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Introduction

In the United States and many other countries, the convicted criminal is subject to both direct and indirect sanctions that greatly restrict his civil and proprietary rights. In addition to a possible prison sentence, he may experience numerous civil disabilities during and after release from prison. In many states, for example, the convicted criminal may lose such rights and privileges as voting, holding offices of public and private trust, and serving as a juror. The criminal offender also may lose his family by divorce or adoption proceedings resulting from his conviction. He may have difficulty managing his property, entering contracts and obtaining insurance, bonding, and pensions. Ex-convicts also may be barred from a broad range of government regulated and private employment.

Many of the statutes imposing civil disabilities are the remnants of a feudal past and appear to serve little useful function in modern times. Unfortunately, scant research has been devoted to the extent and effect of civil disability laws. This lack of research is alarming since each individual in the United States is directly or indirectly affected by the millions of persons restricted by these statutes. It has been estimated that more than two million new offenders are received in prisons and juvenile training Schools or placed on probation each year, and the national crime index continues to rise at an alarming rate. A significant number of convicted criminals return to crime upon release from prison. According to a recent Federal Bureau of Investigation study of 94,467 persons arrested for serious crimes in the years 1967 and 1968, some 70 percent had prior convictions and nearly one-half had served prison terms. These figures illustrate dramatically the inadequacy of current

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1. This Project includes a review of the historical origin of civil disabilities. Frequently, historical analysis shows that the philosophy and environment that engendered certain laws are no longer present, yet the laws remain. Describing this phenomenon, Justice Oliver Wendell Holmes, Jr. observed: "A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the customs, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for." O. HOLMES, JR., THE COMMON LAW 5 (1881).


4. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS 36 (1968).
correctional and rehabilitation methods. It is clear that the war on crime will fail unless post-release failures are greatly reduced.

Numerous studies have sought to determine the causes of high recidivism rates. A leading authority has concluded that the post-release conditions invariably associated with a prisoner’s return to crime are economic deprivation and failure to integrate into non-criminal social groups.\(^5\) The federal government and a number of states recently have taken steps to alleviate these conditions by instituting various programs directed at rehabilitation of convicted criminals.\(^6\) It is clear that these efforts must be accompanied by a comprehensive evaluation of the role civil disability laws play in rehabilitating convicted criminals. The following Project undertakes this crucial task.

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5. D. GLASER, supra note 3 at 402.
Part One: Survey of the Law

This survey is an attempt to portray in graphic detail the entire body of statutory and decisional law that gives rise to the civil consequences of a criminal conviction. The survey begins with a review of the historical development of civil disabilities. Next, the more common definitional and interpretational problems that have characterized this area of the law are detailed. With this background, the survey proceeds to examine the numerous rights and privileges that are either suspended or forfeited upon conviction. Among the activities surveyed are the right to vote, hold public office, and obtain public employment and professional licenses. The survey also considers the property, judicial, and domestic rights lost by the convicted person as well as the effect of a criminal conviction on the offender's ability to participate in insurance, pension, and workmen's compensation programs. The survey concludes with an examination of the existing procedures by which civil disabilities may be removed. In most instances, both federal laws and the laws of every state have been researched and recorded. In a few situations, representative samplings were believed sufficiently illustrative. The survey does not purport to be exhaustive. It is doubtful whether a complete exposition of the pervasive scheme of disabilities is possible. It is believed, nevertheless, that this survey is an accurate and reasonably comprehensive view of the collateral consequences of a criminal conviction. More importantly, it provides the basis for what is believed to be a realistic evaluation of the scope and operation of laws that deprive convicted criminals of civil rights and privileges long after they have paid their debt to society.

I. History and Theory of Civil Disabilities

A. Ancient Greece and Rome, Medieval Europe

Civil disabilities as a consequence of crime can be traced to ancient Greece. The Greeks called the disability “infamy.” Criminals pronounced infamous were prohibited from appearing in court, voting, making speeches, attending assemblies, and serving in the army.\(^1\) In light of the nature of Greek society, which applauded one's loyalty and service to his city-state and placed great emphasis on the right of citizenship, there is little doubt that “infamy” was employed as a retributive measure to punish the criminal for his crime against society. In addition,

since "infamy" entailed the loss of the rights most valued by society, it is likely that this punishment was employed not only for its penal effect, but also for its deterrent value. The Romans of a later age adopted the Greek practice of "infamy" and refined it into laws imposing specific disabilities that were quite similar to those of modern America. In the Roman Empire, as in Greek society, citizenship and its related rights were highly valued. By employing the loss of civil rights as a penal measure, the penologists of that day certainly realized the deterrent value of the social degradation that accompanied civil disabilities.

Roman legal concepts accompanied the expansion of the Roman Empire. By the time the Empire was finally dissolved, the Germanic tribes of Europe and England had incorporated civil disabilities into their primitive penal systems. Civil disabilities were imposed through a method known as "outlawry." Although the practice of this penal method varied throughout Europe, the form that developed in Anglo-Saxon England was generally typical. "Outlawry" was a form of community retaliation against the criminal. The criminal had declared war on the community by violating the laws that regulated society. The community, therefore, had the right to retaliate by whatever means it deemed appropriate. In this early age the retaliation was so severe that the criminal rarely escaped death. Not only did the criminal risk his life, but he also lost all his civil and proprietary rights. Thus, on the eve of the Norman Conquest of England in 1066, civil disabilities resulting from criminal conviction were an integral part of a penal system that was retributive in theory and excessively punitive in practice.

B. English Criminal Jurisprudence: 1066-1870

1. Nature of Civil Disabilities.—As a direct result of this heritage, civil disabilities in England between 1066 and 1870 were imposed through a procedure that was similar to the ancient practice of "outlawry," but which developed into a penal sanction with distinct characteristics of its own. The procedure was denoted "attainder," and the criminal who was convicted of treason or a felony was declared

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3. See Damaska, supra note 1, at 351.
4. See J. Crook, Law and Life of Rome 255-56, 259 (1967); J. Granrud, Roman Constitutional History 86-87 (1901); R. Leage, Roman Private Law 75 (1942).
5. Damaska, supra note 1, at 351.
7. 2 F. Pollock & F. Maitland, supra note 6, at 447.
"attainted." The immediate consequences of attainder were forfeiture, corruption of blood, and loss of all civil rights. This forfeiture of civil and proprietary rights was commonly referred to as "civil death," which, in practice, became synonymous with attainder. In theory, forfeiture entailed the loss of one’s real and personal property through escheatage to the King of England or to the criminal's mesne lord. According to the doctrine of corruption of blood, based on the fiction that the criminal's act was evidence that he and his entire family were corrupt and therefore unworthy of being feudal tenants, the criminal theoretically could not transfer his property by either grant or devise. In actual practice, however, the application of both forfeiture and corruption of blood deviated substantially from the prescribed procedure. The attainted criminal was not immediately divested of his property; he retained possession of it until "office found," which was the procedure by which the king claimed ownership. Until the king's assertion of ownership, the criminal could transfer his property by devise or contract, subject to the king's superior right, and receive property by grant or devise. Therefore, although attainder did not extinguish all of the criminal's rights, it was not a mere legal fiction since the criminal was divested of many civil rights, such as the right to sue, appear in court as a witness or juror, and hold public office.

Contemporaneous with the development of attainder as a form of civil death was the development of another form of civil death which was not, as most frequently applied, related to criminal conduct. This form of civil death was applicable in only three situations: the monk professed, adjuration, and banishment. The most frequently applied was the monk professed, which arose when a person made vows to serve the church and entered a monastery. The professing individual was immediately divested of all his real and personal property as if he had physically died.

8. 4 W. Blackstone, Commentaries *389.
9. Id.
13. Id.
14. The disability accompanying the monk professed is the most important because it was a more frequent occurrence than either adjuration or banishment. Adjudication was the procedure by which a criminal escaped punishment if he swore to leave the country forever. Banishment was a legislative act of Parliament which denounced the person "attained" and banished him from the country. This method was seldom employed. Id. at 328, 18 N.E. at 152.
15. The monk professed was divested of all his property on the theory that since he had rejected the secular world, with all its privileges and obligations, and pledged his allegiance to the
rights, he was not considered civilly dead in the eyes of the law, for he could carry on many activities as the agent of his superior abbot. The monk, for example, often represented the abbot in court and at the trade fairs and markets. Thus, while civil death of the monk professed did impose civil disabilities, it, like attainder, was more severe in theory than in practice.

2. Factors Promoting Civil Disabilities.—Civil disabilities in England were the product of a criminal jurisprudence based on retribution and deterrence, economic changes brought by the growth of capitalism, and the humanitarian influence of the Age of Enlightenment.

(a) Retribution and deterrence.—The primary goals of English criminal jurisprudence were retribution and deterrence. The retributive element was derived from the Anglo-Saxon belief that the criminal, having injured society, was an outcast who deserved nothing less than the full punitive sanction. During this period there was little attempt to understand the nature of the criminal personality. Civil disabilities were in harmony with this ancient emphasis on retribution since the criminal’s loss of civil and proprietary rights resulted in social isolation that, in itself, was punishment. Attainder and its collateral consequences, therefore, achieved the retributive aims of punishment and isolation of the criminal from society.

The deterrent value of a penal sanction was important to the early English penologists because of the rapid increase in the crime rate on several occasions during this period. To curb these increases in criminal activity and the consequent threat to the public order and security, the authorities utilized two methods that they believed had the greatest deterrent effect. The principal penal sanction was the death penalty that

spiritual world, he should be denied the rights and privileges that belong to the members of secular society. Id. at 327, 18 N.E. at 152.

16. F. POLLOCK & F. MAITLAND, supra note 6, at 419. Some of the shrewdest businessmen at the fairs were monks. Id.

17. The phrase “growth of capitalism” as used in this section means the transition of the English economy from a feudal, agriculturally-oriented economy to an urban, industrial nation. This transition began in the fourteenth century and reached its conclusion in the Industrial Revolution of the eighteenth and nineteenth centuries. B. SUVIRANTA, THE THEORY OF THE BALANCE OF TRADE IN ENGLAND 1 (1967).


20. See A. BABINGTON, supra note 18, at 44.

21. The crime rate increased significantly during the 2 periods in which England experienced the rise of a large, impoverished urban population. G. RUSCHE & O. KIRSCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 11-18, 84-95 (1939). See notes 30-34 infra and accompanying text.
was imposed for the most trifling offenses.\textsuperscript{22} Not only was the death penalty frequently imposed, but the methods of execution became inhumanly brutal.\textsuperscript{23} The second penal method employed for its deterrent effect was the public degradation of the criminal that had long been recognized as an effective penal sanction of deterrent value.\textsuperscript{24} Accordingly, early English lawmakers used various means to degrade the criminal in the public's eye. The authorities, for example, publicized executions by encouraging large, enthusiastic crowds to watch the spectacle.\textsuperscript{25} The use of stigmatic mutilations,\textsuperscript{26} furthermore, made the criminal easily identifiable in society with the result that it was difficult for him to find honest employment.\textsuperscript{27} The belief in social degradation as a deterrent also can be seen in the frequent use of less severe punishments, such as stocks, pillory, whipping, and the so-called "poetic punishments."\textsuperscript{28} Similarly, the practice of attainder served as a deterrent because the deprivation of the criminal's civil and proprietary rights brought public degradation and a resulting loss of status for both the criminal and his family.\textsuperscript{29}

(b) \textit{Changes in economic conditions}.—The rise of capitalism, beginning in England with the fall of feudalism and continuing into the Industrial Revolution, brought three economic changes that had a substantial impact on the development of the English penal system.

(i) \textit{Creation of a large, impoverished urban mass}.—The creation of a large, impoverished urban mass bred criminal activity and significantly affected the English penal system.\textsuperscript{30} The transition from a

\begin{itemize}
\item \textsuperscript{22} W. Middendorff, \textit{The Effectiveness of Punishment} 22 (1968); L. Radzinowicz, \textit{A History of English Criminal Law} 720 (1948).
\item \textsuperscript{23} It is recorded that 72,000 criminals were hanged during the reign of Henry VIII in the sixteenth century. During the reign of Queen Elizabeth, vagabonds were hanged in groups of 300 and 400. G. Rusche & O. Kirchheimer, \textit{supra} note 21, at 19. In 1819 it was reported that 180 offenses were punishable by death. A. Babington, \textit{supra} note 18, at 39.
\item \textsuperscript{24} The death penalty was executed by hanging, beheading, burning at the stake, boiling alive, and mutilation of the criminal's body. G. Ives, \textit{A History of Penal Methods} 14-15 (1914); J. Reeves, \textit{History of the English Law} 352 (2d ed. 1787).
\item \textsuperscript{25} E. Sutherland & D. Cressey, \textit{Principles of Criminology} 319 (7th ed. 1966); Damaska, \textit{supra} note 1, at 351.
\item \textsuperscript{26} A. Babington, \textit{supra} note 18, at 40; G. Rusche & O. Kirchheimer, \textit{supra} note 21, at 21.
\item \textsuperscript{27} These mutilations, often quite brutal, included: the branding of the criminal's cheek. E. Sutherland & D. Cressey, \textit{supra} note 24, at 319; and the mutilation of hands, ears, tongue, and other body parts. G. Ives, \textit{supra} note 23, at 15.
\item \textsuperscript{28} See G. Ives, \textit{supra} note 23, at 54-57; Damaska, \textit{supra} note 1, at 351. Poetic punishments were not really punishment in the true sense of the word, but rather were methods used to expose the criminal to public ridicule and loss of status. Making a seller of rotten fish wear a rotten fish around his neck is an example of a poetic punishment.
\item \textsuperscript{29} A. W. Blackstone, \textit{supra} note 8, at *531.
\item \textsuperscript{30} See note 21 \textit{supra} and accompanying text.
\end{itemize}
feudal society to an urban, commercially oriented society created this downtrodden urban mass. This transition began in the fourteenth century and gained momentum in the fifteenth and sixteenth centuries as industry and commerce expanded. Many persons, who heretofore had been bound by feudal obligations, migrated to the urban centers that offered bright but illusory hopes of success and prosperity. As the population of the cities swelled, the masses sank deeper into poverty because they were overcome by unemployment and economic barriers erected by the established businessmen. The hardship of the urban masses was heightened by the development of the Industrial Revolution in the eighteenth and nineteenth centuries. This phenomenon brought unemployment to many people as manufacturers replaced men with machines. As the unemployment rate soared, the economic position of the urban working class declined correspondingly.

(ii) Scarcity of labor.—By the late sixteenth century, industry and commerce in England were flourishing, and the English economy was developing by expanding both internal and external markets. This expansion of the economy opened up new employment positions, and thereby created a demand for labor that could not be met by the existing labor supply. It did not take the imaginative new bourgeoisie long to realize that there existed within its midst an untapped labor source—the mass of criminals and vagabonds who were confined in prison until they paid their fines. The exploitation of this labor source began immediately. The vehicle of exploitation was the house of correction. Criminals sent to the houses of correction often received vocational

31. See 1 E. Lipson, Economic History of England 402-05, 413 (1926); B. Suviranta, supra note 17, at 1.
32. 2 W. Cunningham, The Growth of English Industry and Commerce 45 (1925); 3 E. Lipson, supra note 31, at 410.
33. See G. Rusche & O. Kirchheimer, supra note 21, at 11, 26.
34. Id. at 86-88.
35. See 2 W. Cunningham, supra note 32, at 25-27; J. Horrocks, A Short History of Mercantilism 46-47 (1942); 1 E. Lipson, supra note 31, at 502-06.
36. Two factors created a shortage of labor in England. First, several foreign wars and internal conflicts had diminished the population. Secondly, the existing poor laws forced paupers, who comprised the majority of the large urban mass, back into their native towns where there was no opportunity for employment. G. Rusche & O. Kirchheimer, supra note 21, at 25-26.
37. During this period of history prisons were used to confine the criminal before his trial and to detain him until he paid his fine. Prisons did not exist as a means of punishment. This practice is expressed in the Latin phrase carcer enim ad continendos homines non ad puniendos haberi debet (prisons exist only in order to keep men, not to punish them). Id. at 62.
38. The first house of correction was the Bridewell, which was established in London in 1555. Id. at 41.
39. At first only vagabonds and petty criminals were sent to the houses of correction. Later, however, more serious offenders were given long prison sentences. Id. at 42.
training and then were either forced to work in the shops of the correctional institution or hired out to private businessmen. Some historians have suggested that these houses of correction performed a rehabilitative function. By providing training and jobs for men who had never worked before, imprisonment would enable the criminal to lead a law-abiding, productive life upon release. Yet, this rehabilitative function undoubtedly was not the primary objective of the houses of correction. The correctional institutions existed principally for the purpose of exploiting an available labor supply. If the criminal was rehabilitated in the process, this was a fortunate by-product, for he would then join the free labor force and thereby aid the development of the economy.

(iii) Critical need for revenue.—The transition of English society from a feudal to an urban society was characterized by the rising importance of money. In feudal society money was relatively insignificant because the necessities of life were provided to the lord and peasant by both the local agricultural production and the feudal incidents and obligations. With the breakdown of feudalism and the development of industry and commerce, however, money assumed a new importance. Not only was money required to provide the necessities and pleasures of life, but it was essential to the achievement of position and power. As the rising bourgeoisie demonstrated the economic power of money, the English aristocracy realized that it had to increase its monetary reserves if it was to retain control over the bourgeoisie. The aristocracy's desire to obtain money affected the penal system in two ways. First, the aristocracy assumed control over the compensatory part of the penal system that permitted most criminals to enter a monetary settlement with the victim's family in lieu of further punishment. By assuming control of the administration of this system, the aristocracy was able to channel the monetary settlement to itself rather than to the victim's family. The collections obtained in this manner provided the aristocracy with a fruitful source of revenue. Secondly, the aristocracy

40. A. Harding, supra note 18, at 85.
42. See B. Suurinanta, supra note 17, at 1-2.
43. The compensatory element of the penal system originated in the early Anglo-Saxon penal practices. Under this system the criminal could negotiate a settlement with the victim's family instead of being punished. Practically every crime was "emendable," except for the most serious crimes. Outlawry was employed for the unemendable crimes and for those who refused or were unable to pay the fine. It is interesting to note that "much of the jurisprudence of the time must have consisted of a knowledge of these pre-appointed prices." This system was the forerunner of the present day fine system. 2 F. Pollock & F. Maitland, supra note 6, at 451-60. For examples of the prices placed on different crimes see J. Reeves, supra note 23, at 15-16.
44. G. Ives, supra note 23, at 9.
attributed great importance to the forfeitures of land and personal
property that were the consequences of attainder for treason or felony.
The forfeited properties that escheated to the aristocracy were a valuable
source of revenue for them, since the kings and lords, either by personal
management or assignment to political cronies in return for favors, were
able to turn the forfeited property (even relatively worthless land or
personal property) into cash for the royal coffers. An interesting
example of the importance placed on the forfeiture of property is found
in the struggle between the kings and the lords over the definition of
treason and felony. Under the law of forfeiture, if the crime was declared
treason, the property was forfeited to the king; if the crime was
declared a felony, the lands escheated to the lords. This distinction
brought pressure on the judiciary by the kings to declare ordinary
felonies to be treason, and by the lords to have more crimes declared
felonies. Thus, civil disabilities, in addition to the penal function, served
an important economic function that the aristocracy fully utilized.

(c) Influence of the Age of Enlightenment.—The Age of
Enlightenment blossomed in the late eighteenth and early nineteenth
centuries. Although its leading proponents often were not English, their
 teachings affected the English penal system. The humanitarians of this
movement, who included such notable men as Cesare Becarria, Charles
Louis Montesquieu, Sir Samuel Romilly, and Jeremy Bentham, argued
that punishment should be less severe and aimed at the prevention of
crime and the reformation of the criminal. Another dominant theme of
the humanitarians was the reformation of both procedure and
punishment to achieve certainty in the administration of sanctions. The
principal results of the movement in England were the gradual
substitution of imprisonment for capital punishment and the
introduction of a reformatory theory of corrections based on
humanitarian principles.

The impact of these changes, however, was not significant in
England. Capital punishments were still commonplace and prison

45. 2 F. POLLOCK & F. MAITLAND, supra note 6, at 453.
46. Id. at 500-08.
47. G. Ives, supra note 23, at 9 n.3; 2 F. POLLOCK & F. MAITLAND, supra note 6, at 465-66.
48. A. BABINGTON, supra note 18, at 164-68.
49. See G. Rusche & O. Kirchheimer, supra note 21, at 74-78.
50. Id. at 85.
51. A. BABINGTON, supra note 18, at 166-68.
52. A statement by a member of the House of Commons in 1830 illustrates that the impact of
the humanitarians was minimal on English penal practice: "It is impossible to conceal from
ourselves that capital punishments are more frequent and the criminal law more severe on the whole
in this country than in any country in the world." Id. at 39-40.
conditions had decayed to the extent that prisoners experienced a living hell. The humanitarian movement had little if any effect during the late eighteenth and early nineteenth centuries on the reformation of the law of civil disabilities. The reformative principle of corrections that the Age of Enlightenment introduced into England, however, was one of the elements sparking the reforms that abolished corruption of blood and forfeiture.

C. Early American Criminal Jurisprudence

America's English heritager is clearly reflected in the development of early American penal thought and practice. Like the English system, the penal practices of the American colonies were based on the principles of retribution and deterrence and consequently utilized severe and socially degrading punishments. The only departure during the colonial period from these practices was the Quaker Criminal Code of 1682-1718, introduced by William Penn in Pennsylvania, which reduced the severity of punishment and substituted imprisonment for death. The short life of this code and its replacement by an extremely severe Anglican-Puritan code are indicative of both the tenor of the times and the English background. Consequently, in the United States, civil disabilities were imposed by the English procedure of attainder, resulting in the forfeiture of all property and rights as the immediate consequence of conviction.

After the colonies had gained their independence, an enlightened penal practice developed slowly. The theories of the European humanitarians of the Age of Enlightenment influenced the early American penologists. Gradually, the severity of the penal sanctions was reduced and imprisonment was instituted as a method of punishment. In the late eighteenth century, the leaders of this reform movement introduced a novel penal institution, the penitentiary, which was based on reformative principles. The early 1800's, however, witnessed a return, in the name of reformation, to the punitive concept in the administration of prisons.

53. See G. Rusche & O. Kirchheimer, supra note 21, at 102-12.
54. See Damaska, supra note 1, at 352.
55. Corruption of Blood Act of 1814, 54 Geo. 3, c. 145; Act to Abolish Forfeitures for Treason and Felony, 33 & 34 Vict., c. 23 (1870).
57. H. Barnes & N. Teeters, supra note 19, at 468-69.
59. H. Barnes & N. Teeters, supra note 19, at 473.
60. E. Sutherland & D. Cressey, supra note 24, at 503-07.
61. H. Barnes & N. Teeters, supra note 19, at 506, 516-17, 547.
specifically prohibits forfeiture and corruption of blood except during the life of a person convicted of treason. In addition, civil death was declared not to exist in the absence of an express statute. Yet, in the United States civil disabilities continued to play a significant role in the treatment of criminals. New York passed a civil death statute in 1799. Other states passed civil death statutes and imposed specific disabilities in their constitutions and statutes. Unfortunately, there is no legislative history to explain the enactment of these disabilities. Public security and facilitation of prison administration have been offered as plausible explanations for the civil death statutes. It is likely, however, that civil disabilities in America were actually the result of the unquestioning adoption of the English penal system by our colonial forefathers and the succeeding generations who continued existing practices without evaluation. Later in this Project, civil disabilities will be evaluated according to current correctional theory, based on rehabilitation rather than retribution, which is a descendant of the nineteenth century movement toward a truly reformative prison system.

D. Civil Disabilities in Modern America

The legislatures of every state have enacted civil disability laws. These laws can be divided into two broad categories: civil death statutes and specific disability statutes. Civil death statutes are blanket provisions that deprive the criminal of rights while he is serving a prison sentence for life or less than life. Thirteen states have civil death statutes that are applicable to offenders sentenced to prison for terms of either life or less than life. The following statutes are typical: "A person

63. Owens v. Owens, 100 N.C. 240, 6 S.E. 794 (1888); Davis v. Lanning, 85 Tex. 39, 19 S.W. 846 (1892).
65. See note 71 infra.
66. E.g., CONN. CONST. art. 6, § 3 (right to vote); DEL. CONST. art. IV, § 2 (right to hold public office).
68. See notes 316-94 on pages 1218-33 infra and accompanying text.
69. See H. BARNES & N. TEETERS, supra note 19, at 547-68.
70. It is generally agreed that the statutes which pertain to sentences of life imprisonment and less than life are to be construed in pari materia. 1946 N.Y. LAW REVISION COMM’N REP. 174; Note, supra note 67, at 839.
71. ALASKA STAT. §§ 11.05.070, 080 (1962); ARIZ. REV. STAT. ANN. §§ 13-1653(A), (B) (1956); CAL. PENAL CODE § 2600 (West Supp. 1968); IDAHO CODE ANN. § 18-210 to -311
sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead;72 and "[a] sentence of imprisonment in a state prison for any term less than life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment . . . ."73 The courts have not adequately answered the question of what rights fall within the purview of the statutes. Some courts hold that civil death entails the loss of the right to contract,74 inherit property,75 and bring a civil suit.76 In addition, several courts hold that upon imprisonment, the marriage of the convict declared civilly dead is dissolved77 and his property descends as if he were naturally dead.78 On the other hand, several courts hold to the contrary.79 Later in this survey the consequences of civil death in each specific area will be discussed.

Specific disability statutes designate particular disabilities that take effect upon conviction and remain operative during the term of imprisonment and throughout the convict's life, unless the right is restored by state procedure. Typical specific disability statutes read: "The following persons are not entitled to vote . . . (d) Persons convicted of any felony by any court of record and whose civil rights have not been restored;"80 and "[a]n applicant for a license [as an optician] . . . shall . . . (4) Not have been convicted of a crime involving moral turpitude."81 Specific disability statutes cover many areas, ranging from the denial of traditional civil rights, such as the right

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75. In re Donnelly, 125 Cal. 417, 58 P. 61 (1899) (overruled by statute; see note 150 infra).
78. See, e.g., In re Deming, 10 Johns. 232 (N.Y. 1813).
79. See Graham v. Graham, 251 Ala. 124, 36 So. 2d 316 (1948) (civil death does not dissolve the felon's marriage); Avery v. Everett, 110 N.Y. 317, 18 N.E. 148 (1888) (offender's property does not descend on sentence to life imprisonment); Shapiro v. Equitable Life Assur. Soc'y, 182 Misc. 678, 45 N.Y.S.2d 717 (Sup. Ct. 1943) (civilly dead offender may sue for cause of action that arose before imprisonment); Grooms v. Thomas, 93 Okla. 87, 219 P. 700 (1923) (right to inherit); Byers v. Sun Sav. Bank, 41 Okla. 728, 139 P. 948 (1914) (capacity to contract).
to vote, hold public office, and serve as a juror, to the denial of professional and occupational licenses.

II. INTERPRETATIONAL PROBLEMS PRESENTED BY CIVIL DISABILITY STATUTES

In applying both civil death and specific disability statutes, the courts have most frequently been troubled with such problems as the definition of "conviction," "infamous crime," and "crime involving moral turpitude," and the statutory authority of one state to impose its disabilities on a person convicted in another state.

A. Meaning of Conviction

In most states, an offender incurs numerous civil disabilities upon "conviction" of a crime.\textsuperscript{82} The term "conviction" has posed interpretational problems that the courts have not yet adequately resolved. This definitional confusion stems from several sources. First, the definition of conviction hinges on the legislature's intent,\textsuperscript{83} but the sparse legislative history gives the courts little guidance in defining this intent. Consequently, courts often reach different conclusions concerning true legislative purpose. Secondly, the use of "conviction" in civil disability provisions as well as criminal penalty and procedure statutes causes confusion since the meaning of "conviction" varies according to the type of statute involved.\textsuperscript{84}

1. Statutory Definition.—Fourteen states have enacted a general definition of the term "conviction" that is applicable to both civil disability statutes and criminal penalty and procedure statutes. Twelve of these fourteen states define "conviction" as a plea of guilty, a verdict of guilty by a jury, or a finding of guilt by the court when a jury trial has been waived.\textsuperscript{85} Kansas defines "conviction" merely as a plea of guilty.\textsuperscript{86}


\textsuperscript{83} E.g., Richetti v. Board of Parole, 300 N.Y. 357, 90 N.E.2d 893 (1950).

\textsuperscript{84} E.g., People v. Weinberger, 21 App. Div. 2d 353, 251 N.Y.S.2d 790 (1964); L. Orfield, Criminal Procedure from Arrest to Appeal 488 (1947).


Oregon requires either a jury verdict of guilty or a finding of guilt by the court when a jury trial has been waived. Sixteen states have enacted a definition of "conviction" that applies only to a specific area of state law.

2. Judicial Definition.—In the states having no statutory definition and in the fourteen states that have enacted a general definition, the courts define "conviction" in two ways. The first view equates a conviction with the determination of guilt, either by plea of guilty or by the court's or jury's verdict of guilty. Most courts accept this definition when the statute in question involves either the imposition of a punitive sanction or a criminal procedure. A small minority of courts adopt this view for civil disability statutes, especially when the provision pertains to the right to hold public office.

The second definition of conviction is more specific than the first. According to this view, a conviction has occurred only after both a determination of guilt and a pronouncement of judgment and sentence. There is no conviction unless judgment and sentence are rendered. When

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88. Fifteen states have enacted a definition of "conviction" which applies only to the state law regulating the use and operation of motor vehicles. Nine of these 15 states define "conviction" as the final conviction of an offense. ARIZ. REV. STAT. ANN. § 28-444(c) (1956); KAN. GEN. STAT. ANN. § 8-253(c) (1964); MICH. STAT. ANN. § 9.1808(1) (1968); MINN. STAT. ANN. § 171.01(13) (1960); MO. ANN. STAT. § 302.010(4) (1959); N.D. CENT. CODE § 39-06-30 (Supp. 1969); OKLA. STAT. ANN. tit. 47, § 6-204(c) (1962); TENN. CODE ANN. § 59-714 (1968); TEX. REV. CIV. STAT. ANN. art. 6687b (1969). Three of these 15 states define "conviction" as a plea of guilty, a verdict of guilty by a jury, or a finding of guilt by the court when a jury trial has been waived. CAL. VEHICLE CODE § 13103 (West 1969); S.C. CODE ANN. § 46-195 (1962); WIS. STAT. ANN. § 343.01(2)(a) (1958). Three states define "conviction" as a conviction of any offense related to the use or operation of a motor vehicle. ME. REV. STAT. ANN. tit. 29, § 632(1) (1964); ORE. REV. STAT. § 482.820 (1969); WASH. REV. CODE ANN. § 46.21.010 (1970). In California, Massachusetts, and Oklahoma "conviction," as defined and applied to the laws regulating the licensing of schoolteachers, firearms, and liquor dealers, respectively, means a plea of guilty, a verdict of guilty by a jury, or a finding of guilt by the court when a jury trial has been waived. CAL. EDUC. CODE § 12911 (West 1969); MASS. GEN. LAWS ANN. ch. 140, § 121 (1965); OKLA. STAT. ANN. tit. 37, § 506(7) (Supp. 1969-70).


90. People v. Dail, 22 Cal. 2d 642, 140 P.2d 828 (1943) (right to serve as a witness); Tucker v. Tucker, 101 N.J. Eq. 72, 137 A. 404 (1927) (divorce grounded on criminal conviction).

the statute in question imposes civil disabilities, most courts adopt this second definition. These courts reason that the legislature did not intend for valuable rights and privileges to be lost without a final judgment and sentence. In actuality, perhaps this interpretation was inspired by the judiciary's desire to aid the rehabilitation of those offenders whom it thought possessed a reformative potential.

Under either definition of conviction, therefore, civil disabilities attach when a judge renders a judgment and sentence, and imposes the penal sanction. Similarly, under either view a conviction has occurred when the court imposes both judgment and sentence, but suspends execution of the sentence and places the offender on probation. Consequently, most offenders receiving a suspension of imposition of sentence incur no civil disabilities.

Courts also are faced with the definition of conviction when an


California has amended its Business and Professional Code to provide that occupational and
offender appeals from an adverse decision. A few states have resolved this dilemma by statute. In the absence of a statutory guideline, the few cases in point indicate that most civil disabilities, except the loss of the right to hold public office, will not be imposed until the appellate courts have rendered their decisions. The right to hold public office is generally suspended immediately upon conviction, irrespective of a pending appeal, because a person convicted of a crime does not command the respect that is necessary for the proper functioning of government. If the conviction is subsequently reversed, this rule may yield a harsh result. Consequently, some courts do not deprive the offender of the right to hold public office pending an appeal.

B. Breadth of the Disabling Crimes

Civil disabilities are imposed when the offender has been convicted of a crime enumerated in the disabling statute or constitutional provision. Often the provisions describe these crimes in terms that designate a general class of crimes rather than specific crimes. Common examples of these general terms include "felony," "infamous crime," professional licenses may be denied or revoked because of criminal conviction, irrespective of a probation order suspending sentence. See CAL. BUS. & PROF. CODE § 1679 (West 1962) (dentists); id. § 2383 (physicians); id. § 2555.1 (dispensing opticians); id. § 2963 (psychologists); id. § 6102 (attorneys); id. § 10177(b) (West 1964) (real estate brokers); id. § 10562(b) (mineral, oil and gas brokers). In the absence of a statutory prohibition, a suspended sentence will probably not preclude the attainment of a license. Holland, supra note 92, at 44.

The federal courts generally have not followed the view that a suspended sentence does not constitute a conviction. Korematsu v. United States, 319 U.S. 432 (1943); Gutierrez v. Immigration & Naturalization Serv., 323 F.2d 593 (9th Cir. 1963); United States v. Rivera, 224 F.2d 88 (2d Cir. 1955).

98. See statutes cited note 97 supra; N.Y. EDUC. LAW § 6613(12) (McKinney 1953) (dentists); id. § 6514(1) (physicians, osteopaths, and physiotherapists).


104. Four states have substituted the statutory definition of a felony for the word "felony." These statutes state that the disabling crime is one that is punishable by imprisonment in the penitentiary. Thus, although the disabling crime does not appear on the record for a felony, in actual
and "crime involving moral turpitude." The following statutes are illustrative: "Subject to the constitution of the state, every person convicted of felony shall from thenceforth be disqualified from holding any office of honor, trust, or profit under the laws of this state, or practicing as an attorney in any of the courts of this state;"

"[N]o person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this state;"

"An applicant for a license under this chapter [collection agencies] shall . . . (3) Not have been convicted of a crime involving moral turpitude".

Although statutory definitions of the disabling classifications have somewhat facilitated the interpretational process, often the judiciary must resort to the common law to particularize the general statutory classification.

1. Felony.—The judicial interpretation of "felony" has presented few problems in the application of civil disability statutes, since both the common law and the modern statutory definitions have developed a simple, objective standard of determining what crimes are felonies. This standard is based on the degree of punishment authorized by statute. Therefore, a particular crime is characterized as a felony if the punishment it carries is as severe as that required by statute to constitute a felony. Forty-five states have enacted a statutory definition of felony. Thirty-six states define a felony as an offense that may be punished by death, or imprisonment in the penitentiary or state prison. It has been consistently held that "state prison" and "peniten-


tiary” are synonymous. Neither term includes a municipal or county jail. Eight states having a statutory definition of felony provide that the imprisonment must be for more than one year. This requirement, however, does not differ from the more general “imprisonment in a penitentiary” because a convict is seldom sent to a penitentiary for a sentence of less than a year. South Carolina is the only state that defines felony in terms of specific crimes rather than in terms of punishment.

In the absence of a statutory definition, the courts have held that a felony is a crime “punishable” by death or imprisonment in the penitentiary, regardless of the punishment actually imposed. Under such a broad definition, a felony encompasses a wide variety of offenses. Not only are crimes mala in se, such as murder and rape, classified as felonies, but also included are crimes mala prohibita, such as the conspiracy to commit a misdemeanor, the acceptance of a bribe by a person participating in a sports event, and the willful or negligent creation of an undue quantity of steam in a steam boiler or engine.

2. Infamous Crime.—Conviction of an “infamous crime” results in the imposition of civil disabilities in some states. The courts have encountered considerable difficulty in defining “infamous crime” as used in civil disability statutes. The difficulty stems from a lack of definitive statutory explanation and many judicial interpretations that are contrary to both the historical and rational meaning of the term. Although six states have enacted a definition of an infamous crime, these statutory definitions are rarely helpful. The definitions enacted by

111. See State v. Delmonto, 110 Conn. 298, 147 A. 825 (1929); State v. Neckar, 2 Ohio St. 221, 208 N.E. 2d 134 (1965).
112. ALASKA STAT. § 11.75.030 (1962); CONN. GEN. STAT. ANN. § 1-1 (1958); GA. CODE ANN. § 26-401(e) (1969); HAWAII REV. STAT. § 701-2 (1968); MINN. STAT. ANN. § 609.02(2) (1964); N.M. STAT. ANN. § 40A-1-6 (1953); N.Y. PENAL LAW § 10.00(5) (McKinney 1967); R.I. GEN. LAWS ANN. § 11-1-3 (1956).
115. Five states do not have a statute that defines a felony: Colorado, Delaware, Maryland, New Jersey, and Pennsylvania.
119. N.Y. PENAL LAW § 180.45 (McKinney 1967).
120. ARIZ. REV. STAT. ANN. § 13-1013 (1956).
121. COLO. REV. STAT. ANN. § 39-10-18 (1963); ILL. ANN. STAT. ch. 38, § 124 (Smith-Hurd 1964); KAN. STAT. ANN. § 21-127 (1964); MISS. CODE ANN. § 680 (1942); MO. REV. STAT. § 556.030 (1949); WASH. REV. CODE ANN. § 29.01.080 (1965).
Kansas, Mississippi, Missouri, and Washington provide, in essence; that an infamous crime is a felony. In Colorado and Illinois, the statutes enumerate specific infamous crimes. Although the Colorado statute is held to be an exclusive listing of infamous crimes, the courts of Illinois have adopted the opposite view. Consequently, the Illinois courts may declare any crime to be infamous if the circumstances of the case warrant this classification.

In the absence of a statutory definition, the judiciary is divided on the meaning of "infamous." This conflict is the product of history. In the early English common law, a crime was characterized as infamous if it involved any form of fraudulent or untrustworthy conduct. Although this category originally included only crimes designated crimen falsi, involving some type of falsification, it was later expanded to include felonies and treason. A crime, therefore, was denoted "infamous" according to the nature of the crime itself, rather than the punishment inflicted. This interpretation was accepted by several American courts in the late nineteenth and early twentieth centuries. During the late nineteenth century, however, the United States Supreme Court rendered two decisions that rejected the English common law definition of infamous crime. In Ex Parte Wilson and Mackin v. United States the Court declared that an infamous crime, as described in the fifth amendment of the United States Constitution, involved an infamous punishment, irrespective of the nature of the offense. An infamous punishment was defined to be either death or imprisonment in a penitentiary. The focus of the interpretational approach, therefore, was shifted from the nature of the crime itself to the nature of the punishment. These two cases had a tremendous impact on the subsequent interpretation of infamous crime. The Wilson-Mackin approach was followed not only in cases that involved state indictment statutes similar to the fifth amendment, but also in cases concerning

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127. 114 U.S. 417, 422-29 (1885).
128. 117 U.S. 348, 351-52 (1886).
129. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ." U.S. Const. amend. V.
the application of civil disability statutes.\textsuperscript{131} According to this interpretation, all felonies are infamous crimes.\textsuperscript{132} This interpretation has become the prevailing view in the application of civil disability statutes\textsuperscript{133} despite the fact that the Court in each case was concerned with criminal procedure rather than civil disabilities.\textsuperscript{134}

Several courts have recognized that the Wilson-Mackin interpretation is applicable only for a statute involving criminal procedure. They have adhered to the common law standard that a crime is declared infamous according to its nature, rather than to its punishment.\textsuperscript{135} The common law definition of infamous, however, has been broadened. Under this view, a crime is now infamous if its commission involves the breach of the moral principles of the community.\textsuperscript{136} Fraudulent conduct is no longer necessary. In applying this standard, an infamous crime has been held to include both felonies and misdemeanors.\textsuperscript{137} These courts, therefore, have recognized that the definition of infamous crime requires a connection between the disability and the nature of the crime, but they have not required that the connection be narrowed to relate specific disabilities to specific crimes.

Only one court has held that the disability must be reasonably related to the nature of the crime. In \textit{Otsuka v. Hite}\textsuperscript{138} the California Supreme Court held that the defendant was entitled to be an elector because his crime, a violation of the Selective Service Act, did not indicate that he constituted a threat to the integrity of the voting process. There is no indication that the \textit{Otsuka} case has had a significant impact on other courts.

3. \textit{Crime Involving Moral Turpitude}.—Some states impose civil

\begin{itemize}
  \item \textsuperscript{132} \textit{See}, e.g., Truchon v. Toomey, 116 Cal. App. 2d 736, 254 P.2d 638 (1953).
  \item \textsuperscript{133} \textit{See} R. Perkins, supra note 124, at 18; 22 C.J.S. Criminal Law § 3 (1961).
  \item \textsuperscript{134} A careful analysis of the Wilson and Mackin cases reveals that their interpretation of infamous crime was influenced solely by the Court's view of the purpose underlying the fifth amendment's indictment clause. That purpose, the Court found, is to establish procedural safeguards for persons accused of serious crimes. The Court reasoned, therefore, that justice would be best served by a broad interpretation so that few crimes would fall outside the purview of the procedural safeguards.
  \item \textsuperscript{135} \textit{E.g.}, Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 A. 861 (1920); Commonwealth v. Jones, 334 Pa. 321, 5 A.2d 804 (1939).
  \item \textsuperscript{136} \textit{See} Johnson v. State, 4 Md. App. 648, 244 A.2d 632 (1968).
  \item \textsuperscript{137} \textit{State ex rel.} Stinger v. Krueger, 280 Mo. 293, 305-06, 217 S.W. 310, 313 (1919); State v. O'Shields, 163 S.C. 408, 161 S.E. 692 (1931).
  \item \textsuperscript{138} 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966).
\end{itemize}
disabilities upon conviction of a crime involving moral turpitude. The interpretation of crime involving moral turpitude is founded on a moral judgment of the nature of the offense. The definition that has been established is quite broad, involving an offense that is contrary to justice, honesty, principle, and good morals. This broad definition encompasses both felonies and misdemeanors if their commission is contrary to the public's moral standards. Since the concept of moral turpitude depends on a subjective evaluation of the public's morals, its meaning varies in degree from state to state and from year to year.

C. Extraterritorial Applicability of Civil Disability Statutes

An issue often raised in litigation involving a civil disability statute is whether the forum jurisdiction's disability statute applies to a foreign conviction. This question arises when an offender who has been convicted of a crime in a foreign jurisdiction travels to the forum state, where he encounters the forum state's specific disability statute. It also arises when an offender who is imprisoned in a foreign jurisdiction that does not have a civil death statute asserts a civil right in litigation before a forum court where a civil death statute is in effect. In both situations, the forum court must decide whether its statute applies to an offender convicted in a foreign jurisdiction.

