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Cover Page Footnote
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ARE COLLATERAL SANCTIONS PREMISED ON CONDUCT OR CONVICTION?: THE CASE OF ABORTION DOCTORS

*Gabriel J. Chin**

INTRODUCTION

Persons subject to collateral sanctions—disabilities that occur automatically upon conviction—often claim that those sections constitute unfair punishment. The standard response is that collateral sanctions are not punishment at all; rather, they are civil regulatory measures designed to prevent undue risk by proven lawbreakers.[1] The categorical classification of these disabilities is critical to their constitutionality. If a court classifies a sanction as a criminal penalty rather than a regulatory measure, constitutional provisions applicable to criminal prosecution are triggered.[2] This will not necessarily be a problem if the sanction exists at the time of conviction and is made known to the defendant at the time of plea and sentence.[3] If the sanction, however, is deemed a criminal penalty, then the Ex Post Facto Clause may apply, meaning that new sanctions cannot be imposed retroactively on those convicted before the law was passed.[4] In addition, because guilty pleas must

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1. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 96 (1958) ("But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."); *see also In re* Conduct of Harris, 49 P.3d 778, 782 (Or. 2002) (distinguishing regulation and punishment); Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 606 (1997) ("We think that disqualifications (to the extent that they are supportable at all) should ordinarily be viewed as being civil risk-prevention measures.").

2. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (discussing the classification of an act of Congress as penal or regulatory, and the constitutional implications of such classification).

3. *See, e.g.*, Weaver v. Graham, 450 U.S. 24, 28-29 (1981) (stating that individuals must receive fair warning of the effects of a legislative act).

4. *See, e.g., id.* at 36-39 (holding the Ex Post Facto Clause applicable and voiding the statute as applied to petitioner).

be made knowingly, voluntarily, and intelligently,[5] guilty pleas may be held invalid if the sanctions are deemed criminal penalties but the defendant was not advised of them at the time of pleading.[6]

In principle, collateral sanctions can serve legitimate civil purposes. Few parents would want those convicted of serious violence against a child to be able to obtain employment giving them access to small children; similarly, it makes perfect sense to keep firearms out of the hands of those who engage in unlawful, violent activities.[7] In neither case is the motive punishment, but rather the protection of public safety.[8] Yet, it is not always clear that the primary legislative motivation for a collateral sanction is civil rather than punitive, nor is it always a simple matter to discern the primary motivation. This is particularly true because traditional punishments such as imprisonment and execution are designed in part for the non-punitive purpose of protecting the public, similar to civil regulations. Some consequences traditionally regarded as "civil," such as loss of benefits following conviction of a crime, can be imposed for the purpose of punishment.[9]

This Article proposes that the single most important piece of evidence in the determination of whether a sanction is criminal or civil is whether the sanction is imposed based on conviction or conduct.[10] Assume, for example, a statute prohibits those who have performed an unlawful medical procedure from holding a license as a physician. If the disability is imposed on all who engage in the conduct, whether or not a criminal conviction, civil judgment, administrative finding, or admission by the suspect proves it, there is strong evidence that the punishment has a civil, regulatory purpose. Despite arguments as to the statute's substance, a person denied an opportunity on the basis of conduct (independent of how that conduct is proven) cannot claim that the denial of the license

5. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (holding the voluntary, knowing, and intelligent standard applicable to guilty pleas).

6. *See, e.g.*, United States v. Blackwell, 199 F.3d 623, 625-26 (2d Cir. 1999); United States v. Gigot, 147 F.3d 1193, 1198 (10th Cir. 1998).

7. *See* 18 U.S.C. § 922(g)(1) (2003).

8. *See* Brady Handgun Violence Prevention Act, H.R. No. 103-344, at 1989-90 (1993).

9. *See* Trop v. Dulles, 356 U.S. 86, 124 (1958) (Frankfurter, J., dissenting) (discussing denationalization as similar to the loss of civil rights).

10. The Supreme Court has devoted a great deal of attention to the task of determining whether a sanction is civil or criminal, which will not be recapitulated here. *See generally* Mary M. 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, 1357-64 (1991); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 692-707 (1999).

constitutes further punishment. If, however, the statute allows those who have engaged in the conduct, but not been convicted to hold a license, it becomes more probable that the legislature did not regard the underlying conduct as sufficient to warrant disqualification. Instead, conviction is the determinative factor. In such cases, it is difficult to regard the disability as anything other than part of the criminal justice process.

This Article explores the problem by examining the 1898 United States Supreme Court case of *Hawker v. New York*.[11] *Hawker* was the first major case dealing with the distinction between disadvantage based on conduct or conviction, and it remains the most important doctrinal support for the broad authority of states to impose disabilities based on conviction that are not imposed on those who engage in the underlying conduct.[12] This Article also examines whether there are civil, regulatory justifications for imposing collateral sanctions exclusively on those convicted of crimes, rather than those who are found to have engaged in the conduct.[13] The Article concludes that this explanation fails to account for the actual characteristics of typical administrative systems.[14]

I. *HAWKER V. NEW YORK*

A. The *Hawker* Decision

Hawker v. New York is the seminal case for the idea that sanctions imposed exclusively on those convicted of crimes can nevertheless be "civil."[15] *Hawker*'s importance was recognized at the time it was decided; it was immediately the subject of articles and casenotes in the *Green Bag*, and the Yale, Harvard, and Pennsylvania Law Reviews,[16] and since has been cited frequently by commentators.[17] *Hawker* has been relied upon numerous times by

11. 170 U.S. 189 (1898), *aff'g*, 46 N.E. 607 (N.Y. 1897), *rev'g*, 43 N.Y.S. 516 (App. Div. 1897).

12. *See infra* text accompanying notes 15-48.

13. *See infra* notes 19-85 and accompanying text.

14. *See infra* notes 80-96.

15. Hawker, 170 U.S. at 189.

16. *See* Irving Browne, *The Lawyer's Easy Chair*, 10 GREEN BAG 495, 497 (1898) (discussing the Court of Appeals decision); Ardemus Stewart, *Progress of the Law*, 45 AM. L. REV. 253, 256 (1897) (discussing the appellate division opinion); Comment, 7 YALE L.J. 405, 405-06 (1898); Recent Cases, 12 HARV. L. REV. 214 (1898).

