syndicalism” occurred as part of mass arrests during a labor dispute, and that his arrest for violating the Neutrality Act reflected efforts to aid the Loyalists in the Spanish Civil War, an offense that did not indicate moral turpitude.⁹⁶ In other words, assuming that Schware had committed the acts alleged, those acts, taken in context, were not proof of poor character. More generally, the Court treated Schware’s prior conduct, including not just his arrests but also his use of aliases and membership in the communist party, as past youthful folly which “cannot be said to raise substantial doubts about his present good moral character.”⁹⁷

Schware stands for the proposition that occupational restrictions based on contact with the criminal justice system must be rationally related to the occupation in question, and must take into consideration the lapse of time and the nature of the offense.⁹⁸ Thus the *Schware* court implicitly rejected the conclusion in that case that a past criminal conviction, in and of itself, demonstrates a present lack of good moral character.

Three years later, in the 1960 case of *DeVeau v. Braisted*, the Court, citing *Hawker* but not *Skinner*, *Barsky*, or *Schware*, upheld a statute which prohibited waterfront unions from collecting dues if any agent or official of the union had a felony conviction.⁹⁹ The law effectively prohibited individuals with felony convictions from holding union positions. The appellant union member claimed that barring individuals with felony convictions from waterfront union offices was not a reasonable means of eliminating corruption on the waterfront. The Court conceded that such a broad rule “may well be deemed drastic legislation,” but explained that

in the view of Congress and the two States involved the situation on the New York waterfront regarding the presence and influence of ex-convicts called for drastic action.... Duly mindful as we are of the promising record of rehabilitation by ex-felons, and of the emphasis on rehabilitation by modern penological efforts, it is not for this Court to substitute its judgment for that of Congress and the Legislatures of New York and New Jersey regarding the social surgery required

⁹⁴ *Id.* at 242.

⁹⁵ *Id.* at 243.

⁹⁶ *Id.* at 241-43.

⁹⁷ *Id.* at 246.

⁹⁸ See *Lowe v. SEC*, 472 U.S. 181, 229 (1985) (White, J., concurring) (quoting *Schware* for the proposition that “regulations on entry into a profession, as a general matter, are constitutional if they ‘have a rational connection with the applicant’s fitness or capacity to practice’ the profession”); *Pordum v. Board of Regents*, 491 F.2d 1281, 1287 n.14 (2d Cir. 1974) (citing *Schware* for the proposition that exclusion of convicted persons from a profession can be justified only after a detailed and particularistic consideration of the relationship between the person involved and the purpose of exclusion); *Fussenich*, 440 F. Supp. at 1080 (citing *Schware* for the proposition that occupational restrictions must have a rational connection with the applicant’s fitness or capacity to perform the job, and finding that an across-the-board disqualification of felons as security guards and private detectives did not meet this standard).

⁹⁹ 363 U.S. 144 (1960). The statute exempted individuals who had been pardoned or received a certificate of good conduct.

by a situation as gangrenous as exposure of the New York waterfront ha[s] revealed.¹⁰⁰

The Court, while noting that barring felons from certain jobs was “a familiar legislative device to insure against corruption in specified, vital areas,” stressed that “New York was not guessing or indulging in airy assumptions that convicted felons constituted a deleterious influence on the waterfront,” but “was acting on impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation.”¹⁰¹

It is striking that the Court in *DeVeau* allegedly applied rational basis review, yet repeatedly underscored the longstanding problems of waterfront crime and the extensive legislative record supporting the legislature’s decision to keep individuals with felony convictions out of union positions. The tenor of the opinion, which emphasized the reams of evidence collected regarding the relationship between union corruption and waterfront criminality, stands in stark contrast to many other rational-basis review cases where the Court simply accepts the legislature’s choices, whether well-grounded or not. Here, the Court deferred to legislative judgments, but did so only because of the record that the legislative branch amassed to support those judgments.¹⁰² In other words, the Court did not simply accept the legislature’s conclusion that the felon exclusion was rationally related to the goal of combating waterfront corruption, but assessed the weight of the evidence in support of that conclusion.

In the 1972 case of *James v. Strange*, the Court again applied a rather stringent form of rational basis review, holding that a Kansas recoupment statute which treated indigent criminal defendants differently from other civil judgment debtors was irrational and therefore violated equal protection.¹⁰³ Under the Kansas law, indigent defendants were required to reimburse the state for the costs of their defense, or a civil judgment was entered. The statute stripped indigent defendants of many of the protections afforded other civil judgment debtors, most notably the restrictions on the amount of wages subject to garnishment.¹⁰⁴ The provision thus treated

¹⁰⁰ *DeVeau*, 363 U.S. at 157-58.

¹⁰¹ *Id.* at 158-60.

¹⁰² *Fernandes v. Limmer*, 663 F.2d 619, 630 (5th Cir. 1981) (striking down a regulation prohibiting persons convicted of felonies from distributing literature or collecting funds at an airport because the airport had not shown “impressive” evidence to sustain the provision but was merely “indulging in assumptions”); *Fussenich*, 440 F. Supp. at 1081 (striking down Connecticut’s record-based bar to private detective and security guard work and distinguishing *DeVeau* on the grounds that there the legislature had found impressive evidence regarding the dangers presented by convicted persons, while in the instant case there was “no evidence that prior to the passage of the statute the Connecticut legislature conducted an investigation which revealed that criminality was a serious problem in the regulated occupations”); *Pordum*, 491 F.2d at 1287 n.14 (under *DeVeau*, a *per se* rule to exclude convicted person from certain occupations may be permissible, but only if that rule “was established after a comprehensive investigation into the relationship between the class of persons excluded ... and the evil sought to be avoided”). *But see Gill*, 703 F. Supp. at 1038 (upholding regulations prohibiting persons convicted of felonies from being licensed as school bus drivers and distinguishing *DeVeau* on the grounds that “[w]hile the Court did cite the extensive legislative investigations that led to enactment of the statute, it did not indicate that such investigations were a sine qua non of its validity”).

¹⁰³ 407 U.S. 128 (1972).

¹⁰⁴ *Id.* at 131, 135-136. “This provision strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor’s personal clothing, books, and tools of trade. For the head of a family, the exemptions afforded other judgment debtors become more extensive, and cover furnishings, food, fuel, clothing, means of transportation, pension funds, and even a family burial plot or crypt.” *Id.* at 135.

individuals who owed money as a result of past, publicly-funded representation in criminal proceedings differently from those who owed money as a result of private, contractual arrangements.¹⁰⁵ Kansas also distinguished between recoupment of public welfare assistance, whose recipients were entitled to the customary exemptions from collection, and recoupment from former recipients of criminal defense assistance.¹⁰⁶ The Court questioned the rationality of denying former offenders the same basic protections available to other debtors. It was perverse to do so for defendants found innocent, since the debt arose only as a result of the state's prosecution. It was counter-productive to do so for those defendants found guilty:

It is in the interest of society and the State that such a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation and return to useful citizenship. There is a limited incentive to seek legitimate employment when... the indigent knows that his wages will be garnished without the benefit of any of the customary exemptions.¹⁰⁷

The Court further found that while the

state interests represented by recoupment laws may be important ones... these interests are not thwarted by requiring more even treatment of indigent criminal defendants... State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self respect. The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.¹⁰⁸

In other words, although the Court found that the state had legitimate interests in recouping debts owed by former offenders, it could not pursue those ends by discriminating against convicted persons compared to other debtors. If the goal of recoupment could be pursued in other cases while providing certain exemptions from garnishment, then failing to provide those exemptions in the cases of former criminal defendants reflected both a desire to punish (which is an impermissible basis for a collateral sanction) and unwarranted prejudice.

While the Supreme Court cases are somewhat inconsistent, several overall themes emerge, especially if one understands *Hawker* as an early outlier that was implicitly overruled by *Schware*. First, in assessing the validity of laws targeting individuals with criminal records, courts must consider the significance of the private interests at stake. In all the cases where the Court invalidated record-based disabilities, the interests were substantial: *Skinner* concerned the right to bear children, *Schware* the right to practice one's profession, and *Strange* the ability to protect a minimum level of income and assets from involuntary garnishment. By contrast, *DeVeau* merely concerned the right to be a union official, an arguably less significant interest. Thus, the more important the right at issue, the more likely courts are to overturn restrictions on it.

Second, the Court, while accepting the validity of the government's goals, has also demanded that there be a reasonable fit between those goals and the means used to achieve them. In *Hawker*, of course, the Court found it rational to use prior criminal conduct as conclusive evidence of poor moral character. However *Barsky* suggests that states cannot automatically

¹⁰⁵ *Id.* at 136.

¹⁰⁶ *Id.* at 137-38.

¹⁰⁷ *Id.* at 139.

¹⁰⁸ *Id.* at 141-2.

revoke professional licenses based on criminal convictions. Instead states must provide procedures to assess the relationship between the offense and the occupation. *Schware* essentially extended *Barsky* to include a state's initial determinations about whether a person may enter a profession, requiring that the nature and age of the offenses and the individual's "present good moral character" be considered in deciding whether the person should be excluded from the profession in question.¹⁰⁹ In *DeVeau* the Court accepted the government's argument that the ban on union officials was a reasonable means to combat waterfront corruption, but did so only on the basis of a massive legislative record. Effectively, the legislature had to meet an implicit burden of proof in documenting the relationship between the restrictions and the problems they were designed to combat. In *Strange* the Court acknowledged the legitimacy of the government's interest in recouping debt, but found it irrational to deny basic income protections available to others solely because those debts were the result of state representation in criminal proceedings. Finally, in *Skinner*, which implicated a fundamental right and hence had to survive strict scrutiny, the court again found that the method adopted (sterilization of habitual offenders) was not linked closely enough to the state's goals (reducing crime).

III. Equal Protection Challenges to Occupational Restrictions in the Lower Courts

While the Supreme Court has only rarely considered occupational restrictions imposed on people with criminal records, there are numerous lower court cases where such restrictions have been challenged under the equal protection clause. In these cases, the courts have uniformly concluded that people with criminal records do not constitute a suspect class, and that therefore rational basis review applies.¹¹⁰ In some cases this has led to the predictable result that the legislation is upheld. However, in a surprising number of cases, courts have found that occupational barriers imposed on former offenders are irrational and therefore violate equal protection. This section analyzes both successful and unsuccessful challenges to record-based employment disqualifications, and seeks to determine the circumstances under which courts are likely to uphold or strike down such restrictions.

A. Successful Challenges to Occupational Restrictions

Using rational basis review, courts have overturned bans on public employment,¹¹¹ provisions excluding convicted persons from government contracts,¹¹² laws barring convicted

¹⁰⁹ *Schware*, 353 U.S. at 246.

¹¹⁰ See cases cited in *supra* note 2.

¹¹¹ *Kindem*, 502 F. Supp. 1108 (invalidating city's blanket ban on hiring persons with felony convictions); *Butts*, 381 F. Supp. 573 (holding that prohibiting convicted felons from occupying state civil service positions violated the equal protection clause); *Furst*, 631 F. Supp. 1331 (striking down Transit Authority policy that required the discharge of individuals convicted of felonies because it violated the Equal Protection Clause). Cf. *Cronin v. O'Leary*, 13 Mass. L. Rep. 405 (Mass. Super. Ct. 2001) (striking down ban on employment with state department of human services as violation of procedural due process). Courts have also used rational basis review to strike down bans on public employment of other distinct groups who, like convicted persons, are not suspect classes and who, like convicted persons, have a history of wrongful behavior. See, e.g., *Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1973) (equal protection violated by ordinance barring public employment of veterans who had not been discharged honorably); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (excluding former drug users from city jobs violated equal protection clause under rational basis review).

persons from private employment in particular occupations,¹¹³ and the revocation of or the refusal to issue professional licenses.¹¹⁴ In their decisions, courts have stressed that rational basis scrutiny is “a highly deferential standard of review.”¹¹⁵ Courts have also invariably endorsed the government’s asserted interests, finding, for example, that the state has a legitimate interest in hiring trustworthy employees,¹¹⁶ in protecting vulnerable populations,¹¹⁷ and in restricting employment in certain professions to those of good character.¹¹⁸ In addition, courts have generally admitted that record-based bans were adopted for the purpose of achieving these goals; in other words, courts have not suggested that the proffered rationales were a pretext for discrimination plain and simple. Nevertheless, courts have repeatedly found record-based disqualifications to be unconstitutional.

1. *Overbreadth Cases*

In the majority of cases where record-based bans have been struck down, the primary reason was that the ban in question was overbroad. When courts have invalidated occupational restrictions, they have found again and again that although the government’s goals are legitimate, the disqualifications adopted are so sweeping that they are not rationally related to those goals.

Blanket prohibitions on public sector employment have been particularly vulnerable to overbreadth challenges. For example, in *Kindem v. City of Alameda*, the court invalidated a city ban on hiring persons with felony convictions, finding that the ban failed to meet even the “low

¹¹² *Lewis v. Alabama Dep’t Pub. Safety*, 831 F. Supp. 824, 827 (M.D. Ala. 1993) (finding that a regulation excluding those convicted of crime of force, violence, or moral turpitude from the state’s list of towing contractors was “totally irrational”).

¹¹³ *Fussenich*, 440 F. Supp. at 1080-81 (overturning prohibition on the employment of persons with felony convictions in the area of private detective or security work).

¹¹⁴ *Miller*, 547 F.2d at 1315 (striking down ordinance that permanently barred persons convicted of certain offenses from obtaining a public chauffeur’s license); *Brewer v. Department of Motor Vehicles*, 93 Cal. App. 3d 358 (Cal. Ct. App. 1979) (reversing the denial of a license to sell vehicles); *Pieri v. Fox*, 96 Cal. App. 3d 802 (Cal. Ct. App. 1979) (holding that the denial of a real estate broker’s license was impermissible in absence of evidence that the applicant’s past crime of making false statements was rationally and substantially related to her present qualifications); *Newland v. Board of Governors*, 566 P.2d 254 (1977) (reversing the denial of teaching credentials to individuals convicted of misdemeanors). *Cf. People v. Lindner*, 535 N.E.2d 829 (Ill. 1989) (finding that revocation of a sex offender’s driver’s license bore no rational relationship to safe driving); *Brandt v. Fox*, 153 Cal. Rptr. 683 (Cal. Ct. App. 1979) (finding under California statute that allowed for license denial only where a conviction was substantially related to the qualifications, functions or duties of profession, that plaintiff’s four-year-old cocaine distribution conviction was not so related to the business of selling real estate and therefore reversing the denial of a real estate license). *See also In Re Manville*, 538 A.2d 1128, 1132 n.3 (D.C. Ct. App. 1988) (questioning whether a *per se* rule excluding persons with felony convictions from bar admission was unconstitutionally overinclusive and not sufficiently related to legitimate state interests to be justifiable, but ultimately rejecting the rule on policy rather than constitutional grounds).

¹¹⁵ *Kindem*, 502 F. Supp. at 1111.

¹¹⁶ *See, e.g., Kindem*, 502 F. Supp. at 1111-1112 (noting that government has a legitimate interest in hiring trustworthy employees, but striking down blanket ban on hiring of individuals with felony convictions); *Butts*, 381 F. Supp. at 580-81 (accepting validity of state’s concern that municipal employees occupy positions of “special trust,” but striking down ban on hiring individuals with felony convictions).

¹¹⁷ *Nixon v. Department of Pub. Welfare*, 839 A.2d 277, 288 (2003) (“There is no question that protecting the elderly, disabled, and infirm from being victimized is an important interest.”).

¹¹⁸ *Fussenich*, 440 F. Supp. at 1080 (holding that while the state has a legitimate interest in “prohibit[ing] individuals of bad character” from working as security guards and private detectives, an across-the-board disqualification of persons with felony records from such employment was not rationally related to those objectives).

threshold” of rational basis review. While the city had a legitimate interest in hiring good people, “it has not been demonstrated that the sole fact of a single prior felony conviction renders an individual unfit for public employment, regardless of the type of crime committed or the type of job sought.”¹¹⁹ Similarly, in *Furst v. New York City Transit Authority*, the plaintiff, who had a flawless fifteen-year history working for the defendant, was dismissed due to a felony conviction.¹²⁰ The court held that

[a] municipal policy requiring discharge of ex-felons runs afoul of the Equal Protection Clause. Although the rational relationship test allows a public employer wide discretion in fashioning employment classifications, such a policy is simply too broad to accomplish any legitimate governmental purpose. Before excluding ex-felons as a class from employment, a municipal employer must demonstrate some relationship between the commission of a particular felony and the inability to adequately perform a particular job.¹²¹

In other words, because blanket disqualifications apply both to a broad range of jobs and a broad range of offenses, there will often be no relationship between an individual’s criminal record and the job that he or she seeks.

Courts have not simply struck down blanket bans on public employment, but have also invalidated record-based prohibitions on employment in particular professions. In such cases courts have frequently found the statutes in question to be both over-inclusive and under-inclusive since they disqualify individuals with irrelevant convictions but do not disqualify individuals with relevant convictions. For example, in *Lewis v. Alabama Department of Public Safety*, the court held that a statute which barred individuals with “moral turpitude” convictions from working as towing contractors bore no rational relationship to the state’s legitimate interest in public safety because

persons convicted of adultery would be rejected ... regardless of the fact that this crime is not related to the job. In contrast, an individual convicted of multiple driving while intoxicated offenses, reckless driving, speeding or stop sign offenses would not be precluded ... because these are not considered to be crimes against moral turpitude; yet they are *more* directly related to the job than the proceeding offense.¹²²

Many record-based occupational statutes draw distinctions between felonies and misdemeanors, and courts have repeatedly pointed out that as a result individuals with irrelevant felony convictions are disqualified, while individuals with relevant misdemeanors are not.¹²³ For example, in *Butts v. Nichols*, the court struck down an Iowa law which prohibited the employment of persons with felony convictions in certain civil service positions.¹²⁴ It was “totally irrational” that persons convicted of irrelevant felonies, such as desertion of a spouse, would lose their civil service eligibility, while individuals convicted of relevant misdemeanors,

¹¹⁹ *Kindem*, 502 F. Supp. at 1112 (footnotes omitted).

¹²⁰ *Furst*, 631 F. Supp. at 1332. The plaintiff had been convicted of attempted manslaughter pursuant to an incident where the plaintiff’s son handed the plaintiff a gun, which discharged and killed the son.

¹²¹ *Id.* at 1338.

¹²² 831 F. Supp. 824, 826-27 (D. Ala. 1993).

¹²³ *But see United States v. Giles*, 640 F.2d 621 (5th Cir. 1981) (holding that while prohibition on felons possessing firearms might include some individuals convicted of non-violent offenses and exclude some individuals convicted of violent offenses, the prohibition was rational).

