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## Post-Conviction Release and Defacto Double Jeopardy: Making the Case for Felons as a Quasi-Suspect Class Due to the Collateral Consequences of a Felony Conviction

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# POST-CONVICTION RELEASE AND DEFACTO DOUBLE JEOPARDY: MAKING THE CASE FOR FELONS AS A QUASI-SUSPECT CLASS DUE TO THE COLLATERAL CONSEQUENCES OF A FELONY CONVICTION

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### INTERVIEW:<sup>1</sup>

Background: D’Andre Rolack was born and raised in Liberty City, one of Miami, Dade County’s roughest residential areas, known to its natives as “the City.” Liberty City is notorious for drug related felonies and crimes, robberies, gangs, drive-by shootings, housing projects, residential single-family homes, and even strip clubs. The crime rate is generally high in this area and the number of reported and unreported homicides continue to rise. Accordingly, an individual could be met with danger on any given day, at any given

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1. Telephone Interview with D’Andre Rolack (Sept. 10, 2021). This interview offers the real-world experience of a person, D’Andre Rolack, who was previously convicted of a felony, and features Author’s conversation with him about the event leading to his conviction and current incarceration.

moment. Unfortunately, this is exactly what D'Andre experienced at the young age of twenty-five.

On the evening of November 18, 1999, D'Andre attended a local high school football game with some friends. During half-time, he went to get food from the concession stand. On his way back to his seat, he accidentally bumped into a guy he knew from his neighborhood. He apologized and asked if he could "Holla" at him for a minute. During the conversation D'Andre noticed the guy seemed to be intoxicated. At that moment, the guy started to question D'Andre's motive for the conversation and expressed that he felt D'Andre was trying to "check" him. D'Andre tried to diffuse the situation and explained that "they were better than that." As people started to gather around the commotion, an argument ensued. The guy's friend came over in an attempt to deescalate the situation. It was discovered there was a misunderstanding about the guy's girlfriend, who was also at the game. Hoping to clear the matter up, the friend turned to go and get the girlfriend, but the guy resisted the offer. Another mutual acquaintance called out to the guy saying, "Let me holla at you," to which the guy replied, "It ain't no rapping." In "the City" that reply means to "watch your back!" D'Andre expressed, "needless to say, that shit spoke volumes" to him.

Later that night D'Andre decided to go to Clover Leaf Bowling Alley where he and his friends frequently hung out – playing pool, bowling, and singing karaoke – almost every night. As he arrived and entered the portion of the building where the pool tables, karaoke area, and bar were located, the guy who he had the altercation with was there waiting for him, accompanied by three other men. The guy pulled out a handgun and tried to hit D'Andre in the head with it. D'Andre reacted quickly, blocking the hit. Knowing that he was out-numbered and that his life was in danger, he too pulled out a firearm to defend himself. Consequently, the guy shot D'Andre in his leg, and as he fell to the ground, he fired back striking the guy in his chest, resulting in his death.

*"The right to self-defense is inalienable from the right to life. Weaken one and the other is devalued. Surrender your arms today and forfeit your life tomorrow."<sup>2</sup>*

Not knowing how things were going to turn out because he was then out on probation for a prior felony, D'Andre fled the scene to some nearby apartments and knocked on several doors until someone answered. He begged and pleaded to the tenants to allow him to come in by stating that he had been shot, which was apparent. Ultimately, D'Andre was apprehended. He is currently serving a life sentence for second degree murder, in addition to other charges as a

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2. A.E. Samaan, GOODREADS, <https://www.goodreads.com/quotes/10130726-the-right-to-self-defense-is-inalienable-from-the-right> (last visited Jan. 14, 2022).

result of the events that transpired on that night. D'Andre tried to avoid any subsequent altercations with the guy at the game by talking things out, but the guy's mind was already made up. He met D'Andre's plea for a resolution with the callous response. . . "Ain't no rapping!"

*"An unarmed man can only flee from evil, and evil is not overcome by fleeing from it."*<sup>3</sup>

In 1999, Florida passed two key laws that have a detrimental impact on the sentencing of serious felonies. First, "10/20/Life" for crimes involving firearms, and second, the "Three Strikes" rule, which permits the use of prior convictions to extend the mandatory minimum sentences imposed on certain felonies, which would weigh heavily on D'Andre's case.<sup>4</sup> After these laws were enacted and after D'Andre was convicted, I asked him two very important questions:

Question 1:

Author: *"How do you feel, as an American citizen, who is prohibited, by law, from defending your life with the same level of force that it was threatened with because you are a convicted felon?"*

D'Andre: *"Dude attacked me with a gun, and I reacted by defending myself. At the time of me catching this case, the "Stand Your Ground law" wasn't on the books yet, basically self-defense was non-existent at the time. I didn't have the luxury of the new law at my disposal. All I had was a lawyer who fought tooth and nail, both the judge and prosecutor. I believe if that law was available at the time for me to use as a viable defense I wouldn't be incarcerated now, at least not with the type charges that I am convicted of today. I have no problem with the convicted felon in possession of a firearm, but I will die and go to my grave knowing in my heart that my action that night was what any law abiding person in my situation would have done if they were faced with a life or death situation like mine."*

*"I don't even call it violence when it's in self-defense; I call it intelligence."*<sup>5</sup>

Question 2:

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3. Jeff Cooper, AZ QUOTES, <https://www.azquotes.com/quote/561690> (last visited Jan. 14, 2022).

4. H.R. 92-177, 1992 Leg., Reg. Sess., at 1 (Fla. 1999), [https://www.flsenate.gov/Session/Bill/1999/113/Analyses/19990113HCP\\_HB0113S2Z.CP.pdf](https://www.flsenate.gov/Session/Bill/1999/113/Analyses/19990113HCP_HB0113S2Z.CP.pdf) [hereinafter 1992 Final Bill Analysis and Eco. Stmt.]; FLA. STAT. § 775.087 (confirms that in 1999, 10-20-Life was adopted and criminalizes certain conduct); FLA. STAT. § 775.084 (confirms that in 1999, three strikes was adopted).

5. Malcolm X, GOODREADS, <https://www.goodreads.com/quotes/186788-i-don-t-even-call-it-violence-when-it-s-in-self> (last visited Jan. 14, 2022).