17. *See, e.g.*, Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 645 (1966) ("[disqualifying] laws have been held to be constitutionally permissible when enacted as a means of regulating, in the public interest, an activity which is properly subject to legislative authority . . . .") (citing *Hawker*, 170 U.S. at 189; Edward S. Corwin, *Social Insurance and Constitutional Lim-*

the United States Supreme Court in support of the proposition that felons can be constitutionality disqualified from various programs.[18]

Benjamin Hawker was convicted of felony abortion in 1878.[19] Decades later, the New York Legislature passed a law providing that anyone practicing medicine after conviction of a felony was guilty of a misdemeanor.[20] Hawker was subsequently charged with practicing medicine after having been convicted of a felony.[21] Hawker argued that increasing the penalty for his 1878 conviction by criminalizing his practice of medicine, after his sentence had been fully served, violated the Ex Post Facto Clause of the United States Constitution.[22] The Appellate Division of the New York Supreme Court agreed, but the New York Court of Appeals and United States Supreme Court did not.[23]

Several close votes in the ongoing litigation suggest the difficulty of the issue; there were significant dissenting opinions at every stage of the appeal. Hawker had been convicted in the Court of

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itations, 26 YALE L.J. 431, 435-36 (1917); Francis D. Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 VAND. L. REV. 603, 612 (1951) ("All these statutes rest on the argument of *Hawker v. New York*.")); Comments on Recent Cases, 27 IOWA L. REV. 304, 309 n.34 (1942); Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 415 (1967) ("Any contention that it is unconstitutional to exclude ex-felons from certain professions must deal at the outset with the case of *Hawker v. New York*.") (citation omitted); Note, *The Constitutional Prohibition of Bills of Attainder: A Waning Guaranty of Judicial Trial*, 63 YALE L.J. 844, 853 (1953) [hereinafter *Waning Guaranty*] ("The theory that a statute imposing unavoidable disqualifications was necessarily a bill of attainder collapsed with *Hawker v. New York*.").

18. *See, e.g.*, Lewis v. United States, 445 U.S. 55, 66 (1980) (holding that felons may not possess firearms); De Veau v. Braisted, 363 U.S. 144, 159 (1960) (plurality opinion) ("State provisions disqualifying convicted felons from certain employments important to the public interest also have a long history.") (citing *Hawker*, 170 U.S. at 189); Flemming v. Nestor, 363 U.S. 603, 616 (1960) ("the setting by a State of qualifications for the practice of medicine, . . . and its decision to bar from practice persons who commit or have committed a felony is taken as evidencing an intent to exercise . . . regulatory power, and not a purpose to add to the punishment of ex-felons") (citing *Hawker*, 170 U.S. at 189); Mahler v. Eby, 264 U.S. 32, 40 (1924) (noting that in *Hawker* "the validity of a law of New York which forbade, on penalty, any one who had been convicted of a felony from practicing medicine, was upheld as a reasonable exercise of the police power, and not an increase of the punishment for the felony."); Barsky v. Bd. of Regents, 111 N.E.2d 222, 226 (N.Y. 1953) (citing *Hawker*, 170 U.S. at 189), *reh'g denied*, 112 N.E.2d 733 (1953), *aff'd*, 347 U.S. 442 (1954).

19. *Hawker*, 170 U.S. at 189-90; *see* Hawker v. People, 75 N.Y. 487, 488 (1878) (affirming Hawker's conviction for criminal abortion).

20. N.Y. PUB. HEALTH LAW § 153, 1893 N.Y. Laws ch. 661, § 153, *amended by* 1895 N.Y. Laws ch. 398 (repealed).

21. People v. Hawker, 152 N.Y. 234, 238 (1897), *aff'd*, 170 U.S. at 189.

22. *Hawker*, 170 U.S. at 189.

23. *Hawker*, 152 N.Y. at 234.

General Sessions, New York County, after a trial on stipulated facts.[24] The Appellate Division voted four to one to reverse.[25] Three of the seven judges of the Court of Appeals voted to reverse the Appellate Division and reinstate the conviction.[26] Two judges dissented, voting to affirm dismissal.[27] The controlling votes were cast by two judges who concurred in reversing the Appellate Division decision on a very narrow basis.[28] Their vote to reinstate the conviction was "solely on the ground that the record contains no evidence that the defendant at the time of his conviction, or at any other time, was a physician."[29] The concurring judges had a point; a defendant could hardly complain that he was wrongfully denied the right to practice a profession of which he was not, in fact, a member.[30] Thus, the two dissenters and two concurrers constituted a majority of the Court of Appeals in support of the proposition that the law would have been ex post facto as applied to someone who otherwise would have enjoyed the right to practice medicine.[31]

The United States Supreme Court found the case challenging, as it was reargued before it was ultimately decided.[32] The ultimate decision was split—Justice Brewer wrote for himself and Justices Brown, Fuller, Gray, Shiras, and White, but Justice Harlan dissented, joined by Justices McKenna and Peckham.[33] Thus, of the twenty-two judges participating in the case as it made its way through the system, eleven rejected Hawker's argument,[34] but eleven agreed with it.

While the Supreme Court majority represented the final decision on the issue, Justice Brewer's opinion expressed the arguments on both sides so evenhandedly that it suggests indecision:

> On the one hand, it is said that defendant was tried, convicted, and sentenced for a criminal offense. He suffered the punish-

24. People v. Hawker, 43 N.Y.S. 516 (App. Div. 1897).
25. *Hawker*, 152 N.Y. at 243.
26. *Id.*
27. *Id.* at 243-44.
28. *See id.* at 237.
29. *Id.*
30. *Cf.* Spears v. Ellis, 386 F. Supp. 653 (S.D. Miss. 1974) (three judge court) (layperson has no right to perform abortions, notwithstanding *Roe v. Wade*, 410 U.S. 113 (1973)), *aff'd mem.*, 432 U.S. 802 (1975).
31. *Hawker*, 152 N.Y. at 237.
32. *See* Supplemental Brief for Defendant at 32, Hawker v. New York, 170 U.S. 189 (1898) (No. 415) ("The Court itself, of its own motion, has ordered a re-argument.").
33. *Hawker*, 170 U.S. at 200.
34. Including the trial judge who overruled a demurrer. *See* People v. Hawker, 43 N.Y.S. 516, 516 (App. Div. 1897).