¹²⁴ 381 F. Supp. 573 (S.D. Iowa 1974).

such as larceny, could be employed.¹²⁵ Similarly, in *Smith v. Fussenich* the court held that an across-the-board disqualification of persons with felony records from employment as security guards and private detectives was “simply not constitutionally tailored to promote the State’s interest in eliminating corruption in certain designated occupations.”¹²⁶ Some disqualifying felony crimes, such as bigamy or income tax evasion, had no relevance to security guard work, while some of non-disqualifying misdemeanor crimes, such as false entry, might be relevant.¹²⁷

A number of courts, in striking down record-based bars, have analyzed the lack of a connection between a particular offense and a particular conviction. Thus in *Kindem*, the court held that the “plaintiff’s ten-year-old youth conviction [for tax offenses] has little if any bearing on his ability to perform as a janitor for the City.”¹²⁸ Similarly, in *Brewer v. Department of Motor Vehicles*, the court decided that a conviction for “annoying or molesting a child” was an improper basis for revoking a car dealer’s license.¹²⁹ While the crime was “base, vile and depraved,” the good moral character provision in the licensing law was not intended to punish the offender, since “[p]resumably the penal law has adequately attended to that task.”¹³⁰ Rather, the purpose of the good moral character provision was to protect the public from unscrupulous car dealers. Accordingly, “before a criminal offender may be denied a license to engage in gainful work because of a standard requiring good moral character there must be a substantial or rational connection between the committed offense and the particular occupation.”¹³¹

In some of the overbreadth cases, the courts have looked not just at “the nature and seriousness of the crime in relation to the job sought,” but also at “[t]he time elapsing since the conviction, the degree of the felon’s rehabilitation, and the circumstances under which the crime was committed.”¹³² In other words, disqualifications can be overbroad not only by barring individuals whose offenses are unrelated to the occupation in question, but also by barring individuals who have been rehabilitated or individuals whose actual conduct was not as blameworthy as their convictions suggest. Statutes which “fail 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 related to the nature of the crime and degree of participation,” impermissibly exclude qualified individuals from employment.¹³³

Finally, it is important to recognize that the courts in overbreadth cases have emphasized that record-based policies are not *per se* unconstitutional. Occupational bans are perfectly legal

¹²⁵ *Id.* at 580-581.

¹²⁶ *Fussenich*, 440 F. Supp. at 1080.

¹²⁷ *Id.* The court added that it was irrational to exclude persons with felony convictions from private investigation or security guard positions while allowing them to practice in fields like law or medicine, which “have a greater attachment to the public welfare.” *Id.* See also *Kindem*, 502 F. Supp. at 1112 (finding it irrational to deny a janitorship to a felony tax evader, whose conviction bore no relationship to sanitation work, while permitting the employment of individuals with misdemeanor convictions for assault or theft which “might reasonably be considered related to the opportunities and temptations presented by a janitorship”).

¹²⁸ *Kindem*, 502 F. Supp. at 1112.

¹²⁹ *Brewer*, 93 Cal. App. 3d 358. While this case appears to have been decided under California law, the reasoning applies equally well to equal protection arguments under the U.S. Constitution.

¹³⁰ *Id.* at 366.

¹³¹ *Id.*

¹³² *Butts*, 381 F. Supp. at 581. See also *Lewis*, 831 F. Supp. at 827 (expressing concern that the regulation barring certain convicted persons from working as towing contractors “gives no consideration to the nature, circumstances and seriousness of the crime in relation to the job sought, the time elapsing since the conviction, or the degree of the misdemeanor’s rehabilitation”).

¹³³ *Fussenich*, 440 F. Supp. at 1080.

if there is a reasonable fit between the disqualifying convictions and the jobs in question. It is the overbreadth of the restrictions that violates the equal protection clause. As the *Butts* court explained:

There is no doubt that the state could logically prohibit and refuse employment in certain positions where the felony conviction would directly reflect on the felon's qualification for the job (e.g. conviction of embezzlement and a job requiring the handling of large sums of money). The Iowa statutory scheme however has an across-the-board prohibition against the employment of felons in civil service positions. There is simply no tailoring in an effort to limit these statutes to conform to what might be legitimate state interests.¹³⁴

2. *Offender Classification Cases*

While less common than the overbreadth decisions, in a number of cases courts have struck down occupational restrictions that draw distinctions between classes of individuals with similar records.¹³⁵ For example, in *Miller v. Carter*, the Seventh Circuit invalidated a Chicago ordinance which permanently barred persons convicted of certain offenses from obtaining chauffeur's licenses.¹³⁶ The decision was affirmed by an equally divided Supreme Court in a one-line per curiam opinion.¹³⁷ The Seventh Circuit found an equal protection violation in the distinctions drawn between convicted persons applying for a license, who were permanently ineligible if guilty of one of the specified offenses, and current license-holders, who could have their licenses revoked at the discretion of the city. Thus, under the ordinance, the plaintiff was absolutely barred from obtaining a license, despite the fact that his armed robbery conviction was eleven years old, while "someone who already holds a license may be permitted to retain it, although

¹³⁴ *Butts*, 381 F. Supp. at 580. See also *Kindem*, 502 F. Supp. at 1111-1112 (footnotes omitted) ("This is not to say that a prior felony conviction can never be a factor in public employment decisions. It is reasonable to assume, for example, that a prior conviction might be highly relevant or properly determinative with respect to hiring decisions involving certain sensitive jobs. It may also be reasonable to assume that convictions for certain crimes may indicate that an individual is unfit for any future municipal employment. But the City's policy is not tailored along any lines to conform to what might be considered legitimate government interests.").

¹³⁵ See, e.g., *Miller*, 547 F.2d 1314 (irrational distinction between convicted persons who already had a chauffer license and convicted persons applying for a chauffer license); *Nixon*, 576 Pa. at 385 (irrational distinction between convicted persons who had worked in one nursing care job for a year versus those who had held multiple jobs); *Alabama Dep't of Pub. Safety*, 831 F. Supp. at 825 (holding that equal protection was violated where a record-based bar on towing contractors was enforced differently against people who already had convictions when they applied to be placed on the towing contractor list, and those who were convicted after being placed on the towing contractor list); *Newland v. Board of Governors of Cal. Community Colleges*, 19 Cal. 3d 705, 712 (Cal. 1977) (finding equal protection violation where statutory scheme had the irrational effect of allowing individuals with felony sex offenses to obtain teaching certification but barring individuals with misdemeanor sex offenses from obtaining such certification). Cf. *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000) (finding "no rational basis to preclude the registration of those who were incarcerated within the last five years and who had not registered previously, when those who were legally registered prior to incarceration may vote upon their release").

¹³⁶ *Miller*, 547 F.2d 1314.

¹³⁷ *Carter v. Miller*, 434 U.S. 356 (1978) (equally divided court). Justice Blackmun did not take part in consideration of the case. Although decisions of an equally divided court technically do not have precedential value, see *Neil v. Biggers*, 409 U.S. 189, 190-92 (1972) (holding that an affirmance by an equally divided Court is not entitled to precedential weight); *United States v. Pink*, 315 U.S. 203, 216 (1942) (same), and although it is impossible to know in the absence of an opinion what the reasoning was of those four justices affirming, the fact those four found the statute unconstitutional is still striking.

convicted of armed robbery only yesterday.”¹³⁸ The Seventh Circuit found this distinction among classes of persons with criminal records to be irrational: “regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness ... allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk.”¹³⁹

In a recent decision, the Pennsylvania Supreme Court took a similar approach.¹⁴⁰ The statute at issue there permanently barred individuals convicted of certain crimes from working in nursing care positions, but allowed similarly convicted persons who had been working continuously in one nursing care position for at least a year to continue doing so.¹⁴¹ The court found that if the state’s goal was to protect vulnerable seniors,

there was simply no basis to distinguish caretakers with convictions who had been fortunate enough to hold a single job ... from those who may have successfully worked in the industry for more than a year but had not held one continuous job.¹⁴²

The principle of these cases is that individuals with similar records should receive the same treatment under the law. The government cannot allow some individuals with criminal records to work as chauffeurs or nurse’s aids while barring other individuals with similar convictions from the same jobs. But of course the fact that the legislature must equalize the treatment of similarly situated offenders does not answer the question of what that treatment should be: will all individuals be allowed to work or will all individuals be barred?

B. Unsuccessful Challenges to Occupational Restrictions

While some courts have struck down record-based restrictions on equal protection grounds, other courts have upheld similar prohibitions as rationally related to legitimate government interests. I have identified no cases upholding blanket bans on public sector employment. However, courts have upheld prohibitions on employment in specific public sector positions,¹⁴³ including police officers,¹⁴⁴ correctional officers,¹⁴⁵ and school bus drivers.¹⁴⁶ Courts have sustained the denial of employment-related licenses for everything from selling

¹³⁸ Miller, 547 F.2d at 1316.

¹³⁹ *Id.*

¹⁴⁰ Nixon v. Dep’t of Pub. Welfare, 576 Pa. 385 (Pa. 2003).

¹⁴¹ *Id.* at 389-93.

¹⁴² *Id.* at 403.

¹⁴³ See also *Hill v. City of Chester*, 1994 U.S. Dist. LEXIS 11951 *19 (E.D. Penn., Aug. 26, 1994) (upholding decision of city council to eliminate position of an employee based on his criminal record).

¹⁴⁴ *Dixon v. McMullen*, 527 F. Supp. 711, 721 (N.D. Tex. 1981) (upholding statute automatically excluding persons with felony convictions from certification as police officers on the grounds that the state must ensure that “persons publicly employed in emergency or dangerous situations are sober and alert and possess qualities such as honesty, integrity, reliability and obedience to the law”); *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970) (holding that a person convicted of a felony and subsequently pardoned can still be disqualified from serving as a police officer because a person who has committed a felony may lack the “self-control or honesty” necessary for the position).

¹⁴⁵ *Quarrels v. Brown*, 871 F.2d 1088 (6th Cir. 1989) (unpublished opinion) (upholding denial of correctional officer position to individual with a criminal record).

¹⁴⁶ *Gill*, 703 F. Supp. 1034 (upholding regulations prohibiting individuals ever convicted of a felony or recently convicted of a misdemeanor from operating school buses).

guns,¹⁴⁷ to providing daycare,¹⁴⁸ to operating a dancehall.¹⁴⁹ Finally, courts have upheld statutory bars to private sector employment in a variety of fields.¹⁵⁰

The cases upholding record-based restrictions can be roughly divided into those where courts justify restrictions based on the link between the disqualifying offenses and the prohibited occupations, and cases where courts justify the restriction based on the presumed poor character of individuals with criminal records. In the first set of cases there is a clear link between the occupation and the disqualifying convictions, such as where individuals convicted of sex crimes are prohibited from operating sexually oriented businesses,¹⁵¹ where a theatre license is revoked for violation of a law against sexually explicit screenings,¹⁵² where a firefighter is dismissed due to an arson conviction,¹⁵³ where a police officer is discharged for aiding in the falsification of accident reports as part of an insurance scam,¹⁵⁴ or where osteopath's license is revoked for a conviction for committing fraud while practicing as an osteopath.¹⁵⁵

In these cases the courts have emphasized the relationship between the disqualifying conviction and the offense as the reason for upholding the record-based restriction.¹⁵⁶ For example, in *FW/PBS, Inc. v. Dallas*, which upheld a prohibition on the operation of sexually oriented businesses by those convicted of sex crimes, the Fifth Circuit justified its decision on the grounds that only those convicted of “the kinds of criminal activity associated with sexually oriented businesses” were barred from obtaining a license, since the district court had already invalidated the ban as it applied to offenses that had no relationship to the city’s purpose, included kidnapping, robbery, bribery, controlled substances violations, and organized criminal activities.¹⁵⁷ Similarly in *Weissinger v. Ward*, which upheld the discharge of a police officer convicted of criminal facilitation for completing false accident reports, the court noted that the police department’s discharge policy applied only to officers convicted of crimes while on duty: “[w]hile conviction for an off-duty violation might not have any relationship to an officer’s

¹⁴⁷ *Baer v. City of Wauwatosa*, 716 F.2d 1117 (7th Cir. 1983) (upholding revocation of license to sell guns for individual convicted of sexual assault).

¹⁴⁸ *Lopez v. McMahon*, 205 Cal. App. 3d 1510 (1988) (upholding refusal to issue daycare license to an applicant residing with an individual convicted of a violent felony).

¹⁴⁹ *Darks*, 745 F.2d 1040 (upholding a blanket policy of denying licenses to operate dance halls to individuals convicted of felonies); *Flanagan v. Town of Petersburg*, 150 S.E.382 (1929) (upholding denial of a pool hall license to an applicant who had been convicted of assault and battery).

¹⁵⁰ *Schanuel v. Anderson*, 708 F.2d 315, 319 (7th Cir. 1983) (upholding a statute prohibiting employment of persons convicted of felonies as security guards for a ten-year period); *Muhammad Ali v. Division of State Athletic Comm’n*, 308 F. Supp. 11, 17 (S.D.N.Y. 1969) (holding that Athletic Commission could make a felony conviction grounds for refusing, suspending, or revoking a boxing license).

¹⁵¹ *FW/PBS*, 837 F.2d at 1305.

¹⁵² *Forsyth Corp. v. Bishop*, 482 F.2d 280, 281 (5th Cir. 1973) (per curiam).

¹⁵³ *Carlyle v. Sitterson*, 438 F. Supp. 956, 963 (D.N.C. 1975).

¹⁵⁴ *Weissinger v. Ward*, 704 F. Supp. 349 (E.D.N.Y. 1989). See also *McMullen*, 527 F. Supp. at 721 (upholding refusal to certify pardoned felon as police officer because his conviction for robbery would directly reflect on his qualifications for the job of investigating robberies).

¹⁵⁵ *Seasholtz v. West Virginia Bd. of Osteopathy*, 526 F.2d 590 (4th Cir. 1975) (holding that osteopath’s license could be revoked for a prior conviction for fraud committed while practicing as an osteopath because that conviction was rationally connected with a determination of the fitness and capacity of the osteopath to practice his profession).

¹⁵⁶ *May*, *supra* note 30, at 204 (noting that courts have upheld statutes that they deem reasonably related to the prior conviction).

¹⁵⁷ *FW/PBS*, 837 F.2d at 1305. The Court found that the ordinance was lawful as applied to a variety of prostitution offenses; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault; aggravated sexual assault; and incest, solicitation of a child, or harboring a runaway child. *Id.* at 1304 n.19.

ability to carry out his duties and may not reflect upon the integrity of the police force, conviction for an on-duty violations, such as in this case, where an officer uses his official status to further the crimes committed, reflects directly upon the officer's ability to perform his job."¹⁵⁸

In other cases, however, courts have not sought to draw connections between the disqualifying offenses and the prohibited jobs, but have instead sustained extremely broad restrictions based on the argument that the government can rationally seek to protect its interests by keeping convicted persons – who are all presumptively of poor character – out of particular jobs.¹⁵⁹ For example, in *Darks v. City of Cincinnati*, the Sixth Circuit upheld the city's practice of denying licenses to operate dance halls to persons with a felony record on the grounds that such persons lack "good moral character."¹⁶⁰ Similarly, in *M&Z Cab Corporation v. City of Chicago*, the court found that the revocation of taxicab medallions based on the holder's felony conviction "represent[ed] a rational government decision to protect those who rely on the taxicab industry from the dangers associated with convicted felons."¹⁶¹

A striking feature of these cases is the degree to which the courts rely on the importance of the government interest affected to justify their decisions. The court in *M&Z Cab*, for example, stressed that the city had a legitimate interest in "protect[ing] passengers, promot[ing] driver safety, and ensur[ing] that the taxicab industry does not attract a criminal element."¹⁶² Similarly in *Darks*, the court opined that since "[a] dance hall, which serves as a gathering place during late night and early morning hours, could pose a significant threat to the peace of the community" if run by persons with felony records, the city had a legitimate interest in "insuring that dance halls are operated by persons of integrity with respect for the law" and in "seeing that the owner will abide by and enforce liquor and tax collection laws."¹⁶³

Courts upholding "no-felon" bans have either ignored or rejected the overbreadth arguments which undergird decisions striking down similar laws. In *M&Z Cab*, for example, the plaintiffs had argued that the underlying ordinance was over-inclusive because it applied to those who had no contact with the public.¹⁶⁴ The court, however, held that "while taxicab drivers likely pose the greatest danger, it is certainly reasonable for the City to conclude that events occurring at the corporate level may have an effect on taxicab drivers and passengers."¹⁶⁵ The court similarly rejected an argument that the ordinance should have been limited to convictions related to public safety or transportation, stating that the city "need not make distinctions based

¹⁵⁸ Weissinger, 704 F. Supp. at 352.

¹⁵⁹ *Darks*, 745 F.2d 1040 (upholding a blanket policy of denying licenses to operate dance halls to individuals convicted of felonies); *Schanuel*, 708 F.2d at 319 (upholding a statute prohibiting employment of persons convicted of felonies as security guards for a ten-year period); *Gill*, 703 F. Supp. 1034 (upholding regulations prohibiting individuals ever convicted of a felony or recently convicted of a misdemeanor from operating school buses); *McMullen*, 527 F. Supp. at 721 (upholding statute automatically excluding persons with felony convictions from certification as police officers).

¹⁶⁰ 745 F.2d 1040, 1042 (6th Cir. 1984).

¹⁶¹ 18 F. Supp. 2d 941, 947 (D. Ill. 1998).

¹⁶² *Id.* at 950-51. The city's ostensible concern was that "hundreds of taxicabs operate within the City day and night, and members of the public must essentially place a blind trust in the integrity of the drivers and their driver's ability to safely transport them to their destinations." *Id.* at 950. While this concern might justify an exclusion from driving positions of those convicted of transportation or public safety offenses, it is hard to see how the public is endangered if those in non-driving positions have criminal records for offenses unrelated to transportation or public safety.

¹⁶³ *Darks*, 745 F.2d at 1043.

¹⁶⁴ *M&Z Cab Corp.*, 18 F. Supp. 2d at 950.

¹⁶⁵ *Id.* at 950.

on the nature of the underlying felony.”¹⁶⁶ Finally the court dismissed the plaintiffs’ argument that the ordinance was irrationally under-inclusive because it targeted some and not all corporate positions in taxicab companies, holding that the city “need not strike at all evils at the same time.”¹⁶⁷

In a number of cases, courts upholding record-based disqualifications have responded to overbreadth arguments by arguing that the disqualifications at issue are of a limited duration.¹⁶⁸ In *Schanuel v. Anderson*,¹⁶⁹ for example, the Seventh Circuit considered an Illinois statute barring individuals convicted of felonies from working as private detectives. This law was quite similar to the Connecticut law struck down in *Smith v. Fussenich*, which disqualified persons with felony convictions from employment as private detectives.¹⁷⁰ The *Schanuel* court distinguished *Fussenich* on the grounds that the Connecticut statute involved a permanent ban, while the Illinois law only imposed a ten-year disqualification and was therefore “more closely tailored to the state’s legitimate interest in a competent and reliable workforce in the sensitive area of detective work.”¹⁷¹ It is true that such a time limitation can make a disqualification somewhat more tailored, since the more recent the conviction, the more likely it might be presumed to reflect on the person’s present character. However, time limitations do not address the relationship between the disqualifying offenses and the occupation. The *Schanuel* court simply did not answer the argument in *Fussenich* that “[f]elony crimes such as bigamy and income tax evasion have virtually no relevance to an individual’s performance as a private detective or security guard.”¹⁷²

C. Lessons from the Lower Courts

Courts and commentators have sought to reconcile the disparate cases concerning record-based disqualifications in a number of ways. First, some have sought to draw distinctions based on the importance of the governmental interest at issue, suggesting that those record-based bans which have been upheld “all involve activities in which the state has a particularly strong interest or need to protect the public from those with criminal propensities.”¹⁷³ However, focusing on the importance of the interest at issue provides little guidance, since the interests at stake when courts have upheld record-based restrictions seem indistinguishable from those at issue when courts have struck down such restrictions. Interests asserted to uphold record-based restrictions include protecting children,¹⁷⁴ ensuring that guns are not sold to criminals or children,¹⁷⁵

¹⁶⁶ *Id.* at 951.