Author: *“What do you feel is the proper way to remedy the situation and other collateral consequences that convicted felons face upon release, while attempting to reintegrate into society as a law-abiding citizen?”*

D’Andre: *“As far as a remedy, there is none. These peoples took away my life just because I was a convicted felon and I wasn’t the one who died that night. Although, filling out a job application and placing ‘will explain’ in the box for ‘have you ever been convicted of a felony’ would be crazy, unless of course it’s an employer who is getting tax exempt for hiring convicted felons, anything else would seem out of place. If given a chance to return to society, I know that I can stay out of trouble and live a positive and productive life.”*

*“The price of anything is the amount of life you exchange for it.”<sup>6</sup>*

Summary: D’Andre’s case is a prime example of why a felon’s post-conviction status should not strip him of his self-worth, self-respect, and his ability to learn, imagine, and participate within society upon release. Although, D’Andre is serving a life sentence without the possibility of parole, the facts of his circumstance live with him daily as a constant reminder that he was seconds away from death. As he stared down the barrel of a gun, he had to make a split-second decision, his life or his assailant’s. Pursuant to section 790.23 of the *Florida Statutes*, this decision has already been made for him, and his life was expected to expire in that moment. As American citizens, the United States Constitution was designed to ensure equal protection of the laws, as well as, provide certain inalienable rights to “all” citizens. For example, it is understood the commission of certain crimes results in a State’s use of discretion in determining the punishment, which may involve stripping away rights like the right to bear arms. However, until America recognizes, accepts, and corrects its inadequate criminal justice system that furthers the oppression of sub-classes of people, America will forever fail to ensure the promise of all men being created equal. Who decides if your life is more valuable than mine, or what factors are used to make this determination? Until then, Americans must work case by case, law by law, amendment by amendment, to dismantle some of the archaic ideologies and historical intentions that have become outdated and ineffective for what the current and evolving society, States, and country need to prosper as a progressive nation. This is specifically true for felons like D’Andre and many others, who as a class, have experienced a similarly denigrating, oppressive, and counter-productive past as to that of African Americans, which warrants protection.

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6. Henry David Thoreau, GOODREADS, <https://www.goodreads.com/quotes/9588786-the-price-of-anything-is-the-amount-of-life-you> (last visited Jan. 14, 2022).

Justice Thurgood Marshall's words continue to resound the need to protect incarcerated persons just like D'Andre, in that:

When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling . . . .<sup>7</sup>

## INTRODUCTION

Today, felons in the United States of America serve two sentences.<sup>8</sup> The sentence served in prison serves as punishment for their actual crimes. The sentence served upon release from prison never leaves a felon, they carry it around like a scarlet letter for all of society to see;<sup>9</sup> functioning as a continual punishment in every aspect of living in a “free” society.<sup>10</sup> For the purposes of this discussion, the term “felon” represents all individuals who have been convicted of a felony.<sup>11</sup> A conviction is “the act or process of finding a person guilty of a crime.”<sup>12</sup> Generally, a felony is considered to be one of the most severe classes of crimes. These words are labels created by the American majority that cause an intentional, yet unintentional, classification system due to their impact. As Supreme Court Justice Thurgood Marshall explained:

Even when the words do not seem harsh or offensive, the impact is shattering. What we could be experiencing is the intent behind the

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7. *Procunier v. Martinez*, 416 U.S. 396, 428 (1974) (Marshall, J., concurring) (explaining the role of the First Amendment and the Court to protect the sacred individual rights of persons like need of expression).

8. See generally Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment> (“[E]xamining the punitive excess that has come to define America’s criminal legal system.”).

9. See *What is the meaning of a scarlet letter?*, COMPELLING TRUTH, <https://www.compellingtruth.org/scarlet-letter.html> (last visited Mar. 22, 2022) (“For more than 150 years, writers and songwriters have invoked the scarlet letter to symbolize the public shaming of a person’s sin. . .”).

10. See *id.* (“As Jeremy Travis notes, . . . the collateral consequences faced by formerly imprisoned Americans amount to a variant of the anachronistic tradition of ‘civil death,’ in which returning citizens are ‘defined as unworthy of the benefits of society, and [are] excluded from the social compact.’”).

11. See *Felon*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/felon> (last visited Apr. 2, 2020).

12. See *Conviction*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/conviction> (last visited Apr. 2, 2020).

words. When we intend to do good, we do. When we intend to do harm, it happens. What each of us must come to realize is that our intent always comes through.<sup>13</sup>

America has continually enabled and allowed discriminatory laws<sup>14</sup> to restrict the personal growth,<sup>15</sup> educational attainment,<sup>16</sup> and socio-economic stability of all different sub-classes of people.<sup>17</sup> Historically, a sub-class of individuals, based on race, had to fight to be considered “people,” not property, and to eventually be considered “citizens.”<sup>18</sup> As a result of this fight, states either enacted laws to, or refused to enact laws that would ensure equal treatment of all people or citizens, uniformly. These laws have led to constitutional challenges for the violation of these individuals’ rights, but this note focuses on the novel sub-classification of felons and the violation of their rights under the Fourteenth Amendment’s Equal Protection Clause,<sup>19</sup> and challenges under the Fifth Amendment’s Due Process Clause relating to double jeopardy.<sup>20</sup> When the Thirteenth Amendment was passed, it was designed to end the enslavement and involuntary servitude of African Americans, but this shifted its grip of discrimination to a new group – felons – by reviving the previously outlawed behavior. Therefore, America continues to blatantly authorize the discrimination of a new group of individuals, but now based on felony convictions.<sup>21</sup>

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13. 9 *Powerful Quotes by Thurgood Marshall*, BIOGRAPHY (Jan. 28, 2021), <https://www.biography.com/news/thurgood-marshall-quotes>.

14. See generally Danyelle Soloman & Connor Maxwell, *Systematic Inequality and Economic Opportunity*, CTR. FOR AM. PROGRESS (Aug. 7, 2019, 7:00 AM), <https://www.americanprogress.org/issues/race/reports/2019/08/07/472910/systematic-inequality-economic-opportunity/> (“The U.S. economy was built on the exploitation and occupational segregation of people of color. While many government policies and institutional practices helped create this system, the legacies of slavery, Jim Crow, and the New Deal—as well as the limited funding and scope of anti-discrimination agencies—are some of the biggest contributors to inequality in America.”).

15. *Id.* (“While the FLSA boosted wages and improved working conditions for thousands of white workers, it largely excluded African American workers from receiving these benefits by exempting many domestic, agricultural, and service occupations.”).

16. AMITY L. NOLTEMEYER, JULIE MUJIC & CAVEN S. MCLOUGHLIN, *THE HISTORY OF INEQUALITY IN EDUCATION*, 6 (2012) (“[V]ast disparities in the quality of educational programming existed between education for Black and White students. Black students were typically educated in segregated, inferior facilities. In addition, there was a large gap in the availability of secondary schools for these students.”).

17. Daniel E. Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283, 1286 (2018) (“Discrimination based on socioeconomic status (SES) is routine.”).