> ment pronounced. The legislature has no power to thereafter add to that punishment. The right to practice medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and, after the defendant has once fully atoned for his offense, a statute imposing this additional penalty is one simply increasing the punishment for the offense, and is ex post facto.[35]

Thus, the Supreme Court recognized the constitutional principle that the penalty for an offense may not be increased after the fact, and that denying the right to practice medicine solely because of a conviction looked like punishment.[36] It also looked like regulation:

> On the other, it is insisted that, within the acknowledged reach of the police power, a State may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the State is not possessed of sufficient good character, it can deny to such a one the right to practise [sic] medicine, and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law and of the absence of the requisite good character.[37]

This argument is correct as well. It seems obvious that states can regulate the practice of medicine and exclude those of bad moral character from positions of trust and responsibility.

The majority characterized its decision as requiring a choice between these two principles—punishment or regulation—and chose the latter.[38] "The physician is one whose relations to life and health are of the most intimate character. It is fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies."[39] The Court concluded that criminal behavior was related to reliability, and upheld Hawker's conviction:

> 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 . . . . So, if the legislature enacts that one who has been convicted of a crime shall no longer engage in the practice

35. *Hawker*, 170 U.S. at 191.
36. *Id.*
37. *Id.*
38. *Id.* at 192.
39. *Id.* at 194.

> 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 its citizens to his care.[40]

Some commentators have justified *Hawker* in part on the ground that performing an abortion was a justifiable basis to deny or revoke a doctor's license.[41] Of course, *Hawker* was decided decades before *Roe v. Wade*.[42] Although a doctor's performing an abortion could not now support professional discipline in and of itself,[43] surely the Court was correct that commission of illegal acts in the course of professional practice is at least presumptive evidence of unfitness. One commentator praised *Hawker*, suggesting that its result rested on practical necessity if the public were to be protected:

> If, upon all the facts, it appears that the aim was public protection and not individual punishment, it is clear that the statute cannot be within the prohibition of the Constitution, although individuals are hurt. Such hurting is only an incident to the purpose of the statute and is not, properly speaking, a punishment at all. Any other theory would tie the hands of the legislative bodies so that the welfare of the many and the worthy might, in many cases, be sacrificed to the interests of the few and the unworthy. Obviously the Constitution never intended such a result.[44]

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40. *Id.* at 196.

41. *See* Note, *Retroactivity and First Amendment Rights*, 110 U. PA. L. REV. 394, 405 (1962) ("Few would find it capricious for the medical profession to reject an applicant who has previously performed abortions—even if this standard for disqualification was established after the acts had been done."); Notes and Comments, 10 OKLA. L. REV. 441, 445 (1957) ("Here, it is to be noted that the crime for which the physician was convicted does indicate qualities which could make him unfit to practice medicine.").

42. 410 U.S. 113 (1973).

43. *See* Kennan v. Warren, 328 F. Supp. 525, 532 (W.D. Wis. 1971) (restraining civil injunctive and disciplinary action against abortion provider), *aff'd mem.*, 404 U.S. 1055 (1972); Kennan v. Nichol, 326 F. Supp. 613, 616 (W.D. Wis. 1971) (restraining criminal prosecution against abortion provider); *cf.* United States *ex rel.* Williams v. Preiser, 497 F.2d 337, 339 (2d Cir. 1974) (granting habeas corpus to doctor convicted of abortion prior to *Roe*). Abortion doctors continue to be disciplined for misconduct. *See, e.g.*, Nehorayoff v. Mills, 746 N.E.2d 169 (N.Y. 2001) (upholding refusal to reinstate doctor whose license had been revoked for negligent abortions).

44. Morris Putnam Stevens, *State Police Power vs. Federal Constitution: The Distinction Between a Legitimate Moral Test Imposed Upon Physicians to Protect the Public and an Ex Post Facto Punishment*, 3 UNIV. L. REV. 228, 229 (1897).

Similarly, Professor Breck McAllister wrote in the *California Law Review* that the Court was faced with nearly irreconcilable interests, and one would have to be sacrificed:

> We may safely conclude that the statute does impose a punishment and is brought within the purview of the ex post facto clause. On the other hand, the court has found that the statute exacts a reasonable requirement. It falls within the police power of the state. The court is confronted with the proposition that to deny the statute retroactive operation may well defeat its manifest purpose. The choice of alternatives is a problem of judgment. The court has held that the claim of the individual must yield to the interest of the state.[45]

These characterizations of *Hawker* do not give it enough credit. The alternatives faced by the New York authorities were not limited to the extremes of exclusive reliance on conviction, or imposing no regulation at all on dangerous past behavior. The third alternative was to impose discipline based on past conduct, no matter how proved, and *Hawker* rested on the assumption that the New York statute operated in this manner.[46]

The key for the majority was that the disability was based on conduct, rather than conviction:

> The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the state, leaving the question of violation to be determined according to the ordinary rules of evidence; would it not seem strange to hold that that which conclusively established the fact effectually relieved from the consequences of such violation?[47]

By underscoring the idea that the rationale for regulatory action is conduct rather than conviction, the Supreme Court accommodated the two fundamental principles it identified.[48] To conclude, based on conduct, that an individual has bad moral character and thereby deny them a privilege which can be restricted to those with good character is not criminal "punishment." Likewise, to give a valid criminal judgment preclusive effect by treating it as establishing the

45. Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CAL. L. REV. 269, 282 (1927).

46. Hawker v. New York, 170 U.S. 189, 195 (1898).

47. *Id.* at 196-97.