¹⁶⁷ *Id.* (citing *New Orleans v. Dukes*, 427 U.S. 297, 305 (1976)).

¹⁶⁸ See also *FW/PBS*, 837 F.2d at 1305 (noting that the “[t]he relationship between the offense and the evil to be regulated is direct and substantial” not only because the ordinance prohibiting operation of sexually oriented business was limited to those convicted of sex crimes, but also because the ordinance permitted licensing after enough time has passed to indicate that the applicant was no longer criminally inclined). But see *Lopez v. McMahan*, 205 Cal. App. 3d 1510 (1988) (rejecting argument that due process was violated by a permanent ban on persons with violent felony convictions residing in homes licensed for daycare).

¹⁶⁹ 708 F.2d 315, 319 (7th Cir. 1983).

¹⁷⁰ 440 F. Supp. 1077 (D. Conn. 1977).

¹⁷¹ *Schanuel*, 708 F.2d at 320.

¹⁷² *Fussenich*, 440 F. Supp. at 1080.

¹⁷³ *Darks*, 745 F.2d at 1043. The court, which was considering the issuance of dance hall licenses, argued that such licenses “would seem to involve the same concerns, although possibly not to the same degree.” *Id.*

¹⁷⁴ *Gill*, 703 F. Supp. at 1037 (“It is difficult to imagine a more legitimate state interest than that of protecting ... school-age children from the possibility of either physical harm or immoral influences” and that “the selection of

guaranteeing the trustworthiness of police¹⁷⁶ and correctional officers,¹⁷⁷ safeguarding taxicab users¹⁷⁸ and dance hall patrons,¹⁷⁹ and avoiding harm to a city's business reputation.¹⁸⁰ Interests asserted in cases invalidating record-based restrictions include protecting vulnerable seniors,¹⁸¹ ensuring the trustworthiness of public employees,¹⁸² and protecting the public from unscrupulous towing contractors,¹⁸³ car dealers,¹⁸⁴ and chauffeurs.¹⁸⁵

The reason that there is no principled way to distinguish the governmental interests at stake in these cases is that almost all record-based bans will implicate valid governmental interests. After all, "virtually every state statute affects important rights."¹⁸⁶ Some of the interests asserted, such as protecting children and seniors, are arguably more important than others, such as protecting dance hall patrons or car purchasers. But all of these interests are legitimate. And if a court can convince itself that the operation of dance halls presents such a danger that convicted persons must be excluded, might another court not uphold, say, a prohibition on packing produce in a factory in an effort to safeguard the nation's food supply? Could one not argue that even the most menial factory job offers opportunities for theft or drug distribution, or that factory owners have an obligation to protect their employees from potentially violent co-workers? In any field there will be concerns about safety, theft, and public order.¹⁸⁷ If the validity of a law turns merely on whether or not the government can articulate a legitimate interest served by that law, then any law restricting people with criminal records could be upheld. And that leads to the proverbial slippery slope suggested by Justice Douglas in his *Barsky* dissent: if the state can bar a person from working as a policeman or teacher or gas station attendant, can the state not also bar that person from working altogether?¹⁸⁸

A second, closely-related approach to reconciling the cases respectively upholding and invalidating record-based occupational restrictions is to distinguish between blanket bans affecting a wide range of jobs, versus those tied to particular professions.¹⁸⁹ In *Darks*, for

school bus drivers directly impacts upon that interest."); *McMahon*, 205 Cal. App. 3d at 1516 ("[T]he statute is designed to protect the children clientele of home day care facilities from any potential risk of harm.").

¹⁷⁵ Baer, 716 F.2d at 1123.

¹⁷⁶ Upshaw, 435 F.2d at 1191; McMullen, 527 F. Supp. at 721.

¹⁷⁷ *Quarrels v. Brown*, 871 F.2d 1088 (6th Cir. 1989) (unpublished opinion).

¹⁷⁸ *M&Z Cab Corp.*, 18 F. Supp. 2d at 950-51.

¹⁷⁹ *Darks*, 745 F.2d at 1043.

¹⁸⁰ *Hill v. City of Chester*, 1994 U.S. Dist. LEXIS 11951 at *19 (E.D. Penn., Aug. 26, 1994).

¹⁸¹ *Nixon*, 839 A.2d at 286.

¹⁸² *Kindem*, 502 F. Supp. 1108; *Butts*, 381 F. Supp. 573.

¹⁸³ *Lewis*, 831 F. Supp. at 826.

¹⁸⁴ *Brewer*, 93 Cal. App. 3d at 366.

¹⁸⁵ *Miller*, 547 F.2d 1314.

¹⁸⁶ *Plyler v. Doe*, 457 U.S. 202, 231 (1982) (Powell, J., concurring) (citation and quotation marks omitted).

¹⁸⁷ See *Fussenich*, 440 F. Supp. at 1080 (rejecting defendants' argument that an across-the board disqualification of persons with felony convictions from private detective work was justified simply because such work "affects public welfare, morals and safety").

¹⁸⁸ 347 U.S. at 472 (Douglas, J., dissenting).

¹⁸⁹ See, e.g., *Saxonhouse*, *supra* note 11, at 1620 (arguing that courts which have upheld occupational restrictions are careful to distinguish the state action at issue from blanket prohibitions); *Darks*, 745 F.2d at 1043 (distinguishing *Kindem* and *Butts* as involving blanket bans on any form of civil service of employment, while the policy at issue applied to only one particular field); *Schanuel*, 708 F.2d at 320 (distinguishing *Butts* as an across-the board ban on civil service employment, while statute at issue concerned only one occupation); *City of Chester*, 1994 U.S. Dist. LEXIS 11951 at *20 (distinguishing the fact-specific inquiry of the case at bar with general policies prohibiting the employment of convicted persons); see also *Furst*, 631 F. Supp. at 1337, 1338 n.6 (stating that "[e]ven when prohibiting ex-felons from obtaining or retaining specific forms of employment, a public employer must still satisfy

example, the court distinguished cases striking down bans on any form of civil service employment, and argued that the restriction on dance halls was valid because it “only restricts felons from receiving one type of license, which the city has reason to restrict to those of good character.”¹⁹⁰ Similarly, in *Schanuel*, the court contrasted the statute at issue which “bars employment of ex-offenders in the potentially sensitive field of detective work,” from laws imposing across-the-board disqualifications.¹⁹¹

Indisputably, some occupations present greater opportunities for criminal activity or are more important to the public welfare than others. Occupation-specific bans are obviously more tailored than blanket bans. Ultimately, however, distinctions based on the number of jobs affected are unhelpful. First, since courts have struck down a variety of occupation-specific restrictions, the purported distinction between across-the-board bans and job-specific disqualifications does not accurately reflect the caselaw.¹⁹²

More importantly, as in the case of the distinction based on the importance of the interest affected, there is a slippery slope. As one presidential task force studying record-based exclusions has noted, many professions “have an unrealistic view of the importance of their own profession or occupation and the potential harm to the public that might be done by unfit persons.”¹⁹³ Precisely because there are legitimate governmental interests at stake in the regulation of every occupation, it is easy to conclude, when analyzing just one industry, that the particular occupation is so important that people with records should be excluded from it. But justifications like ensuring that “the taxicab industry does not attract a criminal element,”¹⁹⁴ are infinitely expandable. To what occupation should one attract a criminal element?

Fundamentally, the problem with a distinction based on the number of jobs affected is that it assumes that other occupations remain available. In fact, states can and have adopted a multiplicity of occupation-specific laws barring convicted individuals from a wide range of professions. The fact that record-based restrictions are contained in multiple statutes, rather than one over-arching law, does not alter the conclusion that these prohibitions, taken cumulatively, function to exclude persons with criminal convictions from large segments of the job market.

Thus to avoid the slippery slope, one must look beyond the first requirement of rational basis review - that there be a legitimate interest in keeping dangerous or untrustworthy individuals out of a particular occupation - to the second - that the means employed be reasonably related to achieving that goal. In those cases where courts have overturned record-based restrictions, the courts have invariably accepted the legitimacy of the governmental interest. The restrictions were invalidated not because the government’s interests were illegitimate or unimportant, but because the challenged disqualifications were not rationally related to those interests.

One must ask, therefore, why some courts find a rational relationship between occupational restrictions and criminal conduct while other courts do not. The answer appears to

the rational relationship test,” but noting that municipal policies barring persons with records from specific forms of employment “fare far better under Equal Protection Clause scrutiny” than policies that apply to any form of public employment).

¹⁹⁰ *Darks*, 745 F.2d at 1043.

¹⁹¹ *Schanuel*, 708 F.2d at 320.

¹⁹² *Kindem*, 502 F. Supp. at 1112 (citing *Miller v. Carter* and *Smith v. Fussenich* for the proposition that “[e]ven statutes which have tried to relate ex-felon status to a particular job have, on occasion, been struck down”).

¹⁹³ PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, 32, 91 (1967).

¹⁹⁴ *M&Z Cab Corp.*, 18 F. Supp. 2d at 950-51.

lie in whether the reviewing court accepts the mere fact of a conviction as a rational basis for disqualification, or requires instead some sort of relationship between the occupation in question and the crime committed. Under the latter framework, those cases upholding narrowly-drawn restrictions based on the fit between the disqualifying offense and the restriction (e.g. arson convictions disqualifying firefighters), should be categorized alongside those cases invalidating overbroad restrictions. In such cases the court rejects the presumption that individuals with criminal records are morally defective people who present a generalized threat, irrespective of the nature of the job or the nature of the conviction, and requires instead a “close nexus between the felony involved and the particular job” in order for a record-based ban to survive.¹⁹⁵

Conversely, if people with criminal records are dangerous or untrustworthy irrespective of context, occupational exclusions based on their records will ipso facto be rationally related to the government’s interest (which, as noted above, will always be presumptively legitimate). This takes us back to the slippery slope, since it would then be within the government’s power to exclude people with records from employment altogether.¹⁹⁶ As will be discussed more below, such an outcome conflicts with the fundamental liberty and property interests people have in their ability to work.

If it is illegitimate to bar people with records from being employed, then the problem with this line of reasoning must lie either in the assumption that state has a legitimate interest in regulating who may be employed in particular fields, or in the assumption that former offenders are a threat, irrespective of the context. While the first assumption seems unassailable, the second is questionable as a matter of fact. “[A] half century of behavior research underscores the variability and contextual nature of moral behavior: A single incident or a small number of acts committed in dissimilar social settings affords no basis for reliable generalization.”¹⁹⁷ Moreover, as noted above, research shows that the risk that former offenders will reoffend diminishes dramatically over time.¹⁹⁸

One way to understand the caselaw, then, is that laws which rely on the faulty assumption that criminal records can be blindly equated to a general dangerousness or untrustworthiness are vulnerable under rational basis review. By contrast, those laws which rest on more accurate assumptions about the relationship between particular convictions and particular jobs will survive such scrutiny. Thus, across-the-board restrictions, such as those affecting all public sector employment, and sweeping disqualifications, such as those targeting all persons with felony convictions, are vulnerable under rational basis review. By contrast, more tailored laws,

¹⁹⁵ *Kindem*, 502 F. Supp. at 1112. See also *Weissinger*, 704 F. Supp. at 352 (distinguishing *Furst* on the grounds that it applied to all persons convicted of a felony, while policy at issue only required dismissal of police officers who were convicted of crimes while on-duty, which were necessarily related to the officer’s ability to perform the job); *Barreto v. Gunn*, 134 A.D.2d 495 (N.Y. App. Div. 2d 1987) (distinguishing *Furst* from the instant case, where the court saw a connection between the petitioner’s job as a train dispatcher and his conviction for drug sales); Saxonhouse, *supra* note 11, at 1620-21 (arguing that courts which have upheld occupational restrictions have emphasized that these restrictions only apply to specific jobs and are therefore sufficiently tailored to be constitutional). Cf. *People v. Lindner*, 127 Ill. 2d 174, 178 (Ill. 1989) (holding that revocation of driver’s license was not reasonably related to commission of a sex offense).

¹⁹⁶ Cf. *Truax v. Raich*, 239 U.S. 33, 42-43 (1915) (striking down law limiting employment of aliens to 20 percent of the workforce and rejecting argument that this law did not constitute a “total deprivation of the right of the alien to labor,” since logically if the state has the power to impose the 20 percent requirement, it would have the power to impose a much lower percentage).

¹⁹⁷ Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 560 (1985).

¹⁹⁸ See *supra* notes 42-43.

which rest on assumptions that, for example, convicted arsonists do not make good firefighters and convicted pedophiles do not make good daycare providers, are likely to survive.

This distinction creates a new problem. How do we figure out when we can rely on assumptions about the dangerousness or untrustworthiness of people with records? It may be wrong to assume that all former offenders are dangerous or untrustworthy, irrespective of context. But it clearly is permissible to assume that some offenses are possible indicators of dangerousness or untrustworthiness in specific contexts. How do we figure out which assumptions are justified? If a court disagrees with a legislature's assumptions, what standard should it use in reviewing the resulting law? Imagine, for example, that the legislature passes a law preventing shoplifters from working in daycare centers or firehouses. Can the state justify the law by asserting that shoplifters are more likely than other people to commit future thefts and therefore should be kept out of daycare centers and burning homes, since theft is possible in both locations? It is arguably rational, if rational means no more than coming up with some conceivable justification for a law. But if such a law survives, we are back at the bottom of the slippery slope, since assumptions that people with records are dangerous in one context easily become assumptions that they are dangerous in two or three contexts, which then easily become assumptions that they are dangerous in all contexts. After all, virtually every job presents opportunities for theft.

In sum, the cases suggest that when courts reject generalized assumptions about the dangerousness and untrustworthiness of former offenders, those courts will require a reasonably close fit between the occupation and the crime in question. Yet the requirement for such legislative tailoring arises under heightened scrutiny, not rational basis review. And heightened scrutiny is reserved for groups that qualify as a suspect class. So we must ask: are these courts, consciously or unconsciously, doing something other than standard rational basis review? To answer that question, we must look at the ways in which people with criminal records are and are not like a suspect class.

IV. The Suspect Class Analysis

In *United States v. Carolene Products Co.*, the Supreme Court held that legislation should generally be upheld so long as it is supported by some rational basis, but suggested in its now famous fourth footnote that

[l]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment...[since] prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.¹⁹⁹

This footnote forms the bedrock for modern equal protection jurisprudence. While legislation generally is given the presumption of constitutionality, legislation that targets a so-called "suspect class" must withstand a higher level of scrutiny.

The Supreme Court has struggled to define which groups qualify as suspect classes. Unable to articulate a qualifying test, the Court has instead focused on different factors in different cases. As Justice Marshall has observed, "[n]o single talisman can define those groups

¹⁹⁹ 304 U.S. 144, 153 n.4 (1938).

likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny.”²⁰⁰ In this section I will seek to tease out the criteria the Court has considered when identifying suspect classes, and assess how those criteria apply in the case of people with criminal records. Six factors will be considered: (a) the extent and history of discrimination against the group in question; (b) the political powerlessness of the group; (c) the immutability and origin of the distinguishing characteristic; (d) the relevance of that characteristic to legitimate state objectives; (e) the visibility of the characteristic; and (f) the discreteness and coherence of the group.

A. The Extent and History of Discrimination

In order to qualify as a suspect class, a group must have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment ... as to command extraordinary protection from the majoritarian political process."²⁰¹ The Court thus looks to the extent and history of discrimination in defining suspect classes. For example, women qualify as a quasi-suspect class entitled to intermediate scrutiny because of the large number of laws based on "gross, stereotyped distinctions between the sexes" and the "long and unfortunate history of sex discrimination."²⁰² By contrast, the elderly are not a suspect class because "[w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a history of purposeful unequal treatment."²⁰³

People with criminal records have long been socially stigmatized and legally excluded.²⁰⁴ Indeed, until the 1960s the consequences of criminal convictions could include the automatic dissolution of marriage and the inability to enter into contracts or engage in civil litigation.²⁰⁵ While such restrictions are no longer in place, in other areas, the number of laws targeting people with records appears to be increasing.²⁰⁶ Moreover, the easy availability of criminal record

²⁰⁰ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

²⁰¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

²⁰² *Frontiero v. Richardson*, 411 U.S. 677, 684-685 (1973). See also Erwin Chemerinsky, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 669 (2002) (noting that one justification for applying strict scrutiny to alienage classifications is a history of discrimination and prejudice).

²⁰³ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (quotations omitted). See also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (U.S. 2000) (holding that Congress could not abrogate state sovereign immunity through the Age Discrimination in Employment Act because it had failed to uncover any significant pattern of unconstitutional discrimination against elderly state employees).

²⁰⁴ See, e.g., *DeVeau*, 363 U.S. at 158 ("[B]arring convicted felons from certain employments is a familiar legislative device."); *Hawker*, 170 U.S. 189 (upholding occupational restriction based on criminal record). Cf. *Hudson v. Palmer*, 468 U.S. 517, 557 (1984) ("Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a discrete and insular minority.") (quotation marks omitted).

²⁰⁵ Demleitner, *supra* note 26, at 153-155.

²⁰⁶ Emsellem, *supra* note 37 (stating that since the late 1990s and again since September 11, 2001 there have been major expansions of state and federal laws denying employment in key entry-level jobs, and that these laws routinely impose lifetime felony disqualifications even for nonviolent offenses); Olivares, *supra* note 36, at 13 (between 1986 and 1996 there has been an increase in restrictions on the civil rights of persons convicted of felonies); Demleitner, *supra* note 26, at 153 ("An increasing number of mandatory exclusions from the labor force, and governmental programs have followed a temporary decrease of some collateral consequences during the 1960s and early 1970s.").

information means both that such laws are more consistently enforced,²⁰⁷ and that the public can more readily identify the subjects of its derision. The easier it is to figure out if someone has a record, the easier it is to discriminate against him or her on that basis.