Although statutory provisions occasionally are dispositive of these issues, the courts frequently must

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139. E.g., In re Hatch, 10 Cal. 2d 147, 150, 73 P.2d 885, 886 (1937); Huff v. Anderson, 212 Ga. 32, 34, 90 S.E.2d 329, 331 (1955).
141. E.g., In re Bartos, 13 F.2d 138 (D. Neb. 1926).
142. A foreign conviction is one rendered by a court of another jurisdiction. Thus, if the forum is a New York state court, a conviction rendered in Alabama is a foreign conviction. Similarly, if the forum is a New York state court, a conviction by a federal court in New York is also a foreign conviction. Accordingly, a conviction in a military court is a foreign conviction to a nonmilitary court. Also, a conviction in a foreign country is considered a foreign conviction.
143. In one other factual situation the application of civil death statutes raises problems. A prisoner convicted to serve a life term by a state that has a civil death statute attempts to file suit or assert a civil right in a foreign state that does not have a civil death statute. The forum court must decide whether the civilly dead status of the prisoner prohibits him from initiating a suit or asserting a right in the forum state. This issue has not been raised often. Two early cases held that the civilly dead status of the prisoner did not preclude him from initiating a suit or asserting a civil right in another state. Wilson v. King, 59 Ark. 32, 26 S.W. 18 (1894) (right to sue); Presbury v. Hull, 34 Mo. 29 (1863) (right to contract). Since the courts of one state will not execute the penal laws of another, the courts of the forum state will not give effect to a foreign state's civil death statute if it is considered penal in nature. See Hayashi v. Lorenz, 42 Cal. 2d 848, 271 P.2d 18 (1954); J. Story, Conflict of Law § 620, at 767 (7th ed. 1872).
interpret civil disability statutes that make no reference to foreign convictions. On its face, this issue resembles a conflict of laws problem. The real problem confronting the forum court, however, is an interpretational one, requiring a determination of whether the state legislature intended for the disability statute to have extraterritorial applicability. Since courts frequently reach different conclusions about unexpressed legislative intent, the case law on this issue has been conflicting and inconsistent. From the existing confusion, however, several distinct positions are apparent.

1. The Majority View.—A majority of state courts hold that specific disability statutes are applicable to foreign convictions. In at least 21 states, the controlling case law clearly supports this view. In California, Florida, New York, and Ohio, the authorities are in conflict, but the case law indicates that these states will follow the majority view. Although the majority’s interpretation has been applied to a

N.C. Gen. Stat. § 85-9(5) (1965) (revocation of auctioneer’s license on “conviction of any crime involving moral turpitude either in this State or any other state”); Ohio Rev. Code Ann. § 2961.02 (Baldwin 1964) (persons “imprisoned in the penitentiary of any other state of the United States, under sentence for the commission of a crime punishable under the laws of this state by imprisonment in the penitentiary” denied the right to vote).


broad spectrum of specific disability statutes, a common rationale appears in the opinions. These courts have found that specific disability statutes are designed to protect the public's interests rather than to punish the offender. Since the public's interests could not be adequately safeguarded if the statutes applied only to convictions by the courts of the forum state, the courts conclude that the legislature intended for the statutes to apply to foreign convictions.

The majority position also has been followed by one state when the issue before the court was whether the forum state's civil death statute was applicable to a foreign conviction. Both state and federal courts in New York hold that when rights that arise under New York law are involved, as a matter of public policy the New York civil death statute applies to foreign convictions imposing life imprisonment.

Although the jurisdictions that follow the majority position agree that both specific civil disability and civil death statutes are applicable to foreign convictions, they disagree over which body of law should apply.

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148. See, e.g., State ex rel. Barrett v. Sartorious, 351 Mo. 1237, 175 S.W.2d 787 (1943).


The majority's rationale has been challenged on the ground that it is contrary to the established principle that no state will execute the penal laws of another state. In answer to this criticism, the majority has stated that the application of civil disability statutes to foreign convictions is not an imposition of an additional penalty, but only a protective measure which must be taken to safeguard the public's interest. See, e.g., State ex rel. Olson v. Langer, 65 N.D. 68, 90, 256 N.W. 377, 387 (1934).

determine whether a foreign conviction is sufficient to invoke the forum's disability statute. The dispute focuses on whether the forum should use its own law or that of the convicting jurisdiction to characterize the offender's criminal act. Assume, for example, that an offender is convicted by a federal court of a crime that the federal government denotes as a felony. Under the law of the forum state, however, the same crime is only a misdemeanor. Since a certain disability statute in the forum state is applicable to an offender convicted of a felony, the forum court must decide whether the offender's crime is a felony, as that term is used in the disability statute. If the forum decides that the law of the convicting jurisdiction characterizes the crime, the offender has committed a felony and the disability must be imposed. If, however, the forum characterizes the crime by using its own law, the offense is only a misdemeanor and the disability will not be imposed. The problem of characterization, like that of applicability, is a question of statutory interpretation. The courts are divided on the question of characterization. In at least nine states it is clear that the disabling crime is characterized by the law of the disqualifying (forum) state. The weight of authority in New York supports this view, even though a lower New York court recently rejected it. The courts of Ohio have reached no consensus on this issue. The courts following the view that the forum's law is to be used have reasoned that the legislature undoubtedly intended for the beliefs of the citizens of the forum state to


152. E.g., In re Donegan, 282 N.Y. 285, 25 N.E.2d 260 (1940); People v. Guttenber, 244 N.Y. 243, 125 N.E. 113 (1926).


determine the standards by which the disabilities are imposed, since the forum state's disability statutes protect its citizens.\textsuperscript{155} If this were not the rule, these courts note, a state's disability statutes would be imposed according to the views of the foreign jurisdiction's citizens, which frequently differ from those existing in the forum state.\textsuperscript{156} Accordingly, both the Model Penal Code and the Uniform Act on the Status of Convicted Persons\textsuperscript{157} state that the forum should use its own laws to characterize crimes so that civil disability statutes of the forum state are applicable to foreign convictions only if the offense in question is a disabling crime under the laws of the forum state.\textsuperscript{158}

In at least seven states the courts hold that the offender's crime is characterized by the law of the foreign, convicting jurisdiction.\textsuperscript{159} Under the rationale of these decisions, the criminal act proves that the offender lacks an acceptable moral character.\textsuperscript{160} This view assumes that since the offender knew the laws of the state in which he committed a crime, he also knew that he was committing an illegal act. Therefore, to these courts, such callous disrespect for the laws of society, manifesting a morally deficient character, is a valid ground for the imposition of civil disabilities.\textsuperscript{161}

2. The Minority View.—The controlling cases in at least eight jurisdictions reject the majority view and hold that specific disability statutes are applicable only to convictions by the courts of the forum state.\textsuperscript{162} Although several cases in Florida, Oklahoma, and New


\textsuperscript{156} See, e.g., \textit{DuVall v. Board of Medical Examiners}, 49 Ariz. 329, 339-40, 66 P.2d 1026, 1031 (1937); \textit{In re Canter's Will}, 146 Misc. 123, 132, 261 N.Y.S. 872, 882 (Sur. Ct. 1933). The case of \textit{Gutterman v. State}, 141 So. 2d 21 (Fla. App. 1962), is illustrative. The offender was convicted in New York of second degree assault. Florida, however, does not recognize a crime of second degree assault. Thus, the offender was not disqualified from holding public office in Florida.

\textsuperscript{157} \textit{MODEL PENAL CODE} § 306.2(1) (Proposed Off. Draft 1962); \textit{UNIFORM ACT ON STATUS OF CONVICTED PERSONS} § 1 in \textit{HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS} 295-97 (1964).

\textsuperscript{158} See notes 151-52 \textit{supra} and accompanying text.


\textsuperscript{160} See, e.g., \textit{State ex rel. Olson v. Langer}, 65 N.D. 68, 256 N.W. 377 (1934).


York have held that a foreign conviction did not render an offender incompetent as a witness or a juror, the general rule in these states still supports the majority position since these cases have been confined to particular disabilities. The courts of both Colorado and Kentucky have rendered conflicting opinions on this issue, although the most recent decisions support the minority position. Most courts following the minority position focus on accepted principles of the common law rather than on the unexpressed legislative intent. In the leading case of Commonwealth v. Green, for example, the Massachusetts Supreme Court held that the forum's use of a foreign conviction to impose a civil disability constitutes a penalty imposed for the commission of a crime committed in a foreign state. The imposition of such a penalty by the courts of a state other than the convicting state would effectively execute the penal laws of another state, a practice that contravenes the common law.

This reasoning, adopted by several New York courts, formed the basis for the United States Supreme Court's decision in Logan v. United States, where the Court stated:

At common law and on general principles of jurisprudence, when not controlled by express statute giving effect within the State which enacts it to a conviction and sentence in another State, such conviction and sentence can have no effect by way of penalty or of disability or disqualification, beyond the limits of the State in which the judgment is rendered.

Although the Logan doctrine has generally been limited to an offender's competence to serve as a witness, it has occasionally been cited as controlling authority in cases involving other specific disability statutes. Several courts that adhere to the minority position have not relied on the rationale of Green and Logan. These courts, ignoring the common law approach, reason that the legislatures did not intend that the specific disability statutes be applied to convictions rendered in the courts of foreign jurisdictions.

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163. See cases cited note 146 supra.
164. See People v. Enlow, 135 Colo. 249, 310 P.2d 539 (1957); Wood v. Wood, 264 S.W.2d 260 (Ky. 1954).
165. 17 Mass. 515 (1822).
167. National Trust Co. v. Gleason, 77 N.Y. 400 (1879); Sims v. Sims, 75 N.Y. 466 (1878).
168. 144 U.S. 263, 303 (1892).
170. See State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508 (1933); Isaacs v. Board of Ballot Comm'rs, 122 W. Va. 703, 12 S.E.2d 510 (1940).
The courts in California and Missouri have held that the legislature intended for the civil death statutes to apply only to convictions by the courts of the forum state and imprisonment in the prisons of the forum state.171

III. LOSS OF UNITED STATES CITIZENSHIP

The fourteenth amendment confers citizenship upon all persons born or naturalized in the United States.172 The Constitution does not provide that criminal offenders shall lose their United States citizenship as a result of a criminal conviction, and it does not give Congress the power to impose this disability. As a general rule, therefore, United States citizens convicted of criminal offenses retain their citizenship and many of the rights and privileges accompanying it,173 including the right to obtain a passport.

Although a criminal offender retains his citizenship, his position in many respects is similar to that of an alien. The courts have recognized that there is a fundamental distinction between the status of citizenship and the privileges of citizenship.174 Consequently, a citizen convicted of a criminal offense may be prevented from exercising such rights and privileges as voting, holding public office, and serving on juries. Moreover, many of the privileges of citizenship retained by convicted criminals also are available to non-citizens, making the status of

171. See Hill v. Gentry, 280 F.2d 88 (8th Cir. 1960); Beck v. Downey, 191 F.2d 150 (9th Cir. 1951); Vedin v. McConnell, 22 F.2d 753 (9th Cir. 1927); Hayashi v. Lorenz, 42 Cal. 2d 848, 271 P.2d 18 (1954); Fidelity & Deposit Co. v. Boundy, 236 Mo. App. 656, 158 S.W.2d 243 (1942); Jones v. Jones, 188 Mo. App. 220, 175 S.W. 227 (1915).

172. U.S. Const. amend. XIV, § 1. The fourteenth amendment also provides that persons born or naturalized in the United States are citizens of the state in which they reside. The courts have recognized that there is a difference between United States citizenship and state citizenship. See, e.g., United States v. Cruikshank, 92 U.S. 542, 549 (1876); Slaughter-House Cases, 83 U.S. (16 Wall.) 86, 166 (1873). For example, the Maryland Court of Appeals in Crosse v. Board of Supervisors of Elections, 243 Md. 555, 221 A.2d 431 (1966), held that it is not necessary for a person to be a United States citizen in order for him to be a citizen of the state in which he resides. The court interpreted a state constitutional requirement that a candidate for public office must have been a citizen of the state for 5 years to mean that he must have been domiciled in the state for 5 years. The court said citizenship of a state depends on the constitutional or statutory context in which the term is used. For some purposes, the court found that the term citizenship in a state statute may be equated with residency. Id. at 434. In Factor v. Pennington Press, Inc., 230 F. Supp. 906 (N.D. Ill. 1963), however, a federal district court held that the language of the fourteenth amendment indicates that an individual must be a United States citizen before he can be a citizen of a state.


citizenship less meaningful. Nevertheless, aliens who participate in criminal activity may be subjected to a number of disabilities not imposed on citizens. Unlike convicted citizens, for example, aliens are subject to deportation. In addition, if an alien has been convicted of a criminal offense, he may be prevented from obtaining citizenship in the United States since Congress has provided that an alien cannot be naturalized unless he possesses good moral character.

This section will discuss the effect of a criminal conviction on citizenship and the constitutional problems involved in the efforts by Congress to denationalize citizens convicted of certain offenses. In addition, this section will review the effect of a criminal conviction on aliens.

A. Effect of Criminal Conviction on Citizenship and Passport Rights

1. Denationalization of Convicted Citizens.—There has been considerable controversy in recent years over the power of Congress to provide for the involuntary denationalization of citizens. During this period, the Supreme Court has ruled unconstitutional several attempts by Congress to denationalize citizens and has recognized that a criminal conviction does not result in the denationalization of the offender, even if he has lost his civil rights under a state statute.

The privileges and immunities clause of the fourteenth amendment protects “citizens,” as distinguished from the due process and equal protection clauses, which protect “any person.” U.S. CONST. amend. XIV, § 1. See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (power to exclude aliens includes power to detain stateless aliens indefinitely); Carlson v. Landon, 342 U.S. 524 (1952) (discretionary refusal of Attorney General to grant bail not reviewable unless arbitrary).

175. Aliens as well as citizens are entitled to protection under the fifth amendment. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (dictum). In addition, aliens are protected by the due process and equal protection clauses. Truax v. Raich, 239 U.S. 33, 39 (1915). Moreover, all persons in the United States, irrespective of citizenship, may exercise such rights as freedom of speech and religion because the Constitution prohibits the government from interfering with these rights. U.S. CONST. amend. I. See Hurst, Can Congress Take Away Citizenship?, 29 ROCKY MT. L. REV. 62, 63 (1956).

176. The privileges and immunities clause of the fourteenth amendment protects “citizens,” as distinguished from the due process and equal protection clauses, which protect “any person.” U.S. CONST. amend. XIV, § 1. See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (power to exclude aliens includes power to detain stateless aliens indefinitely); Carlson v. Landon, 342 U.S. 524 (1952) (discretionary refusal of Attorney General to grant bail not reviewable unless arbitrary).


179. See, e.g., Afroyim v. Rusk, 387 U.S. 253 (1967) (invalidating statute providing that citizen loses his citizenship for voting in a political election in a foreign state); Schneider v. Rusk, 377 U.S. 163 (1964) (declaring statute unconstitutional which provided for denationalization of naturalized citizen after his continuous residence for 3 years in the country of his birth); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (invalidating statute which expatriated citizens who leave the United States to avoid the draft); Trop v. Dulles, 356 U.S. 86 (1958) (invalidating statute which denationalized citizens convicted of desertion in time of war).

180. See note 173 supra and accompanying text.

courts have had little difficulty in establishing this rule since the Constitution does not provide that convicted citizens should forfeit their citizenship, and Congress, with two limited exceptions, has not attempted to denationalize convicted citizens.

In 1958, the Supreme Court in *Trop v. Dulles* invalidated a statute providing for the denationalization of citizens dishonorably discharged from the armed forces after a court martial conviction for desertion in time of war. Finding that the statute was designed to punish the convicted deserter, the Court held that the use of denationalization as a punishment violates the eighth amendment's proscription against "cruel and unusual punishment." The Court explained that the Constitution does not give Congress the power to use denationalization as a weapon to express its displeasure with a citizen's conduct however reprehensible that conduct may be.

In addition to its effort to denationalize convicted deserters, Congress has provided that a United States citizen shall lose his citizenship upon conviction of treason, of advocating the overthrow of the United States government by force or violence, or of other specified crimes relating to the forceful opposition to the government. In passing this statute, Congress was attempting to equip the government with sanctions to combat internal communism. Although the statute has not been declared unconstitutional, the Supreme Court's decisions in *Trop* and in *Afroyim v. Rusk* place its validity in doubt. The Court in *Afroyim* ruled that a statute denationalizing a citizen for voting in a political election in a foreign state was unconstitutional because Congress has no power, express or implied, to denationalize a citizen without his consent. The Court stated that the fourteenth amendment "can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this [fourteenth amendment] citizenship was not to be shifted, canceled, or

185. The Court stated that citizenship "is not a license that expires upon misbehavior." *Trop v. Dulles*, 356 U.S. 86, 92 (1958).
186. 8 U.S.C. § 1481(a)(9) (1964). The statute provides for the expatriation of citizens convicted of violating the following statutes: 18 U.S.C. § 2383 (1964) (rebellion or insurrection against authority or laws of United States); 18 U.S.C. § 2384 (1964) (advocating overthrow of United States government by force or violence); and 18 U.S.C. § 2385 (1964) (conspiracy to overthrow or destroy the government by force, or to prevent or delay execution of any law of the United States by force, or to take, seize, or possess any property of the United States by force).
188. 387 U.S. 253 (1967).
diluted at the will of the Federal Government, the [s]tates, or any other governmental unit." As a result of this broad language, the *Afroyim* decision may mean that a citizen convicted of treason or of attempting by force to overthrow the government will retain his citizenship, despite the statute passed by Congress. This result will depend on whether a citizen may voluntarily abandon his citizenship through his actions. Although the broad language of *Afroyim* indicates that positive and affirmative consent is necessary before a citizen can lose his citizenship, the Court could interpret an act of treason or an attempt to overthrow the government as a voluntary abandonment of citizenship.

2. Right of Convicted Citizens to Obtain Passports.—A criminal conviction generally does not affect the right of the offender to obtain a passport. Congress has granted to the Secretary of State the power to issue passports under rules designated by the President. By executive order, the President has empowered the Secretary of State to prescribe the rules for the issuance of passports without the approval or ratification of the President. The present rules do not deny passports to citizens on the basis of a criminal conviction.

In the 1950's passports were regularly denied to habitual criminals, but since that time the Secretary of State has sharply narrowed the reasons for which passports are denied. Under existing rules, a passport will not be issued if the applicant is the subject of an outstanding federal warrant of arrest, or if he is subject to a court order, conditions of parole, or conditions of probation that forbid his departure from the United States. If a convicted citizen has completely paid his debt to society, he will not be prevented from obtaining a passport on the

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189. *Id.* at 262.
190. See 20 *VAND. L. REV.* 1341, 1345 (1967).
193. A passport is a document identifying a citizen. In effect, a passport requests foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to protection by American diplomatic and consular officers. *United States v. Laub*, 385 U.S. 475, 481 (1967).
196. The current rules do provide, however, that a passport may be refused if the Secretary of State determines that the applicant's activities abroad are likely to cause serious damage to the national security or the foreign policy of the United States. 22 C.F.R. § 51.70(b)(4) (1970). In addition, the rules provide that a passport may be revoked or restricted if a citizen's activities abroad are in violation of the laws of the United States. *Id.* § 51.71(c).
basis of his conviction. Passport authorities do not initiate investigations to determine if applicants have criminal records. Nevertheless, the applicant must swear on his passport application that he has never "been convicted by a court or court martial of competent jurisdiction of committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, or conspiring to overthrow, put down or to destroy by force, the Government of the United States." 200 If an applicant has been convicted of such an act, an explanation must be attached to his passport application. Passport officials explain that this inquiry is made because citizens convicted of these offenses lose their nationality and therefore are ineligible for a passport.

B. Effect of Criminal Conviction on Aliens

Although a born or naturalized citizen of the United States generally does not lose his citizenship or his capacity to acquire a passport when convicted of a crime, a criminal conviction may have serious consequences for persons who are not already citizens. Congress has provided, for example, that aliens who have been convicted of certain crimes may be excluded from admission into the United States. In addition, an alien who has a criminal record may be ineligible to be naturalized as a United States citizen and may even be subject to deportation.

1. Entrance into the United States.—Federal law prohibits aliens convicted of certain offenses from entering the United States. First, an alien is ineligible for admission into this country if he has been convicted of a nonpolitical crime involving moral turpitude. 202 This restriction does not apply to an alien convicted of a crime involving moral turpitude while he was under the age of eighteen if the crime was committed or if the alien was released from confinement more than five years prior to the date of his application for admission into the United States. Secondly, Congress has provided that aliens shall be excluded from admission into the United States if they have been convicted of two or more offenses for which the aggregate sentences actually imposed were five or more years.
of incarceration. This statute, by its terms, applies even though the offenses did not involve moral turpitude and arose from a single course of conduct. Thirdly, the federal statute prohibits the admission of any alien who has been convicted of violating any law relating to illicit traffic in narcotics. When an alien is convicted of a crime in a foreign jurisdiction, the law of the United States is applicable in determining whether he has been convicted of an offense that will preclude his entry into this country.

2. Naturalization.—If an alien is admitted into the United States and later desires to become a citizen, his criminal record may prevent him from meeting the statutory qualifications. The United States Constitution grants to Congress the power to establish uniform rules of naturalization. Accordingly, Congress has provided that no person shall be naturalized as a citizen unless he has been a person of “good moral character” for at least five years preceding the date when he filed his petition for naturalization. Statutory guidelines provide that an alien shall not be regarded as a person of good moral character if he has been convicted during the five-year period of any offense that could have excluded him from admission into the United States. Nor does an alien possess good moral character if he: (1) has been convicted of two or more gambling offenses during the five-year period; (2) has been confined in a penal institution, as a result of a criminal conviction, for a total of 180 days or more during the five-year period, regardless of whether the offenses for which he was confined were committed within the period; or (3) has been convicted of murder at any time. Moreover, an alien who has never been convicted of a crime may lack good moral character. The statute specifies, for example, that habitual drunkards and persons who have committed adultery do not possess

204. Id. § 1182(a)(23).
207. 8 U.S.C. § 1427(a) (1964). The statute provides that a finding by the Attorney General that an alien is not deportable is not conclusive evidence that the alien possesses good moral character. Id. § 1427(d) (1964).
208. 8 U.S.C. § 1101(f)(3) (1964). The courts have held that naturalization is a privilege which must be given or withheld in accordance with the terms imposed by Congress. See United States v. Manzi, 276 U.S. 463, 467 (1928); Tutun v. United States, 270 U.S. 568, 578 (1926); Jubran v. United States, 255 F.2d 81, 84 (5th Cir. 1958). Consequently, the courts first examine the statutory guidelines in determining whether an alien seeking naturalization is a person of good moral character. In re Mayall's Naturalization, 154 F. Supp. 556, 560 (E.D. Pa. 1957).
210. Id. § 1101(f)(7).
211. Id. § 1101(f)(8).
212. Id. § 1101(f)(1).
213. Id. § 1101(f)(2).
good moral character. Similarly, Congress permits the courts, in their
discretion, to find that an alien does not possess good moral character
even if his conduct does not fall within the statutory definition. According to the courts, the test of good moral character should be the
ethical standards current at the time in the community, not the personal
moral principles of the individual judge or court. The court may
consider a number of factors, including arrests and traffic violations. Although a denial of naturalization cannot be based on an offense
committed before the five-year period, the courts may consider crimes
committed prior to the five-year period along with other evidence to
determine if the alien has shown good moral character within the
period. A criminal conviction within the five-year period, however,
does not conclusively establish bad moral character unless Congress has
so provided.

3. Deportation.—In addition to making aliens convicted of
certain offenses ineligible for United States citizenship, Congress has
provided that convicted aliens may be deported. A federal statute directs
the Attorney General to order the deportation of any alien who has been
convicted of a crime involving moral turpitude within five years after
his entry into the United States and who has been sentenced to or
confined in a prison for a year or more. An alien also is subject to
deportation if he has been convicted of two crimes involving moral
turpitude at any time after his entry into the United States, regardless of
whether he was confined in prison as a result of his convictions. In
addition, Congress has authorized the deportation of aliens convicted of
laws relating to illicit possession of or traffic in narcotics or
marijuana.

214. Id. § 1101(f). See, e.g., Buklewicz v. Savoretti, 211 F.2d 541 (5th Cir. 1954); cf: In re
Naturalization of Denessy, 200 F. Supp. 354 (D. Del. 1961). For a discussion of cases applying the
requirement of good moral character see Note, Naturalization—Good Moral Character as a
Prerequisite, 34 NOTRE DAME LAW., 375 (1959).
215. See, e.g., Posusta v. United States, 285 F.2d 533 (2d Cir. 1961); In re Schmidt, 56 Misc.
456, 289 N.Y.2d 89 (Sup. Ct. 1968).
218. See, e.g., Marcantonio v. United States, 185 F.2d 934 (4th Cir. 1950); In re Sacco's
Petition, 184 F. Supp. 803 (D. Md. 1960); In re Orphanidis' Petition, 178 F. Supp. 872 (N.D.
220. For a discussion of what constitutes a crime involving moral turpitude see notes 139-41
supra and accompanying text.
222. Id.
223. Id. § 1251(a)(11).
To ease the harshness of the deportation provisions, Congress gives
the Attorney General discretion to suspend a deportation order under
certain circumstances. In addition, a convicted alien generally cannot
be deported on the basis of his conviction if he has been granted a full
and unconditional pardon or if the court imposing his sentence makes a
recommendation to the Attorney General that he not be deported. A
pardon or judicial recommendation, however, will not prevent the
deposition of an alien convicted of violating narcotics laws. Moreover, the courts have held that an alien whose conviction has been
expunged under state law still is subject to deportation.

In Mahler v. Eby, the United States Supreme Court upheld
statutes authorizing the deportation of convicted aliens as an exercise of
the sovereign's power to determine the conditions upon which an alien
may reside in this country. The Court found that the statute in question
was not designed to punish aliens, but to rid the country of persons who
have shown that their continued presence might be detrimental to the
safety and welfare of society. Although deportation provisions have
been upheld, the courts have ruled that they should be strictly construed
since they may inflict the equivalent of banishment or exile on the
convicted alien. Accordingly, the Supreme Court has ruled that a
criminal offender cannot be deported unless he was an alien at the time
of his conviction. Consequently, a citizen who has been convicted of
offenses involving moral turpitude cannot be deported if he is
subsequently denaturalized. In determining whether an alien has been

224. Id. § 1254(a)(2). To obtain a suspension of a deportation order, an alien must have
been physically present in the United States for a continuous period of 10 years following the
commission of the act constituting a ground for deportation. He must prove that during that period
he has been a person of good moral character. He also must satisfy the Attorney General that his
deposition would result in unusual hardship "to the alien or to his spouse, parent, or child, who is a
citizen of the United States or an alien lawfully admitted for permanent residence." Id.

225. Id. § 1251(b).

226. Id. The Ninth Circuit recently held that Congress has not unconstitutionally abridged
the power of executive clemency by nullifying the effect of a state pardon of a narcotics conviction.
Kwai Chiu Yuen v. Immigration & Naturalization Serv., 406 F.2d 499 (9th Cir. 1969), cert. denied,

227. See, e.g., Tsimbidy-Rochu v. Immigration & Naturalization Serv., 414 F.2d 797 (9th Cir. 1969); Brownrigg v. Immigration &
Naturalization Serv., 356 F.2d 877 (9th Cir. 1966). See Comment, The Futile Forgiveness: Basing

228. 264 U.S. 32 (1924).

229. Id. at 39.

F. Supp. 433 (S.D.N.Y. 1958). Banishment has never been allowed as a punishment in this country.


232. Id.
convicted of a crime that makes him subject to deportation, the courts
apply the law of the United States, not the law of a state or foreign
country.233

IV. LOSS OF VOTING RIGHTS

The United States Constitution provides that the voting
qualifications established by the states for state elections also apply to
elections for the United States House of Representatives234 and Senate.235
State law also governs the qualifications for voting in presidential
elections.236 As a result of these provisions, both national and state
elective officials are selected under a medley of voting qualifications that
vary considerably from state to state.237 Historically, voting was
considered a privilege rather than a right.238 Consequently, the states
were able to enact strict voting requirements that discriminated against
citizens on such grounds as sex, economic status, race, and education.
Throughout the years, however, the right to vote has been the subject of
continuous expansion through constitutional amendments,
congressional action, and judicial decisions.239 Today, therefore, voting
is considered a fundamental right.240 Nevertheless, since the states still
have considerable power to set voting qualifications, the requirements
for voting are different in each state.241

Although most of the restrictive and discriminatory voting
requirements have been eliminated, all citizens who have reached their

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233. See, e.g., Mercer v. Lence, 96 F.2d 122 (10th Cir.), cert. denied, 305 U.S. 611
235. U.S. CONST. amend. XVII.
236. When the voters go to the polls at a presidential election, they do not vote directly for the
President and Vice President, but rather for presidential electors. Although the electors are chosen
by the people in each state, this is due solely to state law and not to any requirement contained in the
United States Constitution. The Constitution simply requires that the states “appoint” presidential
electors in a manner prescribed by the state legislature. U.S. CONST. art. II, § 1. For a collection of
state laws requiring the popular election of presidential electors see R. HUPMAN & R. TIENKEN,
NOMINATION AND ELECTION OF PRESIDENT AND VICE PRESIDENT OF THE
238. 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 1360-61 (8th ed. 1927).
239. See, e.g., U.S. CONST. amend. XV (suffrage not denied because of race, color, or
servitude); U.S. CONST. amend. XIX (suffrage rights granted to women); Voting Rights Act of
CONG. & ADMIN. NEWS 2097 (July 20, 1970) (granting suffrage rights to 18-year-olds); Reynolds v.
Sims, 377 U.S. 533 (1964) (requiring equal legislative representation for all citizens of state).
241. D. McGovney, supra note 237,
state's voting age and met the residency requirements still do not have free access to the polls. In almost all states, for example, persons who have been convicted of certain crimes are not allowed to vote unless their civil rights have been restored. To date, there have been few substantial efforts to eliminate or weaken provisions denying the franchise to convicted citizens.

A. Disfranchisement Upon Criminal Conviction

The state constitutional and statutory provisions disfranchising persons convicted of criminal offenses are so diverse that they are difficult to categorize. Despite this diversity, the result in the overwhelming majority of states is that citizens convicted of serious crimes, usually felonies, lose their right to vote until their civil rights are restored in accordance with the appropriate state law.

A number of states provide that no person who has been convicted of a felony or an infamous crime shall be allowed to register and vote. Some states use these classifications, but also disqualify citizens convicted of specified offenses. Generally, the offenses listed separately are election offenses and treason. Other jurisdictions deny voting


243. ILL. Const. art. 7, § 7; ILL. ANN. Stat. ch. 38, § 124-2 (Smith-Hurd 1964); IOWA Const. art. 2, § 5; WASH. Const. art. 6, § 3; WASH. Rev. CODE Ann. § 29.59.060 (1965). The Indiana constitution gives the state legislature power to deny the right of suffrage to persons convicted of an infamous crime. IND. Const. art. 2, § 8. The legislature, however, has provided that the right to vote is lost only during the period of confinement in jail or prison for persons convicted of a felony or misdemeanor. IND. ANN. Stat. § 29-4804 (1969). For a general discussion of what constitutes an infamous crime see notes 121-38 supra and accompanying text.

244. Ten states provide that voting rights are lost upon conviction of a felony or specified offenses: ARIZ. Const. art. 7, § 2; ARIZ. Rev. Stat. ANN. § 16-101(c) (1956); KY. Const. § 145; KY. Rev. Stat. ANN. § 117.605 (1969); MO. Const. art. 8, § 2; MO. ANN. Stat. § 111.060 (1966); NEB. Const. art. 6, § 2; NEB. Rev. Stat. §§ 29-112 to -113 (1964); NEV. Const. art. 2, § 1; N.D. Const. § 127; N.D. CENT. CODE § 16-01-04 (1969); S.D. Const. art. 7, § 8; TEX. Const. art. 16, § 2; TEX. Election CODE art. 5.01 (1967); VA. Const. § 23; VA. CODE Ann. § 24-18 (1969); WIS. Const. art. 3, § 2; WIS. Stat. ANN. § 6.03 (1967).

At least 3 states deny voting rights to citizens convicted of an infamous crime or specified offenses: CAL. Const. art. 2, § 1; R.I. Const. amend. XXIV; TENN. Const. art. 1, § 5; TENN. CODE ANN. § 2-205 (1955); id. § 40-2712.

245. E.g., ARIZ. Const. art. 7, § 2; ARIZ. Rev. Stat. ANN. § 16-101(c) (1956); KY. Const. § 145; KY. Rev. Stat. ANN. § 117.605 (1969). But see VA. Const. § 23 (specified offenses include petit larceny, obtaining property under false pretenses, embezzlement, forgery, and perjury); TENN. CODE ANN. § 2-205 (1955); id. § 40-2712 (specified offenses include bribery and larceny).
rights to persons convicted of either an infamous crime, a felony, or specified crimes. In addition, a few states disqualify voters convicted of crimes punishable by imprisonment in the state penitentiary.

Rather than classifying offenses, a number of states specify the crimes that result in disfranchisement. Some of these states disqualify only a few offenders, such as those convicted of election offenses or treason. On the other hand, the constitutional and statutory provisions in other states list numerous offenses causing a loss of voting rights. Alabama has one of the most far-reaching disfranchisement provisions of any state. The state constitution disqualifies a person from voting for his conviction of any one of about 25 specified offenses, covering almost everything from murder to vagrancy. In addition, the constitution provides disfranchisement for conviction of “any crime punishable by imprisonment in the penitentiary, or any infamous crime or crime of moral turpitude.”

In some cases, the state constitution says one thing and the statutes say another. The New York, Ohio, and Wyoming constitutions, for example, exclude from the right of suffrage all people convicted of infamous crimes. The legislatures in those states have provided that convicted felons are not entitled to vote. In Illinois, both the constitution and an implementing statute provide for disfranchisement of citizens convicted of infamous crimes, but another Illinois statute excludes from voting all persons who have been legally convicted and

246. Fla. Const. art. 6, §§ 4-5; Fla. Stat. Ann. § 97.041 (Supp. 1969); id. § 112.01 (1960); Idaho Const. art. 6, § 3; Idaho Code Ann. § 34-402 (1963); Md. Const. art. 1, § 2; Md. Ann. Code Ann. § 33, § 186 (1967); Minn. Const. art. 4, § 15; Id. art. 7, § 2; N.M. Const. art. 7, § 1; N.Y. Const. art. 2, § 3; N.Y. Election Laws §§ 152(2)-(5) (McKinney 1964); Ohio Const. art. 5, § 4; Ohio Rev. Code Ann. §§ 2961.01-02 (Baldwin 1964); Wyo. Const. art. 6, § 6; Wyo. Stat. Ann. § 6-4 (1957).

247. N.C. Const. art. 6, § 2; N.C. Gen. Stat. § 163-55 (Supp. 1969); Ore. Const. art. 2, § 3. Generally, only persons convicted of felonies are imprisoned in the penitentiary; persons convicted of misdemeanors usually serve their sentences in local jails.


251. Ala. Const. art. 8, § 182. Georgia’s constitution lists a few specific crimes, and then adds “or of any crime involving moral turpitude.” Ga. Const. § 2-801.

252. N.Y. Const. art. 2, § 3; Ohio Const. art. 5, § 4; Wyo. Const. art. 6, § 6.


sentenced to confinement in the penitentiary.255 Due to this inconsistency, it is unclear whether a defendant who is sentenced to the penitentiary loses his right to vote if he has not committed a crime labeled “infamous” by the legislature.256

At least one state, Arkansas, apparently has repealed its disfranchisement provision. The Arkansas constitution delegates to the legislature the power to deprive convicted felons of the right to vote.257 Until recently, the Arkansas Election Code contained a disfranchisement provision,258 but the state legislature repealed the entire Code, replacing it with a new law that apparently does not exclude felons from voting.259

B. Disfranchisement During Confinement in Jail or Prison

In most states, all citizens, including those not otherwise disqualified, can be deprived of their right to vote during confinement in jail or prison. A few states have specific provisions to this effect. In other states, prisoners cannot vote because they do not have access to the polls and do not qualify for absentee ballots.260

1. Provisions Expressly Excluding Prisoners from Voting.—Several states have express provisions excluding persons confined in public prisons from voting. An Indiana statute, for example, provides: “Every person undergoing a sentence of imprisonment on conviction of any felony or misdemeanor shall be disfranchised during the period of such imprisonment.”261 Other states have clauses depriving all prisoners of voting rights in their statutes disfranchising persons convicted of serious crimes whose civil rights have not been restored.262

New Hampshire is the only state that has adopted the Uniform Act on the Status of Convicted Persons.263 This Act provides that a person

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256. Id. ch. 38, § 124-1 (1964) (designates the offenses that are considered “infamous”).
259. Id. § 3-707 (Supp. 1969).
260. Since voting rights are lost or suspended during confinement in jail or prison, several states have provided that inmates do not lose their residence for voting purposes while imprisoned. E.g., N.H. Rev. Stat. Ann. § 54:10 (1955); N.M. Stat. Ann. § 3-1-6 (Supp. 1969); N.Y. Const. art. 2, § 4.
convicted of a felony cannot vote from the time of his sentence until his final discharge. The Act, however, allows the offender to vote if execution of his sentence is suspended or if he is placed on probation or parole after being committed to prison. Under its provisions, a convicted felon retains the right to vote and may exercise his right at any time other than during his period of confinement, regardless of the offense committed. Like the Uniform Act, the Model Penal Code also proposes that convicted persons be disqualified from voting only during the period of their confinement in prison. A serious obstacle to widespread adoption of either the Uniform Act or the Model Penal Code is that the constitutions of most states provide for disfranchisement. Consequently, most state constitutions would have to be repealed or amended before the provisions could be effective.

Although West Virginia has not adopted the language of either the Uniform Act or the Model Penal Code, the State has taken a lenient attitude toward voting by ex-convicts. The state constitution provides that no person "under conviction" of treason, felony, or bribery in an election shall be permitted to vote. The convicted citizen regains his right to vote as soon as he has served his full term of imprisonment or has been pardoned.

2. Unavailability of Election Machinery to Prisoners.—In the majority of states, there are no statutes expressly disfranchising pre-trial detainees or prisoners who were not disqualified by their conviction. Voting rights are suspended during confinement in these states simply because there are no provisions permitting voting booths at penal institutions or authorizing the temporary release of prisoners on election day. Moreover, prisoners are not allowed to vote by absentee ballot. Most states, for example, permit voting by absentee ballot only in limited circumstances, which do not include confinement in jail or prison. At least four states have statutes specifically excluding persons confined in penal institutions from the right to receive absentee ballots.

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265. In New Hampshire, the Uniform Act is limited by the state constitution, which disfranchises persons convicted of treason, bribery, or any willful violation of the election laws. N.H. CONST. pt. 1, art. 11.
266. W. VA. CONST. art. 4, § 1; W. VA. CODE ANN. § 3-1-3 (1966).
267. See, e.g., ILL. ANN. STAT. ch. 46, § 19-1 (Smith-Hurd Supp. 1970); ORE. REV. STAT. § 253.010(1)(a) (1965); Wis. STAT. ANN. § 6.85 (Supp. 1969). Alaska permits voters to obtain absentee ballots "because of physical inaccessibility of the polling place," but there are no indications that prisoners have been permitted to vote under this provision. ALASKA STAT. § 15.20.010(C) (1962).
These provisions have been upheld in the few cases that have tested their validity. In *Ray v. Pennsylvania*, for example, a federal district court refused to strike down Pennsylvania's statute providing that prisoners cannot receive absentee ballots. In addition, the court found that even when a prisoner's voting rights are not affected by his conviction, election officials are not required to establish procedures and provide equipment in order that he might vote.

The issues raised in the *Ray* decision were discussed by the United States Supreme Court in *McDonald v. Board of Election Commissioners*, which involved a class action on behalf of inmates awaiting trial. The inmates were qualified electors, but could not appear at the polls because they were either charged with nonbailable offenses or were unable to post bail. Under the Illinois statute, they did not fall within the class of persons permitted to vote by absentee ballot. The Court, in a unanimous decision written by Chief Justice Warren, held that the Illinois absentee voting statute did not deny the untried inmates equal protection of the law. Noting that the state could furnish the jails with special polling booths, provide transportation to the polls for inmates, or permit temporary reductions in bail to allow inmates to get to the polls on their own, the Court found that the statute did not in and of itself prevent the prisoners from voting.

The *McDonald* decision is significant because the Court implied that a state would violate the constitutional rights of pre-trial detainees by completely precluding them from voting. This situation also appears to be present in a case pending before the Illinois Supreme Court. In *People ex rel. St. George v. Woods*, the plaintiff was temporarily detained in jail due to his inability to post bail. Although he touched all the procedural bases suggested by the Court in *McDonald*, the plaintiff was denied the right to vote. In his brief, the plaintiff

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269. See, e.g., Wyers v. Bannan, 249 F.2d 136 (6th Cir. 1957); Ray v. Pennsylvania, 263 F. Supp. 630 (W.D. Pa. 1967). Courts have held that the privilege of absentee voting is one within the legislative power to grant or withhold. Hallahan v. Mittlebeeller, 373 S.W.2d 726, 727 (Ky. 1963); Hilliard v. Park, 212 Tenn. 388, 370 S.W.2d 829 (1963).
272. *Ill. Ann. Stat.* ch. 46, § 19-1 (Smith-Hurd Supp. 1970) makes absentee balloting available to 4 classes of persons: (1) those who are absent from the county of their residence for any reason whatever; (2) those who are "physically incapacitated," so long as they present an affidavit to that effect from a licensed physician; (3) those whose observance of a religious holiday precludes attendance at the polls; and (4) those who are serving as poll watchers in precincts other than their own on election day.
273. 394 U.S. at 808 n.6.
contends that denial of the right to vote because of pre-trial incarceration violates the due process and equal protection clauses.276

In deciding these cases, courts may attempt to distinguish between untried inmates, as in McDonald and St. George, and convicted inmates who did not lose their voting rights by their conviction, as in Ray. State constitutional and statutory provisions establishing qualifications for voting, however, do not make such a distinction.

C. Voting By Disfranchised Persons

Although most states disqualify persons convicted of certain offenses from voting, it is uncertain, as a practical matter, how many technically disfranchised persons actually continue to vote. In many states, there appear to be no statutory provisions for removing the names of convicted persons from the voting lists. In these states, unless a special investigation is made into voting frauds, the police and court files are not ordinarily consulted to determine whether all voter registrants are qualified.277 Several states have attempted to rectify this situation by providing a statutory procedure for the removal of the names of disfranchised persons from the voting lists. The typical statute places the responsibility on the court clerk278 or prosecutor279 to supply the board of elections or other appropriate body with the names of persons who have been convicted of crimes that disqualify them from voting under the state law. California requires the county clerks to examine the court records to obtain the necessary information.280 In Connecticut, the statute requires the registrar of voters to notify convicted persons by certified mail before their names are removed.281

In addition to providing for the removal of disqualified citizens from the voting lists, many states have criminal sanctions to discourage voting by disfranchised persons.282 In most of these states, the individual

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276. The plaintiff contends that due process was violated because he was denied the right to vote without a prior hearing. He claims the equal protection clause was violated because he was prevented from voting solely because of his financial inability to post bail. Brief for Appellant at 11, 14, People ex rel. St. George v. Woods, No. 43017 (Ill. Sup. Ct., filed April 30, 1970).


who votes illegally after being convicted of a disqualifying crime is guilty of a misdemeanor. Other statutes, however, provide that the illegal voter is guilty of a felony. Some provisions specifically provide that the ex-convict is guilty of illegal voting only if he votes knowing he is not legally qualified. The courts are divided on the question of whether intent or knowledge is necessary to the statutory offense of illegal voting in the absence of a statutory requirement. Some authorities contend that a conviction for illegal voting can occur if the voter knew a state of facts that would disqualify him from voting. Other authorities, however, hold that the voter cannot be convicted unless his vote is knowingly cast without right, although he had full knowledge of the facts that disqualified him from voting. If an ex-convict reasonably believes that he has been restored to his citizenship rights, the courts generally will not find him guilty of making a false registration statement to vote.

D. Judicial Developments

The courts have recognized, especially in recent years, that the right to vote is one of the most precious and fundamental rights enjoyed by citizens in a democratic society. The Supreme Court has suggested that the right of free suffrage is the most basic of all rights. Consequently, the Court has demanded that any infringement on free suffrage be "carefully and meticulously scrutinized." Before the right to vote can be restricted, the Constitution demands a compelling state interest and legislation that is non-discriminatory. The Court has held that restrictions on the right to vote must be "germane to one's ability to participate intelligently in the electoral process." Moreover, states cannot "casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."