48. *Id.* at 196.

occurrence of underlying conduct is not "punishment." Although the doctor in such a case is no better off than if the issue had been proven through a civil judgment, she is also no worse off.[49] To this extent, *Hawker* represents a sensible reconciliation of the prohibition on ex post facto legislation, and the acknowledged legitimacy of using prior adjudications to establish facts in administrative proceedings.

The distinction between using a criminal conviction as proof of underlying facts and as a basis for punishment is subtle. Conduct constituting crime, however, can be established in many non-criminal proceedings. In *Hawker*, the issue was the commission of an unlawful abortion, proof of which could be established in a malpractice case, for example.[50] Findings of rape or sexual assault can result from tort or civil rights actions;[51] drug use can be established in forfeiture proceedings or suits to terminate parental rights.[52] Some collateral consequences may be established through admission by the individuals involved.[53] Many administrative agencies have their own factfinding capacity through administrative hearings, but given the variety of civil judgments, even those agencies that do not have their own adjudicators are by no means restricted to relying on criminal judgments.

Courts have continued to suggest that *Hawker*'s use of the conviction for evidentiary purposes is constitutionally significant.[54]

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49. Professor David Shapiro has argued, however, that guilty pleas should not have preclusive effect in civil cases. *See* David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 30-41 (1984).

50. *See, e.g.*, Aetna Cas. & Surety Co. v. Yeatts, 99 F.2d 665, 668 (4th Cir. 1938); Wolcott v. Gaines, 169 S.E.2d 165, 166 (Ga. 1969); Richey v. Darling, 331 P.2d 281 (Kan. 1958); Bauer v. Bowen, 164 A.2d 357 (N.J. Super. 1960); Henrie v. Griffith, 395 P.2d 809 (Okla. 1964).

51. *See, e.g.*, Griffin v. City of Opa-Locka, 261 F.3d 1295 (11th Cir. 2001) (rape claim brought under Section 1983); St. John v. United States, 240 F.3d 671 (8th Cir. 2001) (sexual assault claim brought in Federal Tort Claims Act proceeding); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (rape, assault, wrongful death claims raised in Alien Tort Claims Act proceeding); M.L.E. v. K.B., 794 So. 2d 1143 (Ala. Civ. App. 2000) (per curiam) (rape and sexual assault in tort case); Herzfeld v. Herzfeld, 781 So. 2d 1070 (Fla. 2001) (sexual abuse claim in tort case); LK v. Reed, 631 So. 2d 604 (La. App. 1994) (sexual assault claim in tort case).

52. *See, e.g.*, *In re* Brook P., 634 N.W.2d 290 (Neb. 2001) (finding of drug use in parental rights termination action); *see also* United States v. 16328 S. 43rd E. Ave., 275 F.3d 1281 (10th Cir. 2002); *In re* Anthony M., 773 A.2d 878 (R.I. 2001).

53. *See, e.g.*, Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(2)(A)(i) (2003) (declaring any noncitizen "convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of [particular crimes] ineligible for visas or admission.").

54. *See, e.g.*, Hill v. Gill, 703 F. Supp. 1034, 1038 (D.R.I. 1989).

Five decades after *Hawker*, during the McCarthy era, New York's medical discipline system was again invoked to sanction those who acted inconsistently with the values of the day.[55] Doctors who had participated in the Spanish Civil War and the Joint Anti-Fascist Refugee Committee were called before the House Un-American Activities Committee to testify about their conduct.[56] On advice of counsel, they refused to produce documents, and were ultimately convicted of contempt of Congress, a misdemeanor.[57] Convicted doctors were then subjected to the medical discipline process.[58] Relying on *Hawker*, the New York Court of Appeals upheld the legislature's decision to discipline any doctor convicted of a crime.[59] The Supreme Court affirmed, finding it significant that disposition in cases of misdemeanors was on a case-by-case basis:

> 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 conviction of any crime a violation of its professional medical standards, and then [disposing of the charges based on individual hearings and appeals].[60]

In 1997, the Supreme Court upheld a Kansas statute civilly committing certain sexual offenders against ex post facto and double jeopardy challenges, in part on the grounds that a conviction was

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55. *See* Barsky v. Bd. of Regents, 111 N.E.2d 222 (N.Y. 1953), *reh'g denied*, 112 N.E.2d 773 (N.Y. 1953), *aff'd*, 347 U.S. 442 (1954).

56. *Barsky*, 347 U.S. at 444-46; *Barsky*, 111 N.E.2d at 224.

57. *Barsky*, 347 U.S. at 444-45; *Barsky*, 111 N.E.2d at 224.

58. *Barsky*, 347 U.S. at 445; *Barsky*, 111 N.E.2d at 224.

59. *Barsky*, 111 N.E.2d at 226. Judge Fuld dissented, pointing out that violation of the segregation laws by a physician would require discipline. *Id.* at 230 n.2 (Fuld, J., dissenting).

60. *Barsky*, 347 U.S. at 452. As to the issue of automatic disqualification, the Court was slightly equivocal, notwithstanding *Hawker*:

> 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 in a court of competent jurisdiction either within or without the State of New York. 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 a fair hearing, whether the convictions, if any, were of such a date and nature as to justify denial of admission to practice in the light of all material circumstances before the board.

Id. at 451.

used exclusively for evidentiary purposes, and the class of those eligible was not limited to those convicted of crimes:[61]

> As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness .... In addition, the Kansas Act does not make a criminal conviction a prerequisite for commitment—persons absolved of criminal responsibility may nonetheless be subject to confinement under the Act. —To the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes.[62]

The *Hawker* Court, then, offered a powerful solution. The doctor's[63] disqualification was allowed, affirming the substantial government interest in regulating the profession. Yet, the disqualification was achieved using the conviction in a non-punitive way, simply as a judgment giving rise to collateral estoppel, and thereby establishing the underlying facts.[64] Consistent with the forward-looking, regulatory justification for the disqualification, it was the conduct, not the conviction, which was significant.[65] Therefore, the system satisfied the restrictions of the ex post facto clause.