Public rhetoric is filled with condemnation of “criminals” and “felons.” Politicians trumpet their tough stance on crime. Internet websites brand thousands of people as sex offenders, prisoners, and criminals. Social discrimination against individuals with records is completely acceptable. Even people who seek to be unbiased with regard to race, gender, disability, sexual orientation or other traditional bases for social exclusion have no compunction about denying employment, housing or friendship on the basis of a criminal record, regardless of what that record contains. Inaccurate stereotypes are common. For example, it is widely assumed that most offenders are violent, when in fact 71 percent of state prisoners were convicted of non-violent offenses.²⁰⁸

Discrimination against individuals with criminal records is not only socially sanctioned but, in many cases, legally required. The widespread public contempt for individuals with records is reflected in innumerable laws and regulations that restrict their rights.²⁰⁹ Because civil restrictions stemming from criminal convictions are rarely articulated as a part of the sentence, they have been criticized as “invisible punishment.”²¹⁰ Because such restrictions prevent people with records from participating fully in many basic aspects of society, they create a form of “internal exile.”²¹¹ And because these restrictions fall disproportionately on people of color, they are arguably the “new Jim Crow.”²¹²

As discussed in Section I, there are pervasive legal restrictions on the employment of former offenders. In addition, people with criminal records confront legal barriers in many other spheres of life. Criminal convictions can result in deportation of noncitizens, even in cases where the individual has lived virtually his or her entire life in the United States.²¹³ Convictions, particularly those resulting in incarceration, can result in the termination of parental rights.²¹⁴ Federal law makes individuals with certain criminal records – along with members of their

²⁰⁷ Rhode, *supra* note 197, at 497 (noting that the absence of centralized records and the mobility of the workforce made record-based exclusions difficult to enforce in the past).

²⁰⁸ U.S. DEP’T OF LABOR, *supra* note 13, at 4. Given that violent offenders are the ones most likely to be sent to prison, the percentage of non-violent offenders is probably even higher among individuals whose convictions did not result in a prison sentence.

²⁰⁹ See OFFICE OF THE PARDON ATTORNEY, U.S. DEPT. OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY app. B (1996) (*available at* http://www.usdoj.gov/pardon/forms/state_survey.pdf) (providing overview of collateral consequences of a criminal conviction in each state); Saxonhouse, *supra* note 11, at 1598 (noting that the collateral consequences of criminal convictions “are scattered far and wide throughout federal, state, and municipal codes”).

²¹⁰ MARK MAUER & MEDA CHESNEY-LIND, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (2002).

²¹¹ See Demleitner, *supra* note 26, at 1.

²¹² This term is borrowed from Michelle Alexander, whose forthcoming book, THE NEW JIM CROW, applies that term to the war on drugs and mass incarceration. See http://www.soros.org/initiatives/justice/focus_areas/justice_fellows/grantees/alexander_2005.

²¹³ See, e.g., Judith Bernstein-Baker, *Divided Families: Immigration Consequences of Contact with the Criminal Justice System*, in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 91 (Amy Hirsch et al. eds., 2002).

²¹⁴ Bureau of Justice Statistics, U.S. Dep’t of Justice, State Court Organization 1998, at 308-11 tbl.49 (*available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf>) (last visited May 14, 2005) (providing state-by-state description of the impact that criminal convictions have on the termination of parental rights).

households – ineligible for federally subsidized housing.²¹⁵ Most states ban some or all people with felony drug convictions from receiving welfare and food stamps.²¹⁶ Individuals convicted of drug-related offenses are ineligible for student loans, grants or work study assistance funded by the federal government.²¹⁷ Many states prohibit felons from serving on juries²¹⁸ or holding political office.²¹⁹ Released prisoners often face crushing debt as a result of laws requiring them to pay for their own incarceration, as well as laws or practices under which prisoners must pay child support during their incarceration, when they typically have no realistic means to do so.²²⁰ Finally, some convicted persons, most typically those with convictions for sex offenses, are subject to registration and community notification schemes, where their pictures and addresses are posted on the Internet to alert the community that they present a potential danger.²²¹ In sum, people with criminal records face a staggering array of social and legal disabilities that appear to equal or exceed those faced by traditional suspect classes. In fact, as the American Bar Association has noted, “collateral consequences [of criminal convictions] have become one of the most significant methods of assigning legal status in America.”²²²

B. Political Powerlessness

As *Carolene Products* suggests, the underlying rationale for applying heightened scrutiny is that in some cases the legislative process cannot be trusted to protect the interests of particular groups. Certain groups have been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”²²³ Because suspect classes are unable adequately to protect their own interests, laws targeting such groups “are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective.”²²⁴ Therefore the judiciary must step in to ensure that these laws reflect legitimate state interests rather than animus.²²⁵

²¹⁵ See Rue Landau, *Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter*, in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 41 (Amy Hirsch et al. eds., 2002).

²¹⁶ Legal Action Center, *supra* note 44, at 12. Under federal law, individuals with felony drug convictions are subject to a lifetime ban on cash assistance and food stamps unless their state affirmatively opts out of the ban. See generally Amy Hirsch, *Parents with Criminal Records and Public Benefits: “Welfare Helps Us Stay in Touch with Society,”* in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 27-39 (Amy Hirsch et al. eds., 2002).

²¹⁷ See 20 U.S.C. §1091(r) (2004) (“A student who has been convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance shall not be eligible to receive any grant, loan, or work assistance.”). See generally Irv Ackelsberg & Amy Hirsch, *Student Loans and Criminal Records: Parents with Past Drug Convictions Lose Access to Higher Education*, in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 85 (Amy Hirsch et al. eds., 2002).

²¹⁸ Kalt, *supra* note 9, at 65.

²¹⁹ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE COURT ORGANIZATION 1998, at 308-11 tbl.49, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf> (last visited May 14, 2005).

²²⁰ Peter Schneider, *Criminal Convictions, Incarceration, and Child Welfare: Ex-Offenders Lose Their Children*, in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 53, 73 (Amy Hirsch et al. eds., 2002).

²²¹ See Eric Lotke, *Politics and Irrelevance: Community Notification Statutes*, 10 FED. SENTENCING REP. 64 (2002) (describing community notification schemes).

²²² AMERICAN BAR ASSOCIATION, *supra* note 7, at 9.

²²³ San Antonio Indep. Sch. Dist., 411 U.S. at 28.

²²⁴ Plyler, 457 U.S. at 218 n.14.

²²⁵ See, e.g., *Chemerinsky*, *supra* note 202, at 699 (noting that one reason strict scrutiny is applied to alienage classifications is that aliens cannot vote and therefore cannot protect themselves in the political process); *Frontiero*, 411 U.S. at 684, 686 n.17 (plurality opinion) (noting the disenfranchisement of women prior to the adoption of the

While the existence of pervasive legal restrictions on people with criminal records provides significant evidence of their political powerlessness, that political powerlessness is also frequently enshrined in law. Indeed, many people with criminal records are literally disenfranchised: with the exception of children, felons are the largest group of U.S. citizens barred by law from voting.²²⁶ Approximately 3.9 million people – or one in fifty adults – are affected by state disenfranchisement laws.²²⁷ All but two states restrict the right to vote for at least some people with criminal convictions. Twelve states have lifetime bans on voting for some or all people convicted of crimes. Eighteen states prohibit individuals from voting until they have completed probation or parole. Six states prohibit individuals from voting while incarcerated or on parole. And twelve states bar individuals from voting while incarcerated.²²⁸

Even when people with criminal records can vote, they lack political influence.²²⁹ Those involved in the criminal justice system are disproportionately people of color and disproportionately poor.²³⁰ Most are poorly educated, and many are mentally ill.²³¹ Moreover the intense stigma associated with criminal records makes it extremely difficult to organize former offenders politically. While many other marginalized groups – whether ethnic or racial groups, women, or gays – take pride in their identity, individuals with criminal records rarely celebrate their shared experience as former lawbreakers.²³²

Few groups today are as politically powerless as people with criminal records.²³³ The political marginalization of people with records, coupled with the public pressure for politicians to be “tough on crime,” makes it very difficult for people with records to protect their rights through the legislative process.²³⁴ While some other groups that have been denied suspect class status by the court – notably the elderly and the disabled – have successfully lobbied for statutory protection against discrimination, the inconceivability of similar legislation to protect people with criminal records shows just how powerless they are.

19th Amendment as well as the fact that although women are not a small and powerless minority, they remain underrepresented in the political process).

²²⁶ Saxonhouse, *supra* note 11, at 1601.

²²⁷ Jamie Fellner & Marc Mauer, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* 1 (1998), at <http://www.sentencingproject.org/pdfs/9080/pdf> (last visited May 14, 2005).

²²⁸ Legal Action Center, *supra* note 44, at 14.

²²⁹ Olivares, *supra* note 36, at 15-16 (“[T]here is little opposition by convicted offenders in the presence of legislative action limiting rights and interests of convicted offenders. Stated simply, convicted felons have no uniform voice to argue against the enactment of legal restrictions on civil rights.”).

²³⁰ See TRAVIS, *supra* note 13, at 9-13. Felony disenfranchisement laws disproportionately affect people of color. Nationally, thirteen percent of African-American men are disenfranchised, and in some states the number is almost as high as one in three. Fellner, *supra* note 227, at 1

²³¹ See TRAVIS, *supra* note 13, at 9, 11.

²³² A few groups have sought to organize people with criminal records. For example, All of Us or None is a national organizing initiative of prisoners, former prisoners and persons with felony convictions whose goal is to “combat the many forms of discrimination that are faced as the result of felony convictions.” See About All of Us or None, available at <http://www.allofusornone.org/about.html> (last visited May 16, 2005).

²³³ See Saxonhouse, *supra* note 11, at 1638 (citing *Carolene Prods.*, 304 U.S. at 153 n.4, for the proposition that courts may have a special role to play in protecting the rights of persons with criminal convictions since they face blockages in the political process).

²³⁴ *Id.* at 1636 (“Public pressure on politicians to be ‘tough on crime’ and, obviously many ex-felons’ inability to hold politicians accountable by participating in elections themselves mean that legislative reform is often illusory.”). Saxonhouse also suggests that parole restrictions prohibiting parolees from associating with one another may also weaken the ability of parolees to organize politically. *Id.* at 1637-38.

Both with respect to the extent of discrimination and with respect to political powerlessness, people with criminal records meet the standard for a suspect class. If these characteristics sufficed, people with criminal records would qualify, and laws discriminating on the basis of a person's offense history would be subject to heightened judicial scrutiny. However political powerlessness and demonstrated prejudice are not enough. For example, minors are not a suspect class, despite their lack of political power.²³⁵ Nor does heightened scrutiny apply to legislative classifications based on age,²³⁶ mental retardation,²³⁷ or sexual orientation,²³⁸ despite the history of discrimination against these groups. Therefore, we must consider a series of other factors, all of which complicate the argument that people with criminal records should be treated as a suspect class.

B. Relevance

"Classifications treated as suspect tend to be irrelevant to any proper legislative goal."²³⁹ Where suspect classes are involved, the Court has generally found little or no justification for laws that make distinctions based on the unique characteristics of those groups. For example, race and gender are factors "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."²⁴⁰ Thus, it is assumed that race-based laws reflect irrational prejudice unless the government can demonstrate that such laws are narrowly "tailored to a compelling state interest."²⁴¹ Likewise what "differentiates sex from such non-suspect statuses as intelligence or physical disability ... is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."²⁴² While gender classifications sometimes reflect real differences between men and women, they are "very likely [to] reflect outmoded notions of the relative capabilities of men and women."²⁴³ Therefore, laws which classify by gender must be substantially related to achievement of important government objectives.²⁴⁴

²³⁵ *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in the judgment in part and dissenting in part) (citations omitted) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates."). Note though, that people with criminal records have even less political power than these children, since children are often well-represented by family members and advocacy groups, since all legislators were themselves once children, and since many legislators have children whose interests they seek to protect.

²³⁶ *Murgia*, 427 U.S. 307 (applying rational basis review to a compulsory retirement law).

²³⁷ *Cleburne*, 473 U.S. at 446 (holding that rational basis review applies to classifications on the basis of mental retardation).

²³⁸ *Romer v. Evans*, 517 U.S. 620, 632 (1996). The *Romer* Court did not explicitly discuss the question of whether gays and lesbians constitute a suspect class, but rather assumed they do not, noting simply that laws which neither burden a fundamental right nor target a suspect class are subject to rational basis review. *Id.*

²³⁹ *Plyler*, 457 U.S. at 218.

²⁴⁰ *Cleburne*, 473 U.S. at 440. See also *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring) ("Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision.").

²⁴¹ *Cleburne*, 473 U.S. at 440-41.

²⁴² *Frontiero*, 411 U.S. at 686.

²⁴³ *Cleburne*, 473 U.S. at 441.

²⁴⁴ *Craig v. Boren*, 429 U.S. 190, 197 (1976). See also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982). The Court has looked to the relevance of the characteristic not only in determining that particular groups qualify as suspect classes, but also in rejecting claims advanced by other groups for suspect class status. For example, in finding that undocumented children are not a suspect class, the Court noted that "it could hardly be suggested that undocumented status is a 'constitutional irrelevancy.'" *Plyler*, 457 U.S. at 219 n.19.

There is not, however, a bright line between relevant and irrelevant characteristics. The Court has awarded suspect or quasi-suspect class status to groups whose characteristics are, at least sometimes, relevant to legislative goals. As Justice Marshall has noted in criticizing the Court's focus on the relevance of classifications,

that a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not. A sign that says "men only" looks very different on a bathroom door than a courthouse door.²⁴⁵

The Court's "tiers of scrutiny" approach can be understood as a way to tie the level of scrutiny to a classification's likely relevance. Thus strict scrutiny is appropriate for classifications like race and national origin, which are almost never relevant, while intermediate scrutiny is used for classifications like gender or illegitimacy "because the Court views the trait as relevant under some circumstances but not others."²⁴⁶ In the context of alienage classifications the Court has adopted a slightly different method of reconciling the fact that alienage is sometimes relevant and sometimes not. Instead of applying intermediate scrutiny, the Court has applied a general rule that alienage classifications are subject to strict scrutiny, but has carved out an exception for alienage classifications related to self-government and the democratic process.²⁴⁷ Thus the Court applies strict scrutiny in situations where foreigner status is not relevant, and rational basis review in situations where foreigner status is relevant.

Criminal records are often relevant to legitimate government interests. For example, a law that prohibits a person with a child abuse conviction from owning or working at an in-home daycare is properly based on the state's concern for protecting children. Similarly, a law that prevents an individual with an embezzlement conviction from working in a bank reflects the state's legitimate concern about the integrity of financial institutions.²⁴⁸ The underlying assumption of such laws is that people who have committed certain types of crimes are more likely to commit similar crimes in the future, and that therefore they should be excluded from environments where they could harm others by reoffending.

This assumption creates two difficulties, however. First, while it may be true that people with criminal records, as a class, are more likely to be dangerous or untrustworthy than people without criminal records, this is not true in every individual case. Relying on generalizations – even statistically accurate ones – is problematic when there is great individual variation. For example, women generally are not as strong as men, but a law barring them from jobs requiring heavy lifting would be struck down since some women could perform the job. It would certainly be permissible to exclude individuals who could not do the heavy lifting, and such a law would undoubtedly affect more women than men. But because some women would meet the lifting requirement, it is impermissible to adopt gender as a proxy for strength.²⁴⁹ The same analysis can be applied in the context of criminal records. While it is certainly appropriate to exclude dangerous or untrustworthy individuals from certain occupations, the fact that a person has a criminal record does not necessarily mean that they are dangerous or untrustworthy.

²⁴⁵ *Cleburne*, 473 U.S. at 468-69 (Marshall, J., concurring in judgment and dissenting in part).

²⁴⁶ *Id.* at 469 (Marshall, J., concurring in judgment and dissenting in part).

²⁴⁷ See generally, Chemerinsky, *supra* note 202, at 743.

²⁴⁸ The age of the conviction will also affect its relevance. The more recent the conviction, the more likely it is to be relevant. See Section I, and notes 42-43, *supra*.

²⁴⁹ Cf. *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (U.S. 1978) (holding under Title VII that women could not be charged a higher pension premium than men because, although women as a class live longer than men, the longevity of individual women varies greatly).

A second difficulty in evaluating record-based classifications is that while they sometimes reflect legitimate government interests, they sometimes reflect little more than animus towards people with criminal convictions. For example, a law that prohibits an individual with an embezzlement conviction from establishing an in-home daycare reflects irrational fears. It is, after all, hard to embezzle in one's own home. Similarly, a law which prohibits an individual with a child abuse conviction from working in a bank rests more on the opprobrium associated with this offense than it does on real concerns about reoffending. A financial position, so long as it does not involve contact with children, provides few opportunities for recidivism. Such laws are driven by a generalized antipathy towards people with criminal records, as well as by the assumption that such people are inherently bad or inferior. In other contexts such views are described as "animus" or "prejudice," and I will use those terms here.

If record-based laws sometimes reflect legitimate state interests and sometimes reflect animus, how can one distinguish? Even if one accepts that a child abuse conviction is relevant to a license for home daycare and an embezzlement conviction is not, reasonable people might disagree about whether or how much bearing an assault conviction should have. As we have seen in the context of the lower-court cases, it is difficult to draw the line between a rational assumption that a particular record makes a person unfit for employment in a specific area and an irrational assumption (i.e. prejudice) that such a person is just generally bad, and therefore unfit for employment in many or all sectors of the economy. Figuring out what is rational concern and what is irrational prejudice is not easy. The task is further complicated by the fact that record-based laws frequently cover not just individuals whose records are clearly relevant, but also individuals whose records are clearly not relevant, as well as everyone in between.

Record-based restrictions typically limit the rights of a broad class of former offenders. For example, a law might prohibit anyone with a felony from providing in-home daycare or working in a bank, rather than barring only child molesters or embezzlers. In such cases, the law will reflect *both* legitimate state interests and unjustified prejudice. To the extent these laws reflect a concern that individuals with particular criminal histories present a danger to children or a threat to bank funds, these laws reflect a legitimate concern. However, to the extent that these laws assume that everyone with a felony conviction presents a risk, these laws reflect an unjustified prejudice against people with criminal records. Record-based restrictions are thus often quite overbroad. Nevertheless, because record-based laws have legitimate applications, it cannot be said that criminal records are irrelevant in the same way that other suspect characteristics are irrelevant.

D. Immutability and Accountability

Underlying much of the Court's equal protection analysis is a concern that people should not be penalized for characteristics that they did not choose and cannot change. The term "immutability" is often used to encompass both the lack of choice and the inability to change. However, "immutability" really refers only to the latter of these concepts – whether the individual can change the characteristic in question.²⁵⁰ Immutability should be distinguished from the related concept of accountability which addresses whether the individual acquired the characteristic as a result of his or her own choices. Both immutability and accountability concern the degree to which the characteristic is something the individual can control. However,

²⁵⁰ FUNK & WAGNALLS STANDARD COLLEGE DICTIONARY 672 (1977) (defining "immutable" as "[n]ot mutable; unchanging; unalterable").

immutability concerns the permanence of the characteristic while accountability concerns the origin of the characteristic.