18. See generally, *Scott v. Sanford*, 60 U.S. 393 (1857).

19. U.S. CONST. amend. XIV, § 1 (“[N]or deny to any person within its jurisdiction the equal protection of the laws.”).

20. U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . .”).

21. U.S. CONST. amend. XIII, § 1.

Felons are a prime example of a sub-class of individuals that, once convicted in a court of law, are classified, punished, stigmatized, stripped of their rights as American citizens, and discriminated against.<sup>22</sup> Could this be a form of *De Facto* double jeopardy?<sup>23</sup> While felons are not literally subjected to a second trial within the judicial system for the same offense, felons face a pseudo trial with society, as its jury, upon re-entry into society, based on the continual discrimination for crimes they have already served time for.<sup>24</sup> The enactment of discriminatory laws against felons<sup>25</sup> dehumanizes the individual by discarding their rights as citizens and encourages, perpetuates, and condones such a societal trial upon their re-entry into society<sup>26</sup> from which these individuals need protection, not more punishment.<sup>27</sup>

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22. See Kimble & Grawert, *supra* note 8 (highlighting collateral consequences “serve to remind people with criminal records of their permanent status as ‘other.’”).

23. See Amy J. Kappeler, CHANGING THE TIDE OF DOUBLE JEOPARDY IN THE CONTEXT OF CONTINUING CRIMINAL ENTERPRISE, 87 J. Crim. L. & Criminology 967, 970 (1996-1997) (De facto Double Jeopardy occurs when a person is tried for a second time for a charge already adjudicated in fact or effect); see also Micheal “Zaki” Smith, *A Life Sentence*, NEXT100 (Oct. 16, 2019), [https://thenext100.org/a-silent-life-sentence/?gclid=CJwKCAjwlcRBhBYEiwAK341jWn5MGAhey-MDPbUHkHGUtvDsYzuX8ZiaOrEc16uNOIe0LJ3L0NebhoCi70QAvD\\_BwE](https://thenext100.org/a-silent-life-sentence/?gclid=CJwKCAjwlcRBhBYEiwAK341jWn5MGAhey-MDPbUHkHGUtvDsYzuX8ZiaOrEc16uNOIe0LJ3L0NebhoCi70QAvD_BwE) (“This means that if you are found guilty in a trial, or pled guilty in a plea agreement, you can serve your time – but that time will not be enough. You also automatically receive a silent life sentence of discrimination.”) (Here, author asserts that the collateral consequences suffered after release from incarceration act as a second trial for felons through exacerbated societal stigma, i.e., a life sentence).

24. See Kimble & Grawert, *supra* note 8 (“Roughly 600,000 people leave prisons every year hoping that their punishment has ended, only to encounter a combination of laws, rules, and biases forming barriers that block them from jobs, housing, and fundamental participation in our political, economic, and cultural life.”).

25. See *id.* (“Starting in the mid-1980s, state legislatures accelerated the number and breadth of occupational restrictions for people with prior convictions. In the 1970s, roughly 1,950 separate laws limited job opportunities for people with a criminal record. Today, more than 27,000 rules bar formerly justice-involved people from holding professional licenses.”); (“[S]ince 1996, people convicted of certain drug crimes have been ineligible for government assistance through the Temporary Assistance for Needy Families (TANF) program and Supplemental Nutrition Assistance Program (SNAP).”); (“[I]n the 1980s, Congress passed and public housing authorities implemented ‘one strike and you’re out’ rules providing for the eviction of people who became involved in criminal activity.”); (“[F]loridians voted to restore voting rights to . . . people with felony convictions . . . [F]lorida legislators . . . made voting rights conditional upon . . . paying all . . . owed due to their conviction, which the[y] . . . cannot pay. . .”).

26. Melissa Li, *From prisons to communities: Confronting re-entry challenges and social inequality What makes re-entry into communities challenging?*, AM. PSYCH ASSOC. (Mar. 2018), <https://www.apa.org/pi/ses/resources/indicator/2018/03/prisons-to-communities> (“A consequence of incarceration is that relationships with families and the broader community are strained.”).

27. Smith, *supra* note 23 (explaining that these impediments impact the ability of felons to meet their own basic needs, as well as the needs of their families and children who depend on them).



These actions by the state and federal governments have an opposite effect from their stated goal of public safety, and interest in protecting society from re-offenders.<sup>28</sup> Consequently, to strike a balance between a state's interest and a felon's interest in safeguarding his or her fundamental rights, felons should be classified as a quasi-suspect class.

This article demonstrates the drastic necessity for felons to be protected by law through classifying them as a quasi-suspect class due to the past and present discrimination these individuals endure. Moreover, this level of discrimination likely constitutes a violation of their rights under the Fifth and Fourteenth Amendments of the United States Constitution. Part I explains the three-tier classification system that encompasses the suspect class, quasi-suspect class, and non-suspect class; along with their respective level of judicial review. Additionally, it seeks to offer a justification for why felons should be considered quasi-suspect as opposed to non-suspect or suspect. Part II evaluates the problematic nature of how an individual's criminal past impacts certain rights and privileges afforded to all citizens by the United States Constitution. Part III provides support for the need of heightened protection for felons as American citizens and returning members of society. This note concludes by proposing a new classification of felons for their equal protection and fundamental rights under the law.

## I. AMERICA'S EQUAL PROTECTION CLASSIFICATION SYSTEM

In America, it is inevitable that an individual will be categorized, labeled, identified, distinguished, or simply slotted into a group based on similar or same behaviors, beliefs, socio-economic statuses, educational backgrounds, appearances, etc. by other individuals.<sup>29</sup> For this discussion, "classification" refers to how the government draws a distinction between individuals. As a result of endemic discrimination against formerly enslaved people after the Civil War, the Fourteenth Amendment was passed, which features an Equal Protection Clause

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28. *Id.* ("Men and women released from correctional facilities receive minimal preparation and inadequate assistance and resources, which makes their re-entry into communities challenging . . . [for] a criminal conviction limits employment prospects, public housing assistance and social services.") (citations omitted); *but see* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10. *NEW. CRIM. L. REV.* 319, 324 (2007).