B. The Transformation of *Hawker*

The defect in *Hawker's* answer was that it rested on a hypothesized regulatory scheme which did not exist. Noting that "[w]e must look at the substance and not the form," the Court articulated the following premise:

> the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the state should be deemed of such bad character as to be unfit to practise [sic] medicine, and that the record of a trial and conviction should be conclusive evidence of such violation.[66]

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61. Kansas v. Hendricks, 521 U.S. 346 (1997).

62. *Id.* at 361, 371.

63. Or, as may have been the case, person pretending to be a doctor.

64. *Hendricks*, 521 U.S. at 369-70.

65. *Id.* at 357-58.

66. Hawker v. New York, 170 U.S. 189, 196 (1898).

The felon prohibition was then a piece of a "good moral character" test.[67] There was a separate statute, however, prohibiting those without good moral character from receiving licenses,[68] so the felon prohibition seems to serve a purpose independent of the character examination.

More fundamentally, there was simply no statute, practice, or policy that "one who had violated the criminal laws of the state" was not permitted to practice medicine.[69] As one commentator observed, "[p]ast acts as such were irrelevant; significance was attached only to judicial convictions."[70] Concretely, the licensing board was not required to deny a license to someone who had committed abortion or some other felony, even if the felony was proven by a civil judgment, admission, its own administrative findings, or other legally sufficient means.[71] The disciplinary authorities enjoyed the discretion to sanction those proven by civil or administrative findings to have done wrong, but if they did so it would be under the distinct "good moral character" inquiry.[72]

In practice, *Hawker* unraveled. New York medical authorities regularly punished physicians found in administrative hearings to have committed abortions with temporary suspension,[73] when convicted doctors' licenses were automatically revoked.[74] In many

67. *See id.* at 195-96.

68. *See* Main Brief for Defendant in Error at 15-17, *Hawker* (No. 415).

69. *Hawker*, 170 U.S. at 196.

70. *See Waning Guaranty*, *supra* note 17, at 854.

71. *Hawker*, 170 U.S. at 196.

72. *See Waning Guaranty*, *supra* note 17, at 853.

73. *See, e.g.*, Friedel v. Bd. of Regents, 73 N.E.2d 545 (N.Y. 1947) (six month license suspension); Weinstein v. Bd. of Regents, 56 N.E.2d 104 (N.Y. 1944) (two year suspension); Neshamkin v. Bd. of Regents, 23 N.E.2d 16 (N.Y. 1939); Sos v. Bd. of Regents, 272 N.Y.S.2d 87 (App. Div. 1966) (six month suspension; set aside on other grounds), *aff'd*, 228 N.E.2d 814 (N.Y. 1967); Genova v. Bd. of Regents, 74 N.Y.S.2d 729 (App. Div. 1947) (per curiam) (one year suspension imposed based on hearing following acquittal on criminal charges); Newman v. Bd. of Regents, 61 N.Y.S.2d 841 (App. Div. 1946) (per curiam) (two year suspension based on admission); Ganz v. Bd. of Regents, 47 N.Y.S.2d 863 (App. Div. 1944) (per curiam) (one year suspension); *In re* Neshamkin, 7 N.Y.S.2d 483 (App. Div. 1938) (per curiam) (one year suspension), *aff'd per curiam sub nom.*, Neshamkin v. Bd. of Regents, 23 N.E.2d 16 (1939); Reiner v. Bd. of Regents, 6 N.Y.S.2d 356 (App. Div. 1938) (one year suspension).

74. Robinson v. Bd. of Regents, 164 N.Y.S.2d 863 (App. Div. 1957) (felony abortion). Cases involving other felony convictions also discuss automatic revocation. *See, e.g.*, Tonis v. Bd. of Regents, 67 N.E.2d 245, 246 (N.Y. 1946) (holding that because crime was a misdemeanor, not a felony, license could not be "automatically revoked without a hearing before the Medical Grievance Committee."); Erdman v. Bd. of Regents, 261 N.Y.S.2d 634, 635 (App. Div. 1965) (per curiam) ("Although the crime constituted a felony under the Federal statute, it would have been a misdemeanor under New York law . . . and must be treated as such for purposes of this

other instances, medical authorities suspended doctors based on administrative findings of acts which could readily have been charged as criminal felonies.[75] Actual practice flatly contradicted Hawker's assertion that the statute merely disqualified from licensure "one who had violated the criminal laws of the state," and that the conviction was nothing more than a method of proof.[76] Quite clearly, committing a felony, but not being convicted of it, was not regarded as conclusive evidence of a lack of moral character rendering the individual unfit to hold a license as a doctor.[77]

It is insufficient to suggest that this differential treatment simply represents a divergence of opinion between the legislature and the medical authorities about the nature of good moral character, with the doctors taking a more lenient view. The legislature specifically authorized suspensions or discipline more lenient than license revocation based on an administrative finding of criminal abortion.[78] Accordingly, the state law contemplated systematically harsher treatment for the same misconduct when proven through the criminal process, with case by case determinations and thus the possibility of lighter sanctions when misconduct was shown in a noncriminal forum.[79]

In the context of this administrative regime, *Hawker*'s contention that the case turned on conduct rather than conviction ultimately failed:[80] if Doctors Jones and Smith jointly perform an unlawful abortion, and Dr. Jones turns state's evidence in a successful prosecution of Dr. Smith, Dr. Smith's license is automatically lost under the statute, and Dr. Jones's is not, even though they have engaged in precisely the same conduct. The only difference is

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disciplinary proceeding. . . . [R]evocation of the practitioner's license, or punishment in lesser degree, is permissive, for conviction of misdemeanor."); Lindenfeld v. Bd. of Regents, 78 N.Y.S.2d 630 (App. Div. 1948) (per curiam) (doctor's license was summarily revoked, court held, "revocation was improper because the crime in this State was a misdemeanor and not a felony."); People v. Fisher, 261 N.Y.S. 390 (Gen. Term. 1932).