In identifying suspect classes, the Court has frequently looked at the degree to which that class is accountable for its inferior status.²⁵¹ Characteristics which are “determined solely by the accident of birth”²⁵² are more deserving of protection than those originating in human choices.²⁵³ The reason that choice-based characteristics do not warrant heightened scrutiny is that it is a “basic concept of our system that legal burdens should bear some relationship to individual responsibility.”²⁵⁴ Morally, it is much less fair to discriminate against people for characteristics that are, as one says, “not their fault,” than for characteristics they have chosen.

While accountability is an important factor, it is not sufficient for a finding that a group is a suspect class. Children, for example, are “not accountable for their disabling status,” but have nevertheless been denied the status of a suspect class.²⁵⁵ Similarly, the equal protection clause requires only rational basis review for classifications based on disabilities, despite the fact that in most cases disabled individuals did not choose their status.²⁵⁶

Faultlessness is also not necessary for suspect class status. For example, non-citizens, at least to the extent that they entered the United States as adults, can be understood as being accountable for their status: they made a conscious decision to leave their home countries to become non-citizens in the United States. Yet, legal aliens are protected under strict scrutiny, even though they chose their status.²⁵⁷ Similarly, even though religion is a matter of choice, the Constitution prohibits discrimination on the basis of religion (though this protection is grounded in the First Amendment rather than the Equal Protection Clause).

A lack of responsibility for the suspect characteristic, while neither sufficient nor necessary, is nevertheless important. We must ask, therefore, how the concept of accountability applies in the context of criminal records. In *Plyler v. Doe*, the Supreme Court briefly mentioned the issue of criminality in rejecting an argument that undocumented aliens are a suspect class:

Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime.²⁵⁸

Interestingly, the court actually appeared to be applying intermediate scrutiny, in part because the law at issue, which provided a free public education to citizens and legal residents, but not to

²⁵¹ See, e.g., *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (“[T]he legal status of illegitimacy ... is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual.”).

²⁵² *Frontiero*, 411 U.S. at 686.

²⁵³ See *Plyler*, 457 U.S. at 218 n.14 (1982) (“Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”).

²⁵⁴ *Frontiero*, 411 U.S. at 686. See, e.g., *Plyler*, 457 U.S. at 219 n.19 (rejecting argument that undocumented aliens are a suspect class because “[u]nlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action”).

²⁵⁵ *Plyler*, 457 U.S. at 223.

²⁵⁶ See *Cleburne*, 473 U.S. 432.

²⁵⁷ See *Graham v. Richardson*, 403 U.S. 365, 372 (1971). A related statutory example can be found in the case of the disabled. In some (albeit rare) cases, such as the drunk driver who is paralyzed in an accident or the individual who blinds herself in a suicide attempt, a disabled individual can be said to be responsible for his or her status. This is also true where individuals acquire disabilities through intravenous drug use or unprotected sexual activity. Statutory protections for the disabled are not limited to those who had no control over becoming disabled, but also protect those whose disability stems from their own unfortunate choices. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213).

²⁵⁸ *Plyler*, 457 U.S. at 219 n.19.

undocumented aliens, concerned children.²⁵⁹ While the state could “withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct,” the children of such illegal entrants were not to blame for their undocumented status and therefore were entitled to the same free public education as other young people.²⁶⁰

Like the undocumented adults discussed in *Plyler*, the status of people with criminal records stems from voluntary actions and is “the product of their own unlawful conduct.” *Plyler* implicitly suggests that it is the voluntariness of the conduct which is determinative, not the unlawfulness. After all, an undocumented child’s entry into the United States is just as illegal as that of an adult.²⁶¹ If the critical factor is voluntariness, however, this raises further questions, since classifications affecting legal aliens are subject to strict scrutiny,²⁶² even though entry into that class, like entry into the class of undocumented aliens, is voluntary.²⁶³ Thus *Plyler*’s explicit distinction between undocumented children and undocumented adults, and its unspoken distinction between undocumented aliens and legal ones, seem inconsistent.

In any event, clearly people are not born with criminal records, but rather acquire criminal records because they commit crimes.²⁶⁴ People do not choose to be black or white, male or female, legitimate or illegitimate. But people choose to break the law. In other words, the status of people with criminal records originates in those individuals’ own choices. Moreover, offenders not only choose their status by committing crimes, but that choice is also morally blameworthy. They are not just responsible, they are at fault. If we are normally expected to bear the consequences of our decisions even when those decisions are not morally blameworthy, then there is an even stronger argument for making those who choose illegal conduct responsible for those choices. This cuts against a finding that people with criminal records are a suspect class.

The concept of immutability, which is related to the concept of accountability, concerns whether an individual has control over the characteristic in question. Immutability focuses not on how the characteristic was acquired, however, but rather on whether the characteristic can be changed. Many of the classifications subject to heightened scrutiny, including race, national origin, gender, and illegitimacy, involve permanent characteristics.²⁶⁵ The Supreme Court has stressed that it is unfair to impose disabilities based on a characteristic which “its possessors are powerless to escape or set aside.”²⁶⁶

²⁵⁹ Chemerinsky, *supra* note 202, at 747 (arguing that although the *Plyler* Court did not articulate a level of scrutiny, intermediate scrutiny was used).

²⁶⁰ *Plyler*, 457 U.S. at 219.

²⁶¹ While the child may not be old enough to be prosecuted, the child is still subject to deportation and other consequences of unlawful entry.

²⁶² *Graham*, 403 U.S. at 367. While strict scrutiny is generally applied to alienage classifications, rational basis review applies in cases concerning self-government and the democratic process. *See, e.g., Folely v. Connelie*, 435 U.S. 291, 296 (1978).

²⁶³ For both legal and undocumented aliens, the question of whether entry into the class can be considered voluntary depends upon the person’s age at the time of entry into the United States.

²⁶⁴ While factors like race and income may have a significant bearing on how likely one is to be caught, prosecuted and convicted, this does not alter the fact that a criminal record ultimately stems from the individual’s own conduct (except, of course, in cases of actual innocence).

²⁶⁵ *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (noting that race, gender and ethnic background are immutable characteristics); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (Blackmun, J., concurring and dissenting) (noting that race, gender and illegitimacy are immutable characteristics). Note that illegitimacy is potentially subject to change, if the child’s parents subsequently marry. Of course the child has no control over this development.

²⁶⁶ *Bakke*, 438 U.S. at 360 (Blackmun, J., concurring in the judgment and dissenting in part).

Immutability, like the absence of responsibility, is not itself sufficient for heightened scrutiny to apply. The “immutability of the trait at issue may be relevant, but many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances.”²⁶⁷ Nor is immutability necessarily required. For example, alienage classifications are subject to strict scrutiny even though non-citizen status can be alleviated through the process of naturalization.²⁶⁸ Nevertheless, immutability, though neither sufficient nor necessary to finding a suspect class, is a significant factor in determining if heightened scrutiny is appropriate.

Whether an individual is born with a particular characteristic – that is whether the characteristic is inherent – relates both to accountability and to immutability. At birth, a person is of a particular race, national origin, and gender, and either has or does not have married parents. The person did not choose those characteristics (and hence is faultless) and cannot change those characteristics (which are therefore immutable). By contrast, a person who has a criminal record both chooses that characteristic (in the sense of choosing to commit a crime) and can change that characteristic (in the sense of changing from being a person without a record to being a person with a record).

One should, however, assess mutability not just in terms of birth characteristics, but also in terms of the ability to change the characteristic once acquired. For example, disabilities are generally considered to be immutable, yet many people are not born disabled. Rather, they are born able-bodied, but then lose their sight, become paralyzed, or acquire some other infirmity during the course of their lives. Once acquired, the disability is immutable. The fact that a disability may in some cases be the product of an individual’s own unfortunate choices – such as where a person contracts HIV through intravenous drug use or becomes paralyzed as the result of a drunk driving accident – does not mean that the individual has the power, going forward, to eliminate his or her disability. The legal protections afforded to the disabled, which are primarily statutory rather than constitutional in origin, in part reflect a recognition that the disabled should not be penalized for a condition they cannot change.²⁶⁹ Similarly, the elderly are not born old, but once they become old, they cannot change their status. Like the disabled, the elderly are accorded statutory (though not constitutional) protection, evidencing a legislative recognition that it is inappropriate to penalize the elderly for a status they cannot change.²⁷⁰

Just as with age or disability, a criminal record is generally unchangeable once acquired. Only a few states allow former offenders to expunge their criminal records.²⁷¹ Those that do, restrict expungements to individuals with minor records.²⁷² Thus, the vast majority of individuals

²⁶⁷ *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in judgment and dissenting in part) (citations omitted).

²⁶⁸ See Chemerinsky, *supra* note 202, at 742). While alienage might be considered temporarily immutable for those non-citizens who are not yet eligible for naturalization, the heightened scrutiny applicable to alienage classifications is not limited to such persons. Individuals who are eligible for naturalization but choose not to become citizens are also protected.

²⁶⁹ See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213).

²⁷⁰ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2000)).

²⁷¹ See Legal Action Center, *supra* note 44; LOVE, *supra* note 37, at 4 (surveying mechanisms for pardons, expungements and sealing of criminal records throughout the United States and concluding that these mechanisms are largely unreliable or inaccessible so that as a practical matter formerly convicted persons have little hope of ever fully discharging their debt to society).

²⁷² Pardons and certificates of rehabilitation or certificates of good conduct may confer governmental recognition of the individual’s growth, but do not eliminate the record itself.

with criminal records cannot change their status, no matter how long it has been since they committed their crimes or how fully reformed they have become in the meantime. In other words, once an individual becomes a person with a criminal record, the individual generally cannot change that characteristic. He or she will remain an “ex-offender” for the rest of his or her life. Thus the status of people with criminal records, while not immutable in the sense of being inherent from birth, is largely immutable in the sense of being permanent once acquired.

Criminal records are immutable in a particular way which makes them different from many other acquired, immutable characteristics. While age and disability are immutable once acquired because it is physically impossible for people to revert back to their younger or able-bodied selves, the immutability of criminal records is a function of law.²⁷³ States set standards for expunging and sealing records, as well as standards for the extent to which employers can ask about or obtain information about expunged or sealed offenses. For individuals who cannot expunge or seal their records, a clean record is a legal, not a physical, impossibility.

In theory, criminal records could be made much more mutable through expanded use of expungements, sealing and pardons. Alternately, offenses could drop off one’s criminal history after a specified period of time, much the way bankruptcies and late payments disappear from one’s credit report. However, unless such changes are widely adopted, which seems unlikely, criminal records will remain largely immutable.

To summarize, most, but not all, of the characteristics that the Court has identified as deserving heightened scrutiny do not originate in the individual’s own choices. Because people with criminal records are responsible for their own status, the concept of accountability weighs against a finding that people with criminal records are a suspect class. Suspect characteristics are also generally immutable from birth (inherent) and immutable once acquired (permanent). Criminal records are not inherent, though once acquired they are, in most cases, permanent. Thus the concept of immutability cuts both ways.

E. Visibility

Whether a characteristic is immediately visible is another factor in identifying a suspect class. The reason to consider visibility is that where characteristics are immediately apparent, discrimination may be more likely and more pervasive. By contrast, when the characteristic “does not carry an obvious badge,”²⁷⁴ the likelihood of discrimination decreases. In contexts where the characteristic does not become visible, there may be no discrimination.

With respect to visibility, people with criminal records are similar to illegitimates or aliens. Just as it is not immediately apparent whether a person’s parents were married or whether a person is a citizen, it is not immediately apparent whether a person has a criminal record. However, in situations where there are laws that distinguish on the basis of illegitimacy, alienage, or criminal history, the person’s status is checked. Thus, illegitimacy-based distinctions assume an opportunity to determine parental marital status, alienage-based classifications assume an opportunity to determine citizenship status, and record-based laws assume an opportunity to conduct a criminal background check. In other words, while these characteristics may not be immediately visible upon meeting the person, they are visible in situations where distinctions are drawn based on those characteristics.

²⁷³ To the extent that alienage classifications are immutable, they are also legally not physically impossible to change.

²⁷⁴ Mathews, 427 U.S. at 506.

Visibility has more to do with whether strict or intermediate scrutiny applies than with whether a group qualifies as a suspect class in the first place.²⁷⁵ After all, a number of characteristics that are not immediately apparent, like illegitimacy or alienage, are suspect, while any number of visible characteristics, like hair color or height, are not. Thus while the mere fact that a criminal record is not initially visible suggests that intermediate and not strict scrutiny would be the applicable standard, that fact tells us little about the ways in which people with records are like a suspect class.

F. Discreteness and Coherence

In *Carolene Products*, the Supreme Court referred to the “discreteness” of particular groups.²⁷⁶ While it is hard to know exactly what the Court meant, it may have been referring to the coherence or “boundedness” of a particular group. In the case of characteristics like sex or illegitimacy, a person usually falls on one side of a bright line. A person is either male or female. A person is either born to married parents or born to unmarried parents. Moreover, the legal and historical disabilities associated with being female or illegitimate generally apply to all women or to all persons born to unmarried parents.²⁷⁷

By contrast, the contours of the class of “people with criminal records” are not so easily defined.²⁷⁸ True, it is fairly simple to distinguish between those people who have never been convicted and those who have, though even there the status of individuals who are adjudicated as juveniles muddies the distinction. However, the commonalities of experience as well as the legal and historical disabilities associated with a record-based status vary tremendously within the broad class of individuals with records. While there is no good national data on the number of Americans with criminal records, some estimates suggest that 20 percent²⁷⁹ or even 25 percent²⁸⁰ of adults have a criminal record. The contents and consequences of those records vary tremendously.²⁸¹ A person convicted of a misdemeanor for possessing alcohol as a minor may suffer some collateral civil consequences, but those consequences will be not be nearly as severe as those for a person convicted of felony drug distribution. The political powerlessness of people with records also varies within the class, since disenfranchisement laws differ considerably among states. Disenfranchisement does not affect minor offenders and, in many states, applies

²⁷⁵ See *id.* (holding that because illegitimacy is not immediately apparent, only intermediate scrutiny is required for laws that discriminate based on the marital status of one’s parents).

²⁷⁶ *Carolene Prods.*, 304 U.S. at 153 n.4.

²⁷⁷ But note that pregnancy-based classifications apply only to those women who are pregnant.

²⁷⁸ This is also true of other groups that have been denied suspect class status. For example, it is difficult to determine exactly who qualifies as “disabled,” a question that has generated significant litigation even where there is a statutory definition. See, e.g., *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184 (U.S. 2002) (discussing definition under the Americans with Disabilities Act that a disability is a physical impairment that substantially limits one or more major life activities); *Sutton v. United Air Lines*, 527 U.S. 471 (U.S. 1999) (requiring individualized inquiry to determine whether individual qualifies as disabled under the Americans with Disabilities Act).

²⁷⁹ National Employment Law Project, *supra* note 14, at 2.

²⁸⁰ Amy Hirsch, *Introduction*, in *EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS* 7, 9-10 (Amy Hirsch et al. eds., 2002).

²⁸¹ A few scholars have looked specifically at the collateral consequences resulting from certain types of convictions or at those imposed on particular categories of offenders. See, e.g., Gabriel Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. OF GENDER, RACE, & JUSTICE 253 (2002); Robert Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part I*, 15 CRIM. JUST. 59 (2000).

only to persons who are still serving their sentences.²⁸² In other words, the primary characteristics that make people with criminal records like a suspect class – the history of discrimination against and the political weakness of this group – do not apply with equal force to all members of the class.

It should be noted that some classifications which have historically been treated as suspect are also quite fluid. In particular, there are not bright-line boundaries around classifications like race, national origin, or disability. Nor has the history of legal and social discrimination against members of those groups affected all of them equally. Nevertheless, the difficulty of delimiting the members of a suspect class composed of people with criminal records weakens the argument that they are a suspect class.

G. People with Records as a Suspect Class?

People with criminal records do not fall neatly into the category of a suspect class. They are not born with records, but rather acquire them as a result of their own choices. Moreover, their criminal records are relevant to many legitimate legislative goals. There is, after all, a fundamental difference between discriminating against someone based on inherent and largely irrelevant characteristics, such as race, and discriminating against someone based on prior choices to engage in criminal behavior, especially when the person's criminal history is relevant to the governmental objective at issue.

At the same time, people with criminal records, like traditionally recognized suspect classes, have been subjected to a history of severe discrimination. That discrimination is not only a part of the fabric of society, but is embedded in law. Criminal records, once acquired, are largely immutable. Record-based restrictions are frequently overbroad, thereby imposing disabilities that do not serve the legislature's goals. Moreover, people with criminal records lack political clout. Arguably, no other group is subject to such overt legislative hostility or is as powerless to protect itself.

If, as seems likely, the courts will continue to find that people with criminal records are not a suspect class, what jurisprudential approach should be used to ensure that their rights are respected? The fundamental concern expressed in *Carolene Products* will not just disappear: people with criminal records have been “saddled with such disabilities, [and] subjected to such a history of purposeful unequal treatment, [and] relegated to such a position of political powerlessness” as to raise real questions about whether they “command extraordinary protection from the majoritarian political process.”²⁸³ If the ordinary political process cannot be relied upon to protect the rights of people with criminal records and if they nevertheless are not a suspect class, how can the law recognize the very important ways in which they are like a suspect class?

Part of the justification for the deference inherent in rational basis review is that the government virtually always classifies people when it legislates, and such government classifications are rarely exact. The fact that some fifteen-year-olds might be able to drive safely, that some teachers might be quite capable without passing licensing tests, or that some needy students might not be eligible for government loans, should not prevent the government from setting a minimum age limit for driving, from adopting licensing standards for the professions, or from establishing a scholarship program to assist low-income students. Since

²⁸² See MARC MAUER & TUSHAR KANSAL (THE SENTENCING PROJECT), *BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES*, at 1.

²⁸³ *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28.

most legislation is under- or over-inclusive, “perfection is by no means required” when the government draws lines.²⁸⁴

The difficulty in assessing laws which target former offenders is that the over-inclusiveness of such laws often reflects not merely the inaccuracies inherent in all line-drawing, but also assumptions about the inherent badness or inferiority of people with criminal records. Review that is too deferential ignores the danger of such inaccurate negative assumptions. The rigid “tiers of scrutiny” approach, which is a judicial short-cut for assessing whether the political process can be relied upon to protect the interests of a vulnerable group, is ill-suited to situations like this one, where laws partly reflect legitimate government purposes and partly reflect deep-seated antipathy towards an unpopular and politically powerless group. Laws targeting people with criminal records cannot be blindly equated to other social and economic legislation. But if former offenders are not a suspect class, we must seek some alternative constitutional framework that can distinguish between rational restrictions and irrational prejudice. The rest of this article seeks to do just that.

V. Rational Basis with Bite

Since the “[c]onventional wisdom is that ... virtually anything goes under rational relationship scrutiny,”²⁸⁵ the fact that numerous courts have struck down record-based restrictions suggests that something more is at work here. Perhaps courts are applying what commentators have described as “rational basis with bite.”²⁸⁶ In rational basis with bite cases, courts, although purportedly applying rational basis review, do not in fact accept just any legislative rationale, but will strike down laws where they find an insufficient relationship between the state’s goals and the legislation.