Despite their desire to protect and expand the right to vote, the courts have not been willing to declare state provisions unconstitutional

285. Id.
287. Id.
288. E.g., State v. White, 237 Mo. 208, 140 S.W. 896 (1911).
293. Id. at 668.
that deny the franchise to persons convicted of certain crimes. Although
the precise issue has never been before the Supreme Court, laws
excluding felons from the electorate have been cited by the Court in
several cases as examples of voting restrictions that serve a legitimate

Even the more liberal members of the Court have said in
The lower courts have relied heavily on Supreme Court dicta in cases testing

The courts have used several grounds to justify provisions
disqualifying criminals from voting. The most common explanation for
the laws is that the states have a compelling interest in preserving the
integrity and purity of the ballot box.\footnote{See, e.g., Washington v. State, 75 Ala. 582 (1884); State ex rel. Barrett v. Sartorious, 351 Mo. 1237, 175 S.W.2d 787 (1943); Application of Marino, 23 N.J. Misc. 159, 42 A.2d 469 (1945); State ex rel. Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934).}

In Green v. Board of Elections,\footnote{Id. at 585.} a federal court of appeals advanced
two additional explanations to justify the disfranchisement provisions.
First, the court suggested that the states, in passing the laws, may have
relied on Locke's theory that every man who enters society authorizes
the society, or its legislative body, to make laws for the public good and
pledges that he will assist in the execution of those laws. In applying this theory the court said, "A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact." On a less theoretical plane, the Green court found that it is not unreasonable to deny criminals the right to elect "the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime." The Missouri Supreme Court has justified the disfranchisement provisions by holding that they are designed to permit "only those who have lived up to certain minimum moral and legal standards . . . to exercise the high privilege of participating in government by voting." An interpretative comment to the Texas constitutional provision that disqualifies criminals from voting says the state has an important interest in guarding the polls against "unsafe elements."

Since the courts have found reasons to justify the practice of denying criminals the right to vote, the disfranchisement provisions have withstood a number of constitutional objections. First, it is recognized that the due process clause is not violated as long as state laws are enacted pursuant to a legitimate state purpose. Secondly, the equal protection clause cannot be used to set aside a statutory discrimination, such as the disfranchisement provisions, if facts reasonably may be conceived to justify it. Thirdly, some courts have found support for disfranchisement laws in the express wording of the fourteenth amendment. This section reduces the basis of representation of a state in the House of Representatives "when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-

302. Id. at 451, quoting J. Locke, An Essay Concerning the True Original, Extent and End of Civil Government § 89 (1698).
304. Id.
307. For a discussion of constitutional objections to civil disability laws see notes 137-315 on pages 1184-1218 infra and accompanying text.
one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime . . . .”

In Green, the state argued that the framers of the fourteenth amendment could not have intended the general language of section one to outlaw a discrimination that section two expressly allows without penalty of reduced representation. The court found the state's argument "convincing." It could find no support for the argument that "other crime" refers only to crimes connected with rebellions. Fourthly, the fifteenth amendment requirement that the right to vote must not be denied on account of "previous condition of servitude" does not prevent the disfranchisement laws, according to the Illinois Court of Appeals. In People v. DeStefano, the defendant claimed that "previous condition of servitude" includes penal confinement. Since the fifteenth amendment was designed to guarantee slaves the right to vote, the court found that imprisonment is not a "previous condition of servitude" for purposes of the amendment. Fifthly, the Constitution's prohibition against bills of attainder does not invalidate the disfranchisement provisions since the courts have found that such laws are not designed to punish but to accomplish a legitimate governmental purpose. The disfranchisement laws represent a "nonpenal exercise of the power to regulate the franchise." Lastly, courts have held that the eighth amendment's proscription of cruel and unusual punishment is not applicable to these provisions because depriving convicted felons of the franchise is not a punishment. In Green the court found that even if the laws were designed to punish, the framers of the Bill of Rights would not have regarded them as "cruel and unusual."

310. U.S. Const. amend. XIV (emphasis added).
311. Green v. Board of Elections, 380 F.2d 445, 452 (2d Cir. 1967), cert. denied, 389 U.S. 1048 (1968). The argument that the fourteenth amendment expressly authorizes the disfranchisement provisions also was made by the dissent in Otsuka v. Hite, 64 Cal. 2d 596, 616, 414 P.2d 412, 426, 51 Cal. Rptr. 284, 298 (1966).
312. U.S. Const. amend. XV.
313. 64 Ill. App. 2d 389, 212 N.E.2d 357 (1965).
314. Id. at 397, 212 N.E.2d at 362.
319. Id.
Constitutional objections also have been raised against the procedures by which convicted citizens may regain their right to vote by having their civil rights restored. In Beacham v. Braterman, the plaintiff was not permitted to vote because he had been convicted of two marijuana violations and his application for a pardon had been denied. The plaintiff not only complained that the Florida disfranchisement provisions are unconstitutional because they do not support a compelling state interest, but he also argued that his fundamental citizenship rights cannot arbitrarily be brought under the pardon umbrella and dispensed with at the discretion of the executive branch. A three-judge federal court rejected both arguments, and the Supreme Court affirmed in a per curiam decision. The district court relied on previous Supreme Court dicta in holding that states may constitutionally exclude felons from the franchise. The court also found that the restoration of civil rights is a part of the pardon power and, as such, is an act of executive clemency not subject to judicial control. The court explained that the discretionary power to pardon is recognized as a peculiar right of the executive branch of government.

A Connecticut statute requiring that petitions for restoration of voting rights be accompanied by a five dollar fee was challenged in Bynum v. Connecticut Commission on Forfeited Rights. The plaintiff contended that the statute discriminates against the indigent by depriving them of equal protection of the laws. A federal district judge denied plaintiff's motion for a three-judge court to hear the case, but the court of appeals reversed. In holding that a three-judge court should be convened, the appellate court relied on the Supreme Court's finding in Harper v. Virginia Board of Elections that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." The leading case restricting the scope of the disfranchisement

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320. For a discussion of restoration procedures see notes 181-277 infra and accompanying text.
322. Id.
325. 410 F.2d 173 (2d Cir. 1969).
326. The plaintiff conceded that Connecticut had the right to bar him and other ex-felons from the ballot box.
330. Id. at 668.
provisions is *Otsuka v. Hite*,\(^3\) which interprets California's constitutional provision disfranchising persons convicted of infamous crimes. In *Otsuka*, the California Supreme Court held that the disfranchisement provision, standing alone, does not violate the equal protection clause because the state has a compelling interest in maintaining the "purity of the ballot box."\(^2\) The court found, however, that the equal protection clause is violated unless "infamous crime" is interpreted to include only "crimes involving moral corruption and dishonesty, thereby branding their perpetrator as a threat to the integrity of the elective process."\(^3\) The decision is significant because the court recognized that there are equal protection limitations on the disfranchisement of voters.\(^3\) In reaching its decision, the court said:

> [T]he only tenable purpose yet proposed of the voting disqualification...is to protect 'the purity of the ballot box' against abuses by morally corrupt and dishonest voters operating to the detriment of the electorate as a whole. But such abuses are not consistently predictable by simply considering 'the nature of the punishment,' in this day of indeterminate sentences and proliferation of technical, malum prohibitum offenses. Rather, the inquiry must focus more precisely on the nature of the crime itself, and determine whether the elements of the crime are such that he who has committed it may reasonably be deemed to constitute a threat to the integrity of the elective process.\(^3\)

The dissent in *Otsuka* complained that the majority opinion furnishes no guidelines for registrars of voters to follow in determining whether certain crimes involve moral corruption and dishonesty of such a nature that their perpetrator can be deemed a threat to the integrity of the elective process.\(^3\) The dissent also pointed out that under the majority's reasoning there may be misdemeanors which would qualify as infamous crimes.\(^3\)

At least one court has restricted the disfranchisement laws by holding that they only disqualify offenders from voting at public elections. In *Galloway v. Council of Clark*,\(^3\) the Superior Court of New Jersey held that a city councilman was entitled to exercise the rights and duties of his office, including voting on ordinances, even though he had been convicted of an offense that disfranchised him from voting. The councilman was convicted of conspiring to unlawfully demand and

\(^{331}\) 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966).

\(^{332}\) Id. at 602, 414 P.2d at 416, 51 Cal. Rptr. at 288.

\(^{333}\) Id. at 599, 414 P.2d at 414, 51 Cal. Rptr. at 286.

\(^{334}\) The New Jersey disfranchisement statute was recently declared unconstitutional on equal protection grounds. See note 404 on page 1241 infra.

\(^{335}\) 64 Cal. 2d at 611, 414 P.2d at 422, 51 Cal. Rptr. at 294.

\(^{336}\) Id. at 615, 414 P.2d at 425, 51 Cal. Rptr. at 297.

\(^{337}\) Id., 414 P.2d at 426, 51 Cal. Rptr. at 298.

receive compensation for favorable consideration of a local variance application. Although he was later removed from office because of his conviction, the court upheld the legality of his vote on the very ordinance that he was paid to support. The court found that the New Jersey disfranchisement law only operated to prevent the councilman from voting at public elections and did not apply to votes he might cast as a member of the city council.

V. LOSS OF RIGHT TO HOLD PUBLIC OFFICE

Although the voting requirements within each state are identical for federal, state, and local elections, the qualifications for holding all public offices are not the same. Most states have constitutional and statutory provisions disqualifying persons convicted of certain crimes from holding public office, but these provisions do not apply to federal offices, even though the person holding the office is appointed or elected to represent the people of the state. The courts have ruled that the qualifications for federal elected officials are determined by the Constitution and laws of the United States, and cannot be altered by the states. As a result of this distinction, an individual may be qualified to seek election to the United States Senate, but not to the local school board. This section will survey both federal and state provisions designed to prevent convicted citizens from holding public office.

A. Definition of Public Office

A number of state constitutional and statutory provisions disqualify persons who have been convicted of certain crimes from "holding any office of trust, honor, or profit under this state." Provisions in other states, on the other hand, simply disqualify convicted persons from holding any "office." The difference appears to be one of form rather than substance. Regardless of the language used, the provisions generally apply to local as well as state public offices, and to appointive as well as elective positions. Most of the provisions do not apply to public employment consisting of merely clerical functions.

339. The councilman lost his office after a hearing that resulted in the finding that he had committed a crime involving moral turpitude.
340. See notes 234-36 supra and accompanying text.
342. See, e.g., DEL. CONST. art. 2, § 21.
343. See, e.g., KY. CONST. § 150; N.M. STAT. ANN. § 5-1-2 (1966).
Since all states have various qualifications that their public officials must meet, there have been a number of cases in which the central issue has been whether a specific position is a "public office" or an "office of trust, honor, or profit." One court has held that five elements are indispensable in order to have a public office.

(1) It must be created by the Constitution or the Legislature, or by a municipality or other body with authority conferred by the Legislature. (2) There must be a delegation of a portion of the sovereign powers of government to be exercised for the benefit of the public. (3) The powers conferred and the duties to be discharged must be defined either directly or indirectly by the Legislature or through the legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The office must have some permanency and continuity and the officer must take an official oath.5

The Supreme Court of Arizona has ruled that a public office must impose on the incumbent certain definite duties and involve the exercise of some portion of sovereign power.6 The court also held that an office, as distinguished from an employment, may be created only by the constitution or the legislature, either indirectly or by necessary implication.

Applying the various tests, courts have ruled that terms such as "public office" or "office of trust, honor, or profit" include the following positions among others: city manager,7 postmaster,8 school board member,9 county treasurer,10 school director,11 justice of the peace,12 commissioner of conservation,13 and a member of the board of public works.14 Courts have held that deputy sheriffs15 and deputy clerks of courts16 are mere agents or employees, not public officers. Other positions that the courts have found not to constitute public offices include: chairman of the executive committee of a political party,17 secretary of a state dental board,18 assistant city attorney,19 and delegate to a constitutional convention.20

345. Pope v. Commissioner, 138 F.2d 1006, 1009 (6th Cir. 1943).
349. Id. at 495, 137 So. at 864.
352. Whitehead v. Clark, 146 Tenn. 660, 673, 244 S.W. 479, 482 (1922).
B. Disabilities Imposed on Holding Public Office

By a variety of constitutional and statutory provisions, persons convicted of certain crimes may be disqualified from holding public office or from keeping an office already held. Many states have express provisions denying a convicted citizen the right to hold public office unless his civil rights have been restored. Congress also has passed statutes disqualifying persons convicted of specified offenses from holding federal offices. In addition, a number of states indirectly disqualify convicted persons from public office by providing that only qualified electors are eligible to hold public office. In almost all states, persons convicted of certain crimes cannot be qualified electors unless their civil rights have been restored. Moreover, the federal government and most states provide for forfeiture of public office upon conviction of a crime.

1. Laws Expressly Disqualifying Convicted Citizens from Public Office.—Most states expressly provide that persons convicted of serious crimes, usually felonies, are not qualified to hold public office unless their civil rights have been restored. These provisions apply only to state and local offices. Congress, however, has provided that persons convicted of certain offenses cannot hold federal offices.

(a) Federal offices.—As a general rule, an individual with a criminal record stands a better chance of qualifying for a federal office than he does for a state or local office. The United States Constitution, which establishes the qualifications for the President, Vice President, and members of both Houses of Congress, does not exclude convicted persons from the right to hold these offices. Several attempts have been made to add state requirements for public officials to the requirements contained in the Constitution for federal officials, but the courts have uniformly rejected these efforts.

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361. For a discussion of how civil rights can be restored see notes 570-659 on pages 1143-54 infra.

362. See notes 243-59 supra and accompanying text.

363. U.S. Const. art. II, § 1 (establishing the qualifications for President); id. art. I, § 3 (establishing the qualifications for Senator); id. art. I, § 2 (establishing the qualifications for Representatives). The fourteenth amendment, however, provides: "No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability." Id. amend. XIV, § 3.

364. See note 341 supra and accompanying text.
Although the Constitution does not disqualify felons from holding federal offices, Congress has passed several statutes that exclude persons convicted of specified offenses from holding any federal office. A member of Congress who practices before the Court of Claims, for example, is disqualified from holding any "office of honor, trust, or profit under the United States." Similar provisions disqualify members of the Armed Forces convicted of interfering with voting, collecting or disbursing officers convicted of trading in public property, any person convicted of falsifying, destroying, or removing public records or documents, or any government official convicted of receiving compensation in matters affecting the government. Persons convicted of rebellion or treason also are disqualified. Only in one instance, conviction of bribery, is disqualification discretionary with the sentencing court.

Several provisions disqualify individuals convicted of certain crimes from all public employment. The Omnibus Crime Control and Safe Streets Act of 1968, for example, provides that any person convicted of inciting, organizing, encouraging, or participating in a riot or civil disorder shall "be ineligible to accept or hold any position in the government of the United States" for five years following the date of his conviction. Under this statute and similar provisions covering all federal employment, the offender is barred from public office only for the period specified in the statute. In this respect, these statutes are similar to the proposed new Federal Criminal Code, which provides that a person convicted of a disqualifying crime shall not be disqualified for longer than five years following completion of his sentence. The matter of disqualification under the proposed code, however, is not automatic but is left entirely to the court's discretion. The court could provide that

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366. Id. § 593.
367. Id. § 1901.
368. Id. § 2071.
369. Id. § 203.
370. Id. § 2383.
371. Id. § 2381.
372. Id. § 201.
374. See, e.g., 18 U.S.C. § 2385 (1964) (knowingly or willfully advocating the overthrow of the government); Id. § 2387 (advising, urging, or causing disloyalty, insubordination, mutiny, or refusal of duty by any member of the military service).
an individual would be disqualified from office for any period less than five years.

Since most of the present disqualifying provisions apply only in rare situations, there have been few cases interpreting the statutes. It seems clear, nevertheless, that Congress cannot add to the qualifications created by the Constitution for constitutional offices.378 Otherwise, the Supreme Court has held that Congress has the constitutional power to enact such provisions “[i]n order to promote the efficiency of the public service and enforce integrity in the conduct of . . . public affairs.”377

(b) State and local offices.—The state constitutional and statutory provisions that expressly disqualify persons convicted of criminal offenses from holding public office vary considerably. Despite the variations, the net effect of the provisions in the majority of states is that persons convicted of serious crimes cannot qualify to hold public office.

Several states disqualify citizens who have been convicted of a felony,378 an infamous crime,379 or a crime punishable by imprisonment380 from public office. Other states use either the felony or infamous crime classification, but also disqualify persons convicted of specified offenses.381 The specified crimes generally include such offenses as embezzlement of public money, bribery, and perjury.382 Moreover, some jurisdictions provide that individuals convicted of either a felony, an

376. See Burton v. United States, 202 U.S. 344, 369 (1906) (holding that disqualification provision does not apply to appointments made by states under the Constitution).
377. Id. at 367.
378. KAN. CONST. art. 5, § 2; KY. CONST. § 150 (also gives legislature power to disqualify persons convicted of high misdemeanors); LA. CONST. art. 8, § 6; LA. REV. STAT. ANN. § 15:572.1(A) (Supp. 1970); NEB. CONST. art. XV, § 2; NEB. REV. STAT. § 29-112 (1964); WYO. STAT. ANN. § 22-7 (1959). In Nebraska, a separate statute disqualifies persons imprisoned in another state for a crime punishable by imprisonment in Nebraska. NEB. REV. STAT. § 29-113 (1964).
379. WIS. CONST. art. 13, § 3.
381. Some states provide that any person convicted of a felony or a specified offense is ineligible to hold public office. See, e.g., CAL. CONST. art. 20, § 11; CAL. GOV'T CODE §§ 1021, 1029 (West 1966); COLO. CONST. art. XII, § 2; COLO. REV. STAT. ANN. § 39-10-17 (1963); GA. CONST. § 2-801; GA. CODE ANN. § 89-101 (1963) (requiring that the felony involve moral turpitude); TEX. CONST. art. 16, § 2; TEX. ELECTION CODE art. 1.05 (Supp. 1969-70).
In at least 7 states, the right to hold public office is lost upon conviction of an infamous crime or certain specified crimes. ARK. CONST. art. 5, § 9; DEL. CONST. art. 2, § 21; FLA. CONST. art. 6, § 5; FLA. STAT. ANN. § 112.01 (1960); ILL. CONST. art. 4, § 4; ILL. ANN. STAT. ch. 46, § 124-2 (Smith-Hard 1964); MISS. CONST. art. 4, § 43; PA. CONST. art. 2, § 7; S.D. CONST. art. 111, §§ 4, 28.
382. E.g., ARK. CONST. art. 5, § 9.
infamous crime, or specified crimes are disqualified from public office. In some of these states, the terminology varies from statute to statute. Tennessee, for example, has one statute disqualifying every person convicted of any felony except manslaughter, and another statute that disqualifies persons convicted of infamous crimes.

In a number of states, only persons convicted of specified crimes are ineligible to hold public office. At least one state has several statutes, taken together, result in the disqualification of almost every offender convicted of a major crime. Other states, on the other hand, disqualify persons convicted of only a few limited offenses. In addition, a number of states still provide that no person is eligible to hold public office who has engaged in a duel.

A few states have provisions that disqualify offenders only from serving in the legislature. These states generally have separate statutes


A variety of other combinations are used by the states to disqualify criminal offenders from public office. See, e.g., ALA. CODE tit. 41, § 5 (1958) (disqualifying persons convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or any other crime punishable by imprisonment in the state or federal penitentiary); N.M. STAT. Ann. §§ 5-1-2 to 3 (1966) (disqualifying any person convicted of a "felonious or infamous crime"); N.C. Const. art. VI, § 8 (disqualifying persons convicted of treason, felony, corruption or malpractice in office, or any other crime for which the punishment is imprisonment in the penitentiary).


385. Id. § 8-1801. In Ohio, the constitution gives the General Assembly power to exclude from public office people convicted of bribery, perjury, or other infamous crimes. OHIO Const. art. V, § 4. Instead of using the prescribed terminology, however, the General Assembly passed a statute excluding citizens convicted of felonies. OHIO Rev. Code Ann. § 2961.01 (Baldwin 1964).

386. MO. Ann. Stat. § 560.610 (Supp. 1969-70) (disqualifying persons convicted of arson, burglary, robbery, grand larceny, or other crimes against property); id. § 561.340 (1953) (offenses against property involving fraud, such as forgery); id. § 557.490 (perjury); id. § 559.470 (offenses against persons, such as murder and manslaughter).


389. See, e.g., OKLA. Const. art. 5, § 18 (disqualified for conviction of felony); S.D. Const. art. 111, § 4 (disqualified for conviction of bribery, perjury, or infamous crime); W. VA. Const. art. 6, § 14 (disqualified for conviction of infamous crime).
that refer to all public offices. In Oklahoma, for example, convicted felons are ineligible to serve in the legislature, while persons convicted of bribery are disqualified from holding all public offices.

New Hampshire is the only state that has adopted the Uniform Act on the Status of Convicted Persons. The Act provides that any person convicted of a felony is ineligible to become a candidate for public office from the time of his sentence until his final discharge. At discharge, the convicted felon regains the right to hold public office. The Act, however, is subject to the provisions of the New Hampshire constitution that disqualify from public office any person convicted of treason, bribery, or any willful violation of the election laws.

Even though a state constitution does not expressly disqualify convicted criminals from public office, the legislature may have this power. The Indiana Supreme Court, for example, has held that a constitutional provision giving the legislature the power to deprive citizens convicted of infamous crimes from voting also gives the legislature power to prohibit such persons from holding public office.

2. Laws Indirectly Disqualifying Convicted Citizens from Public Office.—Since the laws of many states provide that only qualified electors are eligible for public office, criminal offenders, who are denied voting rights in most states, may thereby be indirectly disqualified from state or local public office even though there are no express provisions for disqualification. Courts have had little difficulty in upholding provisions requiring that all public officers be qualified electors. In these states, if a disqualified voter is elected to public office, his election is a nullity.

390. OKLA. STAT. ANN. tit. 26, § 445 (1955) (bribery); S.D. CONST. art. III, § 28 (bribery or corrupt solicitation); W. VA. CONST. art. 6, § 45; W. VA. CODE ANN. §§ 61-5-3 to -4 (1966) (bribery or perjury). Another West Virginia statute disqualifies from office persons convicted of treason, felony, or bribery in an election, "while such conviction remains unreversed." Id. § 6-5-5. The courts have held that this statute does not apply after the offender has completed his punishment. Webb v. County Court, 113 W. Va. 474, 168 S.E. 760 (1933).

391. OKLA. CONST. art. 5, § 18.


394. Id. § 607-A:3.

395. N.H. CONST. pt. 1, art. 11; id. pt. 2, art. 96.

396. IND. CONST. art. 2, § 8.

397. Lucas v. McAfee, 217 Ind. 534, 29 N.E.2d 403, petition for rehearing denied, 217 Ind. 541, 29 N.E.2d 588 (1940). Acting under this authority, the Indiana legislature has provided that no citizen convicted of specified offenses can hold public office. IND. ANN. STAT. § 49-303 (1964).


(a) **Federal offices.**—There appear to be no provisions disqualifying convicted citizens from holding federal offices because of an inability to vote. The United States Constitution does not require that members of Congress be qualified voters of the districts they represent. Rather, it only specifies that they be "inhabitants" of the states from which they are chosen. Moreover, the Constitution does not require that the President or Vice President be a qualified voter of any state.

(b) **State and local offices.**—At least half of the states have constitutional or statutory provisions limiting the right to hold public office to qualified electors. A number of states having this requirement also have provisions expressly disqualifying criminal offenders from public office. In the remainder of the states, the convicted person cannot qualify for public office unless his right to vote has been restored. Although several states do not have a blanket provision disqualifying nonelectors from holding public office, they accomplish the same result for most offices through separate provisions. Hawaii, for example, has separate constitutional provisions requiring that the governor, lieutenant governor, and all legislators be qualified voters. In addition, a statute provides that all county officers must have been qualified electors of the state and the county in which they were elected for at least one year prior to their election. Other states also have separate provisions for such offices as governor, attorney general, and legislators.

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400. U.S. Const. art. I, § 2 (Representatives); id. § 3 (Senators).
403. For a general discussion of restoration procedures see notes 570-659 on pages 1143-54 infra and accompanying text.
404. Hawaii Const. art. IV, § 1.
405. Id. § 2.
406. Id. art. III, § 7.
408. See, e.g., Conn. Const. art. IV, § 5; Md. Const. art. II, § 5; Utah Const. art. VII, § 3.
410. See, e.g., Alaska Const. art. 2, § 2; Conn. Const. art. III, § 3; S.C. Const. art. 3, § 7; S.D. Const. art. III, § 3.
3. Forfeiture of Public Office Upon Conviction of a Crime.—In addition to provisions either directly or indirectly disqualifying convicted citizens from holding public office, the federal government and most states provide for forfeiture of public office upon conviction of a crime. Moreover, state officials and certain federal officers convicted of crimes may be subject to impeachment.

(a) Federal offices.—The United States Constitution provides: “The President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”\(^{411}\) The United States Attorney General has ruled that a member of Congress is not a civil officer within the meaning of this section.\(^{412}\) Although the impeachment provision has rarely been applied, the phrase “other high Crimes and Misdemeanors” has caused difficulty. Some interpretations of the phrase permit impeachment of an officer for bad behavior, even when there are no grounds for an indictable offense.\(^{413}\)

The Constitution does not provide for the automatic removal of most federal officers convicted of crimes. Congress, however, has enacted a number of provisions requiring forfeiture of public office by individuals convicted of specified crimes. A conviction of disclosing confidential information, for example, results in removal from office.\(^{414}\) Similarly, farm credit examiners\(^{415}\) and National Agricultural Credit Corporation Examiners\(^{416}\) who make unauthorized disclosures are subject to removal. Bank examiners convicted of theft are disqualified from office\(^{417}\) and any officer found guilty of lobbying with appropriated moneys forfeits his position.\(^{418}\) In addition, federal officers might be removed if convicted of an offense that would disqualify them from office.\(^{419}\)

(b) State and local offices.—The overwhelming majority of states have constitutional or statutory provisions requiring the removal of public officers convicted of certain crimes. Like the provisions making convicted citizens ineligible to hold public office, the forfeiture

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415. Id. § 1907.
416. Id. § 1908.
417. Id. § 655.
418. Id. § 1913.
419. For a discussion of statutes that exclude persons convicted of specified offenses from holding federal offices see notes 365-74 supra and accompanying text.
provisions vary considerably from state to state. A number of states, for example, provide that a public officer forfeits his position if he is convicted of a felony, an infamous crime, or a crime involving moral turpitude. Several jurisdictions remove public officers convicted of felonies or other crimes, such as violation of the official oath of office, malfeasance in office, or misdemeanors involving moral turpitude. Other states require the removal of public officers convicted of any one of a number of assorted offenses. The statutes in several of these states are similar, but no two are identical. A number of jurisdictions have statutes providing that a sentence of imprisonment in the penitentiary forfeits all public offices and all private trusts, authority, or power during the term or duration of the imprisonment. Many of these provisions are contained in civil death statutes. In a few states, statutes


428. See notes 70-71 supra and accompanying text.
indicate that an officer can be removed from his position if convicted of any crime. 429

Most states supplement their provisions requiring the removal of public officers convicted of certain crimes with a constitutional or statutory impeachment procedure. In many states, the grounds and procedure for impeachment are modeled after the United States Constitution. 430 Most states provide that all state officers are subject to impeachment; 431 provisions in other states specifically cover judges 432 and prosecutors. 433 The impeachment procedure is rarely used to remove an officer convicted of a serious crime, since in most states his removal is automatic upon conviction.

When the forfeiture provisions have been applied, the courts have often disagreed as to whether a public officer loses his position from the time of his initial conviction in a lower court 434 or only after all appeals have been exhausted. 435 The few state statutes dealing with this problem likewise reach no consensus. Some statutes, for example, command removal of public officers at the time of their initial conviction, but authorize restoration to office if the conviction is reversed on appeal. 436 Other statutes provide that, for removal purposes, a conviction is not complete when an appeal is pending. 437 In at least one state, the legislature has authorized the governor to suspend any officer after his indictment for a crime. 438

C. Judicial Developments

As a general rule, the courts have given the states considerable power and discretion in setting qualifications for public officers. 439 It has

430. See note 411 supra and accompanying text.
431. See, e.g., ARIZ. REV. STAT. ANN. § 38-311 (1956); FLA. CONST. art. 3, § 29; IND. ANN. STAT. § 49-801 (1964); IOWA CONST. art. 3, § 20.
432. See, e.g., ARIZ. REV. STAT. ANN. § 38-311 (1956); FLA. CONST. art. 3, § 29; IND. ANN. STAT. § 49-801 (1964).
435. See, e.g., Pineville v. Collett, 249 Ky. 853, 172 S.W.2d 640 (1943). For a general discussion of what constitutes a conviction see notes 82-103 supra and accompanying text.
been consistently held that there is no constitutional or inherent right to hold public office. The opportunity to be elected or appointed to a public position is not an absolute right but a political privilege subject to reasonable regulation by the states. Consequently, almost all states have constitutional provisions establishing the qualifications for public officers. Most courts have held that where a constitution creates an office and prescribes the qualifications for it, the legislature has no power to add to those qualifications by statute. The result is different, of course, if the constitution either expressly or by implication gives the legislature such power. Subject to constitutional requirements, the legislature does have the power to set the qualifications for statutory, as opposed to constitutional, offices. In the absence of a constitutional or statutory prohibition, the courts have held that there is no restriction on the power of the people to elect any citizen to office.

Although the states have the power to establish the qualifications for their public officials, their discretion is limited by the United States Constitution, which invalidates qualifications found to be arbitrary and without a reasonable basis. There have been numerous cases dealing with this issue.

440. See, e.g., Crampton v. O’Mara, 193 Ind. 551, 555, 139 N.E. 360, 362 (1923), error dismissed, 267 U.S. 575 (1925); State ex rel. Workman v. Goldthait, 172 Ind. 210, 87 N.E. 133 (1909); Oliver v. Shreveport, 169 So. 2d 1, 3 (La. 1964); State ex rel. Platz v. Mucci, 10 Ohio St. 2d 60, 61, 225 N.E.2d 238, 240 (1967).


442. See, e.g., Crampton v. O’Mara, 193 Ind. 551, 139 N.E. 360 (1923), error dismissed, 267 U.S. 575 (1925); State ex rel. Workman v. Goldthait, 172 Ind. 210, 87 N.E. 133 (1909); Oliver v. Shreveport, 169 So. 2d 1, 3 (La. 1964).

443. See, e.g., Opinion of the Justices, 245 A.2d 172 (Del. 1968); Crampton v. O’Mara, 193 Ind. 551, 139 N.E. 360 (1923), error dismissed, 267 U.S. 575 (1925); State v. Carrigan, 82 N.J.L. 225, 82 A. 524 (1912).


445. H. BERNARD, PUBLIC OFFICIALS: ELECTED AND APPOINTED 46 (1968). Constitutional offices are those set up and defined in the state constitutions. Statutory offices are those established by a legislative body. Id.


447. See, e.g., Taylor v. Beckham, 178 U.S. 546, 570-71 (1900); Landes v. Town of North Hempstead, 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967). In Landes the New York court held that if a classification is employed in prescribing qualifications, it must be nondiscriminatory and based on a substantial difference having reasonable relation to the object sought to be accomplished by the legislation. Accordingly, the court found that property qualifications for public officeholders are invalid. The Michigan Supreme Court, however, recently upheld a city charter provision requiring local public officials to be property owners. The court observed that the United States Supreme Court has not applied the equal protection clause to qualifications for holding public office. Schweitzer v. Clerk for City of Plymouth, 381 Mich. 483, 164 N.W.2d 35 (1969), noted in 118 U. PA. L. REV. 129 (1969). At least one writer has suggested...
with state provisions that disqualify persons convicted of certain crimes from holding public office. In most cases, however, the reasonableness and validity of the provisions have been assumed; the courts have been primarily concerned with such questions as whether there has been a conviction or whether a conviction in one state disqualifies the offender from holding public office in another state. The cases indicate, nevertheless, that the courts consider the provisions disqualifying convicted citizens from public office or other employment to be reasonable and appropriate. The Supreme Court has observed, for example, that "barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas." A federal district court recently found in dicta that "[t]he state has a legitimate interest in excluding from office those who would impair efficiency and honesty in government operations." The cases, therefore, indicate that the underlying consideration in excluding convicted persons from public office is to protect society from a corrupting influence. The courts have applied the same reasoning to justify state provisions removing public officers convicted of certain crimes. In examining the constitutionality of a removal statute, the Washington Supreme Court, for example, has ruled that two possible harms must be balanced: "the possible unfairness of an individual's loss of public office during the remainder of his term against the inherent danger to the body politic that a criminal may exercise the powers of government." The same court earlier observed that the public interest

that the legislative history during the period when the fourteenth and fifteenth amendments were proposed indicates that neither were intended to cover the right to hold public office in the states. Avins, The Right to Hold Public Office and the Fourteenth and Fifteenth Amendments: The Original Understanding, 15 U. KAN. L. REV. 287, 304 (1967). In Torcaso v. Watkins, 367 U.S. 488 (1961), nevertheless, the Supreme Court indicated that certain kinds of discrimination in the selection of public officers may be forbidden by the fourteenth amendment.

448. For a general discussion of what constitutes a conviction see notes 82-103 supra and accompanying text.

449. For a discussion of the effect of a conviction in one state on the offender's civil rights in another state see notes 142-71 supra and accompanying text.

450. See Hawker v. New York, 170 U.S. 189, 196 (1898) (upholding provision excluding felons from practicing medicine).


452. United States v. Warden of Walkill Prison, 246 F. Supp. 72, 94 (S.D.N.Y. 1965), aff'd, 355 F.2d 208 (2d Cir. 1966) (upholding constitutionality of statute providing that public contractors waive immunity before investigative bodies on sanction of possible disqualification from receiving contracts).


demands that public affairs be administered by officers bearing no stigma of a conviction.\textsuperscript{455}

Although the courts seem to agree that provisions excluding convicted citizens from public office are reasonable, some courts have been more restrictive than others in applying the provisions to specific problem areas. One area in which the states are in conflict involves the question of whether a convicted person can seek public office after his rehabilitation or after receiving a pardon.\textsuperscript{454} In the absence of a pardon, the offender, even though rehabilitated, will be unable to hold public offices in most states.\textsuperscript{457} The courts have reached conflicting decisions when considering the effect of a pardon on public office disqualifications.\textsuperscript{456} There also is judicial disagreement on the question of whether a conviction in one state prevents an offender from holding public office in another state.\textsuperscript{459} Some courts have held that only a conviction in the state where the person is a candidate for office renders him ineligible.\textsuperscript{460} Others, however, hold that criminal offenders are disqualified from office, regardless of where they were convicted.\textsuperscript{461}

Although the courts have upheld laws disqualifying convicted persons from public office, these laws have been criticized by the President's Commission on Law Enforcement and the Administration of Justice. The Commission has suggested that the states should rely on the judgment of the voters for elective officials and on the appraisal of the persons with appointive power for appointive positions.\textsuperscript{462} The Swedish already follow the policy suggested by the President's

\textsuperscript{455} State ex rel. Guthrie v. Chapman, 187 Wash. 327, 329-34, 60 P.2d 245, 246-47 (1936).
\textsuperscript{456} For a general discussion of the possible ways to remove civil disabilities see notes 570-659 on pages 1143-54 \textit{infra} and accompanying text.
\textsuperscript{457} People ex rel. Symonds v. Gualano, 97 Ill. App. 2d 248, 240 N.E.2d 467 (1968) (candidate disqualified even though the court recognized that he had been rehabilitated since his conviction more than a quarter of a century earlier). \textit{Contra}, Webb v. County Court, 113 W. Va. 474, 476-78, 168 S.E. 760, 761 (1933). The case involves an interpretation of a West Virginia statute excluding persons convicted of certain crimes from public office "while such conviction remains unreversed." W. VA. CODE ANN. \S\ 6-5-5 (1966).
\textsuperscript{459} For a detailed discussion see notes 142-71 \textit{supra} and accompanying text.
\textsuperscript{460} See, e.g., Hildreth v. Heath, 1 Ill. App. 82 (1878); State ex rel. Mitchell v. McDonald, 164 Miss. 405, 145 So. 508 (1933). \textit{See also} Gutterman v. State, 141 So. 2d 21 (Fla. 1962).
\textsuperscript{461} E.g., Crampton v. O'Mara, 193 Ind. 551, 139 N.E. 360 (1923), \textit{error dismissed}, 267 U.S. 575 (1925).
\textsuperscript{462} President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 90 (1967) [hereinafter cited as \textit{Task Force Report}].
Commission, reasoning that if an ex-convict becomes a candidate, his former conviction probably will become an issue during the campaign. If the voters are informed about the candidate and nevertheless choose to elect him, the Swedes believe that the legislature should not interfere with their choice.  

VI. LOSS OF EMPLOYMENT OPPORTUNITIES

The right to work has been acclaimed "the most precious liberty that man possesses." For the ex-convict, however, the right to work in an occupation of his choice is at best a qualified right and in many instances is nonexistent. A job applicant with a criminal record may face substantial prejudice on the part of many prospective employers. In addition, the ex-convict is confronted with a vast array of federal, state, and local regulations labeling him unsuitable for public employment and a host of licensed occupations.

A. Exclusion of Convicted Criminals by Private Employers

Conviction of a crime can have lasting social and economic consequences for the offender. Depending upon the nature and gravity of his offense, employment opportunities in the private sector may be severely limited. Numerous studies have surveyed the extent and effect of private employers' discrimination against former convicts. Although findings have not been consistent, it is generally concluded that substantial discrimination is practiced. Many employers, for example, flatly reject applicants with criminal records. Most employers avoid hiring released convicts if other personnel are available. Moreover,
since most fidelity insurance companies refuse to bond ex-convicts, the released offender is often ineligible for employment in positions that require bonding.\textsuperscript{470} Past criminality is usually overlooked only in employing persons for low-skilled jobs.\textsuperscript{471} Consequently, many ex-convicts who are successful in obtaining meaningful employment probably did not disclose their criminal records.\textsuperscript{472}

Discrimination by private employers based on age, sex, or race is unlawful.\textsuperscript{473} Moreover, in a recent federal court decision a private employer's refusal to hire a job applicant because of his arrest record was held to be violative of the Civil Rights Act.\textsuperscript{474} Convicted criminals, however, may be refused private employment with impunity. Elimination of private prejudice and discriminatory practices against former convicts was long thought to be the task of educators and social scientists.\textsuperscript{475} There is increasing awareness, however, that equal employment opportunity for released convicts, like other minority groups, requires government action.\textsuperscript{476} At present, nevertheless, an ex-convict probably stands a better chance of gaining entrance to private employment than to either public employment or licensed occupations.\textsuperscript{477}

\textbf{B. Exclusion of Convicted Criminals from Licensed Occupations}

No member of society is more likely to forfeit his right to engage in a licensed occupation than a convicted criminal. Laws of the federal government,\textsuperscript{478} every state,\textsuperscript{479} and countless municipali-

\begin{itemize}
\item \textsuperscript{470} Lykke, \textit{Attitude of Bonding Companies Toward Probationers and Parolees}, 21 Fed. Probation 36 (Dec. 1957).
\item \textsuperscript{472} See D. Glaser, supra note 465, at 350-55.
\item \textsuperscript{474} Gregory v. Litton Systems, Inc., 39 U.S.L.W. 2049 (C.D. Cal. Aug. 10, 1970) (enjoining employer from denying job to applicant because of his arrest record on the ground that the practice discriminates against Negroes since they are arrested more frequently than whites).
\item \textsuperscript{475} See S. Rubin, supra note 468, at 639.
\item \textsuperscript{476} See note 34 on page 1160 infra and accompanying text.
\item \textsuperscript{477} See, e.g., D. Glaser, supra note 465, at 414; S. Rubin, supra note 468, at 640.
\item \textsuperscript{478} E.g., 7 U.S.C. § 12a(2)(B) (Supp. 1, 1969) (Secretary of Agriculture may refuse to register felons as futures commission merchants and floor brokers); 46 C.F.R. § 10.02-1 (1969) (persons convicted of narcotics violations ineligible for licensing as deck or engineering officers for 10 years after conviction).
ties⁴⁸⁰ single out the ex-convict for possible exclusion from the majority of regulated occupations. In general, if a trade, profession, business, or even an ordinary job requires licensing, conviction of any serious crime may disqualify the offender from obtaining or holding a license.⁴⁸¹

1. Scope of Occupational Licensing.—Under licensing laws, an individual’s right to engage in an occupation becomes a privilege granted by the state.⁴⁸² Entrance to and continued participation in a licensed occupation is conditioned upon the applicant’s ability to meet qualifications prescribed by the legislature.⁴⁸³ Unlicensed participation in a regulated activity may lead to criminal prosecution.⁴⁸⁴ Until the end

⁴⁸¹ See, e.g., In re Morris, 74 N.W. 679, 681, 397 P.2d 475, 476 (1964) (license to practice law confers no vested right, but is a conditional privilege, revocable for cause).
⁴⁸² Statutory qualifications often embrace the applicant’s character, criminal record, age, education, skill, experience, and entrance examination scores. See generally Barron, Business and Professional Licensing—California, A Representative Example, 18 STAN. L. REV. 640 (1966).
of the nineteenth century, few occupations other than medicine and law were subject to license requirements.\textsuperscript{485} Since that time, however, occupational licensing has proceeded at a feverish pace.\textsuperscript{486} In addition to licensed professional callings,\textsuperscript{487} modern statutes regulate semi-skilled and unskilled workers ranging from ambulance attendants\textsuperscript{488} to billiard-room employees.\textsuperscript{489} Regulations for many of these licenses are imposed by local ordinances.\textsuperscript{490} Although no definite figures are available, it is clear that a substantial portion of the working population is subject to licensing.

The United States Supreme Court has upheld the local regulation of essential occupations as a valid exercise of police power necessary to the safety, health, good order, and morals of the community.\textsuperscript{491} The Court, however, has consistently emphasized that a state cannot, under the guise of protecting the public, arbitrarily deny access to lawful occupations by imposing unreasonable restrictions.\textsuperscript{492} Consequently, patently unreasonable regulations have been stricken by a number of courts.\textsuperscript{493} As a general rule, however, courts are reluctant to substitute their judgment for that of the legislature.\textsuperscript{494}

Access to licensed employment is most often a matter of

\textsuperscript{485} See W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 126 (1956).
\textsuperscript{486} COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES 7-8 (1952) (indicating that approximately 80 occupations were licensed by state laws).
\textsuperscript{488} E.g., MICH. STAT. ANN. § 14.528(59) (1970).
\textsuperscript{490} States often delegate broad regulatory power to municipal corporations. In some states, the power of municipalities extends to the licensing of exhibitions, trade, business, vocations, occupations, and professions conducted within the municipality. See generally E. MCQUILLIN §§ 26.22-31, supra note 480.
\textsuperscript{491} Dent v. West Virginia, 129 U.S. 114 (1889).
\textsuperscript{492} E.g., Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924).
\textsuperscript{493} E.g., State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949) (licensing of photographers held an unreasonable restriction of a lawful and harmless occupation, bearing no relation to public health, morals and safety); Livesay v. Tennessee Bd. of Examiners, 204 Tenn. 500, 322 S.W.2d 209 (1959) (licensing of watch repairmen held unnecessary).
administrative determination. Federal statutes, as well as municipal ordinances, confer licensing authority on administrative agencies such as licensing boards and boards of examiners. In some instances, authority is vested in a single official. Most agencies are composed of appointed members of the regulated occupation and exercise broad discretion in processing applications and supervising licensed personnel.

It is well settled that licensing authorities may not refuse, revoke, or suspend a license without informing the applicant or licensee of the reason for the proposed action and giving him an opportunity to be heard. In the absence of a hearing satisfying due process standards, mandamus or similar relief is available in most state courts. Moreover, it has been held that arbitrary action by licensing authorities is a violation of civil rights cognizable in federal courts. When an agency determination is contested on the merits, however, the scope of judicial review varies considerably between jurisdictions. A number of courts, for example, have held that licensing authority actions are exclusively administrative and have refused to accord review on the merits. In other jurisdictions, however, expanded judicial review is either authorized by statute or assumed by the reviewing court.