75. *See, e.g.*, D'Alois v. Allen, 297 N.Y.S.2d 826 (App. Div. 1969) (per curiam) (suspension for filing insurance claims for services not actually rendered), *appeal dismissed*, 252 N.E.2d 133 (N.Y. 1969); Frank v. Bd. of Regents, 264 N.Y.S.2d 413 (App. Div. 1965) (per curiam); Siegal v. Bd. of Regents, 59 N.Y.S.2d 454 (App. Div. 1946) (per curiam) (suspension for issuing fraudulent bills).

76. Hawker v. New York, 170 U.S. 189, 191 (1898).

77. *See Waning Guaranty*, *supra* note 17, at 855.

78. N.Y. EDUC. LAW § 1264(2), *renumbered* N.Y. EDUC. LAW § 6514(2), 1947 N.Y. Laws c. 820, § 2, 1910 N.Y. Laws ch. 140, *amended and renumbered* N.Y. EDUC. LAW § 6509, 1971 N.Y. Laws c. 987, § 1; *see also* N.Y. PUB. HEALTH LAW § 174-a.

79. *Hawker*, 170 U.S. at 204.

80. *Id.* at 205.

the existence or nonexistence of a criminal conviction. Accordingly, the key to disqualification is conviction rather than conduct. Yet, from the perspective of protecting the public based on the risk demonstrated by past misconduct, the regulatory interest in disciplining both doctors is identical.[81] Indeed, depending on additional facts, the less dangerous doctor could be disciplined, while the more dangerous doctor is not.

While collateral sanctions are imposed in a variety of ways, the actual New York disciplinary system triumphed, rather than the imagined one praised in *Hawker*.[82] Many statutes impose collateral sanctions on those convicted of crime without imposing those sanctions on those who engage in identical conduct but are not convicted of it. Examples include the inability to possess firearms by those convicted of felonies,[83] the loss of parental rights for conviction of certain violent crimes,[84] and the loss of government benefits for conviction of drug crimes.[85]

II. SPECIAL RELIANCE ON CONVICTION: DUE PROCESS

Hawker suggested, for civil purposes, that conduct rather than conviction was critical.[86] Accordingly, it made no effort to justify reliance on conviction independently of its evidentiary value in proving conduct.[87] Even so, it is possible that there are reasons, apart from a desire to impose additional punishment, for administrators to rely upon criminal convictions but not other forms of evidence of misconduct.

One justifiable basis for relying on convictions might be that they are high quality fact findings—legislators might restrict administrative action to conviction in recognition of the special processes which must occur before criminal conviction.[88] In criminal trials, unlike most administrative hearings, defendants have constitutional guarantees of the assistance by counsel, trial by jury, the presumption of innocence, and a stringent burden of proof.

81. *See supra* note 44 and accompanying text.

82. *See supra* notes 73-77 and accompanying text.

83. *See* 18 U.S.C. § 922(g)(1) (2002).

84. *See, e.g.*, 42 U.S.C. § 5106a(b)(2)(A)(xii) (2002) (efforts to reunify parents and children in foster care not required of parents committed certain offenses).

85. *See, e.g.*, 21 U.S.C. § 362-A(1)(A) (1999); United States v. Littlejohn, 224 F.3d 960, 966 (9th Cir. 2000).

86. *See* Hawker v. New York, 170 U.S. 189, 196 (1898) ("The vital matter is not the conviction, but the violation of law.").

87. *Id.*

88. *See supra* notes 90-96 and accompanying text.

Perhaps the New York legislature provided for mandatory license revocation upon conviction for abortion, but discretionary sanctions upon a finding based on a less elaborate proceeding, because the legislature was not entirely confident in taking away someone's livelihood based on a comparatively informal administrative process.

The problem with this explanation is that there is little evidence that either the legislature or medical authorities believe criminal procedures are a necessary predicate to disciplinary action. In a case involving a Missouri doctor, the United States Supreme Court upheld an administrative decision revoking the doctor's license after a finding that the doctor had performed an illegal abortion.[89] New York administrative authorities frequently revoked doctors' licenses based on administrative findings that they had performed abortions.[90] Of course, the administrative findings occurred after hearings which were not based on the formalities surrounding a criminal trial.[91] By the same token, New York authorities have declined to revoke licenses even where the facts bore the special reliability of having been established through criminal convictions in cases when the crimes involved did not require automatic revocation.[92] Moreover, medical authorities give preclusive effect to administrative findings by other bodies.[93] As early as 1833, New

89. Missouri *ex rel.* Hurwitz v. North, 271 U.S. 40, 42-43 (1926).

90. *See, e.g.*, Epstein v. Bd. of Regents, 65 N.E.2d 756 (N.Y. 1946); Mascitelli v. Bd. of Regents, 299 N.Y.S.2d 1002 (App. Div. 1969) (per curiam); *In re* Jones, 168 N.Y.S.2d 42 (App. Div. 1957); *In re* Herschman, 56 N.Y.S.2d 241 (App. Div. 1945) (per curiam); *In re* Kasha, 36 N.Y.S.2d 19 (App. Div. 1942) (per curiam), *aff'd*, 48 N.E.2d 712 (N.Y. 1943) (per curiam); Kahn v. Bd. of Regents, 4 N.Y.S.2d 233 (App. Div. 1938) (per curiam), *aff'd*, 23 N.E.2d 16 (N.Y. 1939) (per curiam).

91. Stammer v. Bd. of Regents, 39 N.E.2d 913, 915-16 (N.Y. 1942).

92. *See* Durante v. Bd. of Regents, 416 N.Y.S.2d 401 (App. Div. 1979) (suspension of nurse for federal drug convictions); Zimmerman v. Bd. of Regents, 294 N.Y.S.2d 435 (App. Div. 1968) (suspension based on guilty plea to assault in satisfaction of indictment charging abortion); *but see Mascitelli*, 299 N.Y.S.2d at 1002 (revocation based on conviction of assault; underlying facts involved abortion); Scardaccione v. Allen, 280 N.Y.S.2d 716 (App. Div. 1967) (revoking license based on misdemeanor conviction for conspiracy to commit abortion); Ciofalo v. Bd. of Regents, 258 N.Y.S.2d 881 (App. Div. 1965) (per curiam) (upholding revocation based on conviction of misdemeanor in satisfaction of abortion charge); Lindenfeld v. Bd. of Regents, 78 N.Y.S.2d 630 (App. Div. 1948) (per curiam) (error to revoke license automatically based on conviction of misdemeanor, but sustaining revocation based on underlying facts).