29. RAJIV JHANGIANI & HAMMOND TARRY, *PRINCIPLES OF SOCIAL PSYCHOLOGY – 1ST INTERNATIONAL EDITION* 518-19 (BCampus 2014) (explaining that social categorization occurs naturally and spontaneously through a cognitive process of putting people into social groups based on their group membership i.e., gender, race, age, etc).

that provides: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>30</sup> The Equal Protection Doctrine reviews classification of an individual as: (1) suspect, (2) quasi-suspect, or (3) non-suspect.<sup>31</sup>

### A. *The Levels of Scrutiny*

The first classification is known as a suspect class because “it is likely to be based on illegal discrimination”<sup>32</sup> or cover persons who have been “historically disadvantaged” and have “historically lacked effective representation in the political process.”<sup>33</sup> It follows that, the characteristics deemed suspect are race, ethnicity, national origin, and in some instances, alienage – commonly differentiated by an individual’s appearance and is highly visible.<sup>34</sup> The suspect class receives the highest level of review, strict scrutiny, and requires that the law is “narrowly tailored to achieve its purpose,” and contains “a compelling governmental interest.”<sup>35</sup> Additionally, the government has the burden to prove the law is necessary to achieving the governmental interest.<sup>36</sup> Courts have generally interpreted all suspect classification to be “inherently suspect” because the “guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied” to another individual.<sup>37</sup>

The second classification, quasi-suspect class, encompasses the characteristics of gender,<sup>38</sup> sexual orientation,<sup>39</sup> and illegitimacy

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30. U.S. CONST. amend. XIV, § 1; *14th Amendment*, HISTORY, <https://www.history.com/topics/black-history/fourteenth-amendment#:~:text=the%2014th%20Amendment%20to%20the,era%20to%20abolish%20slavery%20and> (last visited Mar. 19, 2022) (“The 14th Amendment to the U.S. Constitution, ratified in 1868, granted citizenship to all persons born or naturalized in the United States—including former enslaved people—and guaranteed all citizens ‘equal protection of the laws.’” It was enacted during the Reconstruction era with two additional amendments to end slavery and create civil and legal rights for African Americans and has become paramount to many landmark Supreme Court decisions since its inception).

31. Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1324 (2018).

32. *Suspect Classification*, USLEGAL.COM, <https://definitions.uslegal.com/s/suspect-classification> (last visited Oct. 11, 2021) [hereinafter *Suspect Classification*].

33. *Id.*

34. Selene C. Vázquez, *The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants*, 51 U. MIA. INTER-AM. L. REV. 63,74 (2020).

35. *Id.* at 71.

36. *Id.*

37. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218 (1995) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-291 (1978)).

38. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *see also* *Craig v. Boren*, 429 U.S. 190, 198 (1976).

(nonmarital children).<sup>40</sup> This class receives a more medial level of review, intermediate scrutiny, requiring the law to be “substantially related” to “an important government objective.”<sup>41</sup>

Finally, the third classification, non-suspect class, covers all other characteristics that are not specified within the suspect or quasi-suspect classes, such as age, poverty, and disability.<sup>42</sup> Age and poverty are analyzed under the lowest level of review known as rational basis, only requiring that the law is “rationally related to a legitimate governmental purpose.”<sup>43</sup> Rational basis is the only level of the three, that places the burden on the challenger to overcome the presumption that a facially neutral law is valid by showing that the law is outright capricious or irrational.<sup>44</sup> Yet, disability has been known to warrant something extra – a bite.<sup>45</sup> Under rational basis with a bite, if “the ‘practical effect’ [i]s ‘to impose a disadvantage, a separate status, and so a stigma’ on a class of people,” the law must be invalidated.<sup>46</sup>

### B. *Evolving Classifications*

One of the first cases where the Supreme Court evaluated the Equal Protection Clause, with respect to sexual orientation, is *Romer v. Evans*.<sup>47</sup> In *Romer*, various Colorado municipalities passed ordinances banning discrimination against homosexuals. In response, voters passed “Amendment 2” as a referendum aimed to prevent any legislative, executive, or judicial action by the state or local government, designed to protect homosexuals.<sup>48</sup> The Supreme Court held that the classification of homosexuals was “not to further an appropriate legislative end,” but to make them incongruent to everyone else.<sup>49</sup> The Court further reasoned that it invalidated the law because Amendment 2’s purpose “raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of person

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39. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

40. *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

41. Ariel Subourne, Law School Student Scholarship, *Alienage as a Suspect Class: Nonimmigrants and the Equal Protection Clause*, SETON HALL UNIV. (2014).

42. *Suspect Classification*, *supra* note 32.

43. *Vázquez*, *supra* note 34, at 72.

44. *Latta v. Otter*, 19 F. Supp. 3d 1054, 1080 (2014).

45. *Id.*; *see also Vázquez*, *supra* note 34, at 85.

46. *Latta*, 19 F. Supp. 3d at 1080.

47. *Romer v. Evans*, 517 U.S. 620 (1996).

48. *Id.* at 623, 624.

49. *Id.* at 635.

affected.”<sup>50</sup> The Court also stated, “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”<sup>51</sup> Given the egregious nature and pervasive attack on a person’s sexual orientation of Amendment 2 in *Romer*, the Supreme Court concluded those that identify as homosexual were entitled to additional protection. This left open the question of whether a higher level of scrutiny should apply to those individuals.<sup>52</sup>

Twelve years later, the Supreme Court adopted a four factor approach to determine if a new class of person qualifies as a quasi-suspect class.<sup>53</sup> First, “whether the class has been historically ‘subjected to discrimination.’”<sup>54</sup> Second, “whether the class has a defining characteristic that ‘frequently bears [a] relation to ability to perform or contribute to society.’”<sup>55</sup> Third, “whether the class exhibits ‘obvious, immutable, or distinguishing characteristics that define them as a discrete group.’”<sup>56</sup> Fourth, “whether the class is ‘a minority or politically powerless.’”<sup>57</sup> This four factor approach was used in *Windsor v. United States*, to determine if homosexuals qualified as a quasi-suspect class when a same sex couple were denied the spousal deduction benefit under the Defense of Marriage Act (“DOMA”).<sup>58</sup>

After analyzing the four factors, the Court concluded that the Court reasoned that homosexuals were entitled to additional protection because “homosexuals as a group have historically endured persecution and discrimination; homosexuality has no relation to aptitude or ability to contribute to society; homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and the class remains a politically weakened minority.”<sup>59</sup> Therefore, this case settled the dispute of whether or not “homosexuals” as a traditionally non-suspect class, should be a quasi-suspect class, and subject to intermediate scrutiny. The foregoing is a clear example of how suspect classes and the level of review intertwine with one another. As explained, the level of review dictates the difficulty or ease that a law will face in staying

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50. *Id.* at 634.

51. *Id.* at 633.

52. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

53. *Windsor v. U.S.*, 699 F.3d 169, 181 (2012).

54. *Id.* (citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

55. *Id.* (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985)).

56. *Id.* (citing *Bowen*, 483 U.S. at 602).

57. *Id.* (citing *Bowen*, 483 U.S. at 602).

58. *Windsor*, 699, F.3d at 175.

59. *Id.* at 181-82.

valid when it comes to equal protection and rights of American citizens.