495. See generally W. Gellhorn, supra note 485, at 105-51 (1956).
499. E.g., Ohio Rev. Code Ann. § 3905.01 (Baldwin 1964) (insurance).
501. Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (refusal of Bar admission without hearing is denial of procedural due process).
503. See, e.g., Hornsby v. Allen, 326 F.2d 605, 612 (5th Cir. 1964) (arbitrary refusal of liquor license held to be in violation of 42 U.S.C. § 1983 (1964)).
Some courts have found that pursuit of an occupation is a property right, the deprivation of which requires a trial de novo on review.\textsuperscript{508}

2. Effect of Criminal Conviction under Licensing Statutes.—The United States Supreme Court, in \textit{Hawker v. New York},\textsuperscript{509} recognized the power of local governments to bar individuals from occupations on the basis of past criminality. In upholding a provision prohibiting convicted felons from the practice of medicine, the Court noted that a legislature might reasonably require that members of a profession be of good character and provide that conviction of crime demonstrates a lack of this requisite character.\textsuperscript{510} More recently, in \textit{Barsky v. Board of Regents},\textsuperscript{511} the Court upheld suspension of a practicing physician's license because of his conviction for refusing to produce records subpoenaed by a congressional committee. In \textit{Schware v. Board of Bar Examiners},\textsuperscript{512} however, the Court indicated a readiness to examine more closely character standards that bar citizens from professional life. In reversing on due process grounds the refusal of an application for Bar admission, the Court noted that any standard by which an applicant is measured must have a rational connection with his fitness for the profession.\textsuperscript{513} In its most recent decision in this area, \textit{DeVeau v. Braisted},\textsuperscript{514} the Court upheld a provision of the New York Waterfront Commission Act of 1953 prohibiting convicted felons from holding office in waterfront unions. Although this latest decision cites \textit{Hawker} with approval, it is clear that the Court attached special significance to the circumstances that prompted the challenged legislation. In light of the conditions then existing on the waterfront, the Court found the legislature's judgment entirely reasonable.\textsuperscript{515} Read together, \textit{Schware...
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and DeVeau indicate that in the future the United States Supreme Court will subject legislative restrictions on occupational choices to greater scrutiny than is suggested by the Hawker decision. Even so, recent legislation and judicial decisions make it clear that a criminal conviction remains a serious obstacle to the pursuit of a licensed occupation.

For a significant number of former convicts, the barriers to employment created by licensing laws may be insurmountable. Entrance to a licensed occupation may be especially difficult for an individual with a criminal record because he has the burden of establishing good character. The person already holding a license is in a more favorable position, since he has the benefit of prior performance in the occupation as evidence of his fitness. Moreover, the burden of demonstrating unfitness rests with the licensing authority. On the other hand, the licensee convicted of crime may be faced with a presumption that he has betrayed the trust conferred by the license, thereby forfeiting his privilege to continue in the occupation. Once expelled, reinstatement is unlikely.

As a general rule, acquittal of criminal charges does not preclude refusal or revocation of a license. Moreover, it is usually held that neither suspension of sentence nor pardon will prevent exclusion from licensed employment. Even in states that provide for expungement of


517. See, e.g., Kaufman v. Taxicab Bureau, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849 (1965) (taxicab license refused because of applicant's prior convictions of participating in student civil disorders); In re Morris, 74 N.M. 679, 397 P.2d 475 (1964) (attorney's conviction of involuntary manslaughter justifies suspension from the Bar).

518. It is likely that many former convicts barred from licensed employment do not seek judicial relief due to the prohibitive expense of litigation.

519. See, e.g., Application of Patterson, 213 Ore. 398, 410, 318 P.2d 907, 912 (1957) (casting on petitioner "the burden of showing by a preponderance of the evidence that he is of good moral character," but failing to define "good moral character").


523. Cases cited note 549 infra.


penalties and disabilities incident to conviction, it is generally held that this relief does not extend to licensed employment.528

The extent that occupational freedom is diminished by licensing laws is uncertain. Conviction of an abominable crime will probably make an individual unsuitable for most licensed employment. Petty offenses, on the other hand, seldom bar the offender.527 Between these extremes there is a broad range of criminal conduct that invariably casts a shadow on an individual's employment future. Disqualification depends largely on the nature of both the occupation pursued and the crime committed. To determine the exact effect of his conviction, a former convict must look to the applicable licensing provisions of the jurisdiction in which he seeks employment. In some instances, federal law is pertinent,528 but more often state or municipal regulations control.

Licensing laws vary considerably among the states and even among regulated occupations within a state. Municipal regulations contribute further to the lack of consistency. Thus, a conviction that bars a person from an occupation in one state may not preclude licensing in another.529 Similarly, within the same state an ex-convict may be excluded from some occupations and qualified for others.529 Exclusion may be mandatory for certain occupations and for others discretionary.531 In some instances, the conviction's proximity in time may be


527. Misdemeanors involving moral turpitude, however, may disqualify the offender. See, e.g., CAL. BUS. & PROF. CODE § 3094 (West 1962) (optometrists); N.C. GEN. STAT. § 93A-4 (1965) (real estate brokers).

528. See, e.g., 18 U.S.C. §§ 922(g)(1), (h)(1) (Supp. IV, 1969) (unlawful for any person under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship, transport, or receive firearms or ammunition in interstate or foreign commerce).


530. Arizona, for example, no longer lists felony convictions as a ground for refusing a barber's license (ARIZ. REV. STAT. ANN. § 32-353 (1956)), but still prohibits issuance of a license to practice cosmetology if the applicant has been convicted of a felony. ARIZ. REV. STAT. ANN. § 32-352 (Supp. 1969-70).

531. The reason for the distinction is often not clear. North Carolina, for example, requires mandatory refusal or revocation of a physical therapist's license for any act derogatory to the standing or morals of the profession. N.C. GEN. STAT. § 90-265 (Cum. Supp. 1969). In the same state, however, revocation of a physician's license is discretionary. N.C. GEN. STAT. § 90-14 (1965).
A few jurisdictions have enacted provisions mitigating the effect of a criminal record on employment opportunity. Although these statutory variations and inconsistencies make it difficult to gauge accurately the effect of a criminal conviction on future employment, it is possible to determine the extent of probable exclusion from licensed employment by examining typical statutory provisions.

(a) Common grounds for excluding convicted criminals.—Prior criminal conduct may disqualify an individual in several ways. Most licensing laws exclude persons convicted of relatively serious crimes or crimes indicating lack of moral character. Moreover, general character requirements often preclude licensing of ex-convicts. Professionals convicted of a crime may be disqualified on the basis of unprofessional conduct.

(i) Lack of good moral character.—Statutes and ordinances frequently establish character standards that must be met for admission to an occupation. Some statutes also authorize revocation of licenses for immoral acts. Most, if not all, professional callings require applicants to prove good character. In addition, a surprising number of non-professional occupations impose character requirements. Thus, failure to demonstrate good moral character may prevent an individual from operating a dry-cleaning plant, selling hearing aids, or becoming a forester. Although character standards bearing little or no relationship to a regulated activity may be stricken, courts have found good character to be a reasonable prerequisite in a wide variety of vocations and activities. Even when character is not a statutory

532. See, e.g., Mich. Stat. Ann. § 19.803 (Supp. 1970) (authority to deny or revoke a real estate broker's license because of a felony conviction is limited to cases in which an applicant has been convicted within the past 5 years).
533. See notes 568-71 infra and accompanying text.
534. Character standards are now so firmly embedded in admission requirements that little thought is given to their relevance. See, e.g., A Model Professional and Occupational Licensing Act, 5 Harv. J. Legis. 67, 81 (1967) (good moral character should be an entrance requirement for all licensed professions and occupations).
536. See generally Affeldt & Seney, supra note 500, at 399-410.
requirement, some courts find that the licensing authority has the implied power to bar persons who are found morally unfit for participation in the licensed activity.\footnote{541}

Conviction of a crime is quite generally held to be evidence that the offender lacks the requisite character for either a professional calling\footnote{542} or the most ordinary pursuit.\footnote{543} Some reviewing courts look beyond the conviction in determining whether an individual's exclusion on character grounds is justified.\footnote{544} A court may conclude, for example, that denial of a license is unreasonable in light of the applicant's rehabilitation.\footnote{545} More often, however, a record of conviction will be conclusive evidence of bad character. Exclusion on character grounds may be upheld even on the basis of an applicant's association with criminals.\footnote{546}

\begin{itemize}
  \item[(ii)] \textit{Conviction of crime.---Most statutes expressly make conviction of certain types of crimes a ground for exclusion.} The record of conviction is normally a sufficient basis for the licensing authority to act.\footnote{547} In a few cases, licenses have been revoked even though the holder was acquitted of the criminal charge.\footnote{548}
\end{itemize}

\footnote{541. E.g., Dorf v. Fielding, 20 Misc. 2d 18, 197 N.Y.S.2d 280 (Sup. Ct. 1948) (denial of license to sell secondhand goods because of convictions for running house of prostitution).
544. A few states expressly provide for the exercise of similar discretion by licensing authorities. See, e.g., CAL. BUS. & PROF. CODE § 117 (West 1962) (record of conviction only conclusive of the fact of conviction and authorities may inquire into the circumstances to determine if the offense involved moral turpitude). But cf. CAL. BUS. & PROF. CODE § 9540.3(d) (West 1964) (conviction of felony or crimes involving moral turpitude constitutes evidence that applicant for license to operate dry cleaning establishment lacks moral character).
545. See, e.g., Tanner v. DeSapio, 2 Misc. 2d 130, 150 N.Y.S.2d 640 (Sup. Ct. 1956) (reversing a refusal to license former convict to operate beauty parlor).
547. A few statutes provide for license revocation upon the commission of a crime. See, e.g., ARIZ. REV. STAT. ANN. § 32-1263 (1969-70) (mandatory revocation of dentist's license upon commission of a felony).
549. See, e.g., Freeman v. Board of Alcohol Control, 264 N.C. 320, 141 S.E.2d 499 (1965); accord, Silver v. McCamey, 221 F.2d 873 (D.C. Cir. 1955).}
Conviction of a felony is often a ground for denial or revocation of a license. Felons are barred from occupations ranging from practical nursing to selling horsemeat. Crimes, irrespective of where committed, are generally classified as a felony or misdemeanor according to the law of the licensing jurisdiction. When a license is refused or revoked on the basis of a felony conviction, courts are reluctant to disturb the licensing authority's determination. There have been instances, however, when reviewing courts have found the exclusion of felons unreasonable.

Crimes involving moral turpitude are frequently grounds for disqualification from a licensed occupation. A few statutes exclude persons convicted of a felony involving moral turpitude, but the usual provision embraces any crime involving moral turpitude. Thus, misdemeanors involving moral turpitude may exclude the offender under most statutes. Irrespective of statutory language, both licensing authorities and courts have experienced considerable difficulty in applying the moral turpitude standard.

A few statutes bar persons convicted of enumerated crimes. These provisions may limit exclusion to crimes that indicate unfitness for

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550. For a discussion of the definition of felony, see notes 108-20 supra and accompanying text.
552. E.g., ILL. ANN. STAT. ch. 56 1/2, § 242.2(d) (Smith-Hurd 1967). See also CAL. BUS. & PROF. CODE § 17769 (West 1964) (trading stamp dealers); N.Y. ALCO. BEV. CONTROL LAW § 102 (McKinney 1970) (night club employees).
554. E.g., Barton Trucking Corp. v. O'Connell, 7 N.Y.2d 299, 165 N.E.2d 163, 197 N.Y.S.2d 138 (1959) (denial of public cart license because of felony conviction 20 years earlier). The court stressed that the petitioner's conviction had been for criminal activities linked to the business in which he sought to be licensed. Id. at 313, 165 N.E.2d at 170.
555. See, e.g., Brown v. Murphy, 3 Misc. 2d 151, 224 N.Y.S.2d 423 (Sup. Ct. 1962). A license to drive a tow truck was refused by the New York City Police Commission based on the applicant's court-martial conviction of carrying a concealed, loaded weapon and subsequent bad conduct discharge from the Navy 15 years earlier. The New York Supreme Court reversed because of the Commissioner's failure to accord a proper hearing, but noted in dictum that deprivation based solely upon the stated grounds would be capricious in light of the applicant's commendable record since discharge from the service. Id. at 157-59, 224 N.Y.S.2d at 429-31.
557. E.g., ARK. STAT. ANN. § 72-1613 (Supp. 1969) (inhalation therapist's license refused or revoked for conviction of moral turpitude crime).
558. E.g., ALA. CODE tit. 46, § 16 (Supp. 1967) (revocation of architect's license authorized for misdemeanor involving moral turpitude).
559. For a discussion of what constitutes moral turpitude see notes 139-41 supra and accompanying text.
particular occupation. The offense of receiving stolen property, for example, may prevent licensing as a junk dealer.\textsuperscript{560} Revocation may also be confined to offenses involving use of a license.\textsuperscript{561} As a general rule, however, specificity is lacking in licensing legislation.

Statutes also may provide that persons separated from the Armed Forces under less than honorable conditions are barred from licensed employment. New York, for example, refuses to issue a peddler's license to a former serviceman who failed to obtain an honorable discharge.\textsuperscript{562} Court-martial conviction of a wide variety of military offenses may subject the offender to dishonorable discharge.\textsuperscript{563} Moreover, Armed Forces personnel may be separated administratively as undesirables under less than honorable conditions.\textsuperscript{564}

(iii) Unprofessional conduct.—Professionals such as doctors, lawyers, and accountants may have their licenses revoked or suspended for unprofessional conduct.\textsuperscript{565} Courts have upheld this vague criterion despite attacks on the failure to prescribe specific standards of conduct.\textsuperscript{566} Conviction of a crime is generally regarded as unprofessional conduct, and revocations frequently are sustained even though criminal proceedings are dismissed.\textsuperscript{567}

(b) Mitigating provisions.—A few states have enacted legislation mitigating the effect of criminal conviction under licensing laws. Several statutes, for example, provide for reinstatement of revoked licenses following specified periods of time, normally one to five years.\textsuperscript{568} A similar remedy is available in New York where a certificate of good conduct may be issued to former criminals after five years of satisfactory conduct.\textsuperscript{569} Although this statute expressly states that issuance of a

\textsuperscript{560} N.Y. GEN. BUS. LAW § 61 (McKinney 1968). See also ME. REV. STAT. ANN. tit. 32, § 575 (Supp. 1970) (embezzlers barred from becoming collections agents); N.Y. GEN. BUS. LAW § 74 (McKinney 1968) (conviction of illegal possession of weapons disqualifies for guard duty).

\textsuperscript{561} See, e.g., ARIZ. REV. STAT. ANN. § 32-2322 (Supp. 1969-70) (structural pest control).

\textsuperscript{562} N.Y. GEN. BUS. LAW § 32 (McKinney 1968).

\textsuperscript{563} E.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 127c (rev. ed. 1969) (absence without leave, violation of a lawful general order, feigning illness).


\textsuperscript{566} E.g., Irwin v. Board of Regents, 304 N.Y.S.2d 319 (Sup. Ct. App. Div. 1969) (upholding statute revoking license of accountant for unprofessional conduct, defined as acts evidencing moral unfitness).

\textsuperscript{567} See, e.g., Meyer v. Board of Medical Examiners, 34 Cal. 2d 62, 206 P.2d 1085 (1949) (physicians).

\textsuperscript{568} See, e.g., N.Y. GEN. BUS. LAW § 409 (McKinney 1968) (reinstatement of cosmetologist's license possible after one year).

\textsuperscript{569} N.Y. EXEC. LAW § 242 (McKinney Supp. 1969-70).
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Certificate shall not proscribe licensing authority discretion, a few New York licensing statutes require recognition of the certificate.\textsuperscript{570} California recently enacted legislation requiring licensing authorities to recognize prison training when passing upon a former criminal's application.\textsuperscript{571} Under this provision, an inmate who has received training for an occupation in the course of a prison rehabilitation program cannot be denied the right to take the examination required to obtain a license for that occupation. In effect, if the applicant is otherwise qualified, his conviction will not bar licensing.

Most licensing statutes, however, make no provision for mitigating the effect of a criminal conviction. In these jurisdictions, an applicant excluded from licensed status on the basis of his criminal record must depend upon the courts for relief. In many instances, judicial review of the agency determination may be of limited scope.\textsuperscript{572} In the absence of a showing of arbitrary or capricious action, it is unlikely that a licensing authority's exclusion of a convicted criminal will be disturbed by the reviewing court.\textsuperscript{573}

C. Exclusion of Convicted Criminals from Public Employment

The difficulties experienced by the ex-convict in securing public employment are no less formidable than those he encounters in seeking entrance to licensed occupations. The restrictions excluding convicted criminals from public employment affect a large number of job opportunities. Federal, state, and local governments employ more than twelve million people.\textsuperscript{574} One out of six civilian workers is a public employee.\textsuperscript{575} Moreover, three and one-half million men and women currently serve in the Armed Forces.\textsuperscript{576}

A number of government employees are elected or appointed to positions of public trust. Individuals occupying these positions are generally thought of as public officers. The many restrictions on the convicted criminal's privilege of holding public office, as well as the distinction between officers and employees, are fully discussed elsewhere.\textsuperscript{577} The present inquiry embraces the many public occupations

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\item \textsuperscript{570} E.g., N.Y. GEN. BUS. LAW § 74 (McKinney 1968) (private investigators).
\item \textsuperscript{571} CAL. BUS. & PROF. CODE § 23.8 (West Supp. 1970).
\item \textsuperscript{572} See note 505 supra and accompanying text.
\item \textsuperscript{575} Id. at 211.
\item \textsuperscript{576} Id. at 255.
\item \textsuperscript{577} See notes 342-60, 363-77 supra and accompanying text.
\end{itemize}
that are not appreciably different from jobs in the private sector. Although a number of these positions appear particularly suited to ex-convicts, both federal and local governments have been slow to recognize this fact. Thus, it is not unusual to find constitutional and statutory provisions barring convicted criminals from a wide variety of routine public occupations. Additionally, regulations requiring that public employees be of good moral character may disqualify many offenders.

The decision whether to employ an applicant with a criminal record is often discretionary with governmental agencies. Available information indicates, however, that examining and certifying agencies actually hire few ex-convicts. It is likely that those offenders who do succeed in obtaining employment are most often placed as unskilled laborers. Even an acquittal of a criminal charge will generally not prevent the offender from being denied employment if the public agency regards him as unfit. Similarly, neither pardon nor expungement preclude exclusion. There may even be instances in which members of a convicted criminal's family will be barred from public employment.

For some offenders, the passage of time may lower the barriers to employment. Others may be employable by reason of positive rehabilitation measures initiated by the federal government and certain states. Under a few court decisions, pardoned offenders may have increased employment opportunities. It is apparent, however, that under current practices many ex-convicts are barred from public employment. It is equally clear that reviewing courts are not likely to

578. See, e.g., C. Hyne, Municipal Law § 8-2 (1957) (typical public employees include architects, medical inspectors, engineers, matrons, janitors, park attendants, superintendents of nurses, switchboard operators, and watchmen).
579. See, e.g., C. Hyne, Municipal Law § 8-2 (1957) (typical public employees include architects, medical inspectors, engineers, matrons, janitors, park attendants, superintendents of nurses, switchboard operators, and watchmen).
586. See, e.g., Slater v. Olson, 230 Iowa 1005, 299 N.W. 879 (1941) (application for civil service position as assistant smoke inspector); Commissioner of Metro. Dist. Comm'n v. Director of Civil Serv., 348 Mass. 184, 203 N.E.2d 95 (1964) (disabled veteran applying for police department position).
intervene unless exclusion is found to be arbitrary or patently unreasonable.887

1. Federal Employment.—The United States Constitution does not require exclusion of convicted criminals from federal employment. Congress, however, has enacted legislation barring certain types of offenders from many federal positions. A number of disqualifying provisions under the Federal Criminal Code have already been discussed in connection with the prohibitions against convicted criminals holding public office.888 Many of these provisions apply equally well to public employees.889 Other federal statutes, however, make it clear that individuals convicted of certain crimes are barred from all federal employment. Conviction of either advocating the overthrow of the government890 or promoting insubordination in the Armed Forces,891 for example, disqualifies the offender from employment by the United States government or any department or agency thereof for a period of five years following the conviction. Moreover, under the Omnibus Crime Control and Safe Streets Act of 1968,892 a person convicted of inciting a riot or civil disorder and sentenced to imprisonment for one year will be ineligible for federal employment for five years subsequent to conviction. Under the Study Draft of the New Federal Criminal Code,893 disqualification from federal office or employment because of criminal conviction is discretionary with the sentencing court.894 Moreover, the Draft provides for automatic removal of the disqualification five years after the defendant has completed his sentence.895

Conviction of a serious crime often disqualifies the offender from military service. Only in exceptional cases, for example, are convicted felons permitted to enlist in the Armed Forces.896 In addition, a wide

887. City of Aurora v. Schoberlein, 230 Ill. 496, 82 N.E. 860 (1907) (removal from civil service is administrative and not to be judicially tried de novo on the merits); accord, Appeal of Fredericks, 285 Mich. 262, 280 N.W. 464 (1938); City of Jackson v. McLeod, 199 Miss. 676, 24 So. 2d 519 (1946).
888. See notes 365-74 supra and accompanying text.
890. Id. § 2385.
891. Id. § 2387.
892. 5 U.S.C. § 7313 (Supp. IV, 1969) (inciting, organizing, promoting, encouraging, aiding, or abetting a riot or civil disorder or any offense determined by the head of an employment agency to have been committed in furtherance of civil disorder).
894. Id. § 3501.
895. Id. § 3503.
896. 10 U.S.C. § 504 (Supp. IV, 1969) (Service Secretaries may authorize exceptions in meritorious cases).
variety of civil and military offenses may result in a serviceman's separation from the Armed Forces under less than honorable conditions.\textsuperscript{597} Servicemen who fail to receive an honorable discharge are ineligible for preferential Civil Service appointments available to other veterans.\textsuperscript{598}

In certain instances, convicted criminals may be barred from employment in activities regulated by the federal government. Under the Labor-Management Reporting and Disclosure Act of 1959,\textsuperscript{599} for example, felons are ineligible to serve as officers or directors of any labor organization. Similarly, an individual convicted of an offense involving dishonesty or breach of trust normally is not employable by a bank insured by the Federal Deposit Insurance Corporation.\textsuperscript{600} Convicted criminals also may be denied employment with either the federal government or defense-related industries because their criminal records preclude issuance of the requisite security clearance.\textsuperscript{601}

Even in the absence of direct prohibitions against hiring convicted criminals, federal agencies exercise broad discretion in deciding whether to employ applicants with criminal records. United States Civil Service regulations, for example, provide that "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct" may be the basis for disqualifying individuals from the federal service.\textsuperscript{602} Formerly, before an applicant could be considered for a responsible position, the Civil Service Commission required two years to elapse following discharge from a felony sentence, and one year following discharge from a misdemeanor sentence.\textsuperscript{603} Since employment of rehabilitated offenders has recently received special emphasis in the federal service,\textsuperscript{604} however, the Commission now accepts applications from ex-convicts at any time. Determination of the applicant's suitability embraces the nature, seriousness, and circumstances of the crime, the offender's age, social and economic environment, and rehabilitation. The Commission, however, neither requires applicants to disclose information concerning convictions by juvenile authorities that occurred prior to age 21, nor considers arrests that were not followed by conviction. Moreover,

\textsuperscript{597} See note 563 supra.
\textsuperscript{598} 5 U.S.C. §§ 2108(1), (2) (Supp. IV, 1969).
\textsuperscript{599} 29 U.S.C. § 504(a) (1964).
\textsuperscript{602} 5 C.F.R. § 371.201(b) (1969).
\textsuperscript{603} D. GLASER, supra note 465, at 414.
current Civil Service regulations authorizes employment of federal prisoners participating in work-release programs pursuant to the Federal Prisoner's Rehabilitation Act of 1965.

2. State and Municipal Employment.—Many states and municipalities bar convicted criminals from public employment. The disability may be imposed by constitutional provision, statute, or ordinance. In some instances, former criminals are permanently barred, while in others employment is permitted at a specified time after conviction. In most states, ex-convicts are barred from holding police or correctional employment.

Many constitutional and statutory provisions disqualifying convicted criminals appear to limit the disability to public office. It is clear, however, that a wide variety of routine government jobs may fall within these proscriptions. Recently, for example, the dismissal of a school bus driver upon disclosure of a felony conviction 24 years earlier was upheld under a constitutional provision barring convicted felons from holding "office or appointment of honor, trust, or profit."

State and municipal civil service provisions usually authorize exclusion of convicted criminals. Typical regulations provide that both state and municipal commissions may refuse to examine or certify an applicant guilty of either a crime, or infamous or notoriously disgraceful conduct. Thus depending on a commission's policy, a criminal conviction can be a serious obstacle to civil service appointment. In addition, immoral or criminal conduct may disqualify employees even in

607. See S. Rubin, supra note 468, at 613-14, 625-26 (listing 27 states).
608. E.g., Del. Const. art. 2, § 21; La. Const. art. 8, § 6; Pa. Const. art. 2, § 7; Wis. Const. art. 13, § 3.
610. See generally E. McQuillen, supra note 498, §§ 12.58, .229-.270.
611. E.g., Cal. Gov't Code § 1029 (West 1966) (felons prohibited from being peace officers).
613. See S. Rubin, supra note 468, at 628.
614. See note 344 supra and accompanying text.
the absence of a conviction. One state supreme court, for example, recently upheld the dismissal of a water tradesman with fifteen years' service on the ground that he had committed adultery and that this conduct was wantonly offensive to the public and unbecoming an employee of the city. Under the reasoning of this case, it is likely that many individuals with criminal records will be disqualified from civil service.

**VII. LOSS OF JUDICIAL RIGHTS**

The American judicial system imposes a number of disabilities on the citizen with a criminal record. In some states, for example, the prison inmate lacks the capacity to sue, although he or his representative may be sued. Similarly, the offender may be unable to execute judicially enforceable instruments, such as contracts and wills, or to serve as a court-appointed fiduciary, such as an executor, administrator, or guardian. A criminal conviction also may affect the offender's participation in the judicial process as a witness or juror. Convicted persons, for example, generally cannot testify in judicial proceedings without their testimony being impeached. Persons convicted of perjury lack the capacity to testify in some states. Moreover, convicted persons often are precluded from serving as jurors, irrespective of their individual qualifications or sentiments.

**A. Capacity to Litigate**

At common law, citizens imprisoned in a penitentiary lacked the capacity to sue, but their imprisonment did not prevent them from being sued. This rule developed from the practice that a criminal


619. "[T]here must be an area where conduct of an employee of a municipality . . . in violation of important and fundamental standards of propriety is of legitimate concern to the municipality. . . . When an employee's unacceptable conduct falls within this area of concern, we find no implication in the statute or ordinance that such conduct cannot be cause for discharge unless it can be shown directly to impair performance of duties." *Id.* at 86-87, 133 N.W.2d at 804.


conviction resulted in a forfeiture of the offender's goods to the crown. Since prisoners had no property or rights for which suit could be brought, there was no reason to give them the right to sue. Today, forfeiture has been abolished in all states, but states that have retained civil death statutes generally do not permit prison inmates to maintain civil actions. Most states, however, now permit prisoners to bring civil actions. The common law rule permitting prisoners to be sued has remained unchanged.

1. **Capacity of Prisoners to Sue.**

   The majority of states today permit prison inmates to institute civil suits either in their own names or through personal representatives or committees appointed to manage the estates of prisoners. Persons imprisoned in the penitentiary, however, lack the capacity to sue in most of the thirteen states that have retained civil death statutes. The overwhelming majority of states, including many states that have civil death statutes, provide that imprisonment is a disability that tolls the statutes of limitations. Consequently, upon release, most prison inmates, including those who are unable to sue while incarcerated, can maintain a cause of action that accrued during imprisonment.

   (a) **Capacity of prisoners to sue in their own names.**—In most states without civil death statutes, citizens imprisoned in the penitentiary retain the right to sue in their own names. In the absence of a specific statute, the courts have ruled that prisoners have the capacity to sue since the legislatures have not provided that criminal offenders lose their civil rights during imprisonment. Some non-civil death states have enacted statutes dealing with suits instituted by prisoners. Both New Hampshire

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623. Id.
624. See notes 103-19 on pages 1080-82 infra and accompanying text.
625. This section will not review general restrictions on prisoners or the remedies available to prisoners who are mistreated. See, e.g., Hanna, The Convict and the Compensation Law, 34 Calif. L. Rev. 167 (1946); Vogelman, Prison Restrictions—Prisoner Rights, 59 J. Crim. L.C. & P.S. 386 (1968); Note, Remedies Available to Penal Inmates For Injuries Received While Incarcerated, 34 Ind. L.J. 609 (1959); Note, Federal Remedies for Lawfully Committed Prisoners Who Claim Mistreatment, 2 J. Pub. L. 181 (1953); Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. Pa. L. Rev. 985 (1962); Note, Prisoners' Remedies for Mistreatment, 59 Yale L.J. 800 (1950).
626. For a discussion of the civil death statutes, see notes 70-79 supra and accompanying text.
and Kentucky, for example, expressly grant prisoners the capacity to sue.\textsuperscript{629} Despite the majority rule that prison inmates have the legal capacity to sue, prisoners may find it difficult to bring civil actions and secure remedies for wrongs committed against them. Several courts have indicated, for example, that prison regulations may deny prisoners the absolute and unrestricted right to file any civil action they may desire.\textsuperscript{630} These decisions have been based on the theory that prison discipline demands reasonable restrictions on the activities of prisoners. The courts have held, however, that prison regulations violate the fourteenth amendment if they either frustrate efforts of prisoners to obtain appellate reviews of their convictions,\textsuperscript{631} or prevent them from inquiring into the validity of restraints on their personal liberty and freedom.\textsuperscript{632} In addition to restrictions imposed by prison regulations, prisoners may be prevented from suing because courts have held that inmates do not have the absolute right to appear personally in court to represent themselves.\textsuperscript{633} Similarly, courts are not compelled to appoint attorneys to represent prisoners who institute civil actions.\textsuperscript{634}

Although the majority of states have no legal restrictions on the right of prison inmates to sue, prisoners in most states that have civil death statutes are legally incompetent to institute civil actions. The civil death statutes generally do not expressly provide that prisoners cannot sue, but the courts have held that the right to sue is a civil right that is suspended by these statutes during imprisonment.\textsuperscript{635} To counter this

\textsuperscript{629} N.H. REV. STAT. ANN. § 607-A:3 (Supp. 1969); KY. R. CIV. P. 17.04. The New Hampshire statute adopts the Uniform Act on the Status of Convicted Persons. In Wisconsin, a statute provides that if the plaintiff in an action is imprisoned, the defendant may require him to file a security of not less than $250 to cover court costs. WIS. STAT. ANN. § 271.28 (1958).

\textsuperscript{630} See, e.g., Kirby v. Thomas, 336 F.2d 462 (6th Cir. 1964) (upholding validity of prison regulation prohibiting prisoners from mailing legal papers in civil actions unrelated to the validity of their convictions); Weller v. Dickson, 314 F.2d 598 (9th Cir.), cert. denied, 375 U.S. 845 (1963) (refusing to permit prisoner to file civil action \textit{in forma pauperis}); Tabor v. Hardwick, 224 F.2d 526 (5th Cir.), appeal dismissed, 350 U.S. 890 (1955), cert. denied, 350 U.S. 971 (1956) (holding that warden did not abuse discretion in advising prisoner he could not file civil action not relating to personal liberty). See also Seybold v. Milwaukee County Sheriff, 276 F. Supp. 484 (E.D. Wis. 1967) (permitting prisoner to file suit, but holding action in abeyance until after his release).

\textsuperscript{631} See, e.g., Dowd v. United States ex rel. Cook, 340 U.S. 206 (1951) (equal protection clause); DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966) (due process clause); Haines v. Castle, 226 F.2d 591 (7th Cir. 1955).


\textsuperscript{633} See, e.g., Armstrong v. Rushing, 352 F.2d 836 (9th Cir. 1965); Rogers v. Youngblood, 226 Ind. 165, 78 N.E.2d 663 (1948).


\textsuperscript{635} See, e.g., Quick v. Western Ry., 207 Ala. 376, 92 So. 606 (1922) (Alabama has repealed its civil death statute); Hammett v. San Ore Constr. Co., 195 Kan. 122, 402 P.2d 820 (1965).
development, the legislatures in at least two civil death states have provided that prisoners can sue. In Utah, for example, a special statute states that the loss of civil rights during imprisonment does not render inmates incompetent to maintain civil actions. The Missouri legislature has authorized the appointment of a trustee to sue for and recover any property or debts owed to a prisoner. Prisoners in North Dakota lack the capacity to bring most types of civil actions, but the civil death statute permits them to maintain actions based on their "natural rights." In defining the capacity of prisoners to sue, the North Dakota Supreme Court has held that convicts can maintain only actions that concern their personal liberty, as distinguished from their legal rights.

Although prison inmates lack the capacity to sue in most states that have civil death statutes, a number of exceptions have been created to limit the impact of this disability. The courts have held, for example, that prisoners, even though civilly dead, are entitled to protection under the fourteenth amendment. Consequently, a prisoner has the absolute right to apply for a writ of habeas corpus or to appeal his conviction. Moreover, a number of decisions have held that the civil death statutes cannot prevent a prisoner from bringing suit in a federal court under the 1871 Civil Rights Act. The courts have ruled that all prisoners may invoke the provisions of the Act since it applies to any person within the jurisdiction of the United States.

Under the Federal Rules of Civil Procedure, a prisoner who is a


641. See, e.g., Ex parte Hull, 312 U.S. 546 (1941); In re Jones, 57 Cal. 2d 860, 372 P.2d 310, 22 Cal. Rptr. 478 (1962).
domiciliary of a non-civil death state has the capacity to sue in a federal
district court in a civil death state.\textsuperscript{465} The Federal Rules provide that the
capacity to sue is determined by the law of the plaintiff's domicile.\textsuperscript{466} In
addition, at least one court has held that a citizen imprisoned in a state
that permits prisoners to sue may maintain an action in a civil death
state, even though he would have lacked the capacity to sue if he had
been convicted in the jurisdiction where the action is brought.\textsuperscript{467}
Likewise, a prisoner may file a suit in a state that does not have a civil
dehat statute, even though he is civilly dead in another state.\textsuperscript{468}
Moreover, courts have held that civil death statutes apply only to
sentences in the state courts.\textsuperscript{469} Consequently, a prisoner under a federal
sentence may maintain an action in a state that has a civil death
statute.\textsuperscript{470}

Other exceptions have been created to narrow the scope of the rule
that prisoners in civil death states lack the capacity to sue. In the past,
for example, the New York legislature has adopted special enabling acts
permitting certain individual prisoners to sue. These acts have not been
satisfactory, however, because most prisoners have not enjoyed special
consideration by the legislature.\textsuperscript{481} Prisoners in civil death states also
have been permitted to maintain actions when the courts have found a
superior statutory power, such as that granted by workmen's
compensation laws.\textsuperscript{482} In addition, a New York court has held that a
prisoner who is injured before he is sentenced to prison can maintain an
action, despite the fact that he is considered civilly dead after his
sentence.\textsuperscript{483} The personal representative of a decedent has been permitted
to maintain a wrongful death action even though the decedent was civilly
death at the time of his natural death.\textsuperscript{484}

In at least one case, a prisoner in a civil death state was permitted to

\textsuperscript{645} Urbano v. News Syndicate Co., 358 F.2d 145 (2d Cir.), cert. denied, 385 U.S. 831
(1966).

\textsuperscript{646} FED. R. CIV. P. 17(b).

district court in this case applied the law of New York, a civil death state.

\textsuperscript{648} Wilson v. King, 59 Ark. 32, 26 S.W. 18 (1894).

\textsuperscript{649} E.g., Hill v. Gentry, 200 F.2d 88 (8th Cir. 1960).

\textsuperscript{650} Id.

\textsuperscript{651} Comment, The Rights of Prisoners While Incarcerated, 15 BUFFALO L. REV. 397, 400
(1965).

\textsuperscript{652} See California Highway Comm'n v. Industrial Accident Comm'n, 200 Cal. 44, 251 P.
808 (1926).

\textsuperscript{653} Shapiro v. Equitable Life Assurance Soc'y of the United States, 182 Misc. 678, 45

\textsuperscript{654} Breed v. Atlanta, B. & C. R.R., 241 Ala. 640, 4 So. 2d 315 (1941).
maintain an action for tort injuries suffered in prison work. Most decisions under the civil death statutes, however, have held that an inmate injured in prison cannot sue for his injuries during the term of his imprisonment. Since the right to sue in civil death states is merely suspended during imprisonment, a prisoner on parole can maintain an action. If he is recommitted to prison, the action is abated until his disability is again terminated.

(b) Appointment of representatives to sue for prisoners.—Although a prisoner has the capacity to sue in his own name in most states, a number of states have passed statutes providing for the appointment of some type of personal representative to manage the prisoner's affairs. The statutes refer to the personal representatives as guardians, trustees, administrators, or committees. In most cases, a statute expressly provides that the representative has the duty to prosecute the prisoner's claims and to defend suits brought against him. In other cases, it generally can be assumed that the power to manage an individual's estate implies the power to bring suit on behalf of the estate. Some states provide for the appointment of a representative for the primary purpose of suing for prisoners.

At least two civil death states, Missouri and New York, have statutes authorizing the appointment of a trustee to manage prisoners' estates. The Missouri statute expressly provides that the trustee may sue...
The New York provision, however, does not expressly permit the trustee to sue, and a New York court has held that he does not have this power.

In some states, it is not clear whether a statute permits the appointment of a representative to manage a prisoner's affairs. Statutes, for example, may permit the appointment of a representative for an incompetent or a person under any legal disability. Although some states merely define an incompetent as a person incapable of managing his property, at least one state expressly provides that an incompetent includes any person confined in a penal institution. It has been suggested that in states that do not authorize the appointment of personal representatives to manage prisoners' affairs, convicts can achieve the same result by placing their property and claims in trust before incarceration. The trust could be created during incarceration in states where convicts retain the power to convey property.

Statutes authorizing the appointment of personal representatives to sue for prisoners have been criticized on the theory that they are designed to benefit the convict's creditors and dependents and show little concern for the convict's personal desires. Most statutes, for example, do not expressly authorize the prisoner to apply for the appointment of a representative. Many statutes, however, provide that creditors or friends and relatives may ask that a representative be appointed. Some states permit "any interested party" to apply to have a representative appointed. A prisoner might be able to apply for a representative under these statutes.

668. Hewson v. State, 27 App. Div. 2d 358, 279 N.Y.S.2d 790 (1967). The court reasoned that a decision permitting the prisoner to sue through a representative would partially destroy the effect of the state's civil death statute. Id. at 361, 279 N.Y.S.2d at 794.
672. Ohio Rev. Code Ann. § 2111.01(d) (Baldwin 1964).
The courts are divided on the question of whether a prisoner can sue and be sued in his own name in states that provide for the appointment of a representative to manage the prisoner's affairs. Some courts have held that the statutes authorizing the appointment of a representative are not exclusive and that prisoners still can act personally. Other courts have ruled that after a citizen is imprisoned, all suits must be brought in the name of his representative or committee. When this view is followed, it is conceivable that the statutes can have the effect of preventing prisoners from suing, especially if the courts do not permit prisoners to apply for a representative. It is unlikely that the legislatures intended this result when they enacted the statutes. In any case, the convict can manage his own estate and sue in his own name after he is released from prison.

(c) Statutes of limitations tolled by imprisonment.—Since it is either extremely difficult or impossible for most prison inmates to maintain civil actions, a large number of states have provided that imprisonment is a disability that tolls statutes of limitations. Consequently, prisoners in these states may wait until after their release from incarceration to bring their cause of action. Provisions tolling statutes of limitations for prisoners have been adopted in most civil death states in order to insure that a citizen who lacks the capacity to sue while imprisoned will not completely lose his cause of action.

Courts have held that provisions that toll statutes of limitations for persons under a disability should not be interpreted as restricting the right to sue. Consequently, unless otherwise provided, persons under the protection of a tolling statute may sue during the period of their imprisonment.

679. See, e.g., Rice County v. Lawrence, 29 Kan. 113 (1883); Waynesboro v. Lopinsky, 116 W. Va. 551, 182 S.E. 283 (1935).
681. See, e.g., ALASKA STAT. § 09.10.140 (1962); ARIZ. REV. STAT. ANN. § 12-502 (1956); IDAHO CODE ANN. § 5-230 (1948); MO. ANN. STAT. §§ 516.030, .170 (1952); MONT. REV. CODES ANN. §§ 93-2515, .2703 (1964); N.Y. CIV. PRAC. LAW § 208 (McKinney 1963); N.D. CENT. CODE § 28-01-25 (1960); OKLA. STAT. ANN. tit. 12, § 96 (1960); ORE. REV. STAT. § 12.160 (1963); R.I. GEN. LAWS ANN. § 9-1-19 (1956); S.D. CODE § 15-2-22 (1967); UTAH CODE ANN. § 76-12-36 (1953).
disability as if the statute did not exist. Where prisoners retain the capacity to sue, therefore, the statutes allow but do not compel them to wait until after their release to institute their suits. In most instances, prisoners who have a choice will not delay bringing their action because of the danger that the prospective defendant will have disappeared or will be insolvent. In addition, key witnesses may have died or disappeared by the time the prisoner is released.

The tolling statutes are designed to protect persons who are unable to protect themselves because of their actual imprisonment. Consequently, the cause of action must arise while the plaintiff is imprisoned in order for the tolling statutes to apply. If the cause of action accrues before the plaintiff is imprisoned, the statute of limitations continues to run during the period of imprisonment. Courts have held that statutes of limitations are not tolled for a citizen free on bail or parole. A citizen is imprisoned within the meaning of the statutes, however, while he is confined in jail awaiting trial.

The provisions that toll the statutes of limitations vary considerably from state to state. A number of state statutes provide that the period of imprisonment is not to be included in determining the time allowed for commencement of an action. In these states, prisoners may take advantage of the full statutory period after their release. Many states, however, have statutes that are more restrictive. Some states, for example, provide that the statutes of limitations can never be extended for more than five years and that all actions must be brought within one

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684. See Note, supra note 673, at 914.
686. See, e.g., Williams v. Coughlan, 244 F.2d 6 (9th Cir. 1957); Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948); Bock v. Collier, 175 Ore. 145, 151 P.2d 732 (1944).
691. See, e.g., ARIZ. REV. STAT. ANN. § 12-502 (1956); COLO. REV. STAT. ANN. § 87-1-17 (1963); GA. CODE ANN. § 3-801 (1962); IDAHO CODE ANN. § 5-230 (1948); KY. REV. STAT. ANN. § 413.310 (1969); ME. REV. STAT. ANN. tit. 14, § 853 (1964); MASS. ANN. LAWS ch. 260, § 7 (1968); NEV. REV. STAT. § 11.250 (1967) (applies only to actions not involving real property); R.I. GEN. LAWS ANN. § 9-1-19 (1956); TEX. REV. CIV. STAT. arts. 5518, 5535 (Supp. 1969); UTAH CODE ANN. § 78-12-36 (1953); VT. STAT. ANN. tit. 12, § 551 (1958); WASH. REV. CODE ANN. § 4.16.190 (1962).
year after the prisoner is released. The courts in these states may permit a citizen imprisoned for more than five years to file his suit during imprisonment to stop the running of the statute of limitations. The action will then be held in abeyance until the prisoner is released and in a position to prepare and present his case. This procedure is unnecessary when state statutes place no maximum limit on the period for which the statutes of limitations may be tolled, but provide that all suits must be filed within a specified period after the disability ceases. In some states, the statutes of limitations are tolled only for certain specified causes of action. Other states have separate tolling provisions for real and personal actions. At least two states, Tennessee and Maryland, provide by statute that imprisonment does not delay the running of statutes of limitations. If the legislature provides that the statutes of limitation are tolled for persons “under any legal disability,” prisoners are not included.