The two most notable Supreme Court cases of rational basis with bite – *City of Cleburne v. Cleburne Living Center*²⁸⁷ and *Romer v. Evans*²⁸⁸ – both involved legislation targeting politically unpopular groups. These opinions reflect a judicial unwillingness to identify new suspect classes, coupled with a recognition that the laws in question reflected prejudice. Because of concerns about the discriminatory nature of the laws, the Court refused to accept the types of justifications that are generally enough to survive rational basis review.

²⁸⁴ *Vance*, 440 U.S. at 108 (quoting *Phillips Chem. Co. v. Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960)). See also *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979) (upholding a city regulation that prevented those in a methadone maintenance program from holding positions with the Transit Authority and finding that even though the majority of those in the program posed no safety risk, the regulation was valid because an alternative rule would be less precise and more costly than a total ban on those using drugs).

²⁸⁵ Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 58 (2d ed., rev. 2002). See also Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 *CONST. COMMENTARY* 257, 262 (1996) (“As we all teach our students, the Court never invalidates statutes unless it applies something more than ‘real’ minimal scrutiny . . .”).

²⁸⁶ Chemerinsky, *supra* note 202, at 544; Gunther, *The Supreme Court, 1971 Term – Foreword: “In Search Of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,”* 86 *HARV. L. REV.* 1, 18-19 (1972) (describing a middle standard of review as “rationality with bite”).

²⁸⁷ 473 U.S. 432 (1985).

²⁸⁸ 517 U.S. 620 (1996). But see Farber, *supra* note 285, at 259 (arguing that *Romer* is not a rational basis with bite case, since the court emphasized the minimal level of scrutiny and did not cite the prior rational basis with bite cases).

In *Cleburne*, the Supreme Court rejected the Fifth Circuit's holding that the mentally retarded are a quasi-suspect class.²⁸⁹ The Court of Appeals had reasoned that strict scrutiny was inappropriate, given that mental retardation is in fact relevant to many legislative actions.²⁹⁰ However, since laws discriminating against the retarded are "likely to reflect deep-seated prejudice," since the mentally retarded lack political power, and since their condition is immutable, intermediate scrutiny was required.²⁹¹ The Supreme Court rejected that approach, holding that rational basis review was the appropriate standard under which to judge laws affecting the retarded. The Court emphasized that the retarded have characteristics that are relevant to legitimate governmental classifications.²⁹² The Court also worried that if it found the mentally retarded to be a quasi-suspect class, there would be no principled way to distinguish them from a variety of other groups who could claim this status.²⁹³

Having decided that rational basis review applied, the Court then proceeded to strike down a zoning ordinance discriminating against the retarded under that normally deferential standard. The Court engaged in a searching analysis of each of the proffered rationales for the law. For example, the Court found concerns about fire safety and neighborhood serenity invalid, given that they applied as well to other types of properties (such as apartment houses, fraternity/sorority houses and hospitals) that were permitted under the zoning laws. Yet under traditional rational basis review, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."²⁹⁴ The Court does "not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation."²⁹⁵ As Judge Marshall noted in dissent, *Cleburne's* ordinance "was invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny."²⁹⁶

What accounts for the Court's willingness to scrutinize carefully laws discriminating against the retarded? "The short of it," the Court concluded, "is that [the law] appears to us to rest on an irrational prejudice against the mentally retarded."²⁹⁷ The Court explained that while the mentally retarded are not subject to "a continuing antipathy or prejudice"²⁹⁸ sufficient to justify heightened judicial scrutiny, "[o]ur refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination."²⁹⁹ Even under rational basis review "some objectives – such as a bare ... desire to harm a politically unpopular group – are not legitimate state interests."³⁰⁰ *Cleburne* suggests, then, that even when groups do not qualify as a suspect class, laws will nonetheless be subject to careful scrutiny under rational basis review if the Court suspects that the real justification for the law is prejudice.

²⁸⁹ *Cleburne*, 473 U.S. 432.

²⁹⁰ *Id.* at 438.

²⁹¹ *Id.*

²⁹² *Id.* at 442.

²⁹³ *Id.* at 445. The Court also suggested that legislative efforts on behalf of the retarded "negate[] any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers." *Id.* at 445.

²⁹⁴ *Id.* at 458 (Marshall, J., concurring in judgment and dissenting in part) (citing *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955)).

²⁹⁵ *Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in judgment and dissenting in part).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 450.

²⁹⁸ *Id.* at 443 (finding that lawmakers had been addressing the needs of the mentally retarded).

²⁹⁹ *Id.* at 446 (citation and quotation marks omitted).

³⁰⁰ *Id.*

Another example of rational basis with bite is *Romer v. Evans*, in which the Court invalidated a Colorado constitutional amendment that prohibited governmental action to protect homosexuals.³⁰¹ The Court began by explaining that:

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.³⁰²

The Court then found that the Colorado amendment "fails, indeed defies, even this conventional inquiry."³⁰³

The Court rejected the state's argument that the law was designed to respect the liberties of employers and landlords who object to homosexuality, and was further intended to conserve the state's resources to combat other forms of discrimination.³⁰⁴ Instead, the Court found that because of its sheer breadth, "the amendment seems inexplicable by anything but animus toward the class it affects."³⁰⁵ Echoing *Cleburne*, the Court explained that

[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.... If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.³⁰⁶

Cleburne and *Romer* outline a possible approach to evaluating classifications based on criminal records. These cases suggest that courts should distinguish between legislation that coincidentally harms a particular group, and legislation that reflects animus towards a politically unpopular group. As in the occupational restriction cases, at least some of the governmental interests asserted here – such as fire safety in *Cleburne* or conserving resources for civil rights enforcement in *Romer* – are valid ones. But the Court found that the asserted connection between those interests and the classification in question reflected prejudice. And animus towards a politically unpopular group is not a legitimate governmental interest.

Cleburne is particularly apposite. Criminal history, like mental retardation, is relevant to many legislative actions. At the same time, public fears about people with records, like public fears about the mentally retarded, reflect an assumption that undesirable characteristics which may apply to some members of the class apply across the board. In both cases, some laws will reflect real and relevant differences from the majority population, some laws will be "likely to reflect deep-seated prejudice,"³⁰⁷ and some laws will reflect a bit of both.

³⁰¹ 517 U.S. 620 (1996). *But see* Farber, *supra* note 285, at 259 (arguing that *Romer* is not a rational basis with bite case, since the court emphasized the minimal level of scrutiny and did not cite the prior rational basis with bite cases).

³⁰² *Romer*, 517 U.S. at 631.

³⁰³ *Id.* at 632.

³⁰⁴ *Id.* at 635.

³⁰⁵ *Id.* at 632.

³⁰⁶ *Id.* at 633-634 (citations and quotation marks omitted).

³⁰⁷ *Cleburne*, 473 U.S. at 438.

Rational basis with bite recognizes that laws targeting certain unpopular groups, including the mentally retarded, gays and lesbians, and people with criminal records, like laws targeting suspect classes, may be motivated by animus towards or stereotypes about the group in question. In these cases, the lack of a reasonably close fit between the state's goals and the classification it draws becomes evidence of such prejudice. Then, once animus is established as the real basis for the legislation, the law can be struck down under rational basis review, since the desire to harm an unpopular group is not a legitimate state interest.

Because rational basis with bite accounts for the possibility of prejudice, it shows some promise as an approach to record-based restrictions. Although arguably this is the standard that many of the lower courts have been applying in practice, the lower courts do not discuss animus as a factor. In other words, courts generally do not admit to using rational basis with bite but rather claim their analysis falls under regular rational basis review. For this reason, rational basis with bite is unstable framework for protecting the rights of people with criminal records. True, some courts will recognize the danger that record-based restrictions rest on negative stereotypes, and will therefore look for a closer fit between the law and the governmental interest than they might in other rational basis cases. Other courts, however, will adopt a more traditional form of rational basis review, concluding that the government has a legitimate interest in protecting the public from dangerous or untrustworthy workers, and that, since some former offenders are dangerous or untrustworthy, even very broad record-based restrictions are rationally related to that goal. If record-based classifications are subject only to rational basis review, one cannot be certain which form of rational basis review the court will adopt. For this reason, in seeking to develop a constitutional framework for analyzing record-based restrictions, we must look beyond the issue of prejudice to the issue of rights.

IV. Economic Rights: Warranted and Unwarranted Deprivations of Liberty and Property

The right to employment is not a fundamental right.³⁰⁸ If it were, occupational restrictions would be subject to strict scrutiny. Moreover, people with criminal records, like other individuals, do not have a property right in a particular job, absent some "legitimate claim of entitlement to it," such as a long-term contract.³⁰⁹ At the same time, the rights guaranteed by the Fourteenth Amendment do include the right "to choose one's field of private employment"³¹⁰ and "to engage in any of the common occupations of life."³¹¹ Whether one can practice one's profession is "not a matter of grace and favor,"³¹² since "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."³¹³ This right is

³⁰⁸ *Murgia*, 427 U.S. at 313.

³⁰⁹ *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

³¹⁰ *Connecticut v. Gabbert*, 526 U.S. 286, 291 (1999). See also *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) ("It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition.").

³¹¹ *Roth*, 408 U.S. at 572 (citation and internal quotation marks omitted).

³¹² *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963) (citation and quotation marks omitted).

³¹³ *Raich*, 239 U.S. at 41.

generally understood as a liberty interest,³¹⁴ though a property interest may be at stake as well, particularly in cases where a person has acquired a profession.³¹⁵ Because there is a liberty interest (and potentially a property interest) in the right to pursue one's vocation, the government may not deprive an individual of that interest without due process.³¹⁶ In other words, procedural due process applies.

An analogy can be drawn here with government contracting and debarment cases. The courts have established a series of procedural protections for corporations that are denied government contracts as a result of past wrongdoing.³¹⁷ When the government determines that a contractor lacks sufficient integrity to receive a government contract, that contractor is entitled to notice and an opportunity to be heard.³¹⁸ Record-based occupational restrictions, like corporate debarment, prevent a former offender from entering into a contract as a result of the prior misconduct.³¹⁹

At least one court has noticed the similarity. In *Cronin v. O'Leary*, a Massachusetts court found that a record-based disqualification from employment with the state's Executive Office of Health and Human Services, like a debarment from government contracting, involved (1) the deprivation of a tangible interest, such as employment, (2) stigma resulting from the denial of such employment based on the applicant's purported dishonesty, immorality, or propensity for future criminality, and (3) foreclosure of not merely a single position, but of a number of employment opportunities.³²⁰ Framing the case in procedural due process terms, the Court reasoned that "[i]f 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."³²¹ The plaintiffs were therefore entitled to an opportunity to rebut the inference that, as a result of their convictions, they would pose a danger in the positions they sought.³²²

³¹⁴ See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976) ("[I]neligibility for employment in a major sector of the economy [] is of sufficient significance to be characterized as a deprivation of an interest in liberty.").

³¹⁵ See, e.g., *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (finding property interest in plaintiff's employment and liberty interest in his right to pursue his chosen profession); *Dent*, 129 U.S. at 122 (holding that the right to continue in one's profession, which may have been acquired after years of study, "is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken").

³¹⁶ Although a comparative analysis of judicial approaches towards the many different collateral consequences stemming from a criminal conviction is beyond the scope of this article, it may well be that, because of the importance attached to occupational liberty and property, courts have been more concerned about occupational restrictions than about laws that restrict other types of rights. For example, courts have shown little interest in the privacy or reputational interests implicated by sex offender registries. See, e.g., *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003) (finding no entitlement to a hearing on current dangerousness prior to placement on Connecticut sex offender registry); *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005) (rejecting argument that sex offender registry violated plaintiffs' privacy and reputational interests).

³¹⁷ See, e.g., *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594 (D.C. Cir. 1993) (finding private air carrier had a liberty interest in avoiding the damage to reputation and business caused by a suspension from military airlift transportation program but holding that procedures provided were adequate); *Transco Sec., Inc. of Ohio v. Freeman*, 639 F.2d 318 (6th Cir. 1981) (finding liberty interest in right to bid on government contracts); *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980) (setting out procedural protections due in debarment cases).

³¹⁸ *Old Dominion Dairy Prods.*, 631 F.2d at 963-964.

³¹⁹ The similarity is most pronounced for bans on public sector employment, since these effectively prohibit contracting for employment with the government.

³²⁰ *Cronin*, 13 Mass. L. Rep. at *11-*12 (citing *Old Dominion Dairy Prods.*, 631 F.2d at 964-66).

³²¹ *Id.* at *15.

³²² *Id.* at *24.

The problem with the analogy to the government contracting cases is that government debarment disqualifies a specific contractor through an administrative decision while record-based occupational restrictions disqualify an entire group through a legislative classification. There is presumably nothing illegitimate about the government passing a law that it will not contract with a company that has more than X number of citations for violating labor or environmental laws.³²³ Companies unable to contract because of their prior misconduct might be entitled to hearings on whether or not they have actually violated the law the requisite number of times. But any such hearing would not encompass the question of whether the company in fact now had an excellent labor or environmental record. The company's current conduct is simply irrelevant to the legislative scheme, which predicates debarment on a specified number of prior violations. In other words, when debarment occurs as the result of legislative classifications rather than decisions regarding specific companies, procedural due process is not required.³²⁴

Similarly, in the context of record-based employment prohibitions, procedural due process is only helpful if the disqualification stems from an administrative decision rather than a legislative one. Thus, if a statute requires doctors to be of "good moral character," an individual who is denied a medical license on account of a felony conviction would be entitled to the opportunity to contest the determination that, because of his or her conviction, he or she lacks good moral character. By contrast, if a statute prohibits anyone with a felony record from working as a doctor, then a person with a felony conviction has no right to a procedure to contest the relevance of his or her record. Although the state has deprived that individual of his or her liberty interest in pursuing a career as a doctor, the deprivation occurred through the legislative, not the administrative, process. Procedural due process simply provides no relief from legislatively-mandated occupational restrictions.

The question therefore arises whether substantive due process places any limitations on the government's ability to regulate employment. During the *Lochner* era, the Court routinely used substantive due process to strike down statutes regulating the marketplace.³²⁵ However, the Court subsequently rejected that approach, holding in *Carolene Products* that economic legislation should be upheld so long as it was supported by a conceivable rational basis.³²⁶ Of course, in *Carolene Products* the Court suggested in its famous footnote that, where laws affecting politically powerless and unpopular groups are at issue, a different standard might apply.³²⁷ This takes us full circle. Thus any economic liberty approach to protecting the rights of people with criminal records must somehow avoid the excesses of *Lochner*, while recognizing both the importance of an individual's right to work and the fact that laws barring convicted people from employment are likely to reflect the powerlessness and unpopularity of this group.

There are at least two possible approaches here. First, we can look to the similarity between occupational disqualifications and occupational licensing. In the context of

³²³ See, e.g., 32 U.S.C. §1368 (prohibiting award of federal contracts to convicted violators of the Federal Water Pollution Act).

³²⁴ *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (rejecting taxpayers' argument that they were entitled to due process to contest an order increasing the valuation of all taxable property in Denver by 40 percent because "[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard"); *Connecticut Dep't of Pub. Safety*, 538 U.S. at 7 (holding that procedural due process applies only if the facts at issue are relevant to the legislative scheme).

³²⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

³²⁶ *Carolene Prods.*, 304 U.S. at 152.

³²⁷ *Id.* at 152-53 n.4.

occupational licensing, the courts have been quite protective of individual employment rights. As discussed above, the Supreme Court's occupational license cases highlight the importance of individualized consideration, as well as the need to ensure that licensing restrictions do not needlessly deprive individuals of their chosen profession. The Court upheld the doctor's suspension from practice in *Barsky* because the statute provided a process for making an individualized determination to "match[] the measure of discipline to the specific case."³²⁸ The Court specifically distinguished statutes that would require the automatic termination of a professional license based on a criminal conviction.³²⁹ In *Schware*, the Court focused more on the disqualification standards themselves. Given the importance of a person's right to engage in his or her profession, licensing requirements for bar admission must be rationally related, not merely to a legitimate state interest, but more specifically to "the applicant's fitness or capacity to practice" the profession itself.³³⁰ Moreover, restrictions must take into account the age and nature of the prior offense.³³¹ In other words, *Schware* requires a closer fit than traditional rational basis review, since the restriction must be specifically linked to the applicant's ability to perform the job.

While many record-based restrictions involve flat-out occupational disqualifications rather than licenses, the two are quite similar. The state may regulate an occupation by permitting only those with a license to practice that occupation, setting standards for the issuance and revocation of licenses, and then using a licensing agency to enforce those standards. Or the state may regulate an occupation by setting out standards for the practice of the occupation, and then requiring private employers to enforce those standards. The similarity between the two methods can be seen both in the fact that many previously regulated but unlicensed professions are now licensed, and in the fact that certain occupations are licensed in some states but unlicensed in others. Logically, there is little difference between depriving a licensed doctor of his right to continue in his profession by passing a law that persons with criminal records shall not hold medical licenses, and depriving an unlicensed nurse aid of her right to continue in her profession by passing a statute barring employers from hiring nurse aids who have criminal convictions. Flat-out statutory bars implicate the same interests as licensing standards, and deserve the same constitutional respect.

³²⁸ *Barsky*, 347 U.S. at 448.

³²⁹ *Id.* at 452. The Court's approach to *a priori* restrictions is less clear. *See id.* at 451. If one adopts a property rights framework, under which a license holder has a protected interest in the license once acquired, it may make sense to scrutinize license revocation more closely than license denial. However, if one focuses on the liberty interest that people have in pursuing the common occupations of life, an applicant's interest in a license is very similar to that of a license holder.

³³⁰ *Schware*, 353 U.S. at 239. The Court added that "a person cannot be prevented from practicing [law] except for valid reasons. Certainly the practice of law is not a matter of the State's grace." *Id.* at 239 n.5. In *Baer v. City of Wauwatosa*, 716 F.2d 1117 (7th Cir. 1983), the Seventh Circuit went even further. In that case the city council revoked a gunshop owner's license after he was convicted of sexual assault and then behaved abysmally at a hearing on his character. The plaintiff, though he had a license, had been operating under a loophole in the law which exempted sales of rifles, shotguns and certain other weapons from the license requirement. The council accordingly also amended the law to require a license for such sales. The Seventh Circuit held that the city had deprived the plaintiff of his property by amending the law to require a license and then denying the plaintiff a license. If "[t]he state cannot take away your home without a hearing by passing a law that homeowners need a license for their homes and then denying you a license," then the state cannot take away one's occupation in that manner either. *Id.* at 1122. There are obviously some similarities between the amended *Wauwatosa* law, which deprives a person of property by requiring an unobtainable license, and a record-based occupational restriction, which deprives a person of property or liberty by eliminating his or her ability to work in a particular field.

³³¹ *Schware*, 353 U.S. at 243.