C. *The Levels of Scrutiny Applied to Felons*

Presently, felons are not legally considered a protected class, such as suspect or quasi-suspect. This low standard of review essentially allows the government to use “public health, safety, and welfare” as a one size fits all purpose for potential discrimination, which demonstrates the discrimination is “rationally related [requirement] to a legitimate governmental interest,” because they broke the law. The government can easily draw a logical connection between the idea of protecting society from “felons,” except that all felons are not created equal, because all crimes are not. Although the government’s purpose may be logical and rational and can be tied to an actual governmental interest, the type of felony that was committed may in fact have no relation to the right that is being stripped away.<sup>60</sup> Therefore, the burden placed on the felon to prove that a law is not “rationally related” to a “legitimate governmental interest,” puts the felon at a disadvantage. Simply put, rational basis should not be the correct standard.

Felony classification should not be given strict scrutiny, because although felons have been “historically disadvantaged,” have “lacked adequate representation in the political process,” and are “inherently suspicious;” the immutability factor is not completely satisfied.<sup>61</sup> Immutability is defined as “not capable or susceptible of change: invariable, unalterable.”<sup>62</sup> The court in *Frontiero v. Richardson* opined that immutable traits are generally “accidents of birth” that are not the person’s fault,<sup>63</sup> and oppressing those who are not responsible for their immutable traits “violates basic norms of fairness; Hence, discrimination against non-marital children and children of undocumented parents receives heightened scrutiny.”<sup>64</sup> This is why felons are unable to satisfy

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60. See John G. Malcolm & John-Michael Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?* THE HERITAGE FOUND. (March 7, 2017), <https://www.heritage.org/crime-and-justice/report/collateral-consequences-protecting-public-safety-or-encouraging-recidivism> (“Collateral consequences may be unduly burdensome if drafted with little or no rational relationship between the restriction imposed and the offense committed, or on the basis of gross generalizations about offenders that may not be true.”).

61. *Windsor v. U.S.*, 699 F.3d 169, 181 (2012) (citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

62. Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALI. L. REV. 1191, 1211 (2006).

63. *Id.*

64. *Id.*

the immutability factor because they are legally responsible for committing the crime for which they have been convicted. It is arguably the felon's choice to break the law and to engage in the illegal activity that ultimately caused their branding as "felon."

While felons fall short of meeting the immutability component, by virtue of all the other elements being present, a heightened standard of review is still necessary, given the quasi-suspect classification is applicable to felons. Felons have faced overt discrimination in America for some time now, and have been subject to class-based discrimination through laws that have: (1) "provided for automatic dissolution of marriage, (2) the denial of employment and other licenses, and (3) the inability to make contracts or sue in civil court until the 1960s."<sup>65</sup> Of the thirty-nine states that outline voting rights in their respective constitutions, twenty-seven have guidelines that impact a felons right to vote.<sup>66</sup> Moreover, felons have suffered similar legal discrimination to that of women and African Americans under slave codes prior to the Civil War.<sup>67</sup> While the Thirteenth Amendment prohibited slavery and involuntary servitude for every other person in America, it authorized this very same oppression for felons.<sup>68</sup>

Felons, as a group, constitute a "discrete minority,"<sup>69</sup> based on their political powerlessness and "vulnerability to prejudicial treatment through their discreteness."<sup>70</sup> Just as aliens and non-marital children may not be physically discernable from the ordinary person, except where documentation is necessary to vote or settle probate cases, felons are similarly situated because based on appearance it is not known whether the person has a criminal history or if they have been incarcerated. The most common way to know is through a criminal background check, which acts as a "scarlet letter."<sup>71</sup> Although felons are criminals and the government has many justifications<sup>72</sup> for

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65. *Id.* at 1225.

66. *Id.*

67. Geiger, *supra* note 62, at 1225 (noting how the same restrictions on legal status that once applied to women and slaves i.e., holding office, serving on juries, etc., are now or have been imposed on felons).

68. See U.S. CONST. amend. XIII § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

69. See Geiger, *supra* note 62 at 1226 (defining that a group is "discrete when it is 'separate or distinct,' or 'when its members are marked out in ways that make it relatively easy for others to identify them.'").

70. *Id.* at 1227.

71. *Id.* at 1226.

72. See *id.* at 1229 (noting penological goals of deterrence, retribution, incapacitation, and rehabilitation as justifications to regulate criminals).

regulating them, society misguidedly presupposes that any laws aimed at felons are inherently legitimate.<sup>73</sup> As such, felons are further marred and admonished by collateral consequences which, according to a resource maintained by the U.S. Department of Justice's Bureau of Justice Assistance, are "legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other rights, benefits, and opportunities."<sup>74</sup> For that reason, enforcement of these regulations against felons, who have since completed their term of incarceration and are released, is essentially a second sentence that is, *de facto* double jeopardy. The aforementioned barriers to reintegration because their convictions, prevents felons from becoming productive citizens, undoubtedly increases recidivism, makes communities less safe, and ultimately ends in costing the entire nation.<sup>75</sup> Thus, providing substantial justification as to the need for felons to be classified under the quasi-suspect class, as opposed to non-suspect or suspect class.

## II. FELONS V. SOCIETAL REINTEGRATION

The irrevocable stain placed on felons continue beyond incarceration, as many felons are subject to *de facto* double jeopardy. The societal implications that felons face can be best understood from the following analogy:

In American football, "piling on" occurs when one or more players jumps atop a downed player after a tackle has been made. It is illegal because it is unnecessary, slows the progress of the game, and often results in serious injury. We might also think of "piling on" in terms of the thick stack of labels stubbornly affixed to so many domains of social life – from employment, to education, to public assistance, to online dating, to family relationships, to housing, to restrictions on physical movement, to voting, to volunteering, and to other public service.<sup>76</sup>

Should a felony conviction serve as a scarlet letter, eliminating one's fundamental and constitutional rights, such as the right to equal and fair housing, the right to earn a living, and the right to vote? While backers and supporters of pinning crippling, collateral sanctions on

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73. Geiger, *supra* note 62, at 1229.