694. Some statutes provide that prisoners must file their actions within one year after their release. See, e.g., Mich. STAT. ANN. § 27A.5851 (1962); N.M. STAT. ANN. §§ 23-1-21 to -22 (1953) (applies only to actions involving real property); Okla. STAT. ANN. tit. 12, § 96 (1960) (applies only to actions not involving real property). In some states, the statutes of limitation can never be extended for more than 2 years after the disability ceases. See, e.g., Alaska STAT. § 09.10.140 (1962); Ill. ANN. STAT. ch. 83, §§ 9, 22 (Smith-Hurd 1966); Ind. ANN. STAT. § 2-605 (1967); id. § 2-4701 (1968). Other statutes provide that all actions must be brought within 3 years after the disability is removed. See, e.g., Ark. STAT. ANN. § 37-226 (1962); Wyo. STAT. ANN. § 1-22 (1957). A New York statute provides that if the time limit ordinarily is 3 years or more, the prisoner has 3 years after his release to bring the action. If the time limit ordinarily is less than 3 years, the time is extended by the period of the disability. A statute of limitation can never be extended beyond 10 years for a prisoner in New York. N.Y. CIV. PRAC. LAW § 208 (McKinney 1963).

695. See, e.g., Del. CODE ANN. tit. 10, § 8121 (1953) (prisoners have 5 years after their release to bring actions concerning land boundaries); Del. CODE ANN. tit. 10, § 7903 (Supp. 1968) (if person is imprisoned when right of entry on lands first accrues, he may make entry or bring action within 10 years after his disability is removed); Iowa CODE ANN. § 448.12 (Supp. 1970) (prisoners have 5 years after release to bring actions for recovery of real estate sold for nonpayment of taxes); id. § 448.13 (prisoners have 6 months after release to attack validity of tax sale or deed); Miss. CODE ANN. § 739 (1957) (actions for assault, assault and battery, or maiming must be brought within one year after release from prison); Va. CODE ANN. § 8-757 (1957) (prisoners have 5 years after their release to bring actions against the state).

696. See, e.g., Ill. ANN. STAT. ch. 83, §§ 9, 22 (Smith-Hurd 1966); Kan. STAT. ANN. §§ 60-508, 515 (Supp. 1969); Mo. ANN. STAT. §§ 316.030, 170 (1952); Mont. Rev. CODES ANN. §§ 93-2515, -2703 (1964); Neb. REV. STAT. § 25-213 (1965); N.C. GEN. STAT. § 1-17 (1969); Ohio REV. CODE ANN. §§ 2305.04, 16 (Baldwin 1964); Pa. STAT. ANN. tit. 12, §§ 35.82 (1953). In the above listing, where 2 statutes are involved the one dealing with real actions has been listed first.


2. Capacity of Prisoners to be Sued.—Although prisoners in some states lose their capacity to sue during their prison term, all states permit suits against citizens imprisoned in the penitentiary. Civil death statutes do not shelter prisoners from civil suits because the disabilities resulting from these statutes attach only to the convicted citizens. A statute or decision prohibiting suits against imprisoned persons would suspend not only the prisoners' civil rights but also the rights of all persons who have legitimate causes of action against prisoners.

The courts have held that since prisoners can be sued, they have the right to defend actions brought against them. As defendants, they are entitled to the protection of the procedural rules designed to protect all litigants. At least one court has implied that prisoners who are sued should have the right to appear personally to represent themselves. The prevailing view, however, seems to be that prisoners are not entitled to be present in person when they are sued, although they may testify by deposition and be represented by counsel. It is not clear whether the courts must appoint attorneys to defend prison inmates in civil suits. A recent New York case held that the court should not assign an attorney to represent a prisoner in a civil suit unless it is shown that the prisoner is unable to employ counsel for himself. Some state legislatures have passed statutes dealing with this problem. An Arkansas statute states that a judgment cannot be rendered against a prisoner until a defense has been made for him by his retained attorney or by a person appointed by

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702. Brown v. Brown, 444 S.W.2d 1, 4 (Mo. App. 1969) (setting aside judgment because prisoner was not given notice of order of judgment as required by state statute). A number of states have special statutes dealing with service of process on prisoners. See, e.g., FLA. STAT. ANN. § 48.051 (1969); LA. REV. STAT. ANN. § 13:3471(6) (1968); MASS. ANN. LAWS ch. 127, § 6 (1965); MISS. CODE ANN. § 1867 (1957); MONT. REV. CODES ANN. § 16-2816 (1967); OHIO REV. CODE ANN. § 2101.27 (Baldwin 1964); S.C. CODE ANN. § 10-436 (1962); SD. COMPIL. LAWS ANN. § 24-1-12 (1967); UTAH CODE ANN. § 17-22-6 (1962); WIS. STAT. ANN. § 53.02(4) (1957); Ky. R. Civ. P. 4.04. A few states also have statutes dealing with venue in actions against prisoners. See, e.g., KY. REV. STAT. ANN. § 452.435 (1969); LA. REV. STAT. ANN. § 13:3237 (1968); VA. CODE ANN. § 8-38(5) (1957).


the court to defend him.\(^7\) The Arkansas Supreme Court has ruled that this statute deprives the courts of jurisdiction in an action against a prisoner until an answer has been filed by the prisoner's attorney or appointed counsel.\(^7\) Kentucky and Iowa also provide that judgments cannot be entered against prisoners who have not been defended.\(^7\) Both states require the courts, if necessary, to appoint a guardian ad litem to represent the defendant-prisoner.\(^7\) A Tennessee statute provides that a prisoner "may" be allowed the aid of counsel in preparing his answer.\(^7\) In at least three states, statutes require attorneys representing prisoners to file answers denying all the material allegations in the complaint that are prejudicial to the defendant-prisoners.\(^7\) These statutes, however, do not expressly require that attorneys be appointed to represent prisoners who are sued.

A number of state statutes authorize the appointment of a committee, guardian, or trustee to manage the affairs of prison inmates.\(^7\) The committees or personal representatives generally have the duty of defending actions brought against the prisoners they represent.\(^7\) Some states authorize the appointment of a guardian ad litem to defend suits against prisoners.\(^7\) The prisoner can waive his right to have a guardian appointed, however, by having his counsel file an answer to the complaint.\(^7\) Statutes permitting the appointment of a committee or personal representative to defend prisoners are procedural in nature and do not grant prisoners immunity from claims and demands against them and their estates.\(^7\)

Since prisoners can be sued, it follows that their property can be reached by creditors.\(^7\) Courts have held, for example, that attachment or garnishment proceedings can be instituted against prisoners\(^7\) and

\(^7\) Puckett v. Needham, 198 Ark. 123, 127 S.W.2d 800 (1939).
\(^7\) Iowa R. Civ. P. 13; Ky. R. Civ. P. 17.04.
\(^7\) Iowa R. Civ. P. 13; Ky. R. Civ. P. 17.04.
\(^7\) See notes 263-301 on pages 1101-07 infra and accompanying text.
\(^7\) See, e.g., Emmanuel v. Sichofsky, 198 Cal. 713, 247 P. 205 (1926); Coffee v. Haynes, 124 Cal. 561, 57 P. 482 (1899).
that prisoners are subject to involuntary bankruptcy.\textsuperscript{720} A number of
courts, however, exempt from attachment or garnishment money taken
from a prisoner at the time of his arrest and before his final conviction.\textsuperscript{721}
Although all types of actions may be instituted against prison inmates,
the defendant-prisoner’s right to file a counterclaim may be restricted if
he is imprisoned in a state that has a civil death statute. Since prisoners
in most civil death states lack the capacity to sue,\textsuperscript{722} it has been held that
they lack the capacity to file counterclaims in suits brought against
them.\textsuperscript{723}

B. Capacity to Execute Judicially Enforceable Instruments

In some states, a criminal conviction may substantially impair the
offender’s right to validly execute and effectively enforce legal
instruments. In the thirteen civil death states, for example, the right of
the convicted citizen to execute and enforce contracts is not uniformly
recognized. In other states, however, the convict retains the capacity to
enforce his contracts. Likewise, a criminal conviction does not alter
testamentary capacity in the majority of jurisdictions. A few states,
evertheless, place limitations on this right.

1. Capacity to Contract.—Although the convict at early common
law had the right to contract, his status as a civilly dead person rendered
him incapable of suing in court.\textsuperscript{724} Consequently, he could not enforce his
contracts through the judicial system.\textsuperscript{725} The party with whom the
convict contracted, however, could utilize the courts to secure the
convict’s performance according to the terms of the contract. Since the
majority of jurisdictions now have abandoned civil death, the convict in
most states is fully capable of enforcing contracts. The convict may be
unable to enforce contracts, however, in some civil death jurisdictions.

(a) Non-civil death jurisdictions.—In the 37 states that do not
have a civil death statute, the offender retains the right to make and

\textsuperscript{720} In re Gainfort, 14 F. Supp. 788 (N.D. Cal. 1936).
\textsuperscript{721} See, e.g., Emmanuel v. Sichofsky, 198 Cal. 713, 247 P. 205 (1926); Carmack v. Nichols,
\textsuperscript{722} See notes 635-58 supra and accompanying text.
764 (Q.B. 1597).
\textsuperscript{725} Technically, the denial of a right to sue to enforce a contract would negate the existence
of a contract altogether, since the definition of a contract “is a promise or a set of promises for the
breach of which the law gives a remedy. . . .” Restatement of Contracts § 1 (1932). See 6A A.
Corbin, Contracts § 1376 (1963).
enforce a contract.\textsuperscript{726} The convict's right to contract was recognized at common law, although civil death denied him a remedy for breach.\textsuperscript{727} Consequently, when most states abandoned civil death and allowed the convict to sue in his own capacity or through a representative, the offender gained the corresponding right to enforce his contracts.\textsuperscript{728} At least one non-civil death jurisdiction has enacted a statute expressly allowing the convict to make and enforce a contract.\textsuperscript{729}

(b) Civil death jurisdictions. (i) Jurisdictions without other statutes affecting contracting power.—In the thirteen states that declare the convict civilly dead,\textsuperscript{730} there is no uniform rule concerning his right to contract. Six of these states have not, by decision or statute, dealt specifically with the offender's right to make and enforce a contract. Moreover, the approaches taken by the seven civil death states that have considered this problem are contradictory. Since the capacity to enforce a contract is a civil right,\textsuperscript{731} it would appear that the convict loses at least the capacity to enforce a contract in civil death jurisdictions, which deprive the convict of his civil rights. This is the common law rule and has been adopted in New York.\textsuperscript{732} Missouri courts have gone further, holding that civil death deprives the convict of all his contractual powers.\textsuperscript{733}

\textsuperscript{728} See, e.g., Haynes v. Peterson, 125 Va. 730, 100 S.E. 471 (1919) (since Virginia had expressly repudiated civil death the convict's contractual powers were retained).
\textsuperscript{731} In Byers v. Sun Sav. Bank, 41 Okla. 738, 731, 139 P. 948, 949 (1914), the Oklahoma Supreme Court defined "civil rights" to mean "all rights which civilized communities undertake, by the enactment of positive laws, to prescribe, abridge, protect, and enforce." Cf. Avery v. Everett, 110 N.Y. 317, 18 N.E. 148 (1888).
\textsuperscript{732} Avery v. Everett, 110 N.Y. 317, 18 N.E. 148 (1888) (dictum); Stephani v. Lent, 30 Misc. 346, 63 N.Y.S. 471 (Sup. Ct. 1900).
\textsuperscript{733} Williams v. Shackleford, 97 Mo. 322, 11 S.W. 222 (1889); Jandro v. Jandro, 246 S.W. 609 (Mo. Ct. App. 1923); accord, Gray v. Gray, 104 Mo. App. 520, 79 S.W. 505 (1904) (dictum). See also Ward v. Morton, 294 Mo. 408, 242 S.W. 966 (1922). Although Missouri is the only state to explicitly deny the convict the right to contract on the basis of the civil death statute alone, it appears to be influenced by a statute providing an exclusive guardianship for a convict while incarcerated. Mo. Rev. Stat. § 460.010 (1956). This provision voids all acts done by convicts
The common law rule may have been adopted by implication in some civil death states. A few jurisdictions, for example, have provisions specifically authorizing the convict to convey property, raising the implication that the convict in these states is not permitted to make other types of contracts. In addition, these statutes may imply that a civil death statute without this express exception denies the convict the right to contract. Other civil death states have statutes providing that convicts may contract for necessities. These statutes also may imply that convicts lack the capacity to make or enforce other contracts. Statutes in four civil death states, however, indicate that these implications have questionable validity. In these jurisdictions, statutory provisions specifically deny the convict all right to contract, implying that the general civil death statute does not include this disability.

The best that can be gleaned from this uncertainty is that the convict in a civil death jurisdiction may be able to contract if a statute or decision does not hold to the contrary, but his power to enforce his contract may be limited or non-existent. This position is consistent with the common law view of the civilly dead convict's contractual power.

Both the Missouri and New York-common law views present problems to the prisoner. Although the convict in Missouri is legally protected by a guardian, he may be compelled to act only through a guardian, even though he might prefer to act for himself. Moreover, the New York-common law view invites the other party to breach his contract with the convict, leaving the convict in a worse position than if the contract had been prohibited.

without a guardian, but the convict denied the power to contract still is able to contract through his guardian. See Williams v. Shackleford, 97 Mo. 322, 11 S.W. 222 (1889). In McLaughlin v. McLaughlin, 228 Mo. 635, 646-47, 129 S.W. 21, 24 (1910), the Missouri Supreme Court stated: "If sued, therefore the convict would be powerless to make a contract binding himself and his estate to procure legal talent to defend the suit, or to procure the necessary incidental expenses of a defense of the suit. The only way a defense could be properly made would be through the trustee provided for by the terms of article 2 of chapter 141. . . . [T]he trustee . . . could see that the suit was properly defended." Thus, the convict's guardian in Missouri would be able to make and enforce a contract when dealing with the civilly dead convict's property.

734. E.g., N.D. CENT. CODE § 12-06-27 (1960); ORE. REV. STAT. § 137.240(3) (1969); UTAH CODE ANN. § 76-1-38 (1953).


736. See notes 755-56 infra and accompanying text.

737. Typical of these statutes is the South Dakota law: "All persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights." S.D. COMPILED LAWS ANN. § 53-2-1 (1967); accord, CAL. CIVIL CODE § 1556 (West 1954); IDAHO CODE ANN. § 29-101 (1967); OKLA. STAT. ANN. tit. 15, § 11 (1966).

738. The theory of the valid, but unenforceable contract has 2 facets: first, the prisoner
Since civil death jurisdictions adopting the New York-common law view allow the convict to contract but prohibit him from enforcing his claim, his rights in any contract are not extinguished by his imprisonment. Accordingly, the convict in these jurisdictions can avoid any contractual disability by assigning his contractual claim to a person capable of enforcing the contract. The New York court adopting this view permitted a civilly dead convict to assign a monetary claim. While noting that the convict-assignor retained no beneficial interest in the assignment, the court ignored the fact that the convict may have profited from the transaction through reduced liability. This court also did not consider whether a gratuitous assignment by a civilly dead assignor is enforceable by the assignee. Of course an assignment made before the assignor's incarceration is not invalidated by his subsequent imprisonment and civil death.

(ii) Express denial of contracting power.—Of the thirteen civil death states, four have statutes expressly denying contractual capacity to convicts. A fifth state, Rhode Island, prohibits prisoners from making conveyances without the permission of the superior court. Although several courts in these states have ameliorated the convict's contractual disability when the contract is for necessities, the general application of these statutes may work a hardship on the convict. In Rosman v. Cuevas, for example, the California court held that even a parolee could not contract for the purchase of an automobile. The court found that the loss of civil rights attending imprisonment in California, combined with the specific statutory contractual disability, rendered void any contract made by the parolee. In Jones v. Allen, however, a

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745. CAL. CIV. CODE § 1556 (West 1954).
746. California does, however, permit the parolee's contract to be ratified in certain instances. E.g., Jordan v. Warnke, 205 Cal. App. 2d 621, 23 Cal. Rptr. 300 (1962) (Adult Authority's permitting parolee to bring suit to quiet title implies ratification of the original agreement in which civilly dead parolee purchased land with defendant as his trustee). In Hall v. Hall, 98 Cal. App. 2d 209, 219 P.2d 808 (1950), the court found a resulting trust in favor of the parolee when the parolee, thinking that he could not take title in his own name, furnished consideration to the defendant so that the defendant could purchase at a foreclosure sale.
California court of appeals held that the parolee could not avoid tort liability for an automobile accident by asserting that the car dealer was still the owner of the car because of the parolee’s inability to contract. The *Rosman* decision was distinguished on the basis that the dealer in *Rosman* knew of the parolee’s disability, while the dealer in *Jones* did not.\footnote{Id. at 282, 8 Cal. Rptr. at 319.} The *Jones* court stated that persons dealing with parolees in the ordinary course of business should not be subjected to tort liability when they have no notice of the parolee’s lack of contractual capacity.\footnote{Id. at 280-81, 8 Cal. Rptr. at 318.} If this distinction is followed, a valid contract may be formed in California every time the party with whom a parolee contracts is not aware of the parolee’s disability.\footnote{Id. at 282, 8 Cal. Rptr. at 319.} Although there are no other cases in point, the same distinction could apply when the offender is incarcerated rather than on parole.

(iii) *Statutes authorizing conveyances.*—Seven of the thirteen civil death states make a distinction between the capacity to enter contracts conveying property and contracts for other purposes. Two of these seven states expressly deny the convict the right to make a contract, yet specifically empower him to make and acknowledge conveyances of property.\footnote{Compare CAL. CIV. CODE § 1556 (West 1954), with CAL. PENAL CODE § 2603 (West 1956). Compare IDAHO CODE ANN. § 29-101 (1967), with IDAHO CODE ANN. § 18-312 (1948).} While holding that conveyances by prisoners are valid, courts in one of these two jurisdictions have indicated that all other types of contracts are prohibited.\footnote{E.g., Rosman v. Cuevas, 176 Cal. App. 2d 867, 1 Cal. Rptr. 485 (1959); see notes 744-46 supra and accompanying text.} Five civil death jurisdictions\footnote{ARIZ. REV. STAT. ANN. § 13-1653(c) (1956); MONT. REV. CODES ANN. § 94-4722 (1969); N.D. CENT. CODE § 12-06-27 (1960); ORE. REV. STAT. § 137.240 (1969); UTAH CODE ANN. § 76-1-38 (1953).} authorize the convict to convey property, without indicating whether his capacity to make contracts is impaired. Accordingly, these five states leave the convict’s general power of contracting unsettled,\footnote{See, e.g., Miller v. Turner, 64 N.D. 463, 253 N.W. 437 (1934) (dictum).} for there have been no reported cases in these jurisdictions that indicate an implied lack of capacity to make other types of contracts. Should these states follow the
common law rule that a convict could make but not enforce a contract, the statutes allowing conveyances would partially alleviate the convict’s disability. This follows since an expressly granted power to convey implies the corresponding power to enforce the contract making the conveyance. The limited character of the power to convey, however, does not eliminate the convict’s contractual disabilities. Even with the power to convey property, the convict might not be able to make and enforce a contract for such essentials as attorney’s fees or bonding.

(iv) Statutes authorizing contracts for necessities.—In states that specifically or impliedly deny the convict the right to contract, contracts for necessities still may be allowed. The cases upholding the prisoner’s contracts for necessities take two approaches. The first approach holds that the scope of the particular disability statute prohibiting conveyances is not broad enough to encompass contracting for a necessity. A Rhode Island court, for example, held that a convict may contract for an appeal bond in spite of a statute expressly forbidding conveyances by convicts.755 The other approach emphasizes that rights given to convicts, such as the right to petition for parole or to defend a law suit, imply the power to contract to effectuate these rights. Following this latter approach, Oklahoma has held that a convict without the power to contract could make a valid agreement with an attorney for legal assistance.756 Under either approach, courts could allow the convict broad contractual powers. Under the Rhode Island approach, for example, anything the court found to be necessary could be declared beyond the scope of the disability, on the theory that the legislature did not intend to deny the convict necessities when it passed the disability statute. Similarly, in those states explicitly denying the convict the right to contract, the court could expand what the Oklahoma court called the “natural rights” of the convict to include life and liberty, and allow him the right to contract for any item necessary for the effectuation of these rights. These two theories, therefore, give the courts power to ameliorate disability statutes that restrict commonly recognized rights.

2. Capacity to Make a Will.—At early common law, the convicted felon did not need a will since forfeiture and corruption of blood effectively deprived him of his property.757 Since the convict usually is fully capable of owning property today, however, his ability to

execute an enforceable will may be important to him. In the United States, the capacity to make a valid will is determined by statute.\textsuperscript{758} Most of the state statutes on testamentary capacity were patterned after either of two English acts\textsuperscript{759} and generally contain only two requirements: legal age and soundness of mind.\textsuperscript{760} In the absence of a more specific statute denying prisoners the right to make a valid will, these general statutes do not deprive the convict of testamentary capacity.\textsuperscript{761} Despite this interpretation, however, at least twelve states have specifically provided that convicts do not lose the ability to make a valid will.\textsuperscript{762}

A few states have provisions that may limit the convict's capacity to execute a valid will.\textsuperscript{763} Rhode Island is the only state with a statute specifically denying the convict the right to make a will without prior judicial permission.\textsuperscript{764} This statute does not affect the ex-convict's


\textsuperscript{759} Wills Act of 1837, 7 Will. 4 & 1 Vict., c. 26; Statute of Frauds, 29 Car. 2, c. 3 (1677). For about 2 centuries prior to the Statute of Wills of 1540, 32 Hen. 8, c. 1, there could be no effective will of a legal freehold estate except by local custom. The "will in equity" through the feoffment to use was extensively used during this period. Wills were permitted after the Statute of Wills of 1540, but until formal requirements were imposed by the Statute of Frauds and the Wills Act of 1837, the wills were often subject to fraud and improper administration. See generally Maitland, The Origin of Uses, 8 HARV. L. REV. 127 (1894).


\textsuperscript{761} Rankin v. Rankin, 22 Ky. (6 T.B. Mon.) 531 (1828) (person under death sentence may make a valid will); Avery v. Everett, 110 N.Y. 317, 18 N.E. 148 (1888) (by dictum, civilly dead convict may transfer property by will or deed).


\textsuperscript{763} T. ATKINSON, supra note 757, at § 50; I W. PAGE, WILLS § 12.3 (3d rev. ed. 1960). See generally J. REES, supra note 760. The convict's capacity to attest a will is limited by statute in only one state. LA. CIV. CODE ANN. art. 1591 (1952). In all other states, the convict's capacity to attest a will is determined by the same standards used to judge his competence to serve as a witness in judicial proceedings. Since at early common law the convict was unable to testify, he was also unable to validly attest wills. Pendock v. Mackender, 95 Eng. Rep. 662 (K.B. 1755). This view was adopted by early American decisions. E.g., Jones v. Habersham, 63 Ga. 146 (1879). Under the modern American view, however, conviction of a crime does not affect the offender's capacity to testify except in very limited situations. Thus, it seems that in all states except Louisiana the criminally convicted person may validly attest the execution of a will.

\textsuperscript{764} "No person who shall be sentenced to imprisonment in the adult correctional institutions shall have any power, during his imprisonment, to make any will or any conveyance of
capacity to make a valid will, but seems designed to prevent undue influences upon a prisoner to name a prison authority as legatee or devisee or to aid the convict in making a will. Since the ordinary formalities required to execute a valid will are designed to counter such undue influences, the Rhode Island statute merely increases the formalities to which a convict must adhere.

The Ohio statute also could limit the convict's ability to execute a will. This provision states that one of the requisites for making a valid will is that the testator cannot be "under restraint." The word "restraint" is undefined in the statutory and case law. Under accepted usage of the word "restraint," however, the Ohio provision appears to deny anyone under confinement, including imprisonment, the capacity to make a will. "Restraint" could be interpreted, nevertheless, to refer to confinement for such infirmities as habitual drunkenness and mental illness that reflect the testator's mental capacity rather than his physical limitations.

C. Capacity to Testify

At common law, citizens convicted of treason, felony, or crimes involving fraud or deceit were disqualified from giving testimony in either civil or criminal proceedings. This rule was based on the theory that any person convicted of a crime could not be trusted to tell the truth. The argument was that a criminal was not to be trusted to tell the truth.

765. "A person of the age of eighteen years, or over, sound mind and memory, and not under restraint may make a will." OHIO REV. CODE ANN. § 2107.02 (Baldwin 1969).


767. The District of Columbia has a statute that could limit a convict's capacity to make a will. This statute states that anyone may make a will if "capable of executing a valid deed or contract." D.C. CODE ANN. § 18-102 (1967). Therefore, the testamentary capacity of one imprisoned in another state with respect to land located in the District of Columbia may be collaterally restricted if the state of incarceration places restrictions on the capacity of a prisoner to contract. This result follows from the choice of law rule that the law of the situs governs devises of real property, including the capacity to devise. RESTATEMENT OF CONFLICTS OF LAWS § 249 & comment, at 333 (1934). If a will, made by a prisoner in a state where convicts cannot contract, were submitted to probate in both the state of incarceration and, by ancillary administration, the District of Columbia, it is questionable whether the devise would be upheld in the District against a challenge by an intestate taker. In addition, since there would be 2 forum courts due to the ancillary proceedings, the possibility of a renvoi is evident. This problem could be avoided by bringing the wills provision of the District of Columbia into conformity with those of other states. Maryland at one time had a provision similar to that of the District of Columbia, MD. ANN. CODE art. 93, § 349 (1964), but recently amended its code as follows: "[A]ny person may make a will if . . . legally competent to make a will." MD. ANN. CODE art. 93, § 4-101 (Supp. 1969). It is uncertain whether the amendment is any improvement.

768. C. MCCORMICK, EVIDENCE § 64, at 141-42 (1954).
that a man convicted of a serious crime could not be trusted in any respect and therefore could not be trusted in his testimony.\textsuperscript{769} Today, all states have abolished the common law rule by statute, but a number of states have retained the disqualification for persons convicted of perjury or subornation of perjury.\textsuperscript{770} Statutes abolishing the common law rule generally provide that if a witness has been convicted of a crime, his conviction may be shown to impeach or discredit his testimony.\textsuperscript{771} These provisions present special problems when the defendant in a criminal trial has a criminal record.

1. Competency of Witnesses with Criminal Records.—In most states, statutes provide that citizens who have been convicted of criminal offenses are not incompetent as witnesses, regardless of the crimes for which they were convicted.\textsuperscript{772} A number of states, however, provide that persons convicted of perjury or subornation of perjury are disqualified from serving as witnesses.\textsuperscript{773} These statutes are all that remain of the common law doctrine that all persons convicted of serious crimes were incompetent to testify. In the absence of a specific statute, convicted perjurers are permitted to testify, but evidence of their conviction may be used to discredit their testimony.\textsuperscript{774}

The statutes disqualifying citizens convicted of perjury as witnesses are not in agreement on several issues. In Florida and Mississippi, for example, the statutes provide that the perjurer is incompetent as a witness, even if he has been pardoned.\textsuperscript{775} The Washington statute, on the other hand, states that a pardon removes the disability.\textsuperscript{776} In three states, the citizen convicted of perjury or subornation of perjury cannot be a witness in any action in his own behalf or in any action between adverse

\textsuperscript{769} 2 J. Wigmore, Evidence § 519, at 608 (3d ed. 1940).
parties against a person who objects to his testimony. In Pennsylvania, the convicted perjurer, although incompetent as a witness in most actions, is permitted to testify in proceedings to redress or prevent injury or violence to his person or property.

The unpopularity of statutes disqualifying convicted perjurers as witnesses has resulted in judicial attempts to limit their effectiveness. A federal district court in Pennsylvania, for example, ruled that a witness who had been tried and convicted of perjury was competent to testify because he had not been sentenced. The Florida Supreme Court has interpreted the Florida statute to apply only to perjury convictions in Florida so that a witness convicted of perjury in another state is qualified to testify in Florida. In addition, irrespective of the state statute, the testimony of a defendant in a criminal action generally cannot be excluded as a result of his prior perjury conviction because this exclusion would violate his constitutional right to be heard.

2. Impeachment of Witnesses by Showing Conviction of Crime.—Although the common law disqualification of criminal offenders as witnesses has been abandoned in all states, proof of conviction of a crime still may be used in most states to impeach or discredit a witness. As a general rule, the question of the competency of a witness is for the court to decide, and the weight to be accorded his testimony is for the jury. Under the state statutes, therefore, criminal offenders are permitted to testify in judicial proceedings, but their testimony may be discredited by proof of their conviction.

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considerable disagreement among the states on most of the problems that have arisen as a result of statutes permitting the impeachment of witnesses having a record of criminal conviction.

(a) *Crimes constituting grounds for impeachment.*—In most states, statutes providing for the impeachment of witnesses who testify in judicial proceedings are vague and indefinite. Consequently, by examining the statutes alone it is often impossible to determine what crimes constitute grounds for impeachment. About half of the states provide that a witness who has been convicted of “a crime” or “any crime” may have his testimony impeached. The courts in these states have reached conflicting decisions in interpreting the statutes. In some states, for example, the courts have held that all crimes, either felonies or misdemeanors, may be used to affect the credibility of a witness. Other courts have held that only felonies or infamous crimes may be used. In Pennsylvania, felonies and misdemeanors in the nature of crimen falsi are admissible for impeachment purposes. Despite numerous

300.1 (Supp. 1968). Statutes also provide for taking the depositions of prisoners. See, e.g., CAL. PENAL CODE § 2623 (West 1956); Wyo. R. CIV. P. 26(a). Tennessee requires prisoners to testify by deposition in civil cases, but permits them to appear in person in criminal cases. TENN. CODE ANN. § 41-604 (1955); id. § 41-606 (Supp. 1968).

785. See, e.g., ALA. CODE tit. 7, § 435 (1960); ARK. STAT. ANN. § 28-605 (1962); CONN. GEN. STAT. REV. § 54-145 (1968); FLA. STAT. ANN. § 90.08 (1960); FLA. STAT. ANN. § 932.31 (1944); HAWAI. REV. STAT. § 621-22 (1968); IDAHO CODE ANN. § 9-201 (1948); ILL. ANN. STAT. ch. 38, § 155-1 (Smith-Hurd 1964); id. ch. 51, § 1 (Smith-Hurd 1966); LA. REV. STAT. ANN. § 15:495 (1967); MD. ANN. CODE art. 35, § 10 (Supp. 1969); MASS. ANN. LAWS ch. 233, § 21 (1956); MICH. STAT. ANN. § 27A.2158 (1962); MINN. STAT. ANN. § 595.07 (Supp. 1970); MISS. CODE ANN. § 1692 (1957); MO. ANN. STAT. § 491.050 (1952); MONT. REV. CODES ANN. § 94-4723 (1969); N.J. REV. STAT. § 2A:31-12 (1952); N.Y. CIV. PRAC. LAW § 4513 (McKinney 1963); OKLA. STAT. ANN. tit. 12, § 381 (1960); ORE. REV. STAT. § 44.020 (1963); S.C. CODE ANN. § 26-406 (1962); UTAH CODE ANN. § 78-24-1 (1953); WASH. REV. CODE ANN. § 5.60.040 (1963); WIS. STAT. ANN. § 855.19 (1966); ALASKA R. CIV. P. 43(g)(11)(b).


opportunities, some courts still have not established definite guidelines specifying the crimes that are admissible for impeachment purposes. In South Dakota, for example, the courts have held that witnesses may be impeached if they have been convicted of any felony, any criminal offense, any crime relevant to veracity, any crime involving moral turpitude, or any infamous crime.

In some states, the statutes specify the types of crimes that may be used to impeach witnesses. In a few states, for example, statutes specifically provide that a witness who has been convicted of any felony or misdemeanor may have his credibility attacked. Other statutes permit the impeachment of a witness convicted of a felony, an infamous crime, or a crime involving moral turpitude. In Maine, conviction of a felony, any larceny, or any other crime involving moral turpitude may be shown to affect the credibility of a witness. Kansas has adopted the provision recommended in the Uniform Rules of Evidence and consequently has the most liberal statute of any state. The Kansas statute provides that only convictions of crimes involving dishonesty or false statement are admissible for impeachment purposes. Some states have specific statutes providing that traffic violations may not be introduced to impeach a witness. In most states, Supreme Court seemed to favor the proposal of the Uniform Rules of Evidence permitting impeachment only for crimes involving dishonesty or false statement. McIntosh v. Pittsburgh Rys., 432 Pa. 123, 247 A.2d 467 (1968).


State v. Olson, 158 N.W.2d 526, 528 (S.D. 1968). The court in Olson reviews previous South Dakota cases and acknowledges that the South Dakota courts have failed to establish definite guidelines as to which crimes are admissible for impeachment purposes. Id. at 527-28.


Richardson v. Gage, 28 S.D. 390, 133 N.W. 692 (1911).

State v. La Mont, 23 S.D. 174, 120 N.W. 1104 (1909).

State v. Tarlton, 22 S.D. 495, 118 N.W. 706 (1908).


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See, e.g., Iowa Code Ann. § 321.490 (1966); Wyo. Stat. Ann. § 31-242 (1957). Under both statutes, if the traffic violation is a felony, it can be used to impair credibility.
the courts have held that a witness cannot be impeached for violating a municipal ordinance.\footnote{804}

As a general rule, federal courts in civil cases apply the rules of evidence of the state in which the court is held.\footnote{805} In criminal cases, however, federal law is unclear.\footnote{806} Some federal courts have held that a witness in a federal criminal trial may be discredited if he has been convicted of a felony or a misdemeanor involving moral turpitude.\footnote{807} Others have permitted cross-examination about a former felony conviction or a misdemeanor amounting to \textit{crimen falsi},\footnote{808} or a felony or petit larceny.\footnote{809} At least one circuit has ruled that misdemeanor convictions may not be shown in impeachment.\footnote{810} The proposed rules of evidence for the federal courts would permit impeachment of a witness convicted of any crime involving dishonesty or false statement or punishable by death or imprisonment in excess of one year.\footnote{811}

(b) \textbf{Interpretation of conviction}.—The courts have reached conflicting decisions in dealing with the problem of what constitutes a conviction.\footnote{812} The overwhelming majority of courts have held that an arrest or indictment\footnote{813} is not admissible to impeach a witness. A few

\footnote{804. See, e.g., Neal v. United States, 1 F.2d 637 (8th Cir. 1924); Caldwell v. State, 282 Ala. 713, 213 So. 2d 919 (1968); Massen v. State, 41 Wis. 2d 245, 163 N.W.2d 616 (1969).}
\footnote{805. See Fed. R. Crv. P. 43(a).}
\footnote{806. In criminal cases, the federal courts are not bound by the state law of evidence. See Fed. R. Crim. P. 26. See also Funk v. United States, 290 U.S. 371 (1933); Ramer v. United States, 411 F.2d 30 (9th Cir. 1969); Roberson v. United States, 249 F.2d 737, 740 (5th Cir. 1957).}
\footnote{807. See, e.g., United States v. Conder, 423 F.2d 904, 911 (6th Cir. 1970); Pinkney v. United States, 380 F.2d 882 (5th Cir. 1967), cert. denied, 390 U.S. 908 (1968); Myers v. United States, 377 F.2d 412 (5th Cir. 1967), cert. denied, 390 U.S. 929 (1968); Roberson v. United States, 249 F.2d 737 (5th Cir. 1957).}
\footnote{808. See, e.g., Wounick v. Hysmith, 423 F.2d 873, 875 (3d Cir. 1970); United States v. Klass, 166 F.2d 373 (3d Cir. 1948); United States v. Haynes, 81 F. Supp. 63, 68 (W.D. Pa. 1948), aff'd, 173 F.2d 223 (3d Cir. 1949). Similarly, some circuits permit the impeachment of a witness for his conviction of a felony or a misdemeanor involving truth or veracity. E.g., Ciravolo v. United States, 384 F.2d 54 (1st Cir. 1967).}
\footnote{809. Pearson v. United States, 192 F.2d 681, 699 (6th Cir. 1951).}
\footnote{810. Johnson v. United States, 424 F.2d 537 (9th Cir. 1970).}
\footnote{811. Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 6-09 (March 1969).}
\footnote{812. For a general discussion of what constitutes a conviction for the purpose of imposing civil disabilities on criminal offenders see notes 82-103 supra and accompanying text. Different considerations may apply, however, when the courts are considering what constitutes a conviction for impeachment purposes.}
courts, however, have held that the jury is entitled to know all the facts about a witness, including any arrest or indictment. Some courts have held that a witness may be asked if he is under indictment only if this fact would tend to show that his testimony might be influenced by interest or bias or would provide a motive for him to testify falsely. The courts also are split on the admissibility of both a conviction based on a plea of nolo contendere and a conviction from which an appeal is pending. Most courts hold that a conviction in any state may be used for impeachment purposes. As a general rule, a constitutionally invalid conviction cannot be used to impeach a witness.

(c) Proof and explanation of conviction.—Most jurisdictions permit a conviction to be proved for impeachment purposes by the oral statement of the convicted witness or by production of the official record. Some states outline the procedure for proof of the conviction in their statutes. Louisiana, for example, provides that evidence cannot be introduced to prove a conviction unless the witness has been asked about the conviction on cross-examination and has failed to admit it. Generally, only the nature of the offense and the fact of the conviction can be shown, not the details of the crime. If the witness admits the conviction on cross-examination, he should not be questioned further.

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814. See, e.g., State v. Obey, 193 La. 1075, 192 So. 722 (1939); State v. Sims, 213 N.C. 590, 197 S.E. 176 (1938). The result in the Obey case has been changed by statute. See LA. REV. STAT. ANN. § 15:495 (1967).
820. C. McCORMICK, supra note 768, § 43, at 92.
824. Hendrick v. Strazzulla, 135 So. 2d 1, 2 (Fla. 1961).
Most courts forbid a witness to make any denial of guilt or explanation of his conviction. These courts reason that since the conviction is conclusive, permitting an explanation by the witness would involve a retrial of a collateral issue. Other courts permit the witness to assert his innocence or explain the circumstances of the conviction. Wigmore terms it a "harmless charity to allow the witness to make such protestations on his own behalf as he may feel able to make with a due regard to the penalties of perjury." The courts are in disagreement on the question of whether a convicted witness can be impeached if he has received a pardon. Most courts hold that the pardon does not prevent the conviction from being used to discredit the witness. These courts, however, may permit the pardon to be admitted into evidence along with the conviction. Other courts hold that the conviction may not be used because the pardon nullifies it. The California statute provides that a conviction cannot be used for impeachment purposes if the witness has received either a pardon based on his innocence or a certificate of rehabilitation.

(d) Effect of remote conviction.—In the overwhelming majority of states, the statute authorizing the impeachment of witnesses with criminal records fixes no limitation on the length of time since the conviction. Most courts, therefore, have held that a conviction is admissible to impeach a witness, regardless of how remote it is. Other courts, however, have found that the trial judge has discretion to exclude past convictions.
are not admissible for impeachment purposes.835

At least three states have statutes specifying the time after which convictions cannot be used to impeach the offender. In Massachusetts, a misdemeanor conviction cannot be used after five years, and a felony conviction is inadmissible after ten years from the date of expiration of the minimum term of imprisonment.836 The Colorado statute provides that a witness cannot be impeached if he was convicted at least five years prior to the time when he testifies.837 In Vermont, only convictions within fifteen years can be used for impeachment purposes.838

3. Problems Facing the Criminal Defendant with a Criminal Record.—Special problems result if the defendant in a criminal proceeding has a prior criminal record. His prior conviction may be admissible into evidence under limited circumstances to prove an element of the crime for which he is being tried. If not admissible for this purpose, the prior conviction may be used to impeach the defendant if he elects to testify in his own behalf. Under both situations, proof of the prior conviction is highly prejudicial to the defendant.

(a) Use of previous convictions as circumstantial evidence.—The general rule is that evidence of prior criminal convictions is inadmissible to establish a defendant’s guilt or to show a probability that he committed the crime for which he is being tried.839 This rule is designed to prevent the inference that the defendant is guilty because he is a man of criminal character.840 Despite the general rule, evidence of the defendant’s prior convictions may be admissible to establish some element of the offense for which he is on trial. The courts have held, for example, that evidence of a defendant’s previous convictions is admissible when relevant to show such elements as motive, identity, intent, absence of mistake or accident, or common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other.841 In addition to these

836. MASS. ANN. LAWS ch. 233, § 21 (1956).
841. See, e.g., Spencer v. Texas, 385 U.S. 554, 560-61 (1967); Drew v. United States, 331 F.2d 85, 90 (D.C. Cir. 1964); State v. Ascolese, 59 N.J. Super. 393, 397, 157 A.2d 858, 860 (1960);
purposes, most states have habitual criminal statutes under which evidence of a defendant's prior convictions may be submitted to the jury, theoretically only for sentencing purposes. In 1967, the United States Supreme Court upheld the Texas procedure whereby the jury was informed of the prior convictions at the beginning of the trial.

(b) Use of previous convictions to impeach the defendant-witness.—When the defendant in a criminal proceeding becomes a witness for himself, he is subject to impeachment under the same rules and conditions as other witnesses. If the defendant has a criminal record, therefore, his previous convictions may be introduced to impeach or discredit his testimony. As a result of this rule, the defendant with a criminal record faces an insurmountable problem. If he takes the stand and his prior convictions are admitted as evidence, he is faced with the danger that the jury, despite instructions, will consider the convictions as evidence of his guilt rather than as a reflection on his “credibility.” On the other hand, if the defendant does not testify, the jury is likely to infer that he cannot truthfully deny or explain the charges against him and therefore must be guilty.

The courts have upheld the use of prior convictions to impeach criminal defendants who testify, reasoning that the possibility of prejudice is outweighed by the legitimate purpose served in informing the jury of the defendant’s character. The courts seek to reduce the prejudicial effect by instructing the jury that the defendant’s criminal record can only be used as a reflection on his credibility. Surveys have indicated, however, that juries are unable to follow instructions to


843. Spencer v. Texas, 385 U.S. 554 (1967). In his dissent, Mr. Chief Justice Warren pointed out that 31 states postpone introduction of evidence of prior convictions until after the jury has found the defendant guilty. Id. at 586.


845. See C. McCormick, supra note 768, § 43, at 93-94. See also Note, To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record, 4 Colum. J.L. & Soc. Prob. 215 (1968).


847. See People v. Smith, 63 Cal. 2d 779, 409 P.2d 222, 48 Cal. Rptr. 382 (1966) (approving the following instruction to the jury: “You must not use this evidence in determining the defendant’s guilt or innocence of the other charges, nor must you permit yourself to be influenced against the defendant because he may have suffered a prior felony conviction.”). Id. at 791, 409 P.2d at 230, 48 Cal. Rptr. at 390.
consider prior convictions only as evidence of the defendant's credibility, rather than as evidence of his guilt.848 Studies show that the defendant is less likely to be acquitted if the jury is informed of his criminal record.849

Many defendants choose not to testify in order to avoid the prejudicial effects of their impeachment. In 1965, the Supreme Court ruled that the fifth amendment's privilege against self-incrimination forbids both comment upon a defendant's failure to testify and instructions by the court that his silence may be considered as evidence by the jury.850 The argument has been advanced that the Supreme Court's decision has intensified the defendant's dilemma.851 Since the defendant may choose not to testify for numerous reasons,852 the Supreme Court's decision, by forbidding comment entirely, makes it impossible for his silence to be explained, even though jurors tend to infer guilt from silence.853

A few states have enacted statutes that partially solve the dilemma faced by the defendant with a criminal record. Kansas, for example, has adopted the provision of the Uniform Rules of Evidence844 that permits the defendant to testify without being impeached by his prior convictions unless he first introduces evidence to establish his credibility.855 Similar provisions have been adopted in Pennsylvania and Georgia.856 The Kansas Supreme Court has held that the statute was designed to induce the defendant to take the stand and tell his story without being prejudiced by evidence of his prior convictions.857 Accordingly, even previous convictions of crimes involving dishonesty or false statement cannot be used to discredit a defendant-witness unless he has offered evidence to support his credibility.858

The practice of using prior convictions as evidence to impeach a defendant-witness has been severely criticized on several grounds.859


852. Id. at 220-21.

853. Id. at 221.


858. Id. at 338, 430 P.2d at 267.

859. See, e.g., Spector, Impeachment Through Past Convictions: A Time for Reform, 18 DePaul L. Rev. 1 (1968); Note, supra note 845; Note, Impeaching the Accused by his Prior Crimes—A New Approach to an Old Problem, 19 Hastings L.J. 919 (1968); Note, Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of
First, the practice may violate the equal protection clause since the defendant with a criminal record is less likely to take the stand, and, if he does, he is less likely to be acquitted. The defendant without a record, on the other hand, may testify freely. Secondly, the fifth amendment privilege against self-incrimination may be violated when the defendant who testifies is compelled to answer questions about his prior convictions. Thirdly, the sixth amendment guarantee of trial by an impartial jury may be infringed when unnecessary prejudicial information is introduced about the defendant's past, making it unlikely that the defendant will have a fair opportunity to prove his innocence of the crime with which he is charged. Fourthly, the practice of impeaching the defendant-witness may violate the due process clause by subjecting him to unnecessary prejudice. So far, however, the courts have been unwilling to accept these arguments, and there is little likelihood of any immediate change.