A second approach to the substantive due process problem focuses on the significance of the interest affected by blanket occupational restrictions. While the right to pursue an occupation is necessarily “subject to reasonable government regulation,”³³² the Court has expressed concern about restrictions that impose a “complete prohibition of the right to engage in a calling.”³³³ It may, therefore, be possible to distinguish between laws that regulate the conditions under which one works (i.e. whether a lawyer can work more than 60 hours in a week), versus laws that regulate whether one can work (i.e. no felons can be lawyers). If a lawyer has a liberty interest in being a lawyer and a property interest in his or her law license, then both an hourly restriction and a felony disqualification statute deprive the formerly convicted lawyer of his or her liberty and property interests. In the first instance, however, the property deprivation is partial, while in the second it is total.³³⁴ In other contexts, most notably its takings jurisprudence, the Supreme Court has found this distinction between total and partial property deprivation to be quite important.³³⁵

An analogy may help to clarify the point. Imagine that it is conclusively demonstrated that right-handed lawyers commit twice as much malpractice as left-handed lawyers. Since handedness is not a suspect classification, under classic equal protection analysis a regulation allowing insurance companies to charge right-handers more than left-handers would be subject only to rational basis review and would presumably survive. After all, insurance companies are in the business of insuring against risk, and so it certainly seems rational to allow them to consider the higher risks presented by right-handers when setting rates. By contrast, a flat-out ban on right-handers becoming lawyers just seems wrong, even though there is a rational connection to the state’s legitimate interest in protecting the public from incompetent lawyers. Our gut instinct is that there should be some effort to balance the potential harm to the public against the important interest that right-handers have in being lawyers.

There are two variables in this balancing act. One must first consider the potential harm to the lawyers – the distinction between partial and total deprivation. Forcing good right-handed lawyers to pay higher insurance premiums because some right-handers are sloppy lawyers seems like a relatively minor intrusion. By contrast, it seems fundamentally unfair to deprive some right-handed lawyers of the right to practice just because other right-handed lawyers are committing malpractice.

The balancing act also reflects the potential harm to the public, i.e. the level of risk presented by right-handed lawyers. If 99 percent of right-handed lawyers frequently commit gross malpractice (compared to ten percent of left-handed ones), perhaps a total ban is warranted, even if it is unfair with respect to the one percent of good right-handed lawyers. If, on the other hand, only five percent of the right-handed lawyers are a problem (as compared to three percent of left-handed ones), it seems much less fair totally to deprive the good 95 percent of right-handed lawyers of the right to practice. This focus on risk takes us back to the question of how closely related the restriction is to the harm it seeks to prevent. If our gut instinct is that a slight difference between right-handers and left-handers might justify an insurance differential, but not

³³² Gabbert, 526 U.S. at 292.

³³³ *Id.*

³³⁴ While it is true that a former offender who is prevented from working as a lawyer is not prevented from working altogether, if that person wishes to be a lawyer, he or she has been totally deprived of the right to pursue the occupation of his or her choice.

³³⁵ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (finding a taking “where regulation denies all economically beneficial or productive use” of one’s property).

an occupational ban, this tells us that both the nature of the interest affected and the extent of the deprivation imposed influence how carefully tailored we think a law should be.

The legitimacy of record-based occupational restrictions is susceptible to a similar analysis. In balancing, one would look both at how much risk there really is in letting the disqualified former offenders work in a particular field, and at how severe the deprivation of their liberty of property rights in employment would be if the disqualification were upheld.

To the extent that overbroad occupational restrictions unnecessarily limit the economic liberty interests (and potentially the property interests) of former offenders, rather than serving valid regulatory interests, they effectively sanction those former offenders who are neither dangerous nor untrustworthy. Of course the Supreme Court held long ago in *Hawker* that such disqualifications do not constitute punishment,³³⁶ a holding it recently reaffirmed.³³⁷ The argument, then and now, is that while punishment cannot be imposed without due process of law,³³⁸ record-based occupational disqualifications are adopted for regulatory, and not punitive, purposes.

As the preceding discussion has suggested, however, it is far from clear that the state has a valid regulatory interest in laws that are needlessly overbroad. Occupational restrictions which are unnecessarily overbroad deprive individuals of significant interests in liberty and property in the absence of a valid regulatory interest and without due process of law. That is constitutionally troubling, even if the deprivations do not constitute punishment for the purposes of an ex post facto or double jeopardy analysis.³³⁹ An unwarranted deprivation of liberty or property has a punitive effect, even if it was ostensibly justified by a regulatory purpose.

Occupational restrictions that are overbroad will effect both warranted and unwarranted deprivations of liberty and property. Thus a constitutional framework for analyzing these laws must be able to distinguish cases where such deprivations are justified from cases where they are not. We turn, therefore, to the irrebuttable presumption doctrine, an approach which seeks to accommodate situations where the deprivation of an important interest turns on a characteristic that is sometimes but not always relevant to the government's legitimate regulatory concerns.

³³⁶ *Hawker*, 170 U.S. at 197.

³³⁷ *Hudson v. United States*, 522 U.S. 93 (U.S. 1997) (since occupational debarment for violation of federal banking statutes is civil not criminal penalty, bringing criminal proceedings after the debarment proceedings does not violate double jeopardy).

³³⁸ *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

³³⁹ *See id.* at 168-69 (identifying the factors to consider in determining whether a sanction is punitive or regulatory as "whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, [and] whether an alternative purpose to which it may rationally be connected is assignable for it"). There is an extensive judicial and scholarly literature on the distinction between criminal and civil sanctions. *See, e.g.*, Mary Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (reviewing a variety of approaches to drawing the civil/criminal distinction); Chin, *supra* note 52, at 168 (2003) (arguing that the single most important piece of evidence in determining whether a sanction is criminal or civil is whether the sanction is imposed based on conviction or conduct).

V. Irrebuttable Presumptions

Unlike most suspect characteristics, criminal records are relevant to legitimate governmental interests, and relevant in the very context at issue. It is therefore both permissible and rational for the government to adopt record-based laws. The problem, as we have established, is that record-based occupational prohibitions frequently rest on the inaccurate assumption that because certain criminal records are relevant to certain jobs, criminal records are relevant across the board. As a result, many occupational disqualifications are overbroad, and therefore unnecessarily deprive people with criminal records of their economic liberty and property.

This situation is quite similar to that in the long line of Supreme Court cases which gave rise to the irrebuttable presumption doctrine.³⁴⁰ The irrebuttable presumption doctrine requires that where a law is based on a characteristic that is sometimes but not universally relevant to legitimate governmental goals, and where that law affects important individual rights, the law must either be adequately tailored or the affected individuals must have the opportunity to rebut their inclusion in the legislative classification.

A brief look at several irrebuttable presumption cases demonstrates the similarity to the criminal records context. For example, in *Stanley v. Illinois*,³⁴¹ the Court struck down a state law which made children of unwed fathers wards of the state upon the death of the mother, holding that the statute unconstitutionally presumed that unmarried fathers were unfit parents:

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.³⁴²

The Court held that a state cannot simply presume that unwed fathers are unfit. It must hold individualized hearings. The Court rejected the argument that “unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case,” noting that while the “establishment of prompt efficacious procedures to achieve legitimate state ends is

³⁴⁰ See, e.g., *Turner v. Department of Employment Security*, 423 U.S. 44 (1975) (striking down state law which made pregnant women ineligible for unemployment benefits for a period extending from twelve weeks before the expected date of childbirth until a date six weeks after childbirth); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (invalidating rules that required teachers to take leaves of absence in the fifth month of pregnancy); *United States Dep’t of Agric. v. Murry*, 413 U.S. 508 (1973) (striking down statute that denied participation in the food-stamp program to any household containing individuals over 18 years of age who had been claimed as a tax dependent for the previous year by a person not belonging to that household); *Vlandis v. Kline*, 412 U.S. 441 (1973) (invalidating law that automatically classified certain individuals as permanent nonresidents, making them ineligible for in-state tuition rates); *Stanley v. Illinois*, 405 U.S. 645 (1972) (invalidating irrebuttable presumption that deprived unmarried fathers of custody of their children upon the mother’s death); *Bell v. Burson*, 402 U.S. 535 (1971) (holding that state could not conclusively presume that an uninsured motorist involved in an accident was at fault for the accident); *Carrington v. Rash*, 380 U.S. 89 (1965) (holding that an irrebuttable presumption of nonresidence by members of the Armed Forces violated equal protection); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (holding exclusion from state bar violates the Fourteenth Amendment Due Process Clause if it is based merely on arrest record, past membership in the Communist party, and past use of aliases); *Heiner v. Donnan*, 285 U.S. 312 (1932) (finding due process violation where statute contained an irrefutable presumption that gifts made within two years of death were made in contemplation of death, thus requiring payment of higher estate taxes).

³⁴¹ 405 U.S. 645 (1972).

³⁴² *Stanley*, 405 U.S. at 654.

a proper state interest worthy of cognizance in constitutional adjudication ... the Constitution recognizes higher values than speed and efficiency.”³⁴³

The Supreme Court adopted a similar approach in *Cleveland Board of Education v. LaFleur*,³⁴⁴ where it invalidated a rule requiring pregnant teachers to take maternity leave after their fifth month. The Court held that due process is violated by a conclusive statutory presumption that women are incapable of working in the later months of pregnancy, because such a presumption is neither “necessarily nor universally true.”³⁴⁵ Rather, “the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter.”³⁴⁶ The court rejected the argument that the rule was necessary as a matter of administrative convenience:

While it may be easier for school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law.³⁴⁷

In *LaFleur* the Court did not mandate individualized hearings, as it had in *Stanley*. Rather, the Court required that school boards “employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals.”³⁴⁸ Individualized hearings would be one such alternative. But the Court noted that it might also approve more carefully tailored regulations which related to the last few weeks of pregnancy and were supported by substantial evidence.³⁴⁹

Interestingly, a few months after *LaFleur*, the Court decided *Geduldig v. Aiello*, a case in which it used rational basis review to uphold a state disability insurance program that precluded the payment of benefits for any disability relating to pregnancy.³⁵⁰ *Geduldig* does not mention *LaFleur*, suggesting that the Court saw no contradiction between analyzing the pregnancy-based classification in *LaFleur* under the irrebuttable presumption doctrine and analyzing the pregnancy-based classification in *Geduldig* (which was not susceptible to analysis under the irrebuttable presumption doctrine) under rational basis review.

It is important to recognize that the irrebuttable presumption cases, although they require some level of individualized consideration, involve substantive, not procedural due process.³⁵¹ Procedural due process provides the opportunity for an individual to present factual evidence on how a law should apply to him or her. This means that unless the factual issues are relevant to the statutory scheme, there is no right to procedural due process.³⁵² For example, because the

³⁴³ *Id.* at 656.

³⁴⁴ 414 U.S. 632 (1974).

³⁴⁵ *LaFleur*, 414 U.S. at 646.

³⁴⁶ *Id.* at 645.

³⁴⁷ *Id.* at 646-47.

³⁴⁸ *Id.* at 647.

³⁴⁹ *Id.* at 647 n.13.

³⁵⁰ 417 U.S. 484 (1974).

³⁵¹ *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (“This Court has struck down as illegitimate certain ‘irrebuttable presumptions.’ Those holdings did not, however, rest upon *procedural* due process.”) (citations omitted) (emphasis in the original).

³⁵² *Connecticut Dep’t of Public Safety*, 538 U.S. 1, in which the Court unanimously upheld a sex offender registration statute, neatly illustrates this point. The plaintiffs had argued that they were entitled to a hearing on whether or not they were currently dangerous. The Court found that dangerousness was simply not material under the Connecticut statute, because placement on the registry turned solely on the fact of conviction, not on dangerousness. *Id.* at 7. Both the majority and concurring opinions took pains to point out, however, that only the

parental fitness of unwed fathers was irrelevant to the statutory scheme in *Stanley* and the ability of a pregnant woman to work was irrelevant to the law at issue in *LaFleur*, the plaintiffs in those cases did not have a procedural due process claim.

While procedural due process involves factual questions concerning the applicability of a law to particular individual, the irrebuttable presumption doctrine involves factual questions concerning the legislative classification itself. As the Supreme Court has recognized, the irrebuttable presumption cases “must ultimately be analyzed as calling into question not the adequacy of procedures but – like our cases involving classifications framed in other terms – the adequacy of the ‘fit’ between the classification and the policy that the classification serves.”³⁵³ The doctrine thus exemplifies “the Supreme Court’s reluctance to accept hypothetical justifications for a legislative classification when doubt has been cast on the accuracy of assumptions of fact upon which the classification is based.”³⁵⁴ *LaFleur* and *Stanley* can best be understood as cases where

[t]he legislative classifications were found too lacking in factual foundation to be sustained as conclusive presumptions in light of the important interests adversely affected by the rules. On the other hand, the classifications were not found so utterly lacking in factual foundation as to be impermissible elements in the decisionmaking process.³⁵⁵

The big difference between equal protection analysis and the irrebuttable presumption doctrine is that in situations where a classification is significantly overbroad but is based on a characteristic that is relevant to government decision-making, the law will be upheld under the first doctrine but is likely to be struck down under the second (though, as we have seen in the lower court cases above, some courts will find such overbreadth to be irrational).³⁵⁶ Under an equal protection analysis, the question is whether the state has any business distinguishing on the basis of the suspect characteristic in the context where it is applied. The characteristic either is or is not legitimately related to the government interest at stake. Thus, under equal protection analysis, courts will strike down laws where the state cannot legitimately consider the suspect characteristic, but will uphold them if the characteristic can validly be considered. For example, the Court has struck down gender-based laws where it found gender unrelated to state interests, such as laws regarding drinking age,³⁵⁷ but upheld gender-based distinctions, where it found that gender-based classifications served important government interests and were closely related to those interests, such as statutory rape laws³⁵⁸ or draft registration requirements.³⁵⁹

By contrast, under the irrebuttable presumption doctrine it is conceded that the state may legitimately base distinctions on the distinguishing characteristic, and may do so in the very

question of procedural due process was before the Court. *Id.* at 8. In other words, a procedural due process claim requires that there be potential factual issues concerning a law’s applicability to a particular individual. The absence of such factual issues does not resolve the question of whether the law might fail as a matter of equal protection or substantive due process.

³⁵³ Michael H., 491 U.S. at 121 (citations omitted).

³⁵⁴ Vernon Townes Grizzard, *Mandatory Retirement and the Constitution: Challenging the Factual Basis Underlying Legislative Classifications*, 10 FLA. ST. U. L. REV. 1, 19 (1982).

³⁵⁵ *Id.* at 2.

³⁵⁶ *Miller*, 547 F.2d at 1329 (Campbell, J., concurring) (explaining that while under the equal protection doctrine an unconstitutional classification may not be considered, under the irrebuttable presumption doctrine it can be).

³⁵⁷ *Boren*, 429 U.S. 190.

³⁵⁸ *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

³⁵⁹ *Rostker v. Goldberg*, 453 U.S. 57 (1981).

context at issue.³⁶⁰ The question is whether, given the great differences between individuals who share that characteristic, the law can be applied across the board, or whether there must be an opportunity for individuals to demonstrate that the classification should not be applied to them. Thus, while equal protection analysis asks whether the state may make any use of the characteristic in that context, the irrebuttable presumption doctrine allows “that the state may be free to use the factor *so long as it does not give the factor conclusive force.*”³⁶¹

The irrebuttable presumption doctrine is appealing in the context of laws based on criminal records because, while assumptions about the dangerousness or untrustworthiness of people with records – like assumptions about the unfitness of unwed fathers or the incapacitation of pregnant women – are more likely to be true than for those outside the class, those assumptions are not universally true. Some unwed fathers are unfit, but others are not. Some pregnant women are incapable of working, but others are not. Some people with criminal records are dangerous or untrustworthy, but others are not. Moreover, like marital status or pregnancy, criminal history is not only relevant to many legitimate governmental objectives, but is often relevant in the very context at issue. While a suspect or quasi-suspect characteristic may be relevant in some contexts (“men only” at the bathroom door), and irrelevant in others (“men only” at the courtroom door), the relevance of criminal records usually depends not on the context, but rather on the nature of each individual’s record and rehabilitation. For example, a disqualification from lawyering based on race or sex would be unconstitutional because race and sex are not relevant to whether one can be a good lawyer. By contrast, a criminal record may or may not be relevant to whether one can be a good lawyer. It depends on what is in the record, how old that record is, and what the person has done in the meantime.

Given the huge variation in offenders’ conduct, culpability, and rehabilitation, classifications based on criminal records are almost always overbroad. Even classifications that reflect an effort at tailoring, such as those that apply only to drug offenders or only to assaultive offenders, cannot address the wide array of human experience. Such laws do not distinguish between the cocaine distribution conviction acquired by the drug mule and that acquired by a street thug. They do not distinguish between the assault conviction of a wife beater and that of the wife who fights back. Such distinctions may be taken into account, of course, in imposing a sentence, since offenders convicted of the same crimes may receive vastly different sentences based on culpability and prior conduct. But while the criminal consequences of a conviction reflect an individualized consideration of the offender, the collateral consequences typically do not.

If one applies the irrebuttable presumption doctrine to record-based laws, this would not necessarily mean that individualized hearings would be required for all record-based classifications. After all, the Court suggested that the problems with the legislative classification at issue in *LaFleur* could be solved in one of two ways. The school board could either give women individualized hearings or it could develop more narrowly tailored rules.³⁶² In others

³⁶⁰ *Miller*, 547 F.2d at 1329 (Campbell, J., concurring) (explaining that under the irrebuttable presumption doctrine, criminal records may be considered, but due process requires that “the applicant be given a meaningful opportunity to present evidence of good character and fitness in contravention of any contrary inference based upon his prior conduct”).

³⁶¹ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §16-32, at 1094-1095 (1978) (emphasis in original) (footnote omitted).

³⁶² Similarly in *Turner*, 423 U.S. 44, the Court struck down a state law making pregnant women ineligible for unemployment benefits for a period extending from twelve weeks before the expected date of childbirth until a date six weeks after childbirth. Noting that many women are capable of working during the last trimester of pregnancy

words, to ensure greater accuracy in legislative classifications one can either narrow the classification or allow individualized determinations.³⁶³ This also sounds a great deal like Justice Jackson's approach to involuntary sterilization of offenders in *Skinner*:

Perhaps to employ a broad and loose scheme of classification would be permissible if accompanied by the individual hearings ... On the other hand, narrow classification with reference to the end to be accomplished by the Act might justify limiting individual hearings to the issue whether the individual belonged to a class so defined.³⁶⁴

Such an approach seeks to balance "the advantages and feasibility of individualized determinations against the inflexibility and consequent harshness of the classification."³⁶⁵

The idea that either a narrowly tailored classification or a broad classification coupled with hearings is acceptable under the irrebuttable presumption doctrine takes us back to the idea that overbroad laws which classify based on a relevant characteristic effect both warranted and unwarranted deprivations of liberty and property. If we accept that legislative line-drawing is inevitably inaccurate, then the government's legitimate regulatory interest encompasses the inevitable inaccuracies which would occur under even a carefully tailored law. By contrast, where a classification is quite overbroad, it will effect deprivations of liberty and property that are not inevitably part of line-drawing, and that therefore are unwarranted. Hence, a broad classification must be accompanied by a mechanism for individualized consideration. In practice what this might mean is that no individualized consideration would be required where child abusers are prevented from working in daycare centers and embezzlers from working in banks. By contrast, laws prohibiting all felons from these professions would be valid only if they contained a procedure for individualized hearings.