93. *See, e.g.*, Haran v. Bd. of Registration in Med., 500 N.E.2d 268 (Mass. 1986) (upholding imposition of discipline in Massachusetts based on finding of misconduct by New York authorities); Camperlengo v. Barell, 585 N.E.2d 816 (N.Y. 1991) (upholding findings in prior, unrelated administrative hearing could be used to suspend physician's license).

York courts held that an acquittal of an abortion charge would not preclude administrative discipline,[94] and they continue to deny preclusive effect to acquittal on criminal charges.[95] Under current law, the burden of proof in a medical discipline case is a preponderance of the evidence.[96]

In a variety of ways, it is clear that New York's physician discipline system has operated as a traditional administrative process. Yet, the legislature never stepped in to limit its authority to impose the ultimate sanction of revocation, nor did they impose procedural or substantive requirements approaching those of the criminal system. Accordingly, history refutes the argument that the legislature has determined that only judgments with a level of reliability approaching criminal convictions will justify imposing severe administrative sanctions. Therefore, the special status given to convictions cannot be explained on that basis—it is not that the legislature does not want to impose sanctions unless the process has the characteristics leading to conviction, it is that they want to impose sanctions according to their sole discretion.

Another justification for relying on conviction is administrative ease. It is fast and simple for an administrator to impose discipline as a ministerial act—a conviction for felony determines both liability and the extent of punishment. The legislature's unwillingness to fund case-by-case determinations cannot, though, be the explanation for a rule such as this in a regime that already provides for individualized hearings and a set of adjudicators. Moreover, if the legislature were interested in simplifying punishment administration, they could have established penalties instead of leaving them to the administrators. The legislature's reluctance to do so suggests that, as a general matter, they do not consider case-by-case determination to be too costly or otherwise undesirable.

III. SPECIAL RELIANCE ON CONVICTION: PROSECUTORIAL DISCRETION

An important characteristic of convictions is that they generally result from deliberate decisions—prosecutions are screened before

94. *In re* Smith, 10 Wend. 449 (N.Y. Sup. Ct. 1833).

95. Strizak v. Bd. of Regents, 289 N.Y.S.2d 481 (App. Div. 1968); *see, e.g.*, Younge v. State Bd. of Registration for Healing Arts, 451 S.W.2d 346 (Mo. 1969) (holding acquittal on criminal abortion charges does not preclude discipline).

96. Giffone v. De Buono, 693 N.Y.S.2d 691 (App. Div. 1999).

they proceed.[97] Therefore, it can be assumed that the group of individuals prosecuted for crime are, for the most part, more serious offenders by some measure than those who violated the law but were not prosecuted. It is reasonable to assume, for example, that of those who come to the attention of the authorities, more drivers who exceed the speed limit by thirty miles will be prosecuted than those who drive three miles per hour over the speed limit. A legislature might choose to impose civil consequences based on criminal conviction, as prosecutors' decisions to pursue criminal charges is a satisfactory proxy of identifying the individuals most at risk of committing the harm the collateral sanction is designed to prevent. Prosecutors with limited resources are likely to select the most severe violations of law, and supported by the strongest evidence. One might suppose that potential prosecutions in gray areas, legally or factually, would be passed over in favor of cases more likely to result in conviction.

Even if the process of selecting cases for prosecution works extremely well, and those prosecuted are those most worthy of being prosecuted, it is not necessarily the case that the individuals most worthy of professional discipline will be charged with a crime.[98] Courts have made clear that the discipline system and the criminal justice system serve distinct purposes. "The purpose of professional discipline is not punishment . . . but the protection of the public against dishonest and incompetent practitioners."[99]

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97. *See generally* FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 3 (1969); Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 518-22 (1993); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 263-64 (2001).

98. For example, a physician whose performance is impaired because of a neurological disorder, leading to injury or death to a patient, might present a relatively weak case for criminal prosecution if the doctor was acting in good faith, but a very strong case for professional discipline.

99. *In re* Rubinstein, 506 N.Y.S.2d 441, 442 (App. Div. 1986) (per curiam) (citing Levy v. Ass'n of the Bar, 333 N.E.2d 350 (N.Y. 1975)); *In re* Rotwein, 247 N.Y.S.2d 775 (App. Div. 1964); *see* Griffiths v. Super. Ct., 117 Cal. Rptr. 2d 445, 449 (Ct. App. 2002); Arthurs v. Bd. of Registration in Med., 418 N.E.2d 1236, 1248 (Mass. 1981) ("[T]he purpose of discipline is not retribution but the protection of the public."); Gaddy v. State Bd. of Registration for Healing Arts, 397 S.W.2d 347, 353 (Mo. Ct. App. 1965) ("[T]he primary purpose of a proceeding to revoke a physician's license is to protect and safeguard the public health, not to punish the physician . . . ."); Sokol v. N.Y. State Dep't of Health, 636 N.Y.S.2d 450 (App. Div. 1996) (holding physician disciplinary system designed to protect the public), *appeal dismissed*, 666 N.E.2d 1060 (N.Y. 1996); Haley v. Med. Disciplinary Bd., 818 P.2d 1062, 1074 (Wash. 1991) (noting that "the purposes of professional discipline [are] to protect the public and the profession's standing in the eyes of the public.").

One limit to relying on prosecutorial discretion as a selector for professional discipline is that the group of those who are professionally unfit extends well beyond those convicted of crimes. Even if all felons are unfit to be doctors, it is not true that all of those unfit to be doctors are felons.[100] Accordingly, in many instances where individual character and fitness is significant, the administrative regime must have the capability to engage in a case by case evaluation. If a system of individualized hearings is in place, it is hard to understand why a categorical approach should be employed.