74. Smith, *supra* note 23.

75. *Id.*

76. Christopher Uggen & Lindsay Blahnik, *The Increasing Stickiness of Public Labels* 20 (Nov. 30, 2014) (unpublished manuscript) (on file with the Harvard Kennedy School, Malcolm Wiener Center for Social Policy, Inequality & Social Policy Program).

felons may answer yes to the question posed,<sup>77</sup> it has been repeatedly documented how this behavior reaches beyond the felon, colliding with their families and unequipped communities.<sup>78</sup>

*“We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. . . . We must dissent because America can do better, because America has no choice but to do better.”*<sup>79</sup>

### A. *Right to Live (Housing Discrimination)*

Housing authorities – public and private – act as the triers of fact, convict and resentence felons to an additional sentence in society upon release from prison, by utilizing their criminal conviction as leverage and continued exclusion; also known as “civil death.”<sup>80</sup> More than 625,000 Americans are freed from prison every year; roughly 19 million possess one felony conviction; and 100 million people, accounting for almost one-third of the U.S. population, have a criminal record.<sup>81</sup> The ability for felons to find, qualify, and obtain stable housing after incarceration is one of the most debilitating tasks they will face.<sup>82</sup> Three major obstacles blocking felons from the housing market are: (1) discrimination by public housing authorities, (2) discrimination by private property owners, and (3) deficiencies in affordable hous-

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77. See Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”: Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 527 (2006).

78. See *id.* at 530-32.

79. Thurgood Marshall, Former Just., U.S. Sup. Ct., Acceptance Speech at Independence Hall: The Meaning of Liberty (July 4, 1992) (transcript available at <https://www.naacpldf.org/press-release/thurgood-marshalls-stirring-acceptance-speech-after-receiving-the-prestigious-liberty-award-on-july-4-1992/>).

80. See Malcolm & Seibler, *supra* note 60 (explaining that “civil death” “refer[s] to the status of having all of an individual’s civil rights, including those related to contract and property, extinguished upon conviction of a capital crime.”).

81. Jennifer Safstrom & Rachel Goodman, *Lawsuit Challenges Discriminatory Housing Policy in Chesterfield County, Virginia*, ACLU (June 4, 2019, 12:00 PM), <https://www.aclu.org/blog/racial-justice/race-and-economic-justice/lawsuit-challenges-discriminatory-housing-policy>.

82. See Carly Putnam, BARRIERS TO AFFORDABLE HOUSING FOR OKLAHOMANS WITH FELONY CONVICTIONS 1 (Okla. Pol’y Inst. ed., 2015), <https://okpolicy.org/issue-brief-barriers-to-affordable-housing-for-oklahomans-with-felony-convictions/>.



ing.<sup>83</sup> This is disheartening because a felony conviction is debilitating enough without stacking collateral consequences on top of each other.<sup>84</sup>

Consequently, “The U.S. Department of Housing and Urban Development (‘HUD’) has recognized that excluding people with criminal records can be considered race discrimination under the FHA because ‘African Americans and Hispanics are arrested, convicted, and incarcerated at rates disproportionate to their share of the general population.’”<sup>85</sup> Although some agencies may recognize that certain laws are in direct violation of felons’ fundamental rights, such as the right to live, they simply change the language or create guidelines to help them justify keeping felons out of housing.<sup>86</sup> Statistics show that while Caucasians averaged “23 people with a felony conviction per 1,000 white people, Blacks averaged 65 people with a felony conviction per 1,000 Black people in the same location.”<sup>87</sup> To curtail the overwhelming inequalities among the African American and Caucasian population in Chesterfield County, the federal Fair Housing Act and Virginia state law found Sterling Glen’s blanket ban unacceptable, barring housing providers from purposely discriminating due to race, sex, disability, or other protected status, as well as, any policy that has a disparate impact on any of these protected groups.<sup>88</sup> The opportunity to acquire safe, affordable, stable housing should be a fundamental right that every citizen within society has access to, and the ability to attain. Should such an injustice be allowed under the U.S. Constitution?

### B. *Right to Work (Employment Discrimination)*

Employers – public and private – as the triers of fact, try and convict felons for a second time by utilizing their criminal conviction during the hiring and firing process, thereby, denying felons their nat-

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83. See Lucius Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people*, PRISON POL’Y INITIATIVE (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html>.

84. See Malcolm & Seibler, *supra* note 60 (noting “The list goes on, each law magnifying the effect of the one before it.”).

85. Safstrom & Goodman, *supra* note 81.

86. Thomas Jefferson, *The Preamble to the Declaration of Independence*, Archives.gov, <https://www.archives.gov/founding-docs/declaration> (last visited Mar. 19, 2022) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); see also Archer & Williams, *supra* note 79, at 542.

87. Safstrom & Goodman, *supra* note 81.

88. *Id.*

ural right to earn a living.<sup>89</sup> How are felons expected to abstain from illegal and criminal activities if they are unable to gain legal, reliable employment? “Research has shown that people require a combination of family support, community assistance, and economic opportunity to stay out of the criminal justice system.”<sup>90</sup> The opportunity to obtain employment is another major issue that felons face, because without it, they potentially lose or are unable to find stable housing, cannot meet the conditions of their sentencing, and eventually have no other option but to succumb to the opportunity of committing illegal conduct to support themselves and their families.<sup>91</sup> Despite the need for support from community and economic resources to provide employment opportunities, between 1996 and 2006, background checks by private agencies skyrocketed and FBI checks doubled causing them to process more fingerprints for civil inquiries than criminal.<sup>92</sup>

Public policy favors disenfranchisement of felons because it’s “logical” to “refuse employment in certain positions where the felony conviction would directly reflect on the felon’s qualifications for the job.”<sup>93</sup> However, lawmakers and employers alike must be careful that these laws and practices are a true evaluation of the individual in relation to the job that they are applying for, and “not the person in the abstract.”<sup>94</sup> In *Green v. Missouri Pac. R. Co.*, the Eight Circuit Court confirmed as much stating, “[t]o deny job opportunities to these individuals [felons] because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh burden.”<sup>95</sup> Most often, once an employer or prospective employer learns of a criminal record through the application

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89. See Kimble & Grawert, *supra* note 8 (discussing how background screening and licensing rules limit and decrease opportunity for jobs and promotions, with secured positions after release often being “temporary, part-time, and low paying.”).

90. Chidi Umez & Rebecca Pirius, *Barriers to Work: People with Criminal Records*, NAT’L CONF. OF STATE LEGIS. (July 17, 2018), <https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx#>.

91. See Kimble & Grawert, *supra* note 8 (“As recent Brennan Center Research suggests, a prior criminal conviction is devastating to an individual’s earning prospects, but a prison record all but ensures a lifetime straddling the poverty threshold,” and how modified restrictions “continue to compound disadvantage and set up a self-perpetuating cycle of poverty and recidivism.”).

92. Kai Wright, *Boxed In: How a Criminal Record Keeps You Unemployed For Life*, THE NATION (Nov. 6, 2013), <https://www.thenation.com/article/archive/boxed-how-criminal-record-keeps-you-unemployed-life/>.

93. *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1297 (8th Cir. 1975).

94. *Id.* at 1296.