4. Efforts to Liberalize Rules Concerning the Testimony of Criminal Offenders.—Throughout the years, there have been various efforts to liberalize the rules of evidence concerning the testimony of convicted citizens. Both the state legislatures and the courts, however, have been slow to act. For example, the common law disqualification for conviction of a crime was not abolished in all states until 1953. Statutes that render convicted perjurers incompetent as witnesses have been criticized, but the disqualification still exists in a number of states, and there have been recent suggestions that it be adopted in others. In addition, most courts have appeared satisfied with statutes


862. Id. at 287. The Supreme Court has held that due process requires that the accused receive a trial by an impartial jury free from outside influences. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). In addition, the Court has held that a procedure that "involves such a probability that prejudice will result . . . is deemed inherently lacking in due process." Estes v. Texas, 381 U.S. 532, 542-43 (1965).

863. See Note, supra note 845, at 219-20.

864. Tennessee was the last state to abolish the disqualification for conviction of a crime. Tenn. Code Ann. § 40-2712 (1955).

865. See Note, supra note 779.

866. See note 773 supra and accompanying text.

867. See Comment, supra note 779.
permitting the impeachment of witnesses with criminal records. The statutes are justified by the theory that the conviction indicates a general readiness to do evil, making the offender unworthy of credit. Courts have said that a person who violates the laws he is morally and legally bound to obey is not trustworthy, even though he did not commit a crime involving dishonesty or false statement.

There have been two major efforts to liberalize the state statutes that provide for the impeachment of convicted persons who appear as witnesses. Both the Model Code of Evidence and the Uniform Rules of Evidence recommend that the credibility of a convicted witness should not be attacked unless the offense he committed involves dishonesty or false statement. Kansas has adopted verbatim the recommendation of the Uniform Rules, but other states that recently have revised their evidence statutes have rejected it. Although the statutory reform movement has never been substantial, it undoubtedly has been retarded to some extent by the proposed rules of evidence for the federal courts. These rules, if adopted, would permit impeachment of a witness convicted of any crime punishable by death or imprisonment in excess of one year or involving dishonesty or false statement. A conviction would be inadmissible if it occurred prior to ten years before a witness was released from the penitentiary. The proposed rules have been criticized for failing to recommend needed reforms.

In addition to the efforts designed to achieve statutory reform, there has been a minor movement among the courts in recent years to narrow the scope of the impeachment rules through a strict interpretation of the existing statutes. The movement, however, appears to be confined at the

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870. MODEL CODE OF EVIDENCE rule 106 (1942).
871. UNIFORM RULES OF EVIDENCE 21.
873. New Jersey recently adopted the Uniform Rules of Evidence, but omitted rule 21. See N.J. REV. STAT. § 2A:84A-16 (Supp. 1969-70). California recently revised its evidence code, but a witness still is subject to impeachment if he has been convicted of a felony. CAL. EVID. CODE § 788 (West 1966).
874. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, RULE 6-09 (1969).
875. Id. 6-49(h).
present time to the United States Court of Appeals for the District of Columbia Circuit. The cases have been concerned with interpreting the District of Columbia statute providing that witnesses "may" be impeached if they have been convicted of a crime. In *Luck v. United States,* the court ruled in dicta that the word "may" leaves room for judicial discretion in determining if past convictions should be admitted. Consequently, the court said there may well be "cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility." The Court of Appeals for the District of Columbia Circuit has followed *Luck* in subsequent decisions. In *Gordon v. United States,* it discussed the factors that the trial judge should consider in determining whether to admit the prior conviction of a witness for impeachment purposes. The factors include the type of crime, the time of conviction, the subsequent history of the witness, and the posture of the case. In the case of a defendant-witness, the court found that the trial judge should consider both the similarity between the past crime and the one for which the defendant is on trial and the importance of his testimony. As an example, the court noted that acts of violence have little or no relationship to veracity, but crimes such as perjury, fraud, cheating, and stealing do. Although the *Luck* doctrine has been cited by other courts with approval, it has been specifically rejected by the courts in California and New Jersey.

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877. D.C. CODE ANN. § 14-305 (1967). A number of state impeachment statutes also use the word "may." E.g., CONN. GEN. STAT. REV. § 52-145 (1968); DEL. CODE ANN. tit. 10, § 4303 (1953); MASS. ANN. LAWS ch. 233, § 21 (1956); WIS. STAT. ANN. § 885.19 (1966).
878. 348 F.2d 763 (D.C. Cir. 1965).
879. Id. at 768.
880. See, e.g., Jones v. United States, 402 F.2d 639 (D.C. Cir. 1968); Barber v. United States, 392 F.2d 517 (D.C. Cir. 1968); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967); Brown v. United States, 370 F.2d 242 (D.C. Cir. 1966). Most of the cases have involved a criminal proceeding in which the defendant has a prior criminal record. The court, however, has held that the *Luck* rule applies to all witnesses.
881. 383 F.2d 936 (D.C. Cir. 1967).
882. Id.
883. Id. at 940.
884. Id.
D. Capacity to Serve as Juror

At common law, citizens with criminal records were incompetent to serve as members of juries. This rule developed from the common law disqualification of criminal offenders as witnesses in judicial proceedings. Although statutes in all states now permit convicted citizens to testify, most states have retained statutory provisions excluding persons convicted of certain crimes from serving on juries. The courts have held that legislatures have broad power to establish the qualifications for jurors. Consequently, the legislatures may enlarge or deny the right of jury service as long as the reasons for the qualifications and exclusions are not arbitrary. Some courts have held that the common law rule disqualifying criminal offenders as jurors applies even in the absence of a statute.

1. Exclusion of Convicted Citizens from Jury Service.—Citizens convicted of certain crimes may be disqualified from serving on juries by a variety of constitutional and statutory provisions. Most states have express provisions that exclude convicted citizens from jury service unless their civil rights have been restored. In addition, a number of states have statutes that indirectly prevent persons with criminal records from participating in the judicial system through jury service.

(a) Direct disqualification.—Most states have constitutional or statutory provisions expressly prohibiting persons convicted of specified crimes, usually felonies or misdemeanors involving moral turpitude, from serving as jurors. In some states, the disqualification begins at the time of the indictment. The language of the disqualification provisions varies considerably from state to state.

(i) Disqualification after indictment.—In several states, statutes provide that a citizen is not eligible for jury service if he is under indictment for commission of certain crimes. The statutes are not in

889. 9 W. Holdsworth, History of English Law 186, 191 (1926).
890. See note 772-74 supra and accompanying text.
agreement on the nature of the offense that must be charged before the disqualification will result. In some states, for example, a citizen is ineligible for jury service while under indictment for any crime, whether a felony or misdemeanor.\textsuperscript{895} Accordingly, persons have been excluded from jury service while charged with traffic violations\textsuperscript{896} or with failing to pay a per capita road tax, a misdemeanor punishable by a fine not exceeding five dollars or imprisonment not exceeding ten days in jail.\textsuperscript{897} Other states only disqualify those citizens under indictment for a felony.\textsuperscript{898} Congress has provided that citizens are not competent to serve on federal grand or petit juries while charged in either federal or state courts with crimes punishable by imprisonment for more than one year.\textsuperscript{899}

(ii) Disqualification after conviction. — About three-fourths of the states expressly exclude from jury service persons who have been convicted of certain crimes. Since the statutes vary considerably from state to state, they are difficult to categorize. Several states, for example, have broad disqualification statutes that encompass several types of offenses.\textsuperscript{900} Other states statutes disqualify persons who have been convicted of felonies,\textsuperscript{901} infamous crimes,\textsuperscript{902} or crimes involving moral


\textsuperscript{897} State v. Nicholas, 109 La. 84, 33 So. 92 (1902).


\textsuperscript{899} See, e.g., Ida. Const. art. 6, § 3 (treason, felony, embezzlement of public funds, or other infamous crimes); Idaho Code Ann. § 2-202 (1948) (felony or misdemeanor involving moral turpitude); Md. Ann. Code art. 51, § 6 (Supp. 1969) (crimes punishable by fine of $500 or more, or by imprisonment for more than 6 months); Nev. Const. art. 4, § 27 (bribery, perjury, forgery, larceny, or other high crimes); Nev. Rev. Stat. § 6.010 (1967) (treason, felony, or other infamous crime); Okla. Stat. Ann. tit. 38, § 28 (Supp. 1969-70) (convicted of infamous crime or served term in penitentiary for commission of felony).


The statutes in some states exclude from jury service persons convicted of felonies or certain specified crimes. Other jurisdictions list the individual offenses that bring about the disqualification, or provide that citizens are not competent to serve as jurors if they have been convicted of crimes punishable by imprisonment in the penitentiary. The New Jersey legislature has indicated that a citizen cannot qualify as a juror if he has been convicted of any crime. Missouri has several statutes that, taken together, result in the disqualification of almost every major criminal offender. In Maine, the legislature has provided that the jury commissioners may exclude from jury service an individual convicted of any "scandalous crime or gross immorality."

The qualifications for jury service in Pennsylvania vary from county to county. In first class counties, for example, citizens convicted of crimes involving moral turpitude are ineligible to be jurors. In second and third class counties, disqualification results upon conviction of a felony. In other classes of counties, the statute only

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requires that jurors be "sober, intelligent and judicious persons."

The Pennsylvania Supreme Court has held that the disparity of statutory provisions relating to the qualifications of jurors in the various counties does not violate the equal protection clause.

Congress has provided that citizens are not competent to serve on federal grand or petit juries if they have been convicted of a crime punishable by imprisonment for more than one year. This statute applies to a conviction in either a federal or state court, but the disqualification ends if the citizen is restored to his civil rights by pardon or amnesty.

Some authorities have proposed that rehabilitated offenders should not be excluded from jury service. The Model Penal Code provides that a convicted person should not be disqualified as a juror after he has served his sentence. The Uniform Act on the Status of Convicted Persons, which has been adopted by New Hampshire, does not specifically provide that convicted citizens would be permitted to serve as jurors, but states that they should retain all rights, "political, personal, civil, and otherwise."

(iii) **Conviction as grounds for challenge for cause.**—In addition to the statutes expressly disqualifying convicted persons from jury service, several states have separate statutes providing that a criminal conviction is a ground for challenge for cause. Specifically, most of the statutes state that if an individual has been convicted of a felony, he is subject to be challenged for cause when a jury is being selected. In several states, the statute specifying that a conviction is a ground for challenge for cause is not consistent in terminology with the statute disqualifying the criminal offender from jury service. In Alabama, for

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913. *Id.* § 942.
915. *Id.* § 942.
916. *Id.*
919. See, e.g., ALA. CODE tit. 30, § 55 (1958); MINN. STAT. ANN. § 631.29 (1947); OKLA. STAT. ANN. tit. 12, § 572 (1960); ORE. REV. STAT. § 17.130 (1968); TEX. CODE CRIM. PROC. art. 35.16 (Supp. 1969-70); IOWA R. CIV. P. 187(0)(1). When a jury is being selected, the parties to the action can challenge an unlimited number of prospective jurors for cause. A challenge for cause must be made upon grounds of absolute disqualification. Kempe v. United States, 160 F.2d 406, 409 (8th Cir. 1947). Such a challenge leaves nothing to the discretion of the court. Alabama Fuel & Iron Co. v. Powske, 232 Ala. 66, 166 So. 782 (1936).
920. E.g., MINN. STAT. ANN. § 631.29 (1947); IOWA R. CIV. P. 187(0)(1).
example, one statute provides that citizens convicted of crimes involving moral turpitude are not qualified as jurors, while another statute states that a prospective juror can be challenged for cause if he has been convicted of a felony. An Oregon statute excludes a citizen convicted of a felony or a misdemeanor involving moral turpitude from jury service; another Oregon statute, on the other hand, provides that conviction of a felony is a ground for challenge for cause.

A challenge for cause generally is permitted whenever a prospective juror does not meet the prescribed statutory qualifications. Consequently, it is not necessary for states that expressly disqualify convicted citizens from jury service to have separate statutes providing that a criminal offender can be challenged for cause.

(b) Indirect disqualification.—Although the majority of states have express statutory provisions disqualifying criminal offenders as jurors, convicted persons in most states could be excluded from jury service even if there were no express provisions. A number of states, for example, have statutes providing that only qualified electors are eligible to serve on juries. In addition, some state statutes provide that only citizens having "good character" or the like can qualify for jury service.

(i) Requirement that jurors be qualified electors.—A large number of states have statutes either requiring that all jurors be qualified voters or specifying that the list of prospective jurors must be prepared from the list of registered voters. In addition to the state statutes, Congress contemplated in the Jury Selection and Service Act of 1968

922. Id. § 55.
923. ORE. REV. STAT. § 10.030 (1968).
924. Id. § 17.130.
927. E.g., CONN. GEN. STAT. REV. § 51-217 (1968).
that voter lists would be the primary source for the names for federal jurors.\textsuperscript{929} Since convicted citizens are disfranchised in most states,\textsuperscript{930} both the federal and state statutes indirectly exclude the criminal offender from jury service. Courts have held that it is not improper to use voter registration lists in selecting jurors.\textsuperscript{931} In the absence of a statutory requirement, however, the fact that a citizen is not a qualified voter does not affect his qualifications as a juror.\textsuperscript{932} The use of voter lists for selecting jurors has been justified on the theory that this procedure eliminates citizens who are either unqualified to vote or insufficiently interested in the world about them to register.\textsuperscript{933} The underlying thought seems to be that persons who register to vote presumably have a stake in the community and therefore can be expected to have an interest in the quality of justice rendered in its courts.\textsuperscript{934}

(ii) Requirement that jurors be persons of good character.—In addition to requiring that jurors be qualified electors, a large number of state statutes direct the jury commissioners or other officials to select only citizens having “good character” or “approved integrity” for jury service.\textsuperscript{935} The statutes vary considerably in language from state to state. The Kentucky statute, for example, requires that a juror be “sober, temperate, discreet, and of good demeanor . . . .”\textsuperscript{936} In Georgia, the statute directs the jury commissioners to select only “intelligent and upright citizens” for jury duty.\textsuperscript{937} Some statutes give the trial court considerable discretion to exclude citizens from jury service. The New Hampshire statute, for example, states that the court may discharge any person from acting as a juror “because of vicious habits or other

\textsuperscript{930} See notes 242-59 supra and accompanying text.
\textsuperscript{931} E.g., Chance v. United States, 322 F.2d 201 (5th Cir. 1963), cert. denied, 379 U.S. 823 (1964).
\textsuperscript{933} H.R. Rep. No. 1076, 90th Cong., 2d Sess. 6 (1968).
\textsuperscript{934} Corlew, Mississippi Jury Selection: A Proposed Statute, 40 Miss. L.J. 393 (1969).
\textsuperscript{937} GA. CODE ANN. § 59-106 (Supp. 1969).
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sufficient cause." Since statutes in most states expressly disqualify convicted citizens as jurors, it generally is not necessary for jury commissioners or the courts to use these subjective standards to exclude criminal offenders from jury service. There have been some cases, nevertheless, where courts have held that convicted citizens do not possess the good character required by the statutes. The courts have upheld statutes requiring that jurors be persons of good character, or the like, despite attacks that the provisions are inherently vague and susceptible to discriminatory application.

2. Validity of Verdict Rendered by Jury Containing Convicted Citizen.—Despite statutes excluding citizens with criminal records from jury service, there have been a number of cases where convicted citizens have served as jurors. As a practical matter, many criminal offenders may not be aware that they are ineligible to serve as jurors. Consequently, if the attorneys trying a case do not question prospective jurors with respect to their possible criminal background, there is a possibility, however slight, that one or more disqualified persons will be members of the jury.

The courts are in disagreement on the validity of a jury verdict when a convicted citizen was a member of the jury. Some courts have held that a criminal offender’s disqualification is waived if he is not interrogated or challenged while the jury is being selected or before the verdict is rendered. This rule applies even though the parties were unaware of the juror’s criminal record until after the verdict. These courts, however, may grant a new trial if the appealing party has used reasonable diligence to discover a juror’s disqualification, or if the juror answered falsely when questioned about his criminal record. In

941. In Arkansas, this problem has been solved by statute. ARK. STAT. ANN. § 39-106 (Supp. 1969) (no verdict or indictment shall be void or voidable because any juror fails to possess any of the required qualifications unless a juror knowingly answered falsely any question on voir dire relating to his qualifications).
943. See, e.g., Ford v. United States, 201 F.2d 300 (5th Cir. 1953); Turley v. State, 74 Neb. 471, 104 N.W. 934 (1905).
addition, some courts will grant a new trial if actual injury or bias is shown as a result of the juror's ineligibility.947

A number of courts have rejected the theory that a convicted person's disqualification can be waived. These courts hold that a verdict is absolutely void if rendered by a jury containing a disqualified juror.948 Courts following this rule do not require a showing of injury or probable injury as a result of the juror's disqualification.949 These courts reason that since a jury containing a convicted citizen is illegal under the statutes, the courts cannot enter a judgment on the verdict.950

3. Judicial Developments.—As a general rule, the courts have held that state legislatures have considerable power to establish the qualifications for jurors to serve in the state courts.951 Although the courts will not permit arbitrary and systematic exclusions from jury service,952 most state requirements for jury selection have been upheld. Courts, for example, have held that it is not arbitrary to exempt women from jury service953 or to require that jurors be able to read and write.954

The United States Supreme Court recently held that “[s]tates remain free to confine the selection [of jurors] to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character.”955 Specifically, the Court has found that the fourteenth amendment does not bar jury selection on the basis of reputation and community esteem.956 In addition, the Court has held that jury commissioners may eliminate from jury service anyone who is not an “upright” citizen.957

There have been a number of cases before the courts as a result of statutes disqualifying from jury service persons convicted of certain crimes. In most cases, however, the validity of the provisions has been assumed, and the courts have been concerned with other issues, such as the validity of a verdict rendered by a jury containing a disqualified

950. See note 891 supra.
951. See note 891 supra.
953. Id.
956. Id. at 331-37.
citizen,\textsuperscript{958} the effect of a conviction in a foreign court,\textsuperscript{959} and the effect of a pardon on the disability.\textsuperscript{960} The courts have reached conflicting decisions on these issues.\textsuperscript{961}

In some cases, the courts have excluded convicted citizens from jury service even though a statute did not require it. A federal district court, for example, has held that persons convicted of misdemeanors can be excluded from jury service, even though their rejection is not legally required, because such persons come from all races and classes and their exclusion does not materially affect the jury selection process.\textsuperscript{962} Similarly, the Massachusetts Supreme Court has held that it is not necessary to seat persons with records of conviction on a jury in order to provide a panel that is representative of the community.\textsuperscript{963} The Massachusetts court, however, also has held that a convicted citizen may be included on a jury list if he is found to be a person of good moral character by the authorities preparing the jury list.\textsuperscript{964} The court reached its decision by interpreting the statute to permit, but not require, the disqualification of criminal offenders.\textsuperscript{965}

E. Capacity to Serve as Court-Appointed Fiduciary

A criminal conviction may prevent the offender from holding a court-appointed position of trust. Actual incarceration will, by necessity, have this result because of the physical incapacity of the

\textsuperscript{958} See notes 941-50 supra and accompanying text.

\textsuperscript{959} For a general discussion of the effect of a conviction in a foreign jurisdiction on the various civil disabilities see notes 142-71 supra and accompanying text.

\textsuperscript{960} For a general discussion of the effect of a pardon on civil disabilities see notes 570-608 infra and accompanying text.

\textsuperscript{961} Some courts have held, for example, that a citizen is not disqualified from jury service in the state's courts if he has been convicted of a crime by the courts of another state or by a federal court. See, e.g., Duggar v. State, 43 So. 2d 860 (Fla. 1949), noted in 2 A.L.A. L. Rev. 361 (1950) and 3 U. Fla. L. Rev. 235 (1950); Brady v. State, 199 Ga. 566, 34 S.E.2d 849 (1945). See also Browning v. State, 120 Ohio St. 62, 165 N.E. 566 (1929) (conviction in another jurisdiction of a crime that would not disqualify juror under laws of Ohio did not amount to disqualification). Other courts have held that convicted persons are ineligible to be jurors, regardless of where they were convicted. See, e.g., State v. Hermann, 283 S.W.2d 617 (Mo. 1955); Gann v. State, 397 P.2d 686 (Okla. Crim. App. 1964); Amaya v. State, 87 Tex. Crim. 160, 220 S.W. 98 (1920). The courts also are in disagreement on the question of whether a pardon removes the disability. Compare Easterwood v. State, 34 Tex. Crim. 400, 31 S.W. 294 (1895), with Anderson v. State, 40 Ala. App. 509, 120 So. 2d 397 (1959), rev'd on other grounds, 366 U.S. 208 (1961).


\textsuperscript{964} Commonwealth v. Wong Chung, 186 Mass. 231, 71 N.E. 292 (1904).

\textsuperscript{965} Id. at 235, 71 N.E. at 293.
convict to discharge the duties required by law of a person in this position. Likewise, the released convict will, in all likelihood, be unable either to regain his position of trust or to serve in another fiduciary position. Although most states do not specifically exclude ex-convicts from positions of trust, statutory language giving the courts discretionary power to select fit or suitable persons and to remove unfit or unsuitable persons allows enough leeway to exclude an ex-convict on the fact of his conviction alone.

1. Executors and Administrators.—An executor, the personal representative of the testator, is named in the will. Generally, the court will honor the wishes of the testator and appoint the person named, unless the appointee is legally disqualified. Some courts make appointment of the person designated in the will mandatory unless he is statutorily disqualified, reasoning that the testator’s wisdom is not their concern. Disqualification generally will occur when the statute expressly excludes a group of persons from serving as executors, or when the statute gives the court discretion in appointing or removing the executor nominated in the will. An administrator, on the other hand, is the court-appointed representative of an intestate. In most states, there are statutes fixing priorities among persons being considered for appointment as administrator. A person who is not qualified to serve as an executor generally cannot serve as an administrator, since most statutes contain similar qualifications for both positions.

Several states have statutes expressly excluding convicted citizens from the position of executor or administrator. The grounds for exclusion include conviction of a felony, infamous crime, serious crime, or a crime of moral turpitude. The wording of these

exclusions usually leaves no room for discretion in the courts. Most of the statutes exclude the convict or ex-convict regardless of his rehabilitation, presumably barring him permanently from these positions unless his civil rights are restored in accordance with the appropriate state procedure.

These express exclusions have been avoided by the courts in certain instances, demonstrating a desire to carry into effect the wishes of the testator. Conviction of a felony in one state, for example, may not result in disqualification when the crime is not considered a felony in the state where the will is probated. Furthermore, conviction of a felony has been held not to disqualify a person whose conviction has been pardoned, despite statutory language disqualifying all felons.

Statutes in some jurisdictions, although not expressly excluding felons from serving as executors or administrators, contain language giving the appointing court sufficient discretion to exclude an ex-convict. These statutes usually require the court to appoint a “suitable,” “fit,” or “competent” person, or to remove a person who does not possess these qualities. Although the case law does not indicate conclusively whether a criminal conviction will result in disqualification under these statutes, the cases tend to support exclusion of convicts at the discretion of the court. An Ohio statute, for example, states that appointment of an executor named in a will is mandatory unless he is not “legally competent.”

Despite the lack of more specific language, an Ohio court has determined that a person accused or convicted of a crime is not legally competent to serve as executor. Other jurisdictions, while

973. See, e.g., In re Johnson’s Will, 202 Misc. 751, 112 N.Y.S.2d 866 (Sur. Ct. 1952); In re Duncan’s Estate, 181 Okla. 407, 74 P.2d 117 (1937). A New York court has held that a felon was eligible to serve as an executor since the crime for which he was convicted in federal court was not a felony under New York law. In re Canter’s Will, 146 Misc. 123, 261 N.Y.S. 872 (Sur. Ct. 1933).
977. E.g., ME. Rev. Stat. ANN. tit. 18, § 107 (1964) (executor); MASS. GEN. LAWS ch. 192, § 4, ch. 193, § 1 (1969); OHIO REV. CODE ANN. § 2113.05 (Baldwin 1964) (executor); WIS. STAT. ANN. §§ 310.12, 316, 311.02 (1958).
978. OHIO REV. CODE ANN. § 2113.05 (Baldwin 1964).
not ruling specifically on the suitability of an ex-convict, have held that
the court has complete discretion in determining the fitness of the named
executor, restricted only in the sense that it must appoint that executor if
he is suitable, regardless of the availability of a relatively more suitable
person. Thus, despite provisions making appointment of the named
executor mandatory unless he is disqualified by statute, the courts in
jurisdictions with discretionary statutes can avoid the appointment of an
ex-convict. The same rules apply when statutes require the court to
appoint as administrator the person with statutory preference, but also
give the court discretion in his appointment or removal.

2. Guardians.—Guardianship is the legal solution for the
management of the affairs of those who are physically or mentally
incompetent. Like an executor or administrator, a guardian is a
fiduciary occupying a position of trust. Consequently, the statutory
qualifications for guardianship are similar to those for other positions of
trust, giving the court, in most instances, discretion in the appointment
or removal of an ex-convict.

(a) Guardians of the person and estate.—The majority of states
utilize the discretionary approach to the appointment or removal of a
guardian. The statutes usually include the words “suitable,” “competent,” “fit,” or other phrases implying
discretion. Although most cases interpreting these statutes do not deal specifically
with the issue of a criminal conviction, they do reinforce the broad
discretionary powers of the court. Applying a discretionary statute, a
Mississippi court has held that a criminal conviction is sufficient
grounds for removal of a guardian.
In establishing the qualifications for guardians, a few states utilize the express disqualification standards found in the executor-administrator statutes.\(^7\) These provisions vest little or no discretion in the appointing court to determine whether the convict is qualified to serve as guardian.\(^8\) As a result of an express disqualification statute, a New York court refused to appoint a child’s father as guardian on the grounds that the father’s 22-year-old grand larceny conviction barred his appointment despite the fact that he had led an honorable life since his release. The court pointed out that the refusal was “downright injustice,” stating that such a “flat and sweeping disqualification” left no room for penitence and reform and left no discretion in the court to alter the result.\(^9\)

(b) Testamentary guardians.—The testamentary guardian, usually a creature of statute, is nominated in the will of the minor’s or incompetent’s parents.\(^10\) Many courts, under a discretionary statute, will attempt to honor the wishes of the testator and refuse appointment only when the person nominated is found unsuitable to provide for the child’s welfare. In these jurisdictions, it is apparent that the court, within its discretion, could refuse to appoint or could remove a convict on the basis of his conviction alone.\(^11\) Only a few courts have required mandatory appointment of the person nominated,\(^12\) and no cases have been found where the courts were faced with an ex-convict nominee.

A few jurisdictions disqualify any nominee who has been convicted of a felony\(^13\) or infamous crime.\(^14\)

(c) Guardians ad litem.—The guardian ad litem is a special purpose guardian who represents the minor or incompetent in

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\(8\) The Florida code, for example, states unequivocally that “no person who has been convicted of a felony . . . shall be appointed to act as guardian.” Fla. Stat. Ann. § 744.27 (1964).


\(10\) H. Clark, Domestic Relations 245 (1968).

\(11\) Generally, the statutory provisions for appointment or removal of a testamentary guardian are similar or identical to those for general guardians.

\(12\) See, e.g., In re Welsh’s Estate, 50 App. Div. 189, 63 N.Y.S. 737 (1900).


\(14\) E.g., Utah Code Ann. § 75-6-1 (1953).
Some states allow the general guardian to represent his ward in suit. Although a guardian appointed solely for the purpose of litigation serves a different purpose than the general guardian, the same basic standards apply for his appointment. A few states, however, require that the guardian ad litem be an attorney, a standard as effective as a felony disqualification in removing the ex-convict from this position.

3. Trustees.—To serve as trustee, the person nominated must be able to take and hold property and administer the trust. Thus, the incarcerated offender would be unable to serve as a trustee due to his physical incapacity to administer the trust while in prison. Furthermore, a few jurisdictions divest the imprisoned offender of his property, thereby rendering him unable to be a trustee. The released offender, however, is legally capable of serving as a trustee, since in every state he can take and hold property. Statutory appointment or qualification restrictions, however, may bar the ex-convict's appointment. Moreover, it has been held that the courts have the inherent power to control or remove trustees, giving them great latitude in the disposition of the convict-nominee.

VIII. Loss of Domestic Rights

Conviction of a crime has far-reaching consequences for both the offender and his family. If an offender is imprisoned following conviction, his spouse is deprived of the consortium to which she is entitled under the marriage contract. His imprisonment for a lengthy duration may also result in severe financial deprivations for his spouse and children. In addition, a criminal conviction carries with it a presumption that the offender is unsuitable for marital and parental responsibilities. For these reasons, the laws of most jurisdictions provide

998. See generally 2 & 3 Scott, Trusts §§ 169-96 (1967).
999. See notes 120-43 on pages 1082-86 infra and accompanying text.

1. It is convenient to assume the innocent spouse is the wife and that her husband has been convicted or imprisoned. The law in this area, however, makes no distinction.
for the absolute dissolution of the legal bonds between the convict and his spouse and children. In a few jurisdictions, more serious offenders may even be prohibited from marrying or becoming parents.

A. Restrictions on the Convict's Right to Marry and Have Children

Conviction of a crime is generally regarded as evidence of the offender's unfitness for marital and parental responsibilities. Although the question of a convicted criminal's fitness is most often an issue in proceedings to terminate existing marital or parental rights, there are a few situations in which the convict's rights to marry and have children may be denied, because of his criminal conviction.

A few statutes declare a convict's marriage void if contracted with a spouse who is without knowledge of his criminal past. Several court decisions also support this policy. Although it is generally held that misrepresentations of character do not constitute fraud sufficient for annulment, these courts have granted annulment in cases of concealed criminal records. Since, however, the ground for annulment in these cases was fraud, they cannot be taken for the proposition that a criminal record in and of itself affects the offender's right to marry.

A convict's right to marry also may be challenged in civil death jurisdictions. One case, not yet overruled, held void the marriage of a convict on the ground that his loss of civil rights rendered him incapable of entering a contract. No other authority can be found to support this view, and one state attorney general's opinion expressly rejects it.

Several jurisdictions have enacted laws designed to prevent procreation by certain types of criminals on the theory that criminal tendencies are congenital and transmissible by heredity. Three states prohibit the marriage of habitual criminals or offenders who have three felony convictions. In these states, the proscription extends only for the years of fertility. Thus, an habitual criminal who is a woman under age 45 or a man of any age, unless he plans to marry a woman older than 45, is not permitted to marry.

Other states seek to achieve the same result by the compulsory

sterilization of certain offenders. Nine states have statutes authorizing eugenic sterilization of more serious criminals. Under the typical statutes, sterilization may be ordered for habitual criminals, moral degenerates, and sex offenders. A determination by medical authorities that the convict would likely produce offspring with similar undesirable tendencies is usually a prerequisite for compulsory sterilization. In addition, it must appear that the inmate’s health will not be endangered by the operation.

The convicted criminal’s right to become a parent also may be adversely affected if he attempts to adopt a child. Although there are only a few cases in point, it appears likely that the character requirements of many adoption statutes will disqualify an ex-convict from becoming an adoptive parent.

B. Conviction and Imprisonment as Grounds for Divorce

At common law, neither criminal conviction nor imprisonment were grounds for divorce. Thus, in the absence of a specific statutory provision, the innocent spouse may not maintain an action for divorce based on the convicted or imprisoned spouse’s criminality. Most jurisdictions, however, have made criminal conviction or imprisonment a statutory ground for divorce. Moreover, in some states that retain civil death statutes, automatic dissolution of marriage may occur by reason of a spouse’s sentence to life imprisonment. Similarly, the marriage of

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8. E.g., DEL. CODE ANN. tit. 16, § 5703 (1953).


11. See, e.g., Petition of Berkowitz, 88 Ill. App. 2d 1, 232 N.E.2d 72 (1967) (evidence that applicant had committed forgery was proper grounds for denying his petition to adopt child).

12. E.g., ALA. CODE tit. 27, § 2 (1958) (adoptive parent must be morally fit); COLO. REV. STAT. ANN. § 4-1-9 (1963) (adoptive parent must be of good moral character); HAWAI‘I REV. STAT. § 578-1 (Supp. 1969) (adoptive parent must be a proper person); N.H. REV. STAT. ANN. § 461:2 (1968) (adoptive parent must be a suitable person).

13. “Divorce” as used herein refers to divorce from the bonds of marriage, or absolute divorce, as opposed to divorce from bed and board, often denoted as legal separation.


17. In at least one civil death state, the spouse of a convict sentenced to life imprisonment is free to remarry immediately. E.g., Zizzo v. Zizzo, 41 Misc. 2d 928, 247 N.Y.S.2d 38 (Sup. Ct. 1964). Other civil death states provide that the bonds of matrimony remain unimpaired until the spouse of the civilly dead convict obtains a court decree dissolving the marriage. E.g., R.I. GEN. LAWS ANN. § 13-6-1 (1956). If the civil death jurisdiction has also enacted a statute that makes
a convict subsequent to a loss of civil rights may be subject to annulment because of his incapacity to enter a contract. In the six states that have not made conviction or imprisonment a separate ground for divorce, the spouse of a convicted criminal may still be able to use the criminal conviction indirectly to obtain a divorce under other statutory grounds.

1. Statutory Provisions Permitting Divorce on Grounds of Criminal Conduct.—The jurisdictions vary considerably in their statutory treatment of conviction and imprisonment as grounds for divorce. Not infrequently, a conviction or term of confinement that is a ground for divorce in one state will not support the action in an adjacent state. Under all statutes, however, the defendant spouse must have been convicted of a crime; the mere commission of a crime in the absence of a conviction is not a ground for divorce.

In some states, a criminal conviction alone satisfies the divorce statute. Other states require that the defendant be sentenced to imprisonment. Still others do not permit divorce unless the guilty spouse is in prison or has served a specified period of confinement.

Sixteen states grant divorce to the innocent spouse of an individual convicted of certain types of crime. In these states conviction for a felony or an infamous crime is a ground for divorce, irrespective of conviction or imprisonment a statutory ground for divorce, the innocent spouse may be required to institute formal divorce proceedings under the divorce statute before the marriage can be terminated. See, e.g., Graham v. Graham, 251 Ala. 124, 36 So. 2d 316 (1948). The Alabama civil death statute has since been repealed. § 1, [1965] Ala. Acts 1st Ex. Sess. 381, repealing ALA. CODE ANN. tit. 61, § 3 (1960).


23. Ark. STAT. ANN. § 34-1202 (Supp. 1969); Ill. Ann. Stat. ch. 40, § 1 (Smith-Hurd...
sentence or imprisonment.

Thirteen states authorize divorce upon the guilty spouse's sentence to imprisonment. There is no requirement in these jurisdictions that the defendant actually serve his sentence. In addition, in a number of these states there is no express requirement that the sentence be of specified duration. Since the divorce ground is often limited to sentences for felony convictions or sentences to the state penitentiary, these statutes probably contemplate a lengthy term of imprisonment. Other state provisions expressly require that the sentence be of a minimum duration, usually one to three years. Hawaii and Massachusetts limit the divorce action to sentences of at least seven and five years, respectively.

In fifteen states and the District of Columbia, a divorce will be granted only if the guilty spouse is actually imprisoned as a result of his conviction. A few of these states require that the defendant be imprisoned when the divorce action is brought. Other jurisdictions specify that the defendant must be serving a sentence of a specific duration, or one that resulted from a felony conviction. A number of

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states require the guilty spouse to have served a specified term of years in prison.31

2. Problems of Interpretation.—Many statutes that make conviction or imprisonment a separate ground for divorce leave important questions unanswered. Moreover, because of the lack of uniformity in statutory language, the relatively few judicial decisions in this area are of little value outside the jurisdiction where pronounced. Some of the more common interpretational problems include: when and where the conviction or imprisonment must have occurred; the type of sentence that will satisfy the statute; and when the divorce action may be brought.

(a) When conviction or imprisonment must occur.—A number of statutes expressly state that conviction or imprisonment, as a ground for divorce, must occur subsequent to the marriage.32 A few statutes, on the other hand, permit divorce on the basis of pre-marriage criminal conduct when the innocent spouse does not learn of the defendant's criminal record until after the marriage.33 In the absence of either a statute deciding the question or deception on the part of a defendant amounting to grounds for annulment,34 courts are likely to limit the divorce action to conviction or imprisonment following marriage.35

(b) Where conviction or imprisonment must occur.—Most states do not specify where conviction or imprisonment must occur in order to satisfy the divorce statute. Construing the statutes narrowly, a few early cases refused to grant a divorce when the conviction or imprisonment of the guilty spouse took place outside the state.36 The legislatures of a number of states, however, now expressly provide for divorce when

31. ALA. CODE tit. 34, § 20 (1959) (actual imprisonment for 2 years upon sentence of 7 or more years); DEL. CODE ANN. tit. 13, § 1522 (1953) (actual imprisonment for 2 years); MD. ANN. CODE art. 16, § 24 (Supp. 1969) (sentence to imprisonment for 3 years or more of which 18 months have been served); N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1969-70) (actual imprisonment for 3 or more consecutive years); N.C. GEN. STAT. § 50-5 (1966) (involuntary separation in consequence of a criminal act for one year); TEX. REV. CIV. STAT. ANN. art. 4629 (Supp. 1969-70) (imprisonment for felony; suit not to be brought until 12 months after final judgment); WIS. STAT. ANN. § 247.07 (Supp. 1969) (actual imprisonment for 3 or more years).

32. E.g., COLO. REV. STAT. ANN. § 46-1-1 (1963) (felony conviction); N.Y. DOM. REL. LAWS § 170 (McKinney Supp. 1969-70) (actual imprisonment for 3 or more consecutive years).

33. E.g., MO. ANN. STAT. § 452.010 (1949); VA. CODE ANN. § 20-91 (Supp. 1968). In Hartwig v. Hartwig, 160 Mo. App. 284, 142 S.W. 797 (1912), the court held that only actual knowledge on the part of the plaintiff would bar the divorce action.

34. See note 3 on page 1065 supra and accompanying text.


conviction or imprisonment occurs in other jurisdictions. A few statutes even authorize divorce if the guilty spouse is convicted in a foreign country. In the absence of a statutory determination, most courts now will grant a divorce regardless of where the conviction or imprisonment occurs. A divorce may even be granted on the basis of a court-martial conviction. Construing statutes that grant divorce for a felony conviction, courts have held that a foreign conviction must be for a crime that is a felony under the laws of the forum state in order to satisfy the forum's divorce statute.

(c) When the cause of action arises.—Except when a marriage is automatically dissolved because of the imprisoned spouse's civil death, the innocent spouse must institute divorce proceedings to terminate the marriage. In states that authorize divorce when a spouse has been convicted or sentenced, it would seem that the innocent spouse may bring the divorce action immediately upon conviction or sentencing, without regard to whether the guilty spouse has begun serving his sentence. When the statutory ground is imprisonment, however, it would appear that the convicted spouse must at least be in prison before the action can be brought. When divorce is permitted only after a guilty spouse's imprisonment for a specified period, it is clear that the action may not be brought until the statutory period of confinement has been served.

(d) Effect of pending appeal.—A few statutes expressly state that a conviction must be final before it may serve as a ground for divorce. Most statutes, however, are silent on the matter and the question is not raised in many reported decisions. When the ground for divorce is imprisonment for a specified term and the defendant has served the requisite period of confinement, a subsequent reversal of the conviction

42. E.g., Short v. Short, 57 Misc. 2d 762, 293 N.Y.S.2d 590 (Sup. Ct. 1968).
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will not bar a divorce based on the imprisonment. Under the typical statute that permits divorce merely upon the guilty spouse's conviction or sentencing, however, the effect of a pending appeal is not clear. The weight of authority indicates that a conviction must be final before a divorce will be granted.

(c) **Multiple, indeterminate, and suspended sentences.** When the divorce statute requires a sentence of specified duration, courts generally look to the sentence actually imposed rather than to the sentence the defendant is expected to serve. Thus, a divorce will be granted even though a sentence may be suspended or reduced below the period specified by the divorce statute. Under certain sentencing procedures it may be difficult to determine whether a convicted spouse's sentence falls within the statutory ground for divorce. In multiple sentencing, for example, it is not clear whether an aggregate of the component sentences may be used to satisfy the divorce statute. In an early case involving a two-count conviction, it was held that two separate sentences of one and one-half years each did not constitute cause for divorce under a statute requiring a two-year sentence. Indeterminate sentences that set maximum and minimum terms of confinement also may prove troublesome. Courts have usually looked to the maximum limit set by the indeterminate sentence when applying the divorce statutes even though the minimum term of the sentence falls short of satisfying the statute. These decisions usually reason that the maximum term of the sentence must be served before the prisoner can, as a matter of right, obtain his release.

(f) **Confinement in an institution other than that prescribed by statutes.** A few statutes predicate the divorce action on the convicted spouse's sentence to or confinement in a particular type of penal

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44. Cone v. Cone, 58 N.H. 152 (1877); Colascione v. Colascione, 57 Misc. 2d 199, 291 N.Y.S.2d 559 (Sup. Ct. 1968).
45. Read v. Read, 119 Colo. 278, 202 P.2d 953 (1949); Rivers v. Rivers, 60 Iowa 378, 14 N.W. 774 (1883). But see State v. Duket, 90 Wis. 272, 63 N.W. 83 (1875) (reversal on appeal has no effect when marriage is automatically dissolved by sentence).
46. See, e.g., Young v. Young, 61 Tex. 191 (1884) (pardon); Sargood v. Sargood, 77 Vt. 498, 61 A. 472 (1905).
48. Delaware is the only state that provides specific guidance for applying the divorce statute to an indeterminate sentence. The ground for divorce is actual imprisonment for 2 years, but in case of an indeterminate sentence, at least 2 years of imprisonment. Del. Code Ann. tit. 13, § 1522 (1953).
50. E.g., Oliver v. Oliver, 169 Mass. 592, 48 N.E. 843 (1897).
When the defendant is sentenced to confinement in an institution other than that specified in the divorce statute, courts have granted the divorce when the convicted spouse is imprisoned under circumstances similar to the type of confinement contemplated by the statute.52

3. **Defenses.**—If a convict’s crime or punishment falls within these statutory grounds, it is unlikely that he will successfully defend against a divorce action. As a general rule, the convicted criminal’s subsequent pardon is no defense. Moreover, the convicted spouse will probably have difficulty in asserting the traditional divorce defenses of connivance, recrimination, and condonation.53 In some jurisdictions, however, other statutory defenses may be available to a convict.