There may be a mismatch between conviction and unfitness in other ways. Criminal cases may be brought for reasons which do not suggest that professional discipline is warranted. It may be, for example, that in a particular jurisdiction an airtight case of a relatively minor offense, such as driving without proper automobile registration, will be criminally prosecuted, while a serious crime such as rape, supported by a preponderance of the evidence, but probably not provable beyond a reasonable doubt will not lead to charges. Yet, a professional licensing board with authority to look at the underlying facts might well conclude that the latter case is more worthy of discipline.

The existence of adequate non-criminal remedies is a recognized ground for foregoing prosecution in appropriate cases.[101] Therefore, a doctor who committed an illegal abortion could argue to the prosecutor that the matter should be left to the administrators, and, if successful, might avoid professional discipline or receive a reduced penalty because no criminal charges were brought. Another doctor who committed identical conduct might be criminally charged, and because she suffered that harm, would automatically suffer the resulting administrative punishment.

Moreover, individuals will, in some cases, be convicted for bad reasons. The United States has a "tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution . . . ."[102] Generally, prosecutorial decisions

100. *Cf.* N.Y. EDUC. LAW § 6509 (McKinney 2002) (setting out conduct subjecting to disciplinary action); Candib v. Bd. of Regents, 93 N.Y.S.2d 767 (App. Div. 1949) (affirming revocation of license due to drug addiction).

101. Gabriel J. Chin & Richard W. Holmes. Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 720 (2002) (stating that national prosecution standards allow prosecutors to consider collateral consequences).

102. Ashe v. Swenson, 397 U.S. 436, 452 (1970) (Brennan, J., concurring). *See generally* Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative*

about "when to prosecute and when not to" are not subject to judicial review in the criminal prosecution itself.[103]

The Supreme Court has recognized that choosing to prosecute cases for reasons that violate the Constitution is impermissible.[104] The Court, however, has made it very difficult to obtain discovery in support of a defense of discriminatory prosecution,[105] making successful challenges to prosecutions increasingly rare.

Prosecutorial decisions generally cannot be challenged in a subsequent civil suit. In *Imbler v. Pachtman*,[106] the Supreme Court held that prosecutors enjoy absolute immunity for their prosecutorial decisions, even though, as the Court recognized, "this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty."[107] The Supreme Court observed that "[t]here is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse."[108]

There is evidence that prosecutions of doctors for committing abortion sometimes has rested on questionable premises. As part of extortion plots, physicians have been faced with baseless charges of committing criminal abortion.[109] In the context of criminal abortion, many cases illustrate aggressive efforts to convict doctors.[110] Some disciplinary authorities have refused to impose sanc-

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Study of Prosecutorial Discretion, 47 U. CHI. L. REV. 246, 246-52 (1980); Robert L. Misner, *Criminal Law: Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 736-41 (1996).

103. Wayte v. United States, 470 U.S. 598, 607-08 (1985) (stating that such discretion is "firmly entrenched in American law."). *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 670 (3d ed. 2000).

104. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

105. *See, e.g.*, United States v. Bass, 536 U.S. 862, 863-64 (2002) (per curiam); United States v. Armstrong, 517 U.S. 456, 475-76 (1996).

106. 424 U.S. 409 (1976).

107. *Id.* at 427; *cf.* Kalina v. Fletcher, 522 U.S. 118, 131 (1997) (distinguishing *Imbler*, and holding that absolute immunity not available where prosecutor acts as a witness).

108. Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978)

109. United States v. Maloney, 262 F.2d 535 (2d Cir. 1959); Weinstein v. Bd. of Regents, 56 N.E.2d 104 (N.Y. 1944); *In re* Jones, 168 N.Y.S.2d 42 (App. Div. 1957); *In re* Lurie, 34 N.Y.S.2d 247 (App. Div. 1942); People *ex rel.* Ditchik v. Sheriff of Kings County, 12 N.Y.S.2d 341 (Sup. Ct. 1939), *aff'd mem.*, 12 N.Y.S.2d 232 (App. Div. 1939); Slaymaker v. Warren, 229 N.Y.S. 505 (App. Div. 1928); *cf.* Andrews v. Gardiner, 121 N.E. 341 (N.Y. 1918); Commonwealth v. Bernstine, 162 A. 297 (Pa. 1932); Bertschinger v. Campbell, 158 P. 80 (Wash. 1916).

110. *See, e.g.*, People v. McAlpin, 270 N.Y.S.2d 899 (County Ct. 1966) (finding mandatory reporting of knife and icepick injures inapplicable to hairpin used in self-induced abortion); People v. Martin, 267 N.Y.S.2d 404 (Sup. Ct. 1966) (holding that

tions based on criminal convictions when it appeared those sanctions might have been improperly motivated.[111]

CONCLUSION

Hawker v. New York got it right, in principle. If harsh consequences based on conviction are to be categorized as something other than punishment, it must be because the conviction is proof of conduct, which indicates future behavior expected from the individual. Conduct, though, can be shown in many ways, and it is not clear that those convicted of improper conduct are any more dangerous than those who are proven, by other methods, to have engaged in exactly the same conduct.

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evidence of abortion on one patient did not warrant seizing all patient records); *In re* Abortions in County of Kings, 135 N.Y.S.2d 381 (County Ct. 1954) (denying enforcement of broad subpoena), *aff'd sub nom.*, *In re* Grand Jury of County of Kings, 143 N.Y.S.2d 501 (App. Div. 1955). Other evidence of the local attitude toward abortion is suggested by a decision denying a license to exhibit a film which alluded to abortion; *see also* Distinguished Films v. Stoddard, 68 N.Y.S.2d 737 (App. Div. 1947) (upholding denial of a license to exhibit film with abortion theme). At that time, New York, like many other jurisdictions, had a board of censorship. *See* Note, *Entertainment: Public Pressure and the Law, Official and Unofficial Control of the Content and Distribution of Motion Pictures and Magazines*, 71 HARV. L. REV. 326, 328-29 (1957). *See generally* William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 YALE J.L. & HUMANITIES 265, 269-70 (1993).

111. *See, e.g*, *In re* Nixon, 618 So. 2d 1283 (Miss. 1993); State Bar of Nev. v. Claiborne, 756 P.2d 464 (Nev. 1988).