95. *Id.* at 1298.

process, whether resulting in conviction or not, the individual does not receive a call back or, if already hired, is fired.<sup>96</sup>

While there is no federal protection for discrimination based on conviction status alone,<sup>97</sup> some courts have held discrimination based on felony conviction status plus race, can, however, violate Title VII of the Civil Rights Act of 1964.<sup>98</sup> “Other courts have held that an absolute refusal to hire persons with convictions or a number of arrests is inconsistent with Title VII.”<sup>99</sup> Additionally, the court of appeals in *Guerrero v. California Department of Corrections and Rehabilitation*, “held that federal courts should give ‘great deference’ to EEOC guidelines.”<sup>100</sup> For employment discrimination on basis of arrest, the EEOC adopted the *Green* factors—time since conviction, degree of felon’s rehabilitation, and circumstance of crime- to allow employers to demonstrate business necessity.<sup>101</sup> This approach, however, still did not help felons obtain employment because Congress found a way to undercut these guidelines, by allowing lawmakers to issue blanket bans on certain jobs, and states soon followed Congress’s lead.<sup>102</sup> As a result, felons are unjustly barred from employment in over 800 occupations due to restricting laws and licensing requirements.<sup>103</sup> Once optimistic felons, soon find themselves hopeless when they are unable to utilize skills they learned while in prison, expecting a second chance.<sup>104</sup> For felons that have been released from prison, it is imperative that they have access to employment because it is necessary to their successful reintegration into society and an inherent human right to work and earn a living.<sup>105</sup> This is a right afforded under the Due Process Clause of the Fifth and Fourteenth Amendments, and upon their release into society, felons should be allowed to show that they have been rehabilitated and can adjust to society as law abiding citizens. Yet, felons, at a bare mini-

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96. Uggan, *supra* note 76, at 10.

97. Heise v. Ameritas Life Ins., No. 4:05CV3188, 2006 WL 1441603, 1 (D. Neb. May 22, 2006).

98. See *Green*, 523 F.2d at 1296.

99. Washam v. J. C. Penney Co., 519 F. Supp. 554, 561 (D. Del. 1981).

100. *Guerrero v. California Dep’t of Corr. and Rehab.*, 119 F. Supp. 3d 1065, 1079 (N.D. Cal. 2015).

101. *Id.*; see also Business Necessity, Thelawdictionary.org, <https://thelawdictionary.org/business-necessity/> (last visited Mar. 19, 2022) (“A legitimate business purpose that justifies an employment practice as valid and necessary for the effective achievement of the organization’s objectives and the safe and efficient operation of the business.”).

102. Wright, *supra* note 92.

103. *Id.*

104. See Archer & Williams, *supra* note 77, at 527.

105. Ethan Yang, *The Assault On Our Right To Earn A Living*, AM. INST. ECON. RSCH., <https://www.aier.org/article/the-assault-on-our-right-to-earn-a-living/> (Mar. 8, 2021).

mum, are still unable to find jobs because of a stain on their record that could reflect but one bad choice. Should such an injustice be allowed?

### C. *Right to Vote*

Although the right to vote<sup>106</sup> is a right expressly denoted in the United States Constitution, felons across America have been stripped of this Constitutional protection as a result of committing a crime.<sup>107</sup> Nearly 5.85 million Americans with felony and misdemeanor convictions are precluded from voting, thereby resulting in the coined phrase “felony disenfranchisement.”<sup>108</sup> Some states refuse to take a felon’s right to vote at any time,<sup>109</sup> other states strip away this right temporarily while a felon is incarcerated,<sup>110</sup> and in the remaining states a felon’s right to vote is permanently taken until they take additional steps to restore them.<sup>111</sup>

Congress has archaically chosen to strip one’s rights upon conviction through the enactment of the Voting Rights Act of 1965,<sup>112</sup> because Congress “was careful to carve out an exception for felon disenfranchisement laws.”<sup>113</sup> Congress’s carve out for disenfranchisement laws led to various challenges, such as those in Mississippi, where the United States Court of Appeals for the Fifth Circuit stated, “a felon’s ‘interest in retaining his right to vote is *constitutionally distinguishable* from the “right to vote” claims of individuals who are not felons.”<sup>114</sup>

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106. U.S. CONST. amend. XV, § 1.

107. See Kimble & Grawert, *supra* note 8 (“[M]any states adopted laws to strip voting rights from people with a criminal record.”).

108. *What Rights Do Convicted Felons Lose*, BLACK’S LAW DICTIONARY (2d ed. 1910); see also Felony Disenfranchisement Laws Map, ACLU, <https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map> (last visited Apr. 20, 2022).

109. *Felon Voting Rights*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 14, 2019), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (denoting that “Maine and Vermont” are the only two states in which felons never lose their right to vote).

110. See Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty., 653 F.3d 290, 292 (3d. Cir. 2011); see also *Felon Voting Rights*, *supra* note 109 (explaining that “[i]n 16 states and the District of Columbia, felons lose their voting rights only while incarcerated, and receive automatic restoration upon release.”).

111. *What Rights Do Convicted Felons Lose*, *supra* note 108; see also Horne v. Dist. Council 16 Int’l. Union of Painters & Allied Trades, 234 Cal. App. 4th 524, 536 (Cal. Ct. App. 2015) (noting that California requires additional steps prior to the restoration of voting rights).

112. Voting Rights Act, 42 U.S.C. § 1971 (2004).

113. Farrakhan v. Washington, 359 F.3d 1116, 1120 (9th. Cir. 2004) (Kozinski, J., dissenting).

114. Madison v. State, 161 Wash.2d 85, 101 (2007) (citing Williams v. Taylor, 677 F.2d 510, 514 (5th Cir.1982)) (emphasis added).

In *Richardson v. Ramirez*,<sup>115</sup> Justice Marshall dissents, sharing his view that “the disenfranchisement of [felons] must be measured against the requirements of the Equal Protection Clause of [§] 1 of the Fourteenth Amendment.”<sup>116</sup> He furthers, “that because the right to vote ‘is of the essence of a democratic society, and any restriction on that right strike at the heart of representative government,’ voting is a ‘fundamental’ right.”<sup>117</sup> Therefore, this continued deprivation arguably justified by some inhumane reasoning further illuminates the second incarceration that felons face, where their voice is solitarily confined and diluted to be rendered virtually meaningless.