A number of statutes expressly state that a guilty spouse’s pardon after divorce will not affect the divorce.54 In a few other states, statutes declare that a pardon is no defense to a divorce action.55 Only two states give effect to a convicted spouse’s pardon. In Mississippi, for example, where divorce is authorized upon the defendant’s sentence of imprisonment in a penitentiary, the divorce action will fail if the defendant is pardoned before being sent to prison.56 In Texas, where the innocent spouse must wait one year after final judgment of conviction before bringing suit for divorce, an intervening pardon bars the action.57 In the absence of a statutory provision, courts have generally held that a pardon after the marriage is dissolved does not restore the defendant to conjugal rights.58 Some courts have granted divorce even though the

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52. *E.g.*, Studley v. Studley, 129 Neb. 784, 263 N.W. 139 (1935) (sentence to women’s reformatory held to satisfy statute authorizing divorce for sentence to prison, jail, or house of correction); accord, Bowers v. Bowers, 114 Ohio St. 568, 151 N.E. 750 (1926). But see Hull v. Donze, 164 La. 199, 113 So. 816 (1927) (sentence to county jail was not infamous punishment required by divorce statute); Dion v. Dion, 92 Minn. 278, 100 N.W. 4 (1904).

53. “Connivance” is defined as the corrupt consenting by one spouse to an offense by the other; “recrimination” is a counter-charge in a suit for divorce that the complainant has been guilty of an offense constituting a ground for divorce; “condonation” is the forgiveness of a marital offense. See generally J. Maddens, *Handbook of the Law of Persons and Domestic Relations* 294-311 (1931).


58. *E.g.*, Gargan v. Sculley, 82 Misc. 667, 144 N.Y.S. 205 (Sup. Ct. 1913); State v. Duket, 90 Wis. 272, 63 N.W. 83 (1895).
defendant was pardoned prior to or during the pendency of divorce proceedings.59

There appears to be no reason why the traditional divorce defenses of connivance, recrimination, and condonation should not be available to the convicted spouse. The defense of recrimination, for example, has been allowed when the plaintiff spouse also has been convicted of a crime that is a ground for divorce under the statute.60 One court has held that a resumption of the marital relationship after the defendant's release from prison amounts to condonation that bars a divorce action.61 For reasons that are not always clear, however, some courts have been reluctant to recognize the applicability of these defenses to the convicted or imprisoned spouse.62 Most statutes simply list connivance, recrimination, and condonation among general grounds for denying divorce; they make no express provision for a divorce based on criminal conviction or imprisonment. Only one statute specifically provides that the plaintiff's cohabitation with the defendant following the latter's release from prison will bar an action for divorce.63

Statutes in some jurisdictions make other defenses available to the convicted spouse who is a defendant in a divorce action based upon his conviction or imprisonment. A few statutes expressly provide that divorce proceedings must be instituted within a specified period following the conviction or imprisonment.64 Under these statutes, the failure to bring the action within the prescribed period has been held to bar the divorce.65 Two states have created a unique defense for the convicted spouse who is being sued for divorce. Under these statutes, divorce is prohibited when the defendant's conviction was based upon his spouse's testimony.66

62. See, e.g., Murphy v. Murphy, 204 Pa. Super. 576, 205 A.2d 647 (1964) (denial of divorce to imprisoned convict's wife who knew of and participated in same criminal activities was based on her equal fault and not connivance, recrimination, or condonation); Kosanke v. Kosanke, 30 Wash. 2d 523, 192 P.2d 337 (1948) (condonation not available to convict as a defense in a divorce proceeding).
63. VA. CODE ANN. § 20-91 (Supp. 1968) (cohabitation after defendant's release from imprisonment bars divorce based on his imprisonment).
64. IDAHO CODE ANN. § 32-615(2) (1963) (suit must be commenced within one year after pardon or termination of sentence); MONT. REV. CODES ANN. § 21-130 (1967) (suit must be instituted within 2 years after final judgment or sentence).
C. Conviction and Imprisonment as Grounds for Loss of Parental Rights

Conviction or imprisonment may cause the criminal offender to forfeit forever his rights in his children. If divorce follows his conviction or imprisonment, the court will probably award the custody of the children to the innocent spouse. In some jurisdictions, this deprivation of custody may be the basis for terminating the convict's parental rights. Additionally, in a number of states the convicted criminal's parental rights may be terminated under dependency and neglect statutes or in adoption proceedings.

1. Termination of the Convicted Criminal's Parental Rights Under Dependency and Neglect Statutes.—All states and the District of Columbia have enacted legislation providing for the care and protection of dependent and neglected children. Under these statutes, if, after notice and hearing, a child is found to be dependent or neglected, a court may direct that he be removed from the custody of his natural parents and placed in a foster home or institution. In many states, courts are authorized to terminate the neglectful parent's rights in the child and make the child available for adoption. Whether a parent may be


deprived of custody or have his rights terminated under these statutes depends upon whether the child comes within the statutory definition of dependent or neglected children. Under typical statutes, a child may be declared dependent or neglected when any of the following conditions exist: he is found to be neglected or abandoned by his parents; he lacks proper parental care or support; he lives in an environment injurious to his morals; or his parents are unfit. Only two states make a parent's criminality an express ground for terminating parental rights in dependency and neglect proceedings. These statutes require either that the offense demonstrate parental unfitness or that the term of imprisonment be such that the child will be deprived of adequate support. One state has recently deleted imprisonment of a parent as an express statutory ground for a finding of dependency or neglect. Even under the statutes that do not mention criminal conviction or imprisonment, the children of a convicted or imprisoned parent could be adjudged dependent and neglected. This is particularly likely under the immoral conduct grounds found in many statutes. In the few reported decisions in which the question has been raised, however, courts have been reluctant to declare children dependent and neglected because of the parent's imprisonment. These decisions reason that the forfeiture of parental rights would be additional punishment to the parent-offender. Implicit in these opinions is the recognition that even though the parent has committed a crime, his separation from his child and his inability to provide support are not intentional. Nevertheless, the convicted or imprisoned parent could be brought within the broad definitional terminology of many dependency and neglect statutes.

2. Adoption of a Convicted Criminal's Children Without His


72. E.g., Colo. REV. STAT. ANN. § 22-1-3 (Supp. 1967); Ind. ANN. STAT. §§ 9-3205 to 3206 (1956).


Consent.—All states and the District of Columbia have statutes providing for the legal adoption of children. Under these statutes, the consent of the adoptive child's natural parents is a prerequisite to the child's adoption, except in specified situations.\textsuperscript{77} In a number of jurisdictions, the consent of a convicted or imprisoned parent may be rendered unnecessary by these statutory exceptions.

Six states expressly provide for adoption of children without the consent of natural parents who have been convicted and imprisoned for crime.\textsuperscript{78} With one exception, these statutes require either that the convicted parent be sentenced for a specified term of imprisonment, for example, three years, or have a comparable amount of confinement remaining to serve at the time the adoption petition is filed. One state, South Dakota, dispenses with the necessity for consent of a parent who has been convicted of an offense involving moral turpitude.\textsuperscript{79} At least three states eliminate the consent requirement when the natural parent has been deprived of his civil rights as a result of criminal conviction and


\textsuperscript{78} Alaska Stat. § 20.10.040 (1962) (parent imprisoned under sentence of 3 or more years); Iowa Code Ann. § 600.3 (Supp. 1970) (parent imprisoned for a felony); Mass. Ann. Laws ch. 210, § 3 (1969) (parent imprisoned with 3 or more years remaining to serve); Ore. Rev. Stat. § 109.322 (1969) (parent imprisoned under sentence of 3 or more years); R.I. Gen. Laws Ann. § 15-7-7 (1956) (parent imprisoned under sentence of 3 or more years); S.D. Compiled Laws Ann. § 25-6-4 (1967) (parent convicted of adultery, offense punishable by imprisonment for one or more years, or moral turpitude offense).

\textsuperscript{79} S.D. Compiled Laws Ann. § 25-6-4 (1967).
imprisonment.\textsuperscript{80} Several states that formerly dispensed with the necessity of consent by imprisoned parents have deleted this provision from their statutes.\textsuperscript{81}

Even in jurisdictions that do not make conviction or imprisonment an express ground for dispensing with parental consent, the convicted criminal's consent to his children's adoption may nevertheless be obviated under other statutory provisions. In many states, for example, the consent of a parent who has been judicially deprived of the custody of his children is often unnecessary.\textsuperscript{82} These statutes vary considerably. Some jurisdictions require only that the parent be deprived of custody, while other jurisdictions provide that the loss of custody must be due to the parent's unfitness or wrongdoing.\textsuperscript{83} Since child custody will most likely be awarded to the innocent spouse in a divorce action based on the other spouse's criminal conviction or imprisonment, a divorced convict's consent to his children's adoption may be unnecessary under many of these statutes. Similarly, a convicted or imprisoned parent's consent also might be obviated under adoption provisions dealing with parental fault. Most adoption statutes dispense with the need for consent of parents who have willfully failed to perform their parental obligations. Typical adoption statutes include abandonment,\textsuperscript{84} desertion,\textsuperscript{85} failure to support,\textsuperscript{86} failure to communicate,\textsuperscript{87} neglect,\textsuperscript{88} and unfitness.\textsuperscript{89} Several

\begin{itemize}
\item \textsuperscript{80} N.Y. DOM. REL. LAW § 111 (McKinney 1964); OKLA. STAT. ANN. tit. 10, § 60.6 (1966); WASH. REV. CODE ANN. § 26.32.040 (1961).
\item \textsuperscript{86} E.g., Colo. Rev. Stat. Ann. § 4-1-6 (1963); Ohio Rev. Code Ann. § 3107.06 (Baldwin 1964).
\end{itemize}
states reach this same result by dispensing with the consent requirement when the parent’s rights have already been terminated in dependency and neglect proceedings. The statutes of a few jurisdictions permit adoption over the objection of the natural parents whenever it is determined that consent is withheld against the best interests of the child. Regardless of the ground that obviates consent, the adoptive child’s natural parents are entitled to notice of the adoption proceedings, unless their rights have been previously terminated by judicial decree.

Judicial approaches to the problem of involuntary consent to adoption vary considerably among jurisdictions. In states that have made a parent’s imprisonment or loss of civil rights an express ground for dispensing with his consent, the courts have not hesitated to permit adoption over the objection of convicted or imprisoned parents. This may also be the result when the imprisoned parent’s rights have already been terminated in dependency and neglect proceedings. In the absence of express statutory authority, however, the courts as a rule have been reluctant to permit adoption of a convicted or imprisoned parent’s children without his consent. This attitude may stem in part from the traditional view still held by a number of courts that adoption statutes should be strictly construed since they are in derogation of the common law. These courts apparently focus as much attention on the rights of the parent as they do on the welfare of the child. Thus, it is generally held that an imprisoned parent has not abandoned or deserted his children within the meaning of the provisions dispensing with the necessity for consent on those grounds. Similarly, a few cases hold that a parent’s conviction and imprisonment do not necessarily demonstrate the


94. E.g., Hogg v. Peterson, 245 Ind. 515, 198 N.E.2d 767 (1964) (parents whose children had been made wards of court following parents’ conviction could not later object to adoption).

95. E.g., Martin v. Cuellar, 131 Colo. 117, 279 P.2d 843 (1955); In re Adoption of McKinzie, 275 S.W.2d 365 (Mo. App. 1955).

96. E.g., Mayfield v. Braun, 217 Miss. 514, 64 So.2d 713 (1953); Welker’s Adoption, 50 Pa. D. & C. 573 (Orphans’ Ct. 1944); In re Adoption of Jameson, 20 Utah 2d 53, 432 P.2d 881 (1967).
unfitness contemplated by adoption statutes. When, however, the parent's offense clearly denotes parental unfitness, or results in imprisonment for an extended term, most courts will permit adoption against the parent's wishes. The courts have experienced the greatest difficulties with the provisions that eliminate the consent requirement when a parent has been deprived of the custody of his child in divorce proceedings. Although not limited to divorces based on conviction or imprisonment, the relevance of these provisions to the divorced convict is clear. The overwhelming majority of custody decrees provide for divided custody or at least visitation rights for the divorced spouse. Only a few adoption statutes, however, take partial custody into account. Under these statutes, if the custody decree provides for divided custody, visitation, or support payments, both parents' consent to adoption is required. The majority of statutes are silent on the matter and the resulting conflict of judicial decisions is not surprising. The weight of authority holds that the consent of a spouse who retains partial custody or visitation rights under a custody decree is a prerequisite to adoption. Probably the most that can be said is that under these statutes the divorced convict's ultimate rights in his children will depend to some uncertain extent on the custody decree entered at the time of his divorce.

IX. LOSS OF PROPERTY RIGHTS

Although in most instances a citizen convicted of a crime is not divested of his property rights, a criminal conviction may affect these rights in specific circumstances. In at least three jurisdictions, for example, statutes provide for partial or complete divestment of the convict's property. Furthermore, slayer's acts, which are in effect in many jurisdictions, will prevent the convict from inheriting the estate of

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97. *E.g.*, *In re Adoption of Baby Boy*, 10 Ariz. App. 47, 455 P.2d 997 (1969) (that natural mother was convicted of forgery did not constitute the unfitness that justifies dispensing with requirement that she consent to adoption).


100. See H. CLARK, THE LAW OF DOMESTIC RELATIONS 637 (1968).


his victim. Some states also deny inheritance to the surviving spouse if he has been guilty of adultery, bigamy, abandonment, or non-support.

A number of jurisdictions have recognized the problems that the incarcerated offender faces in trying to manage and protect his property. These states have enacted statutes providing for the appointment of a personal representative to manage the offender's property during imprisonment.

A. Attainder

Modern statutes that deprive the convict of property rights had their origin in common law attainder and its consequences: forfeiture of the convict's land and chattels, corruption of the blood, and loss of civil rights. Although initially adopted by the American colonies, the concept of attainder was limited by the framers of the United States Constitution, who provided that no attainder of treason shall corrupt the blood or result in forfeiture, except during the attained person's life. Most states followed this lead and constitutionally prohibited

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103. Attainder, a consequence of conviction for either treason or felony, was applicable only after judgment was pronounced. Through the incident of forfeiture, the criminal's property, both personal and real, was subject to seizure by the king. Corruption of blood prevented the criminal from transmitting his land to his heirs because those of "his blood" were considered "corrupted" by his crime. Consequently, his property escheated to the lord of the fee, subject to the superior right of the king to take the property by forfeiture. The third consequence of attainder, loss of civil rights, was recognized at common law, but its effect upon property was not clear even in feudal times. A partial explanation for this could be that since the loss of civil rights was concurrent with forfeiture and corruption of blood, normally the criminal's land and chattels either forfeited to the crown or escheated to the lord, leaving no property upon which the attainted felon could exercise civil rights. The loss of civil rights associated with attainder also seems to have been confused with the concept of civil death, a more severe disability attached to those sentenced to death. See Avery v. Everett, 110 N.Y. 317, 324-29, 18 N.E. 148, 150-52 (1888); 4 W. Blackstone, Commentaries *380-81; J. Stephen, A History of the Criminal Law of England 487-88 (1883); Annot., 139 A.L.R. 1308, 1309-11 (1942). These sanctions generally were abolished in England and the Continent during the nineteenth century. Corruption of the Blood Act of 1814, 54 Geo. 3, c. 145; Forfeiture Act of 1870, 33 & 34 Vict., c. 23; Damaska, Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study, 59 J. Crim. L.C. & P.S. 347, 350-59 (1968). Attainder was strictly an English common law punishment, but most Continental European countries had similar punishments derived from earlier Roman law.

104. S. Morrison, The Oxford History of the American People 236-37, 285 (1965). New York and South Carolina had confiscatory laws that continued in use for several years after the Revolutionary War. Id. at 286.

105. U.S. Const. art. III, § 3. The last phrase in this provision, "except during the Life of the Person Attainted," is subject to conflicting interpretations. One view, unsuccessfully argued in several cases arising as a result of the Confiscation Act of 1862, interpreted the phrase to mean that the attained criminal's life estate was forfeited immediately, but that he could convey the remainder at any time. It was held, however, that the entire estate could be forfeited with the remainder going to the heirs on the attained criminal's death. Wallach v. Van Riswick, 92 U.S. 202 (1876).
attainder,\textsuperscript{106} forfeiture,\textsuperscript{107} and corruption of blood.\textsuperscript{108} These provisions can be found in a variety of forms. At least one state only limits the prohibition against attainder for treason,\textsuperscript{109} while other states broadly forbid attainder after “conviction” of any crime.\textsuperscript{110} Occasionally, the same result is reached without the use of the terms “attainder” or “forfeiture.”\textsuperscript{111} Additionally, a number of states have statutes incorporating the constitutional prohibitions against attainder, forfeiture, and corruption of the blood.\textsuperscript{112} Only a few states retain the exception found in the United States Constitution that allows attainder “during the life of the person attainted.”\textsuperscript{113}


\textsuperscript{108} Note 107 supra. All state constitutions, except Florida’s, forbidding “forfeitures” include “corruption of blood,” usually by a clause such as: “No conviction shall work corruption of blood, or forfeiture of estate.” Ariz. Const. art. 2, § 16. For an unexplained reason the Florida Constitution as appears in the 1968 revision omits the reference to “corruption of blood” which had been contained in both the 1885 constitution and the Revision Commission proposal. Fla. Const. art. 1, § 17 (Commentary).

\textsuperscript{109} Idaho Const. art. 5, § 5.


\textsuperscript{111} E.g., La. Const. art. 4, § 4 (no laws allowing affecting estates of persons under disabilities); Mass. Const. § 26 (no subjects to be declared guilty of treason or felony by legislature).


\textsuperscript{113} Del. Const. art. 1, § 15; Ky. Const. § 20; Pa. Const. art. 1, § 19.
Despite these broad prohibitions, the third element of attainder, the loss of civil rights, is not forbidden in any state. Consequently, thirteen states have been able to enact statutes that suspend or deprive the civil rights of the convict. These deprivations are imposed in two ways: (1) through statutes suspending the convict's civil rights during imprisonment for a term of years, and (2) through civil death, which is imposed if the convict is imprisoned for life. Although civil death statutes deprive the convict of many rights and privileges, it is now generally agreed that a civil death statute alone will not divest the convict of his property. In this sense, the courts have moved away from the original concept of attainder. The civilly dead prisoner, however, may be unable to protect his property effectively in states where he cannot institute civil suits or create judicially enforceable instruments.

B. Divestment of a Prisoner's Property

Property divestment upon conviction is a limited and almost non-existent concept. The convict imprisoned for a term of years, for example, generally is not divested of his property. In addition, it is now

114. ALASKA STAT. § 11.05.080 (1962); ARIZ. REV. STAT. ANN. § 13-1653 (1962); CAL. PENAL CODE § 2600 (West 1956); IDAHO CODE ANN. §§ 18-310 to -311 (1948); MO. ANN. STAT. § 222.010 (1962); MONT. REV. CODES ANN. § 94-4720 to 4721 (1969); N.Y. CIV. RIGHTS LAW § 12-06-27 (1960); N.D. CENT. CODE § 12-06-07 (1960); OREG. STAT. ANN. tit. 21, § 66 (1958); VER. REV. STAT. § 137.240 (1969); R.I. GEN. LAWS ANN. § 13-6-1 (1956); S.D. COMPIL. LAWS ANN. § 23-48-35 (1967); UTAH CODE ANN. 76-1-37 (1953).

115. A typical statute states that "[a] sentence of imprisonment in the state prison for any term less than life suspends all the civil rights of the person so sentenced ..." MONT. REV. CODES ANN. § 94-4720 (1969).

116. Utah, for example, provides that "[a] person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead." UTAH CODE ANN. § 76-1-37 (1953).

117. See notes 121-33 on pages 1083-84 infra and accompanying text. A few courts, by interpreting the term "civil death" literally, have applied different rules to it than to the loss of rights accompanying a sentence for a term of years. A California court, for example, has noted that "it has never been doubted that one imprisoned in the penitentiary for a term less than life is capable of inheriting." In re Dickinson's Estate, 51 Cal. App. 2d 638, 640, 125 P.2d 542, 543-44 (1942). But an earlier California decision held that a person who was civilly dead could not inherit. In re Donnelly's Estate, 125 Cal. 417, 58 P. 61 (1899). See also 16 OPs. CAL. ATT'y GEN. 131 (1950) (one serving life sentence cannot inherit without the Adult Authority granting restoration of the right to inherit). Some courts also have found a difference in the effect of these statutes on the convict's estate. E.g., Holmes v. King, 216 Ala. 412, 113 So. 274 (1927).

118. See notes 625-98 supra and accompanying text.

119. See notes 724-67 supra and accompanying text.

120. There are, however, limited situations in which divestment may occur. A Michigan statute, for example, provides that the wife of a convict sentenced to a term of more than 3 years is entitled to dower. MICH. STAT. ANN. § 25.104 (1957). In addition, the California Attorney General ruled that property created by a prisoner in custody was subject to the convict's ownership only with the assent of the prison authorities. 27 OP. CAL. ATT'y GEN. 241 (1959). The California District Court of Appeals reversed in Davis v. Superior Court, 175 Cal. App. 2d 8, 345 P.2d 513
well settled that a citizen imprisoned for life in a civil death state is not divested of his estate unless a statute expressly requires divestment. At least three states have provisions expressly divesting the convict of his property.

1. The Origins of Divestment as a Result of Civil Death.—Without an express legislative mandate, modern courts are reluctant to divest a convict of his property solely on the basis of a statute that declares life prisoners civilly dead. Historically, however, this has not been the case. In *Troup v. Wood*,121 Chancellor Kent, interpreting the New York civil death statute,122 stated in dictum that civil death divested the convict of his estate so that the heirs immediately inherited his property as if he had died a natural death.123 In a later case, *Platner v. Sherwood*,124 Chancellor Kent acknowledged that he had been partially mistaken in his determination that at common law civil death divested the felon of his estate. Nevertheless, he found that the enactment of the civil death statute supplanted the common law and deprived the attainted felon of his estate.

In 1888, the views espoused in *Troup* and *Platner* were overruled in New York by the landmark case of *Avery v. Everett*,125 in which a convict under a life sentence was devised a remainder interest in his father's estate. The will provided that if the prisoner died without children, the property would pass to the testator's nephew. If the effect of civil death was to vest the prisoner's estate in his heirs, the nephew would have been immediately entitled to the property. The New York Court of Appeals, however, declared that there was no basis in the history of civil death for divestment of a life convict's property.126

*Avery v. Everett* did not fully settle the status of the prisoner's property.127
estate under a civil death statute. Nearly 40 years later an Alabama court, in *Holmes v. King*,\(^{127}\) interpreted the state’s civil death statute to find that an offender was divested of his estate upon sentence to life imprisonment. In *Holmes*, however, the court was faced with a statute specifying that, even though the convict was civilly dead, he could “nevertheless” make a last will and testament within six months after his sentence.\(^{128}\) Since the statute specifically provided for disposition of the property after civil death, the Alabama court ruled that the legislative intent required that the civil death statute result in divestment.\(^{129}\)

The Alabama view, however, has not been followed by other courts.\(^{130}\) In *Smith v. Becker*,\(^{131}\) for example, the Kansas Supreme Court recognized the incongruity of divestment by civil death when release from prison was possible. Construing a statute specifying that the estate of a life prisoner was to be “administered and disposed of” as if the prisoner were actually dead, the court held that the words “administered and disposed of” applied only to the payment of creditors or to the disposal of personal property by affirmative action.\(^{132}\) The court conceded that the legislature could, by express language, cause the convict’s estate to be divested upon civil death, but found the necessary language had not been used in the statute under consideration.\(^{133}\)

2. *Divestment by Express Statute.*—It is now well settled that the life convict can be divested of his estate only under an express statute. At least three states, Rhode Island, Hawaii, and Michigan, have express divestment statutes.

(a) *Rhode Island.*—The Rhode Island civil death statute is expressly applicable to property: “Every person imprisoned in the adult correctional institutions for life shall thereupon, with respect to all rights

\(^{127}\) 216 Ala. 412, 113 So. 274 (1927); accord, Wilkerson v. Moorer, 267 Ala. 296, 101 So. 2d 287 (1958).


\(^{129}\) 216 Ala. at 415, 113 So. at 277.


\(^{131}\) 62 Kan. 541, 64 P. 70 (1901).


\(^{133}\) Contra, Dobbs v. Lilley, 86 Kan. 513, 121 P. 505 (1912) (only necessary parties to foreclosure action are the civilly dead convict’s heirs). But see *In re Zeph’s Estate*, 57 N.Y.S. Ct. (50 Hun) 523, 3 N.Y.S. 460 (1888) (civil death not to be treated as natural death).
of property . . . be deemed to be dead in all respects, as if his or her natural death had taken place at the time of such conviction . . .”124 Since the life convict’s property is to be treated as if he were physically dead, the clear implication is that his estate is to be administered and his property given to others. Another statutory provision, however, authorizes the granting of letters of administration only upon application of a creditor of the inmate.125 After granting the letter and giving notice to all interested parties, the probate court is empowered to “do all other things required and authorized to be done in the settlement of the estate of a deceased person.”126 Although the obvious intent of these two sections is to provide a remedy for the prisoner’s creditors, the clause empowering the court to do “all other things” can result in the divestment of the life convict’s entire estate. Under these statutes, there can be no administration unless a creditor applies for administration of the convict’s estate. Therefore, the general civil death statute127 is the only provision affecting the property of the life convict who has no creditors. The Rhode Island statute, however, includes much more than the mere imposition of civil death. The statute clearly states that the effect upon the life prisoner is the same as at natural death.128 When combined with the effect upon the estate of the prisoner with creditors, the overall intent of the legislative enactment can only be interpreted as divesting every life convict of his estate.129

(b) Hawaii.—Although there is no civil death statute in effect in Hawaii, the state has retained a provision for the disposition of a life prisoner’s estate that apparently is a holdover from an earlier civil death statute.130 The present Hawaii statute states: “All property given or in any manner whatsoever accruing to a convict, shall vest in his guardian

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125. Id. § 13-6-4. The statute also provides for the granting of letters of administration in the event of imprisonment for a term of 7 years or more.
126. Id. § 13-6-5.
127. Id. § 13-6-1.
... or if he is sentenced for life, shall vest in his heirs.” Since the wording of this statute includes only property that the convict acquires during imprisonment, it apparently does not divest the prisoner of his property acquired prior to his incarceration, but it does prevent the life convict from retaining property he inherits, receives, or creates.

(c) Michigan.—Michigan divorce statute provides: “[A]nd when the husband shall be sentenced to imprisonment for life . . . the wife shall be entitled to the immediate possession of all her real estate, in like manner as if her husband were dead.” Interpreted literally, this statute authorizes the wife to take immediate possession of all her real estate upon the life imprisonment of her husband. The wife’s real estate interest at her husband’s “death,” however, is not defined. In addition, the statute provides that the wife receives “possession of,” not title to, her real estate, indicating either that other interests and proceedings may be involved or that she already has title. Finally, the words “as if her husband were dead” could give her the dower interest in her husband’s land or could only indicate that she is regarded as feme sole with independent legal authority. Although it is clear that the Michigan statute is not intended to sever the life convict from all of his property, it could divest the convict of some of his real property in order to give his wife possession.

C. Convicted Criminal’s Right to Inherit

At common law, the convicted felon generally possessed the right to inherit. This rule developed because an heir took an interest in the estate of his ancestor by operation of law and consequently could not voluntarily renounce his expectancy. The estate vested in him eo instanti, at the instant of death of the ancestor. The convicted felon,

142. MICH. STAT. ANN. § 25.98 (1957).
143. No cases or literature have been found to explain this section. The intent of the statute is not at all clear. In order to arrive at an understanding of “her real estate” it is first necessary to note both that the wife may obtain a divorce in Michigan if her husband is confined in prison for 3 years or more, and that the wife is entitled to dower interest of one-third of all the husband’s lands if he is imprisoned for life, or for a term of over 3 years, “as if he were dead.” MICH. STAT. ANN. §§ 25.86(3), 104 (1957); id. § 26.221, as modified by the 1947 community property law; id. § 26.216(1)-(20), which was generally repealed in 1948; id. § 26.216(21). See also id. § 25.131. In addition, she may obtain a divorce on the grounds of his imprisonment and presumably receive a share of his property in settlement.
therefore, retained the capacity to inherit even though the crown could expropriate his property under the doctrine of attainder. In this manner, the early constitutional conventions adopted provisions prohibiting forfeiture of estate, attainder of felony, and corruption of blood. Although these provisions do not specifically cover the mere expectancy of an inheritance, they have been cited as grounds for protecting the convicted citizen from arbitrary interference with his interest in succession because of his criminal conduct.

Today, in the United States, the convicted criminal's capacity to acquire property by inheritance is governed entirely by state statutes of descent and distribution. The convict clearly retains the right to inherit in non-civil death states. In addition, he is generally permitted to inherit in states having civil death statutes. The rule usually followed is that the civil death statute does not deprive convicted criminals of all civil rights but only those specifically enumerated or sanctioned by prior judicial holding. The civil death statute may, however, indirectly prevent a convict from inheriting. In In re Lindewall's Will, for example, the New York Court of Appeals held that a civilly dead convict could not inherit as a surviving spouse because his marital status had ceased upon imposition of his sentence. Nevertheless, the courts have generally refrained from tampering with property rights or inheritance rights that have been left undisturbed by statute.

The most significant exception to the rule that a convict may inherit

148. Department of Welfare v. Brock, 306 Ky. 243, 206 S.W.2d 915 (1947) (dictum); In re Shaffer, 184 Misc. 855, 56 N.Y.S.2d 568 (Sur. Ct. 1945); Grooms v. Thomas, 93 Okla. 87, 919 P. 700 (1923); Davis v. Laning, 85 Tex. 39, 19 S.W. 846 (1892). See also notes 103-19 on pages 1080-82 supra and accompanying text for discussion of these provisions.
150. E.g., In re Shaffer, 184 Misc. 855, 56 N.Y.S.2d 568 (Sur. Ct. 1945); Grooms v. Thomas, 93 Okla. 87, 219 P. 700 (1923). This has not always been the case. In 1899, the California Supreme Court ruled that "[t]he right of inheritance is a civil right . . . [and that] the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime." In re Donnelly's Estate, 125 Cal. 417, 419, 58 P. 61, 61 (1899). The civil death statute applicable to those sentenced to life imprisonment was amended in 1953 to allow convicts to inherit, thus overruling the Donnelly decision. Ch. 415, § 1, [1953] Cal. Stats. 1665, amending CAL. PENAL CODE § 2600 (West Supp. 1968).
arises when the offender has been convicted of the felonious killing of the person from whom he would have inherited. The statutes or case law of virtually all jurisdictions bar such an individual from sharing in the estate of his victim. A second exception arises in some states when the surviving spouse has been guilty, even though not criminally convicted, of bigamy, adultery, desertion, or non-support. The prevailing view, however, is that the unfaithful spouse is not denied the right to share in the family's estate.

1. Denial of Slayer's Right to Succeed to Victim's Estate.—The rule that a killer should not inherit from his victim has had a perplexing development. Although primarily a creature of the twentieth century, it is founded upon an ancient maxim of equity, nullus commodum capere potest de injuria sua propria—no one should be allowed to profit by his own wrong. Historically, the constitutional and statutory provisions prohibiting forfeiture of estate formed the major roadblock to full acceptance of this rule. The judicial technique usually employed to overcome this impediment was to hold that the felonious murder precluded vesting of the estate in the felon by operation of law. Thus, the killer's property was not forfeited; he was merely prevented by his wrongdoing from acquiring any new interest. Other courts utilized the constructive trust approach to accomplish the same result. These courts permitted the killer to take bare legal title but denied him the beneficial use and enjoyment of the victim's estate.

154. This topic has received the attention of numerous writers. See generally J. Ames, Can a Murderer Acquire Title by His Crime and Keep It?, in Lectures on Legal History 310 (1913); Chadwick, A Testator's Bounty to His Slayer, 30 L.Q. Rev. 211 (1914); Lauritzen, Only God Can Make an Heir, 48 Nw. U.L. Rev. 568 (1953); McGovern, Homicide and Succession to Property, 68 Mich. L. Rev. 65 (1969); Thomas, Trusts and Succession, 10 Miami L.Q. 414 (1955); Vanneman, The Constructive Trust: A Neglected Remedy in Ohio, 3 Ohio St.L.J. 1 (1937); Wade, Acquisition of Property by Wilfully Killing Another—A Statutory Solution, 49 Harv. L. Rev. 715 (1936); Wade, Restitution—1962 Tennessee Survey, 16 Vand. L. Rev. 857 (1963); Comment, Homicide—Effect on Wrongdoer's Inheritance, Intestate and Survivorship Rights, 7 Miami L.Q. 524 (1952); 9 Baylor L. Rev. 94 (1957); 70 Dick. L. Rev. 213 (1966); 7 S.C.L.Q. 475 (1955); 58 W. Va. L. Rev. 197 (1955); 8 Wyo. L.J. 132 (1954).


156. Weaver v. Hollis, 247 Ala. 57, 22 So. 2d 525 (1945); In re Tyler's Estate, 140 Wash. 679, 250 P. 436 (1926).


158. The constitutional proscription against corruption of blood was avoided since the killer never acquired a beneficial interest to pass. Price v. Hitaffer, 164 Md. 505, 165 A. 470 (1933); In re Tyler's Estate, 140 Wash. 679, 250 P. 436 (1926). The killer's heirs were not barred from acquiring an interest in the estate if they could do so directly as heirs of the deceased. Bates v. Wilson, 313 Ky. 572, 232 S.W.2d 837 (1950); Estate of Wolyniec v. Moe, 94 N.J. Super. 43, 226 A.2d 743 (Ch. 1967); Rasor v. Rasor, 173 S.C. 365, 173 S.E. 545 (1934). In addition, no attainder of felony was
At present, many jurisdictions have slayer's statutes applying the rule that the killer cannot inherit from his victim. Although the constitutionality of these provisions is universally accepted, the statutes have been narrowly construed on the theory that they are penal provisions. Some courts are reluctant to extend the operation of the bar without express legislative declaration. Consequently, an offender convicted of voluntary manslaughter may be allowed to inherit from his victim where the statute applies only to murderers. Generally, however, the courts bar succession to the killer because of the clear manifestation of the legislative intent to prevent a wrongdoer from profiting from his crime.

In the absence of a statute, the courts frequently graft the ancient maxim onto existing laws of descent and distribution. As one court has stated in this regard, "to our mind our statutes of descents and distributions are so largely expressive of the common law that we must consider these maxims and the whole body of the applicable common-law doctrines; that we must read them together as parts and parcels of the same system . . . ."

(a) Types of succession barred to the slayer.—The overwhelming majority of jurisdictions, either by statute, judicial decision, or by imposition of a constructive trust, deny the inheritance right to murderers. In states without slayer's acts, the majority of courts worked since the killer was not prevented from transmitting his own property or estate. The heirs of the killer who were unable to take directly as heirs of the deceased were not deprived of any right or property because the killer himself had no vested interest to pass.


160. Bird v. Plunkett, 139 Conn. 491, 95 A.2d 71 (1953); see In re Kirby's Estate, 162 Cal. 91, 121 P. 370 (1912).


167. E.g., Weaver v. Hollis, 247 Ala. 57, 22 So. 2d 525 (1945); Price v. Hitaffer, 164 Md. 505, 165 A. 470 (1933); Budwit v. Herr, 339 Mich. 265, 63 N.W. 2d 841 (1954); In re Miller's Estate, 17 Misc. 2d 508, 186 N.Y.S. 2d 847 (Sur. Ct. 1959). Of the 17 jurisdictions that have not adopted statutes barring the killer, 10 have adopted the majority rule by court decision; 3 utilize the constructive trust; and 4 apparently have not passed on the matter.
follow the general rule that a felonious killer should be denied both
testate and intestate succession.168

Slaycr's statutes have been enacted in 34 states and the District of
Columbia. There is considerable variation in the language employed and
in the specific types of succession denied. The statutes of 29 states168 and
the District of Columbia170 expressly bar the killer from "acquiring" his
victim's estate. Most of these provisions specifically bar both testate and
intestate succession by their plain meaning. Four states prohibit a

168. An analagous situation has arisen when the murderer and the victim have both held
vested rights in the same property at the time of the offense. The reasoning generally employed
to overcome the constitutional arguments against allowing a killer to inherit from his victim has not
always been persuasive with respect to property rights vested at the time of the murder.
Nevertheless, the same fundamental policy considerations exist for denying to the felonious killer
any material gain that might result from his crime. Consequently, a great many courts, perhaps a
majority, have adopted solutions that permit the killer to retain the rights he held prior to the
offense but bar him from acquiring any new or different interest. This bar is generally applied even
though the interest would be acquired pursuant to a contract or conveyance concluded prior to the
killing. The issue has been hotly contested on both sides, but the trend of the decisions points clearly
toward preventing the killer from enriching himself

surviving spouse from obtaining an interest in the victim’s estate.\textsuperscript{171} Some statutes also have denied acquisition by trust,\textsuperscript{172} deed,\textsuperscript{173} remainder, reversion, or executory devise\textsuperscript{174} or through termination of any other intermediate estate.\textsuperscript{175} Several jurisdictions have appended to the specific exemptions a general catch-all phrase denying acquisition in any other manner.\textsuperscript{176}

The policy objectives implicit in these statutes have been conducive to judicial disposition of matters consistent with legislative intent. Thus, in at least one case, the statute’s existence permitted delaying the final distribution of a son’s interest in his father’s estate in order to allow authorities to complete their investigation where the son was suspected of the killing.\textsuperscript{177}

Despite the attention these statutes have drawn, however, they can precipitate results contrary to their purposes. A slayer’s statute for example, was held inapplicable in a murder-suicide case where the victim-wife outlived the killer-husband by a few hours.\textsuperscript{178} Moreover, in \textit{Pierce v. Pierce},\textsuperscript{179} the Kentucky Court of Appeals held that a son who was convicted of voluntary manslaughter in the killing of his father could take title to his father’s land as the heir of his grandfather.

Courts frequently frustrate the intent of the slayer’s statutes by

\begin{itemize}
  \item 172. ORE. REV. STAT. §§ 112.455-555 (Supp. 1969).
  \item 175. CONN. GEN. STAT. REV. § 45-279 (Supp. 1967); OHIO REV. CODE ANN. § 2105.19 (Baldwin 1964).
  \item 176. COLO. REV. STAT. ANN. § 153-2-13 (1963); GA. CODE ANN. § 113-909 (Supp. 1969); IDAHO CODE ANN. §§ 14-129 to -142 (Supp. 1969); KAN. STAT. ANN. § 59-513 (1964); KY. REV. STAT. ANN. § 381.280 (1970); N.C. GEN. STAT. §§ 31A-3 to -15 (1966); N.D. CENT. CODE § 56-04-23 (1960); TENN. CODE ANN. §§ 31-109, -207 (1955); UTAH CODE ANN. § 74-3-22 (1953); WASH. REV. CODE ANN. §§ 11.84.010-090 (1967). CONN. GEN. STAT. REV. § 45-279 (Supp. 1967) provides that the inheritance rights of the killer are “to be determined by common-law, including equity.” IND. ANN. STAT. § 6-212 (1953) does not prohibit succession to legal title, but imposes a constructive trust.
  \item 179. 309 Ky. 77, 216 S.W.2d 408 (1949).
\end{itemize}
holding that the manner of acquisition is other than by inheritance. By employing this technique, courts have allowed the distributive share provided in lieu of dower or curtesy and the widow's allowance or exemption to pass to a felonious killer. One view has been that the widow is entitled to the distributive share as a matter of contract, not inheritance. Likewise, the statutory allowance has been treated as falling outside the ambit of the statutes of descent and distribution. In *In re Mertes' Estate*, for example, the statutory allowance was viewed as a "preferred claim." The court stated that "the act in question is confined to 'devise' and 'descent' and [can] not be made to apply in this case ... ." In *In re Pinder's Estate,* on the other hand, a Pennsylvania court found the statutory allowance to be "a gratuity," and held that "the widow's exemption is forfeited where the evidence establishes that she [is] the slayer of her spouse." The case law of Ohio supplies another illustration of this diversity of views and an indication of the general trend of the decisions. Two decisions by lower courts initially determined that the statutory exemption falls outside the stricture of the statute barring a killer from inheriting from his victim. Later, in *Bauman v. Hogue* the Ohio Supreme Court overruled these cases and denied the exemption. Specifically, the court reasoned: "We do not . . . have a situation where denial of recovery would amount to taking away a vested right because of the crime. We have a situation where allowing defendant recovery would amount to giving [him] a vested right because of the crime."

Some jurisdictions, in order to avoid frustration of a clear public policy, have adopted the constructive trust approach. This theory involves a blend of the equity maxim and a rejection of the idea that the court should engraft the bar onto the laws of succession. This line of reasoning, however, has not been without its difficulties. One court, for

181. Id. at 478, 104 N.E. 753 (1914), overruled by *IND. ANN. STAT.* § 6-212 (1953).
182. Id. at 481, 104 N.E. at 754.
184. Id. at 194.
187. Id. at 302, 116 N.E.2d at 442.
example, sought to invoke the trust to prevent the killer's "unjust enrichment." Upon analyzing the estate, the court decided that it was "considerably less than what he [had] expended for her during their marriage of ten months," found no enrichment, and allowed the estate to pass to the killer.

(b) **Crimes for which inheritance is denied.**—Slayer's acts specify a number of crimes, generally felonies, as grounds for denial of the killer's right of inheritance from his victim. These acts prevent one who has "murdered" or "feloniously taken the life" of another from succeeding to the deceased's estate. Some statutes deny the right of inheritance to one who has committed a "willful," "unlawful" or "intentional" homicide or to one who has simply "killed" another. In addition to barring the person who actually committed the homicide, some jurisdictions deny inheritance rights to those who "procure" the killing of another or who are guilty of "aiding or abetting," "conspiracy," or "accessory" to an unlawful killing. Some statutes

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191. Id. at 243, 196 A.2d at 71.


specifically exempt those guilty of accidental killing or homicide committed in self-defense from being deprived of their right to succession.198

The typical statutory problem faced by a court interpreting this portion of a slayer's statute is whether to allow a person guilty of a lesser offense, such as manslaughter, to succeed to the estate of the victim when the statute specifies a greater offense, such as murder. A majority of the jurisdictions that have considered this problem have allowed the estate to pass.199 These courts have reasoned that the legislative provision has pre-empted the field200 or that the technical language used ties the court's hands.201 A minority of courts, however, have denied succession to intentional killers whose conviction was for a lesser crime than that specified in the statute.202 These jurisdictions hold that the statute does not abrogate the common law; and consequently, where the crime does not fall within the legislative provision, inheritance rights will be determined in light of common law precepts.203

In jurisdictions without statutes, the rule has been to apply the bar in cases involving willful and intentional killings only. Thus, wrongful killers,204 felonious killers,205 and those guilty of

1964); PA. STAT. ANN. tit. 20, § 1.6 (1950); id. §§ 3441-56 (1964); TENN. CODE ANN. §§ 31-109, -207 (1955); WASH. REV. CODE ANN. §§ 11.84.010-900 (1967); W. VA. CODE ANN. § 42-4-2 (1966). Alaska stands alone in specifically denying succession to the "accessory after the fact" to a felonious killing. ALASKA STAT. § 13.10.130 (1962). Louisiana, following the civil law, prevents participation in the estate of the ancestor for those deemed "unworthy." This term covers a multitude of offenses including killing, attempted killing, calumniously accusing the deceased, or failing to denounce the killer of the deceased to justice. LA. CIV. CODE ANN. arts. 966, 968 (West 1952).


201. In re Kirby's Estate, 162 Cal. 91, 121 P. 370 (1912).

202. McGhee v. Banks, 115 Ga. App. 155, 154 S.E.2d 37 (1967) (semble); Wilson v. Board of Trustees, 108 Ill. App. 2d 210, 246 N.E.2d 701 (1969); Rose v. Rose, 79 N.M. 435, 444 P.2d 762 (1968) (semble). In one unusual case, the court allowed the estate to pass to a convicted felon in the face of a statute barring those guilty of felonious killing. Hatcher v. Actna Life Ins. Co., 105 F. Supp. 808 (D. Ore. 1956). A woman was set upon by her husband who was in a drunken rage. She picked up a knife, and in the resulting melee he was killed, apparently having fallen on the weapon. She pleaded guilty to "assault with a dangerous weapon." Although the judge hearing the civil case considered her guilty of "manslaughter," he nevertheless held that the homicide did not constitute "felonious taking" within the meaning of the statute.