The challenge in applying the irrebuttable presumption doctrine to record-based laws is that it is not clear whether the doctrine is still good law.³⁶⁶ Shortly after deciding *LaFleur*, the Court, in *Weinberger v. Salfi*,³⁶⁷ upheld the constitutionality of rule preventing a widow from receiving benefits unless she had been married to the wage earner for at least nine months. The district court, relying on *LaFleur* and *Stanley*, had struck down the duration-of-marriage

and shortly after giving birth, the Court concluded that more individualized consideration is required "when basic human liberties are at stake." *Id.* at 46. However the Court also suggested that the problem with the statute was that it made women ineligible for "so long a period before and after childbirth," thereby implicitly suggesting that a more tailored statute would be constitutional. *Id.*

³⁶³ Grizzard, *supra* note 354, at 2. See *Davis v. Bucher*, 451 F. Supp. 791, 800-01 (E.D. Penn. 1978) (holding that because a city policy preventing former drug users from working for city amounted to irrebuttable presumption in violation of *LaFleur*, the city was obliged either to develop narrower rules that were rationally related to job classifications or to provide individualized evaluations of each applicant's qualifications); cf. *Boren*, 429 U.S. at 199 (citing *Stanley* and *LaFleur* for the concept that "[i]n light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact").

³⁶⁴ *Skinner*, 316 U.S. at 546 (Jackson, J., concurring).

³⁶⁵ *Miller*, 547 F.2d at 1317.

³⁶⁶ In *Schanuel*, 708 F.2d 315, the court upheld a statute prohibiting detective agencies from employing any individual who had been convicted of a felony or a crime of moral turpitude unless ten years had passed from the time of discharge from any sentence. The court rejected the applicant's irrebuttable presumption claim, finding that it would involve too much judicial interference in legislative affairs and that the "doctrine has been discredited because it is unworkable." *Id.* at 319. See also Grizzard, *supra* note 354, at 14 (noting that scholars have heavily criticized the irrebuttable presumption doctrine).

³⁶⁷ 422 U.S. 749 (1975).

requirement as an irrebuttable presumption that short marriages are a sham. The Court distinguished the irrebuttable presumption cases on the ground that “a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status,” unlike the “important liberties cognizable under the Constitution” that were at issue in *LaFleur* and *Stanley*.³⁶⁸ The Court worried that an extension of the irrebuttable presumption doctrine would turn that doctrine “into a virtual engine of destruction for countless legislative judgments.”³⁶⁹

A year later, the Court upheld a rule in *Massachusetts Board of Retirement v. Murgia* requiring police officers to retire at age fifty, finding that it bore a rational relationship to the state’s objective of maintaining a physically fit police force.³⁷⁰ Although the Court did not discuss the irrebuttable presumption doctrine,³⁷¹ commentators have understood *Murgia* as a repudiation of that doctrine. After all, just as some pregnant women are capable of working after the fifth month of pregnancy, some police officers are capable of staying on the job after they turn fifty. The fact that the *Murgia* Court did not require an individualized determination of fitness has frequently been interpreted to mean that the Court was backing away from the irrebuttable presumption doctrine.³⁷² The status of the doctrine is thus unclear.

A number of lower courts have considered “irrebuttable presumption” challenges to record-based occupational restrictions. The results are mixed. Those courts which have rejected such claims have done so based on questions about the vitality or scope of the doctrine. For example, in *Schanuel v. Anderson*, the Seventh Circuit rejected an irrebuttable presumption challenge to a statute which prohibited individuals convicted of a felony or crime of moral turpitude from working as security guards within ten years of completion of their sentences.³⁷³ The Court concluded that the *LaFleur* doctrine had effectively been overruled by *Murgia*, stating that the “irrebuttable presumption doctrine has been discredited because it is unworkable.”³⁷⁴ In *Hill v. Gill*, the court similarly rejected an argument that a regulation barring persons with felony convictions from driving school buses created an irrebuttable presumption of unfitness, finding that the doctrine only applied in cases where strict or intermediate scrutiny was required.³⁷⁵

Other courts have been more sympathetic to the doctrine. However, they have typically considered the irrebuttable presumption issue only in dicta after invalidating record-based restrictions under rational basis scrutiny. For example, the court in *Lewis v. Alabama Department of Public Safety* suggested that the presumption that a person who committed a crime “is unreliable and untrustworthy as a wrecker driver should be a rebuttable one to prevent it from being unconstitutional.”³⁷⁶ However, the court declined to reach the issue. Similarly, in *Smith v. Fussenich* the court questioned whether an across-the-board disqualification of persons with criminal records from private detective or security guard work might violate the irrebuttable presumption doctrine, but ultimately struck down the statute on equal protection grounds.³⁷⁷

³⁶⁸ *Weinberger v. Salfi*, 422 U.S. 749, 771-72, 785 (1975).

³⁶⁹ *Id.* at 771-72.

³⁷⁰ 427 U.S. 307 (1976).

³⁷¹ Grizzard, *supra* note 354, at 10-12 (discussing the fact that although the lower court relied extensively in *LaFleur*, the Supreme Court’s opinion in *Murgia* did not address the irrebuttable presumption issue).

³⁷² *Schanuel*, 708 F.2d at 319 (concluding that *Murgia* represented a rejection of the irrebuttable presumption doctrine).

³⁷³ *Id.* at 318-19.

³⁷⁴ *Id.* at 319. See also *Darks*, 745 F.2d at 1044 (stating that as long as a classification is rationally related to legitimate state objectives, it cannot be attacked on the grounds that it is an irrebuttable presumption).

³⁷⁵ *Gill*, 703 F. Supp. at 1039 (citation and quotation marks omitted).

³⁷⁶ 831 F. Supp. 824, 827 (D. Ala. 1993).

³⁷⁷ 440 F. Supp. 1077, 1081 (D. Conn. 1977).

Likewise in *Kindem v. City of Alameda*, the court, having already invalidated a city policy prohibiting the employment of felons under rational basis review, noted in dicta that while the irrebuttable presumption doctrine has the

potential for riding roughshod over a tremendous number of state classifications.... it may be that, properly employed, the irrebuttable presumption analysis does not represent an ever-expanding universe, for the Supreme Court has applied it only where the private interests are very important and the governmental interests can be promoted without much difficulty in an individualized evaluation process. If such a limited irrebuttable presumption analysis survives, a strong argument can be made that its application to this case would be another route to finding that substantive due process has been denied.³⁷⁸

The Second Circuit, in *Pordum v. Board of Regents*, took a particularly interesting approach, tying the irrebuttable presumption doctrine to the Supreme Court's caselaw on record-based exclusions.³⁷⁹ The Court suggested that if a hearing to protect the rights of a teacher convicted of a felony was limited to the question of whether the teacher had been convicted, this would raise serious difficulties under the irrebuttable presumption doctrine.³⁸⁰ A *per se* rule barring convicted persons might be permissible under *DeVeau* (the waterfront union case) if that rule "was established after a comprehensive investigation into the relationship between the class of persons excluded... and the evil sought to be avoided."³⁸¹ Thus,

[a]fter a thorough consideration of the matter, the Commissioner may conclude that there is an inevitable relationship between a criminal conviction, or between convictions of a type, and unfitness to teach and therefore deem a particularistic inquiry unnecessary in this case. Such a conclusion would be reviewable and might be found to be warranted. It must, of course, be based on more than administrative convenience.³⁸²

Alternately, the Second Circuit said, if no such legislative finding is present, then under *Schwartz* "exclusion from a profession can be justified only after a detailed and particularistic consideration of the relationship between the person involved and the purpose of exclusion."³⁸³ In other words, there are two options: a carefully tailored rule supported by adequate evidence of the relationship between the convictions and a person's teaching ability, or individualized consideration.

While the irrebuttable presumption doctrine has been criticized, it has not been overruled. Indeed, the Supreme Court has recently referred to it in passing.³⁸⁴ Nor can the doctrine simply

³⁷⁸ 502 F. Supp. at 1114. See also *In re Manville*, 538 A.2d at 1132 n.3 (citing *LaFleur* for the proposition that a *per se* rule excluding persons with felony convictions from membership in the bar might be invalid as an irrebuttable presumption, but declining to decide the issue); *Miller*, 547 F.2d at 1317-19 (striking down a record-based bar on chauffeur licenses under rational basis review and declining to decide the irrebuttable presumption challenge because the status of the doctrine was unclear); *Id.* at 1322-1329 (Campbell, J., concurring) (argued that under the irrebuttable presumption doctrine, individuals with records should be entitled to an opportunity to provide evidence of good character before being denied a license).

³⁷⁹ *Pordum*, 491 F.2d 1281.

³⁸⁰ *Id.* at 1287 n.14.

³⁸¹ *Id.* (quoting *Deveau*, 363 U.S. 144) (alteration in original).

³⁸² *Id.* (citation omitted).

³⁸³ *Id.*

³⁸⁴ *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1523 (2005) (noting that in *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 487 (1983), the Court had held that the plaintiffs could maintain claims that a bar

be equated with a fundamental rights analysis, as some courts have done.³⁸⁵ The irrebuttable presumption doctrine applies to "important liberties cognizable under the Constitution."³⁸⁶ Those liberties need not be "fundamental," in the sense of requiring strict scrutiny. While some of the irrebuttable presumption cases concerned "fundamental rights," such as the right to vote,³⁸⁷ the right to procreate,³⁸⁸ or the right to have custody of one's children,³⁸⁹ others concerned rights that are important but not fundamental, such as the right to in-state tuition rates,³⁹⁰ the right to food stamps,³⁹¹ the right to practice as an attorney,³⁹² the right to drive,³⁹³ or the right to lower taxes.³⁹⁴

Critics of the irrebuttable presumption doctrine claim that almost all laws would be subject to challenge under this theory.³⁹⁵ Justice Rehnquist argued in his *LaFleur* dissent, for example, that:

All legislation involves the drawing of lines, and the drawing of lines necessarily results in particular individuals who are disadvantaged by the line drawn being virtually indistinguishable for many purposes from those individuals who benefit from the legislative classification. The Court's disenchantment with 'irrebuttable presumptions,' and its preference for 'individualized determination,' is in the last analysis nothing less than an attack upon the very notion of lawmaking itself.³⁹⁶

To address the Rehnquist critique one must find a principled way to explain why certain over-inclusive laws are subject to the irrebuttable presumption doctrine, while others are not.

Although the question deserves further study, the analysis above suggests a preliminary answer. First, the irrebuttable presumption doctrine makes the most sense in situations where legislative classifications are based on characteristics that, while relevant to legitimate governmental goals, are highly variable between individuals. Second, the doctrine should come into play only where there are important, albeit not necessarily fundamental, interests at stake. Deprivations of liberty or property are most troubling when they affect interests that are critical to human happiness and dignity. Finally, while Justice Rehnquist is correct that all line-drawing "necessarily results" in imposing burdens on some individuals who really should not be so burdened, this is a function of the inevitable inaccuracy of legislative classifications. Where such overbreadth is not inevitable, but rather reflects the fact that the classification chosen is a

admission rule was unconstitutional "because it creates an irrebuttable presumption that only graduates of accredited law schools are fit to practice law").

³⁸⁵ See Grizzard, *supra* note 354, at 15 (noting that some courts have inaccurately characterized the irrebuttable presumption cases as "fundamental rights" cases appropriate for strict scrutiny under prevailing equal protection doctrine).

³⁸⁶ Salfi, 422 U.S. at 785.

³⁸⁷ Carrington v. Rash, 380 U.S. 89 (1965).

³⁸⁸ Turner, 423 U.S. 44; *LaFleur*, 414 U.S. 632.

³⁸⁹ Stanley, 405 U.S. 645.

³⁹⁰ Vlandis, 412 U.S. 441.

³⁹¹ United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973).

³⁹² Schware, 353 U.S. 232.

³⁹³ Burson, 402 U.S. 535.

³⁹⁴ Heiner, 285 U.S. 312.

³⁹⁵ Grizzard, *supra* note 354, at 14-15 (discussing the "virulent condemnation" of the doctrine by commentators); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1555-56 (1974) (describing doctrine as "an unexplained mutant of interventionist equal protection"); Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644, 661 (1974) (describing doctrine as "very dangerous").

³⁹⁶ 414 U.S. at 660.

poor proxy for the harm to be avoided, we should be concerned that the resulting deprivations of liberty or property may be unwarranted by legitimate governmental interests.

In sum, the irrebuttable presumption doctrine is an effort to protect people from unwarranted deprivations of important liberty or property interests where government classifications rest on characteristics that are relevant to legislative goals but subject to great individual variation. It does not always require individualized consideration, as its critics suggest. Rather, it offers two alternative avenues of protection. Legislative classifications can be drawn so that the demarcating lines (while inevitably imperfect) rest on characteristics that are a good proxy for the harm to be avoided or the benefit to be achieved. Alternately, the state may choose to regulate through over-inclusive classifications, but develop a procedure to address claims that this classification results in an unwarranted deprivation of liberty or property as applied to specific individuals. Because the irrebuttable presumption doctrine recognizes the validity of drawing lines based on criminal history, but also takes into account the fact that such laws often needlessly deprive former offenders of the opportunity to work in their chosen profession, the doctrine shows promise as framework for analyzing record-based occupational restrictions.

VIII. Towards a New Jurisprudence for People with Criminal Records

Although people with criminal records are not a suspect class, record-based occupational restrictions are still subject to scrutiny, both as a matter of equal protection and as a matter of due process. In concluding, I would like to highlight three principles which emerge from the analysis above, and which, if applied, would help ensure that constitutional scrutiny of employment prohibitions is meaningful.

First, courts should recognize that people with criminal records, like traditional suspect classes, lack political power and have suffered a history of discrimination. Because the political process cannot be relied upon, there is a much greater danger than in the case of other social or economic legislation that laws targeting people with criminal records will impose unnecessary harm. If people with criminal records had a real voice in the political process, there would still be occupational restrictions. But those restrictions would do a much better job of balancing the employment rights of former offenders against the need to keep dangerous and untrustworthy individuals out of positions in which they could harm the public. Moreover, the history of discrimination suggests that courts should recognize the danger that record-based laws may reflect not just legitimate state interests, but also animus towards people with criminal records. Even when laws are not motivated by prejudice, the general public loathing of former offenders means that laws will often fail to give due weight to the harms imposed upon people with criminal records.

Because of the deficiencies in the political process and the impact that animus has on legislative choices, reviewing courts should engage in a rigorous equal protection analysis, while recognizing the legitimacy of record-based distinctions. Even under rational basis review, courts must seek to ferret out animus, since “if the constitutional conception of ‘equal protection of laws’ means anything, it must at the very least mean a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental purpose.”³⁹⁷ Moreover, it is important to remember that laws which reflect legitimate interests at their core can

³⁹⁷ U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

simultaneously reflect irrational prejudice in their overbreadth. In other words, as the rational basis with “bite” cases suggest, the lack of a reasonably close fit between the legislature’s goals and the means it has chosen may itself be evidence of prejudice.

Second, a court’s willingness to step in should reflect “the constitutional and societal importance of the interest adversely affected.”³⁹⁸ While employment is not a fundamental right, it is a tremendously important one. Laws that burden very important interests deserve more judicial scrutiny than laws that affect trivial matters.

In the equal protection context, a recognition of the importance of the interest affected points towards rational basis with “bite.” As Justice Marshall noted in *Cleburne*, it was “the importance of the interest at stake,” coupled with history of discrimination, that required the court “to do more than review the distinctions drawn by Cleburne’s zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation.”³⁹⁹ In conducting an equal protection analysis, courts should also recognize that the right to work in a licensed profession is very similar to the right to work in an unlicensed profession. Courts should therefore apply the stricter requirements of the occupational licensing cases to prohibitions that affect unlicensed occupations.

In the due process context, recognizing the importance of the interest affected means asking whether there are legitimate regulatory interests that justify depriving former offenders of their employment rights without giving them due process. If laws are not reasonably well tailored and important interests are at stake, then such deprivations may be unwarranted, even if no fundamental right is involved. In other words, the irrebuttable presumption doctrine may apply.

Third, courts must ask to what extent a challenged law takes individual differences between former offenders into account. Record-based laws use criminal history as a proxy for dangerousness or untrustworthiness, when in fact the existence of a criminal record does not necessarily equate to either. Such proxy-based legislation is problematic. As Justice Marshall has noted, “[w]omen are hardly alike in all their characteristics, but ... legislatures can rarely use gender itself as a proxy for [] other characteristics... Similarly that some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist.”⁴⁰⁰ While women and the retarded have characteristics that are relevant to lawmaking, there are significant differences among women and among the retarded. For example, while some of the retarded are incapable of working anywhere but in a sheltered setting, a law prohibiting the retarded from employment in anything but a supervised workshop should be struck down.

Just as one should not use gender or retardation as an absolute proxy for characteristics where those characteristics, though relevant to lawmaking, may or may not exist in the given case, one should not use prior offense status as an absolute proxy for characteristics that may or may not exist in a given case.⁴⁰¹ Where the relationship between offense history and the occupational restriction is not a reasonably direct one, record-based disqualifications should be

³⁹⁸ *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in judgment and dissenting in part) (citing *San Antonio Indep. Sch. Dist.*, 411 U.S. at 99 (Marshall, J., dissenting)).

³⁹⁹ 473 U.S. at 464 (Marshall, J., concurring in judgment and dissenting in part).

⁴⁰⁰ *Id.* at 468 (Marshall, J., concurring in judgment and dissenting in part).

⁴⁰¹ Note that the Supreme Court has rejected this principle, as applied to age-based classifications. See *Kimel*, 528 U.S. at 86 (holding that legislators may consider age as a proxy for other characteristics “when they have a rational basis for doing so at a class-based level, even if it ‘is probably not true’ that those reasons are valid in the majority of cases”).

invalidated as either irrationally over-inclusive in violation of equal protection, or as a violation of the irrebuttable presumption doctrine, and hence of the due process clause.

These principles, which have been developed in the context of occupational rights, are but a first step in developing a constitutional framework for analyzing the many collateral consequences resulting from conviction. Such a framework must recognize that criminal records are relevant, and that government has legitimate reasons to draw record-based distinctions. But such a framework must also recognize that, because of the ways in which former offenders are like a suspect class, laws discriminating against them may inflict unnecessary harm. Under *Carolene Products*, when the political process cannot be relied upon, “more searching judicial inquiry” is required.⁴⁰² It is high time to figure out, in relation to laws affecting people with criminal records, what form this “more searching judicial inquiry” should take.

⁴⁰² *Carolene Prods.*, 304 U.S. at 153 n.4. *See also Cleburne*, 473 U.S. at 470 (Marshall, J., concurring in judgment and dissenting in part) (suggesting that whenever a “certain classification [is] viewed as *potentially* discriminatory, and when history reveals systemic unequal treatment, more searching judicial inquiry than minimum rationality becomes relevant”) (emphasis in original).