### III. FELONS AS A QUASI-SUSPECT CLASS

Today, convicted felons are classified similar to age and poverty, in the non-suspect category, receiving the lowest level judicial review, rational basis. Here, “the government [need only demonstrate a] legitimate purpose if it advances a traditional ‘police’ purpose: protecting safety, public health, or public morals.”<sup>118</sup> The burden is placed on felons to prove that discriminatory laws that continue to marginalize them, are not rational when taking in to account the basic rights and liberties that are impacted, i.e. employment and stable housing. Usually, upon birth in America, an individual is considered a United States citizen.<sup>119</sup> American citizenship embodies basic and fundamental rights which are outlined in and safeguarded by the United States Constitution.<sup>120</sup> A felon, assuming they are a natural born citizen of the United States, is always a citizen, before and after his conviction, and if allowed, returns to society as one.<sup>121</sup> However, once a felon is convicted and their time is served, a felon returns as a relegated citizen<sup>122</sup> through American law’s tradition of employing “civil

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115. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

116. *Id.* at 77.

117. *Id.*

118. *Berman v. Parker*, 348 U.S. 26, 32 (1954) (noting that public safety, health, morality, peace, etc. are only examples of the traditional uses of police power which demonstrate the scope, but they do not set the limits of said power).

119. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

120. See U.S. CONST. amends. I-X.

121. See Amien Kacou, *When U.S. Citizens Can Lose Their U.S. Citizenship*, NOLO.COM, <https://www.nolo.com/legal-encyclopedia/when-us-citizens-can-lose-us-citizenship.html> (last visited Mar. 22, 2022).

122. See Archer & Williams, *supra* note 77, at 527-28.

disabilities.”<sup>123</sup> “Civil disabilities refers to a condition of a person who has had a legal right or privilege revoked as a result of a criminal conviction.”<sup>124</sup> These include “denial of certain privileges like voting, holding public office, obtaining many jobs and occupational licenses, entering judicially-enforceable agreements, maintaining family relationships and obtaining insurance and pension benefits.”<sup>125</sup>

Resultingly, such laws being passed excluding felons from these constructive social programs and employment opportunities, perpetuate a vicious cycle where majority of felons will be forced to revert to conduct that led to their conviction, or commit alternative crimes as a means to survive.<sup>126</sup> Traditionally, most civil disabilities were seen as being justified as a consequence of the felon’s breaking of the law, or related to the crime committed.<sup>127</sup> Written to grant African Americans their freedom, the Thirteenth Amendment contained a loophole that permitted another’s freedom to be taken away as punishment, when they had been properly convicted of committing a crime.<sup>128</sup> While as a civilized society, there must be sanctions placed on individuals to deter future crime and to protect the public health, safety, and welfare, those bans and restrictions must also be constitutional, logical, and sound.<sup>129</sup> It is clear proof that felons’ constitutional rights are being diminished, violated, and abolished as the government defaults to “public health, safety, and welfare,” as a justification and hides behind rational basis review.<sup>130</sup> Thus, felons are left vulnerable and unprotected, while be-

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123. *See id.* at 534.

124. *Civil Disabilities*, USLEGAL.COM, <https://definitions.uslegal.com/c/civil-disabilities/> (last visited Dec. 7, 2021).

125. *Id.*

126. *See Archer & Williams, supra* note 77, at 529-30; *see also Malcolm & Seibler, supra* note 62.

127. *See Archer & Williams, supra* note 77, at 534-35.

128. *See Thirteenth Amendment—Slavery and Involuntary Servitude*, GPO-CONAN 1549, 1551 (1992), <https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-14.pdf> (The Thirteenth Amendment was passed by Congress on January 31, 1865, and ratified by the states on December 6, 1865, legally abolishing slavery in its entirety after President Lincoln issued the Emancipation Proclamation in 1863, freeing only slaves of Confederate states that were in rebellion against the Union.); *see also* Press Release, Jeff Merkley, Ahead Of Juneteenth, Merkley, Williams Propose Const. Amend. To Close Slavery Loophole In 13th Amend. (June 18, 2021), <https://www.merkley.senate.gov/news/press-releases/ahead-of-juneteenth-merkley-williams-propose-constitutional-amendment-to-close-slavery-loophole-in-13th-amendment-2021#:~:text=%E2%80%9CThe%20loophole%20in%20our%20constitution’s,Slavery%20Clause%20from%20our%20constitution.%E2%80%9D> (“The loophole in our constitution’s ban on slavery not only allowed slavery to continue, but launched an era of discrimination and mass incarceration that continues to this day.”).

129. *See Malcolm & Seibler, supra* note 60.

130. *See id.*

ing expected by society, to rebuild their lives without the consolation of their fundamental rights – therefore being entitled to heightened protections.

#### CONCLUSION

Many courts have spoken on the government's right to enact laws that disenfranchise, demote, denigrate, and discriminate against felons while disparately impacting them.<sup>131</sup> Releasing felons from prison unable to obtain housing, employment, and say in the political process that governs the laws of which they must obey, amongst other collateral consequences and sanctions, is *de facto* double jeopardy – a second sentence to be served in society. “[I]f 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.”<sup>132</sup>

*“The government they devised was defective from the start, requiring several amendments, a civil war, and major social transformations to attain the system of constitutional government and its respect for the freedoms and individual rights, we hold as fundamental today.”*<sup>133</sup>

In order for felons to overcome prior rulings that collateral consequences are more of civil penalties and not additional criminal punishment, the same breakdown, understanding, application, and rationale of the Court in *Windsor*, will need to happen.<sup>134</sup> Legislators should be pressured by reform groups to see beyond the ordinary meaning of a statutory phrase, when looked at literally or individually, especially when the intent behind it is to provide equal protection under the law to all citizens, despite them being an unpopular or disfavored group or individual. “This fixation on continued punishment is not inevitable: it is a policy choice, and it is one that can be changed.”<sup>135</sup> Thus, classifying felons as a quasi-suspect class, would require the government to show a substantial governmental interest in laws applied to this relegated, lesser class of citizens within our society, and is necessary for their equal protection and their fundamental

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131. *See id.* (emphasizing how the Supreme Court has rejected nearly every constitutional challenge to collateral consequences).

132. *Romer v. Evans*, 517 U.S. 620, 634 (1996).

133. Thurgood Marshall, Assoc. Just., U.S. Sup. Ct., *The Bicentennial Speech* (May 6, 1987) (transcript on file at <http://thurgoodmarshall.com/the-bicentennial-speech/>).

134. *Windsor v. U.S.*, 699 F.3d 169 (2012).

135. *Kimble & Grawert*, *supra* note 8.

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rights provided under the United States Constitution's Fifth and Fourteenth Amendments.

*"Equal means getting the same thing, at the same time and in the same place."*<sup>136</sup>

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136. *Thurgood Marshall 1940-1961*, NAACP LEGAL DEFENSE FUND, <https://www.naacpldf.org/about-us/history/thurgood-marshall/> (last visited Jan. 15, 2022) (explaining Thurgood Marshall's reply to Justice Felix Frankfurter's question of what he meant by "equal" during his argument in *Brown v. Board of Education*).



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