204. Horn v. Cole, 203 Ark. 361, 156 S.W.2d 787 (1941).


206. Wells v. Harris, 434 S.W.2d 783 (Mo. Ct. App. 1968).
manslaughter and murder have been barred from testate and intestate succession despite the absence of a statute. A few courts employ the constructive trust to accomplish the same end.

Regardless of whether a court employs common law doctrines or construes a statute, the insane killer has consistently been allowed to inherit from his victim. It has been held, however, that a slayer is barred if he was sane at the time of the murder but subsequently becomes insane.

(c) Procedural effect of criminal conviction.—The majority view is that a criminal conviction is not a condition precedent to the civil adjudication of the killer's inheritance rights. Courts following this view typically assume jurisdiction and try the relevant issues as an incident to the disposition of the decedent's estate. Thus, regardless of the outcome of the prior criminal trial or even when there has been no criminal prosecution, these courts determine the applicability of the bar on the basis of the evidence before them.

In those states where the slayer's statute requires a criminal conviction or final adjudication, the majority view is that a judgment

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208. Welch v. Welch, 252 A.2d 131 (Del. Ch. 1969); Duttill v. Dana, 148 Me. 541, 113 A.2d 499 (1952); In re Estate of Mahoney, 126 Vt. 31, 220 A.2d 475 (1966).

209. E.g., Hill v. Morris, 85 So. 2d 847 (Fla. 1956); Anderson v. Grasberg, 247 Minn. 538, 78 N.W.2d 450 (1956); In re Estate of Bobula, 19 N.Y.2d 818, 227 N.E.2d 49, 280 N.Y.S.2d 152 (1967) (4-3 decision). The test for insanity normally used is that applicable to the criminal proceeding. In Anderson v. Grasberg, however, the M'Naghten rule was abolished in favor of a more realistic test for use in civil trials.


by a criminal court is the *sine qua non* for a subsequent civil determination of inheritance rights. Consequently, a complaint that does not allege a conviction is fatally defective. Moreover, the record of an acquittal is a complete defense at the subsequent civil trial. A few courts have held that the inheritance bar should be applied only after the crime has been established "beyond a reasonable doubt." Another question raised by the statutory provision requiring conviction is what precisely constitutes a conviction. At least two decisions have held that conviction results only after a trial where the accused has been afforded the opportunity to defend himself. An opinion rendered by a coroner's jury is not equivalent to a conviction.

In situations where a prior conviction or acquittal has been obtained, the courts have divided on whether to give the judgment collateral estoppel effect. The majority view is that the record of the criminal proceeding should not be determinative of whether the accused committed the crime. These cases cite differing standards of proof, burdens of proof, and public policy as the rationale behind their denials. A minority of courts and two jurisdictions by statute provide that the record of the criminal proceeding must be given collateral estoppel effect. These courts reason that the retrial of the same issue is purposeless. Where a criminal conviction has been reached, the lower standard of proof imposed during the civil trial will inevitably precipitate the same conclusion. The minority rule has been criticized, however, because these lower standards may result in barring the slayer from succession when an acquittal or conviction of a lesser offense has resulted from the earlier trial.
The majority view, in effect, permits an accused to be tried twice for the same criminal offense. This result is favored, it is said, because the policy against allowing a murderer to inherit from his victim is so strong that the lower standard of proof in the civil proceeding is necessary to protect the public interest. A second argument supporting the majority position is that the defendant at the prior criminal proceeding may not be fully aware of the civil consequences and may therefore refrain from litigating the issues as vigorously as possible.

(d) Evidentiary value of judgment record.—Most jurisdictions have had to decide whether the record of judgment in a prior criminal case may be introduced into evidence at a civil determination of inheritance rights. An in-depth analysis of this problem is beyond the scope of this Project. However, the courts have split on the issue with the majority view holding that such a judgment should not be admissible. A minority of jurisdictions allow the judgment to have evidentiary value.

(e) Transmission of the slayer’s portion of the estate.—In states where a killer is barred from participating in the estate of the deceased, the final problem is disposing of the portion he would have received. Some statutes provide that the murderer is deemed to have predeceased the victim for purposes of transmitting the estate. Other slayer’s acts

226. Id. Judge Alexander expressed a similar feeling in Gholson v. Smith, 210 Miss. 28, 48 So. 2d 603 (1950) when he said, “A jury, sympathetic with human frailties, may by acquittal seek to justify the means by approving the achieved end. In this civil proceeding, we find ourselves in a forum where misplaced emphases may be reviewed and where civil rights may be pondered in an atmosphere undisturbed by the invisible currents which are apt to sway the judgment of those who hold in their hands the life of an accused, and who, despite high resolution, seek out bits of extenuation amid the wreckage of broken homes.” Id. at 32, 48 So. 2d at 605.
230. E.g., Smith v. Dean, 226 Ark. 438, 290 S.W.2d 439 (1956). See also note 229 supra.
231. Smith v. Dean, 226 Ark. 438, 441, 290 S.W.2d 439, 441 (1956) (dissenting opinion). See also note 229 supra.
pass the estate to the remaining heirs-at-law.\textsuperscript{234}

Where the victim dies intestate, the majority of jurisdictions pass the killer's portion to the other heirs-at-law as provided by the statutes of descent and distribution.\textsuperscript{235} Under this rule, the killer's heirs are denied succession. The courts have reasoned that the statutory bar does not create a new heir but merely deprives the right of succession to one who, but for his criminal act, could take.\textsuperscript{236} Generally, this reasoning has not been extended to cover those cases where a child of the killer can take directly as an heir of the victim.\textsuperscript{237} A minority of jurisdictions treat the wrongdoer as having predeceased the victim for purposes of passing the estate.\textsuperscript{238}

The most common solution adopted where the victim has died testate has been to honor the deceased's intent whenever possible.\textsuperscript{239} Thus, an alternative beneficiary has received the proceeds when the primary beneficiary feloniously killed the testator.\textsuperscript{240} When this solution is not practical, the testator is frequently deemed to have died intestate,
and his property is divided among his heirs as provided by the laws of descent and distribution.241

2. Denial of Inheritance Rights to Surviving Spouse for Misconduct.—In addition to the rule that the killer cannot inherit from his victim, some jurisdictions deny succession to a spouse guilty of abandonment, non-support, adultery, or bigamy.242 The bar typically operates as a result of statutory provisions.243 Some jurisdictions have adopted the rule in the absence of a statute by relying on equitable considerations.244

(a) Abandonment and non-support.—The general rule is that abandonment and non-support will not bar the surviving spouse from inheriting. Courts have followed this rule regardless of the circumstances. In In re Torres' Estate,245 for example, a husband, who abandoned his wife and had not contributed to her support for 40 years, was allowed to inherit notwithstanding the fact that her estate was entirely the product of her own effort. This result is avoided in the minority of jurisdictions where the surviving spouse who has deserted the household cannot inherit from the deceased.246

Separation is distinguished from abandonment.247 It is uniformly held that a separation must constitute grounds for divorce before it will bar the spouse from succession.248 It is also obviously recognized that living apart by consent of the parties is not in itself desertion.249 However, a separation not originally amounting to willful abandonment may become so by the commission of acts indicating an intent to desert the spouse.250 Some jurisdictions also deprive a husband of inheritance rights for failing to support his wife in the absence of desertion.251

Few cases have considered whether one confined in prison may be

241. E.g., Whitney v. Lott, 134 N.J. Eq. 586, 36 A.2d 888 (Ch. 1944); Ellerson v. Westcott, 148 N.Y. 149, 42 N.E. 540 (1896).
242. E.g., Simms v. Kirk, 81 Ind. App. 515, 144 N.E. 146 (1924); In re Barnes’ Estate, 149 Misc. 149, 267 N.Y.S. 634 (Sur. Ct. 1943); In re Mehaffey’s Estate, 102 Pa. Super. 228, 156 A. 746 (1931).
245. 61 Nev. 156, 120 P.2d 816 (1942).
barred from inheriting as a surviving spouse on the grounds of abandonment or failure to support. The Pennsylvania Supreme Court, however, directly treated this question in *In re Buckley's Estate.* The court, interpreting a local statute that barred those guilty of either willful desertion or non-support from inheriting, held that a prisoner was precluded from succession. Nevertheless, the court, emphasizing the husband's duty to support his wife, was careful not to hold that imprisonment per se constituted desertion. Rather, it was merely determined that a record of numerous offenses and resulting confinement raised a presumption against the prisoner and shifted the burden of going forward to him. By failing to show that he had contributed to the support of his wife during the intervening periods of freedom, the prisoner failed to overcome this presumption and was barred from participating in her estate.

Other situations may present themselves to the courts. Will the widow of a deceased convict who deserts her husband be able to claim his estate by asserting his confinement as a justifiable excuse for her own misconduct? A number of factors will have to be weighed before an equitable result is reached. Most states provide criminal conviction as grounds for divorce. Thus, the conviction and confinement of the husband might be regarded as legal cause entitling the wife to establish a separate residence. In the absence of a final decree of divorce, however, her position would remain unchanged as a surviving spouse and she would not be barred from participating in the estate. The *Buckley* case, on the other hand, lends some support to the proposition that confinement alone does not constitute willful desertion. If this theory is followed, the wife's activities would be unexcused and she could be barred as a willful deserter.

252. 348 Pa. 311, 35 A.2d 69 (1944).
253. Thomas Buckley, the surviving husband, was shown to have been a persistent offender. During the period 1926 to 1943, he had been in and out of penal institutions in Ohio and Pennsylvania. At the time of the audit of the wife's estate, he was serving a prison term for burglary. The lower court held that for over a year he had willfully neglected to provide for his wife and for that period had maliciously deserted her. On review, the Pennsylvania Supreme Court had only to decide whether the proof supported the findings. Under Pennsylvania precedent, applicable at the time, the burden of proof of non-support or desertion rested with the party asserting it as a bar to succession.
254. See notes 13-66 on pages 1066-73 *supra* and accompanying text. At least one state has held that penal confinement itself constitutes willful desertion within the meaning of the divorce law. Brady v. Brady, 98 N.J. Super. 600, 238 A.2d 201 (Ch. 1968), noted in 23 Rutgers L. Rev. 389 (1969).
255. In those jurisdictions applying an inheritance bar for desertion, non-support, adultery, or bigamy, the general rule has been that excused wrongdoing will not bar the succession. Thus, adultery has been overlooked when it occurred subsequent to an aggravated desertion. *In re Costello's Estate*, 26 Pa. D. & C.2d 481 (Philadelphia County Orphans' Ct. 1962).
Another difficulty is encountered when statutes barring inheritance by willful deserters specify minimum periods for establishing the necessary abandonment. When these statutes are in effect, an initial question is whether confinement tolls the running of this period if the abandonment began prior to incarceration. Buckley indicates that it does not. These statutes raise an additional problem because a prisoner may be deprived of an opportunity for effecting a limited reconciliation with the wronged spouse while incarcerated. The general rule is that reconciliation must be accompanied by cohabitation to restore inheritance rights.

(b) Adultery and bigamy.—The general rule is that neither adultery nor bigamy constitutes grounds for denying inheritance rights. Some jurisdictions, however, bar the wrongdoer for such conduct under a statutory penalty or a common law determination. Where the bar is in effect, a criminal conviction is not required, and the surviving spouse can be denied succession when the preponderance of the evidence indicates such behavior. Where adultery or bigamy is not recognized as an independent ground for denying inheritance, such conduct may indicate a willful, malicious intent, thus transforming mere separation into desertion that will bar the succession.

D. Appointment of a Representative to Protect the Prisoner’s Property

Confinement in prison can be particularly burdensome to the property-owning convict who can no longer effectively supervise his business interests and protect his property from the acts of others. One method of circumventing the restrictions on economic activity during imprisonment and alleviating any hardships upon the prisoner is through the appointment of a representative to act for him. Although guardians and conservators have traditionally been appointed only for mental incompetents and infants, a number of states have statutes making this protection available to prisoners, but most of these provisions are so severely restricted that they are of only limited value. Another way of achieving estate protection for the prisoner is by the use of such devices as the private express trust, bailment, and agency.

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256. E.g., PA. STAT. tit. 20, § 1.6 (1950) (for one year or upwards).
259. E.g., Owen v. Owen, 57 Ind. 291 (1877).
261. Daniels v. Taylor, 145 F. 169 (8th Cir. 1906).
1. Statutes Authorizing the Appointment of Fiduciary Representatives for Convicts.—Appointment of a fiduciary representative for an individual who is not *sui juris* has long been authorized by statute in Anglo-American law. Many statutory terms have been utilized to describe this representative, most notably “administrator,” “conservator,” “curator,” “committee,” “guardian,” and “trustee.” Although these terms are technically distinguishable, the responsibilities of the representatives are similar and the terms usually may be interchanged without sacrificing accuracy of description. In this discussion, the terminology used in particular statutes will be maintained, unless a common term is more appropriate.  

Although most states have provisions permitting the appointment of fiduciary representatives to manage property for various classes of persons, convicts generally are not included in these provisions. Eighteen states, however, make some specific provision for the management of the convict's estate by the appointment of a guardian, a trustee, or a committee. Five states provide for the appointment of guardians to protect prisoners’ property, and four states permit trustees to be appointed for prisoners. Three states, including New York, which has provisions for both a trustee and a committee, authorize the appointment of a “committee” for the prisoner. A few states permit the appointment of representatives different from these three basic types. The representatives generally are empowered to manage, preserve, and apply the convict’s property as required, to sue and defend for the convict, to insure the estate, pay debts, vote stocks, and...
pay taxes, employ agents, continue business associations, and perform other necessary functions.

Many of these statutory provisions for protecting the convict's economic interests have limitations that severely restrict the degree of protection afforded. Some of the statutes limit their protection to inmates sentenced to specified terms of imprisonment. Others only allow certain persons to be appointed to act for the prisoner. Finally, a number of statutes restrict the purpose of appointment.

(a) **Limitations because of the term of imprisonment.**—Three states, Kansas, Maine, and New York, restrict the application of their statutes by using the inmate's term of imprisonment as the criterion for determining whether he is entitled to the appointment of a representative. Kansas provides for appointment of a trustee only for the inmate sentenced to life imprisonment and, if the sentence is subsequently reduced to a less-than-life sentence, the trusteeship is terminated. On the other hand, Maine appoints guardians only for those convicts "committed to the State Prison for a term less than life." New York paradoxically authorizes a committee for the life convict, and a trustee for the less-than-life convict.

There are several possible reasons for the distinctions made in these statutes between a convict sentenced to a term of years and one sentenced to life imprisonment. One possible explanation for the Kansas statute limiting the appointment of a trustee to life convicts is that, until the legislature repealed the law in 1969, the less-than-life inmate in Kansas was authorized to contract, while the life convict impliedly was not. Since it was assumed that the less-than-life prisoner did not need a fiduciary representative because he could contract and manage his own affairs, Kansas provided only for appointment for the life convict. This distinction may pose problems for the less-than-life convict, who has many needs apart from the need to contract; such needs could be met by the appointment of a trustee, who, under the laws of Kansas, has full power to administer and manage property. The Maine provision also may be explained by an examination of the state's former civil death.

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270. Id. § 59-1903 (Supp. 1969).
statute. The Maine statute, repealed in 1959,\textsuperscript{276} provided for the administration of the life convict's estate as if he were actually dead. When the Maine statute was in effect, the life convict had no estate for a guardian to manage and only those inmates under a less-than-life sentence needed a guardian. The current limitation on appointments apparently is a holdover from that civil death approach. Although New York's appointment of different representatives for the life and the term sentence is probably the result of its civil death provision,\textsuperscript{277} no attempt will be made herein to rationalize why the varying treatment exists in New York.

(b) \textit{Limitations on who can be appointed}.—Another limitation on the effectiveness of the protecting statutes is that only certain persons can be appointed to represent the prisoner. Two states, Iowa and Oklahoma, provide that the prisoner's spouse may be empowered to manage his estate;\textsuperscript{278} if the prisoner has no spouse, apparently no one can be appointed to manage his property. These statutes make the prisoner's estate available to his family while he is confined, but the protection given to the convict's property is minimal. The prisoner could lose his property altogether as the result of his spouse's misconduct or managerial inexperience. If this happened, he would have no equitable relief because his spouse would not be under the fiduciary duty to manage the property for his benefit. In addition, if the wife obtains control over her husband's estate and then procures a divorce, the convict-husband's interests are not protected.

(c) \textit{Limitations on the purpose of appointment}.—A third limitation on provisions protecting the inmate's economic interests involves the purposes for which a representative may be appointed. A few statutes, for example, provide for appointment of a representative for the sole purpose of reaching the inmate's estate rather than protecting it. Other statutes only authorize fiduciary appointment for the purpose of representing the convict in litigation.

(i) \textit{Appointment for the purpose of reaching the convict's property}.—Three states have statutes providing creditors with a means of reaching the property of a prisoner. A North Carolina provision, for example, specifies that a trustee may be appointed to "take charge" of the estate when "any debtor is imprisoned in the penitentiary for any term, or in a county jail for any term more than twelve months."\textsuperscript{279} In

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Rhode Island, a creditor must make the application for appointment of a representative for the debtor;280 the imprisoned debtor is not given the right to petition for an appointment or to have any choice in who is appointed. This statute, therefore, is designed to protect the interests of creditors rather than the interests of inmates.281 A Michigan statute, included as a part of its Prison Reimbursement Act, permits the county attorney general to petition for appointment of a guardian for the convict in order to reach his estate and recover the expense of his maintenance in prison.282 The statute is not designed to protect the prisoner’s estate.

(ii) Appointment for litigation purposes.—Many statutes provide for the appointment of a guardian ad litem to represent the prisoner in litigation.283 Without such appointment, the inmate would be denied any opportunity to defend his property because he is not normally permitted to appear personally in court.284 The appointment of a guardian ad litem, however, does not provide adequate property management or extended protection to the convict due to the appointment’s limited purpose and duration.

The prison warden in Tennessee is authorized to serve as the prisoner’s guardian for the special purpose of bringing suit to recover money or goods belonging to the prisoner.285 Other states merely authorize the warden to hold the personal property and effects of the prisoner.286

2. Application of the Statutes: The Exclusiveness Problem.—The courts have liberally construed the guardian statutes to permit the convict to protect his property and prosecute his claims.287 The courts, however, have not been in agreement on the question of whether the statutory provisions authorizing designated legal acts to be made by or

280. R.I. GEN. LAWS ANN. § 13-6-4 (1969). Imprisonment of 7 years to life is also required. Id.
through a representative should be construed to require all legal acts by the convict to be made through this representative. For purposes of discussion, this question of statutory interpretation will be distinguished from the question of whether the acts designated in the statute to be conducted by the representative must be performed solely by him or may be performed by both the convict and him. Only the former question will be denominated as the exclusiveness problem.

If the statute authorizing fiduciary appointment is construed to be exclusive, then all legal acts by the convict must be made through the appointed fiduciary and any act by the convict individually will be invalid. Thus, an exclusive statute may result in the loss of certain civil rights by the convict, even in the absence of a civil death statute. The right to contract or sue, for example, may be lost simply because a provision for the appointment of a representative is held to be an exclusive remedy. Nevertheless, under the exclusive statutes the convicted person usually retains all rights to act personally until imprisoned and any disability to act is terminated when he is no longer confined or when he is on parole. If the statute is not considered exclusive, then the prisoner individually may carry out all legal acts except those for which a representative must be appointed.

In one state, the statute authorizing the appointment of a representative is specifically made exclusive and a person under guardianship cannot effectively act for himself in any area, with the exception of making a will. Moreover, several courts have either

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292. Ward v. Morton, 294 Mo. 408, 242 S.W. 966 (1922); Application of White, 166 Misc. 481, 2 N.Y.S.2d 582 (Cl. Ct. 1938).


294. "If a guardian is appointed thereupon, all contracts, except for necessaries, and all gifts, sales or transfers of real or personal estate after said filing and before the termination of the guardianship are void." Me. Rev. Stat. Ann. tit. 18, § 3603 (1964).


expressly or impliedly held their statutes to be exclusive, denying the
person under guardianship the right to act personally. While in many
jurisdictions the interpretation given to the representative statutes cannot
be ascertained, an analysis of the purposes enunciated in the statutes and
of the decided cases indicates that most of these jurisdictions also view
their statutes as exclusive. The second Restatement of Contracts has
adopted the exclusive rule, stating that a convict has no capacity to incur
contractual duties if his property is under guardianship.

A few states, on the other hand, have interpreted their representative
provisions to be non-exclusive. One statute provides expressly that the
appointment of a representative will not render the disabled person
incapable of acting by himself. Moreover, the Uniform Probate Code
does not impose any incapacity upon a person under guardianship.
States following this rule apparently reason that the convict usually
needs a representative only because he is physically confined, not because
of personal incompetency. An exclusive interpretation, on the other
hand, is justified on the ground that the one under guardianship must be
protected from his own acts.

3. Property Protection in the Absence of Guardian
Statutes.—The absence of statutes in the majority of jurisdictions
authorizing the appointment of a representative can partially be
explained by the lack of interest on the part of state legislators and
prison authorities in the economic consequences of imprisonment. Little
thought has been given either to the needs of the prisoner upon release or
to the protection of his property during confinement because convicts
and ex-convicts have little contact or influence with lawmakers. A
further explanation for the lack of guardian and conservator statutes is
that only a few prisoners have enough property to need a formally
appointed conservator. Consequently, most prisoners accept the lack
of adequate protection for their property as a matter of course and do
not request or petition for formal guardians or conservators.

There are three devices that may be used by prisoners to protect
their property where fiduciary appointment statutes are lacking: the
private express trust, bailment, and agency.

297. E.g., In re Hoffman's Estate, 209 Pa. 357, 58 A. 665 (1904); Tucker v. Jollay, 43 Tenn.
App. 655, 311 S.W.2d 324 (1957); In re Bean's Estate, 159 Wis. 67, 149 N.W. 745 (1914).
301. UNIFORM PROBATE CODE § 5-420.
302. 1946 N.Y. LAW REVISION COMM'N REP. 180.
(a) Private express trust.—One device that may be used by the convict to achieve the same result that could be obtained through conservator appointment is the revocable private trust. The prisoner may provide support for his dependents and protection for his property or business through the trust. Nevertheless, prisoners have not used the trust to any discernable degree for several reasons. Most inmates are unaware of the advantages of the trust, or are deterred from using it because of the sophisticated legal procedures involved in its creation. In addition, in some states there is uncertainty about whether a convict can create a trust. Since a settlor can create a trust only if he may transfer property inter vivos, and since convicts in some states are denied the capacity to contract, there is a possibility that a trust created in some states by an incarcerated settlor may be void.

As a device for protecting the property of an imprisoned person, the private express trust has some disadvantages. Certain property interests of the convict may be subject to restrictions or penalties if transferred or alienated to a trustee. Moreover, trusteeship usually will deprive the convict-settlor of a voice in the management of the trust corpus. The prisoner who creates a trust also may be unable to sue for an accounting by the trustee. Finally, tax considerations surrounding the creation of a revocable trust may present difficulties to the convict.

(b) Bailment and agency.—If a trust is unavailable or

304. Both the guardian and the trustee are fiduciary positions, but the guardian is court appointed while the trustee is designated by the contract; in addition, the trustee has legal title to the trust property while the guardian does not have title to the property of the ward. 1 A. Scott, TRUSTS § 7 (3d ed. 1967).

305. There are no accurate statistics available concerning the disposition of property by the inmates of state penal institutions, but discussions with Tennessee prison authorities indicate that the trust is not utilized for property protection and management. Legal assistance would generally be necessary to aid the prisoner in preparation of the proper trust instrument.


308. See notes 724-56 supra and accompanying text.

309. If "his conveyance is voidable or void because he is under a disability, such as infancy, insanity, coverture, and the like, the trust is likewise voidable or void." 1 A. Scott, TRUSTS § 19 (3d ed. 1967). But see Jordan v. Warnke, 205 Cal. App. 2d 621, 23 Cal. Rptr. 300 (1962) (parolee given a resulting trust even though denied capacity to contract); Hall v. Hall, 98 Cal. App. 2d 209, 219 P.2d 808 (1950) (a trust created by a parolee was held to have been valid).

310. Homestead exemptions, mortgages, insurance policies, and other property interests may be subject to restrictions or penalties if the protected person's title or right is transferred or alienated. See Uniform Probate Code § 5-420.

311. See notes 625-98 infra and accompanying text for discussion of the prisoner's capacity to sue.

312. The settlor is liable for federal income tax on the trust's income. Int. Rev. Code of 1954, § 677. If the settlor's power of revocation is renounced, a gift tax may be imposed. Id. §§ 2501 et seq.
CIVIL DISABILITIES

unappealing, the person convicted of a crime may use a bailment or agency to protect his property. These two devices have similar advantages and disadvantages and hence will be discussed together.

Bailment, which may be used to safeguard the prisoner's personal property, is easily instituted; the prisoner merely gives his chattels to a friend or relative for safekeeping. A common form of agency, the power of attorney, in which the agent is authorized to buy, sell or otherwise act for the prisoner irrespective of the nature of the property, also is easily executed. As a consequence, bailment and agency probably are more commonly used by prisoners than any other means of property protection.

There are, however, several limitations on bailment and agency that restrict their usefulness to prisoners. Both devices subject the prisoner to liability for actions by persons outside of his control. Also, the convict's remedy in case of waste or wrongful acts is limited; the incarcerated principal may not have a remedy against the unloyal agent in some states, and the bailee and the agent are not empowered to bring suit for the prisoner against third parties. Furthermore, since the agent cannot have any powers denied the principal, the scope of agency is severely restricted where the actions of the convict-principal are limited by civil disabilities. Finally, bailment and agency may be abruptly terminated by the action or death of either party.

X. LOSS OF INSURANCE, PENSIONS, WORKMEN'S COMPENSATION BENEFITS

A criminal conviction may prevent the offender from participating in insurance, pension, and workmen's compensation programs. Life and automobile insurance, for example, may not be available to convicted persons at reasonable rates, if at all. Many states also deny pension benefits to convicts regardless of whether they were convicted during or after job tenure. In addition to possible forfeiture of workmen's compensation benefits upon conviction, the convict injured while incarcerated generally is denied injury compensation.

A. Loss of Insurance Benefits

1. Life Insurance.—A criminal conviction, imprisonment, or involvement in criminal activity can have a substantial impact upon the

313. For a general indication of the limitations of agency as compared to trusts and guardianship see I. A. SCOTT, TRUSTS § 8 (3d ed. 1967).
314. Id.
315. Id.
ability of a citizen to obtain, enforce, or benefit from a life insurance policy. The citizen with a criminal record may find it impossible to obtain adequate life insurance coverage at reasonable rates. If an individual with life insurance dies while engaged in criminal activity, his designated beneficiaries or estate may be precluded from enforcing the terms of his policy. In addition, a criminally convicted beneficiary, especially one who has slain the insured, may be unable to benefit from the terms of a life policy.

(a) Insurability of the convict.—An offender’s imprisonment may prevent him from obtaining life insurance or place him in a higher rate bracket. Most major companies refuse to insure a convict while he is incarcerated. This denial of insurance is often based upon uncertainty about the convict’s future rehabilitation pending his return to society. Moreover, some companies take the position that there is no immediate economic interest in the prisoner’s life that will justify insurance coverage.

The convict’s problems in obtaining insurance do not end when he leaves prison. Few major companies have an express policy against writing life insurance on persons convicted of serious crimes after they have been released from confinement and are no longer on probation, or parole. Some companies, however, definitely refuse to give insurance to the offender who is still on parole. Although most companies are willing to consider each case on its individual merits, an applicant’s previous conviction for a serious offense is generally treated as adequate reason for refusing coverage, even in the absence of a formal policy. In determining whether to issue life insurance on an ex-convict, insurance companies usually consider such factors as the gravity, proximity, and amount of violence involved in the offense, the likelihood of a return to crime, the demonstrated degree of rehabilitation, and the number of convictions. Some companies indicate that even if the ex-convict’s application for life insurance is approved, he may have to pay a higher than average premium, depending on the above factors. An applicant who undergoes substantial rehabilitation over a period of several years, however, could probably expect to obtain coverage at standard rates, especially if his offenses were few in number and relatively insignificant in degree.

316. Vand. L. Rev., Survey of Life Insurers [hereinafter referred to as Vanderbilt Survey]. The Vanderbilt Law Review sent questionnaires to the 34 life insurance companies in the United States that ranked highest in premium income, including total life and health premiums, in 1967. See The National Underwriter Co., 249 Life Insurers (1968). Completed questionnaires were received from 20 companies. Unless otherwise footnoted, the information in this subsection was obtained through this survey.
Despite the hesitancy of life insurance companies to insure convicts and ex-convicts, life insurance applications generally do not require any information about an applicant's criminal record. Independent investigations of an applicant's background may be made, however, depending upon the amount of life insurance requested and the age of the applicant. The period investigated may range from one to ten years prior to the date of application. There is disagreement among the insurers as to whether these investigations are successful in uncovering criminal convictions.

Even if an insurance company is willing to underwrite life insurance for a convict, the inmate may be incapable of entering an insurance contract in those few states that limit the capacity of prisoners to contract.\textsuperscript{1} In addition, it is possible that in one state, California, the parolee may be unable to purchase insurance unless he has been granted the capacity to contract.\textsuperscript{2} The incapacity to contract is not always an absolute bar to obtaining insurance coverage, however, since in some states a conservator, guardian, or other representative may be authorized to purchase insurance on behalf of the prisoner.\textsuperscript{3}

(b) Effect of criminal behavior on the offender's life insurance contract.—As a general rule, an insured's criminal conviction does not cause a forfeiture of his life insurance coverage unless the policy so provides. If the insured dies as a result of participation in criminal activity, however, the insurer's liability may be limited by the terms of the life policy. Even if the policy contains no limitation for death occurring in this manner, some courts have held that public policy prevents a recovery by the insured's named beneficiaries or estate. In civil death states, the insured convict may labor under disabilities that make it difficult or impossible for him to enforce the terms of a life insurance policy.

(i) Forfeiture.—The life insurance policy of the convicted offender who is sentenced to prison is normally not subject to forfeiture or cancellation because of his criminal activity or incarceration.\textsuperscript{4} The only reported instances of life insurance forfeiture for criminal conviction have involved fraternal society life insurance policies expressly providing that the policy and all benefits thereunder are forfeited upon the insured's conviction of serious criminal offenses. Courts generally have

\textsuperscript{1} See notes 724-56 supra and accompanying text.
\textsuperscript{2} See notes 744-50 supra and accompanying text.
\textsuperscript{3} See notes 263-301 on pages 1101-07 supra and accompanying text.
\textsuperscript{4} Vanderbilt Survey, supra note 316.
upheld these forfeiture clauses, but have strictly interpreted the meaning of criminal conviction.

(ii) **Limitation of liability for death.**—An entirely different situation arises if the insured dies during the commission of a crime or as the result of a lawful punishment therefor. In the absence of a contrary statute, the insurance policy may limit the insurer's liability to payment of a reduced amount if death results from specified causes or circumstances. For example, the National Service Life Insurance Act, which makes life insurance available to present and past members of the United States armed forces, requires forfeiture of insurance benefits for "death inflicted as lawful punishment for crime." To avoid complete forfeiture, however, this act makes the cash surrender value of the policy payable to the designated beneficiary. This legislation indicates congressional approval for reduced liability provisions when the insured's criminal activity causes his death.

In many states, however, the ability of an insurer to limit his liability on an ordinary life policy is restricted by statutes authorizing insurers to limit liability only for death resulting from such causes as war, aviation, suicide, and specified hazardous occupations. One state, Virginia, expressly precludes any defense by the insurer based on criminal execution. The positive enumeration of all allowed exceptions in the other states seems to preclude a limitation based on criminal

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325. ALASKA STAT. § 21.45.250 (1966); ARIZ. REV. STAT. ANN. § 20-1226 (1956); ARK. STAT. ANN. § 66-3323 (1966); GA. CODE ANN. § 56-2507 (1960); KY. REV. STAT. ANN. § 304.817 (1969) (any life insurance policy); LA. REV. STAT. ANN. § 22:170 (Supp. 1970) (any life insurance policy); MD. ANN. CODE art. 48A, § 410 (1968) (any life insurance policy but group); N.M. STAT. ANN. § 58-8-1.2 (Supp. 1969) (any life insurance policy but group); N.Y. INS. LAW §§ 155, 163 (McKinney 1966) (industrial life insurance policy); N.D. CENT. CODE §§ 26-03-26, -31 (1970) (term life insurance policies); Id. at 26-30-35; OKLA. STAT. ANN. tit. 36, § 4024 (1958) (any life insurance policy but group); TENN. CODE ANN. § 56-1112 (1968) (any life insurance policy); TEX. INS. CODE ANN. art. 3.45 (1963) (any life insurance policy). But see Greer v. Franklin Life Ins. Co., 148 Tex. 166, 221 S.W.2d 857 (1949); WASH. REV. CODE ANN. § 48.23.260 (1961) (any life insurance policy); WYO. STAT. ANN. § 26.1-362 (1967) (any life insurance policy but group). None of these statutes is applicable to a provision for additional benefits in the event of accidental death.
activity unless such conduct falls within the permissible exception of "hazardous occupation." Many statutes limit this exception to death occurring within two years of the date of issuance of the policy. By implication, it appears that the legislatures did not intend to preclude recovery for death resulting from criminal activity. Irrespective of whether the life insurance policy limits liability, there is a split of authority on the question of whether public policy will enable the insurer to avoid payment of death benefits if the insured's death is the result of his criminal activity.

In the absence of an applicable statute or policy provision, the majority of courts have held that normal death benefits in a life insurance policy are recoverable when the insured's death results from his own criminal activity. A few cases allowing recovery have indicated that these proceeds can be recovered by an innocent beneficiary but not by the insured's estate. Recovery is uniformly denied if the insured contemplated the crime causing his death at the time he procured the policy. The majority view, based on the realistic assumption that a dead man cannot profit from insurance payments, rejects the contention that allowing recovery by the insured's beneficiaries or estate would encourage the insured to participate in crime likely to cause his death.

327. See note 325 supra (Oklahoma and Washington do not include hazardous occupations).
329. When it was shown that the legislature enacted a statute governing health and accident policies that provided for a specific required limitation of liability for death or injury resulting from illegal conduct of the insured, the New York statute governing life policies was held not only to show the absence of any public policy against allowing recovery for death resulting from criminal activity, but also to require recovery in such a case. Prudential Ins. Co. of America v. Goldstein, 43 F. Supp. 765 (E.D.N.Y. 1942).
Similarly, some courts permit recovery in order to benefit innocent dependents deprived of support and maintenance by the insured's death. One court has stated that denial of benefits could have the undesirable effect of making the insured's family dependent upon the state for support. Another court following the majority rule has noted that insurance companies assume this risk because insurance rates are calculated from standard mortality tables that do not exclude deaths resulting from criminal conduct. Finally, in the case of capital punishment, state constitutional prohibitions against corruption of blood or forfeiture of estate for criminal conviction have been used as a basis for granting recovery.

The minority view requires forfeiture of all benefits, even by an innocent beneficiary, if the insured's death results from his participation in crime. In perhaps the most extreme application of this position, the United States Supreme Court held that criminal execution could void an insurance policy even if the insured was innocent and had been wrongfully executed. Courts adopting the minority view have used several rationales. The maxim that no one should be allowed to profit from his own wrong by accelerating the maturity of the policy is often applied to deny recovery. Other courts reason that allowing benefits to the insured's estate or named beneficiary would encourage crime. Recovery also has been denied on the theory that death resulting from criminal activity is not a risk assumed by the insurer.

(iii) Accidental death benefits.—A related problem of contractual interpretation arises when the insured, whose life policy or double indemnity clause depends upon his death by “accidental means,” dies as the result of participation in criminal activity. The authorities are divided on this question. Some courts have denied recovery, reasoning that death is a natural and foreseeable consequence of intentional illegal

344. Cases cited note 342 supra.
conduct and therefore cannot be classified as "accidental." Other courts, however, have allowed recovery, noting that the insurer can avoid payment for accidental death only if death was actually intended or anticipated. These cases are so dependent upon their particular facts, however, that no detailed discussion will be attempted here.

(iv) Civil death.—In some states the law declares the prisoner to be "civilly dead." Although death by execution has been held to make a life insurance policy payable, civil death does not accelerate the policy. Accordingly, the insurer is not liable to pay the proceeds to the beneficiary until the insured is physically and naturally dead. Any other result would be contrary to the purposes and obligations of the insurance contract, for "death," when used in a life insurance policy, is not an ambiguous term and the risk contemplated is only physical death.

Although the insured convict cannot profit from his civil death, his ability to enforce his insurance contract may be severely curtailed in those civil death states that prohibit him from bringing suit. The prisoner may have an immediate need to secure a loan on his policy or to cash it in for its surrender value in order to pay an attorney, meet

345. For example, in Gordon v. Metropolitan Life Ins. Co., 256 Md. 320, 260 A.2d 338 (1970), the court held that death resulting from a self-injection of heroin was not "accidental." In Winton v. Metropolitan Life Ins. Co., 174 Tenn. 252, 124 S.W.2d 712 (1939), the Tennessee Supreme Court held that an assailant killed by his victim after threatening the latter with a deadly weapon did not die "accidentally."

346. Death of the insured while attempting to perpetrate arson was held to be "accidental" in Taylor v. John Hancock Mut. Life Ins. Co., 11 Ill. 2d 227, 142 N.E.2d 5 (1957). In Sanders v. Metropolitan Life Ins. Co., 104 Utah 75, 138 P.2d 239 (1943), the court reached a similar conclusion in the case of a youth who died while fleeing the scene of a crime in a stolen auto with police in hot pursuit.


348. See notes 70-79 on pages 950-51 supra and accompanying text.


352. See notes 635-58 supra and accompanying text. Thus the various provisions of a life insurance policy regarding such things as cash surrender value, low interest loans, change of beneficiary rights, and waiver of premiums clauses become unenforceable promises on the part of the insurer. Certainly all responsible insurers would continue to honor the terms of their policies, but there remains the possibility of the irresponsible or inadequately financed company that refuses to perform because the prisoner cannot sue. In the few jurisdictions where the convict must have a representative act for him on all legal matters, this "exclusiveness" also would prohibit the prisoner from personally enforcing the provisions of his insurance policy. In West Virginia, for example, the convict cannot exercise the option of surrendering his insurance policy for its cash value. His committee, however, may do so for him and deliver the proceeds to his estate. 51 Ops. W. Va. Att'y Gen. 596 (1965).
pressing debts, or to provide for his family's support. His ability to utilize a life insurance policy for these ends may be frustrated if he cannot sue. The possibility of any loss by the prisoner will be minimized in states where he can have a guardian or conservator act for him.\textsuperscript{353}

(c) Beneficiary rights of the convict in policies payable on the lives of others.—Criminal conviction and imprisonment usually have no effect upon a beneficiary's right to receive insurance proceeds. When the beneficiary kills the insured, however, public policy demands that he should not profit from an intentional illegal act. Therefore, in many states a beneficiary may be precluded from recovering insurance proceeds payable on the life of his victim.

(i) Beneficiary not causing death of the insured.—The convict's right to receive the proceeds of a life insurance policy generally is not affected by his conviction and imprisonment. Although he may be seriously hampered in the enforcement of these rights in states where he is unable to bring suit, he does not forfeit vested insurance contract rights even in a civil death state.\textsuperscript{354}

(ii) Beneficiary causing death of the insured.—The convicted person's right to receive the proceeds of an insurance policy as beneficiary or assignee may be denied when he causes the death of the insured.\textsuperscript{355} Under specified circumstances seventeen states have statutes precluding a killer from taking any interest in the proceeds of the deceased's life insurance policy or any interest in the deceased's estate.\textsuperscript{356} The Texas statute covers insurance proceeds alone.\textsuperscript{357} Other states have statutes applicable to property interests that do not expressly cover insurance proceeds. Four states, for example, bar the killer from taking any interest in the deceased's estate by inheritance, will, or

\begin{itemize}
\item \textsuperscript{353} See notes 263-301 on pages 1101-07 supra and accompanying text.
\item \textsuperscript{354} Shapiro v. Equitable Life Assurance Soc'y of the United States, 182 Misc. 678, 45 N.Y.S.2d 717 (Sup. Ct. 1943), aff'd on other grounds, 294 N.Y. 743, 61 N.E.2d 745 (1945).
\item \textsuperscript{355} For a discussion of problems in this area of the law see McGovern, Homicide and Succession to Property, 68 MICH. L. REV. 65 (1969); Wade, Acquisition of Property by Wilfully Killing Another—A Statutory Solution, 49 HARV. L. REV. 715 (1936).
\item \textsuperscript{357} TEX. INS. CODE art. 21.23 (1963).
\end{itemize}
Another state prevents the killer from taking in "any other manner." Authorities are in disagreement, however, as to whether these statutes apply to insurance proceeds. Statutes in California and New Mexico that prevent the acquisition of any benefit by wrongful acts have been applied to insurance proceeds.

(1) Manner of causing death.—In the absence of controlling statutory language, courts have uniformly held that a beneficiary or assignee who feloniously and intentionally takes the life of the insured cannot recover the proceeds of the victim’s life insurance policy. The nature of the crime required to deny the beneficiary insurance proceeds has been defined by statutory language in other states to comprehend causing death "willfully," "intentionally," "unlawfully," by "willful and unlawful killing," "feloniously," by "murder or manslaughter in the first degree," or by "murder or voluntary manslaughter." Most courts have held that these statutes continue the

common law rule that encompasses murder or voluntary manslaughter, but not involuntary manslaughter.\textsuperscript{370} Several states have narrowed the application of the statutes by applying them only in the case of murder.\textsuperscript{371} Underlying the common law rule and statutory provisions is the public policy against providing any pecuniary incentive or reward for an intentional killing of the insured without legal mitigation or excuse.

The rule denying recovery does not apply to a beneficiary who is insane at the time he kills the insured.\textsuperscript{372} Temporary insanity, induced by emotional disturbance, however, has been held within the rule prohibiting recovery.\textsuperscript{373}

(II) \textit{Effect of conviction or acquittal.}—Although the common law rule denying recovery does not require a criminal conviction, statutes in many states now require conviction of the required offense as a prerequisite to a denial of insurance proceeds to the killer.\textsuperscript{374} Other states require "final conviction."\textsuperscript{375} The states do not agree on the procedural effects of a prior criminal conviction. According to the common law rule in most jurisdictions, a criminal conviction of the beneficiary for killing the insured is not admissible in evidence in a subsequent civil suit to recover insurance proceeds.\textsuperscript{376} This rule has been modified by statute in some states to make the prior conviction "admissible in evidence."\textsuperscript{377}

\textsuperscript{370} Travelers Ins. Co. v. Thompson, 281 Minn. 547, 163 N.W.2d 289 (1968), appeal dismissed, 395 U.S. 161 (1969); Greer v. Franklin Life Ins. Co., 148 Tex. 166, 221 S.W.2d 857 (1949); see Conner v. Holbert, 49 Tenn. App. 319, 354 S.W.2d 809 (1961). \textit{See also} \textsc{Uniform Probate Code} § 2-803 (expressly incorporating the common law rule).


\textsuperscript{375} \textsc{Conn. Gen. Stat. Rev.} § 45-279 (Supp. 1967); \textsc{N.D. Cent. Code} § 56-04-23 (1960) (see notes 358, 360 \textit{supra} and accompanying text for discussion of whether statute is applicable).

\textsuperscript{376} Goodwin v. Continental Cas. Co., 175 Okla. 469, 53 P.2d 241 (1936). \textit{See generally} \textsc{5 J. Wigmore, Evidence} § 1671a (3d ed. 1940).

"prima facie evidence of guilt," or "final and conclusive" evidence. In two jurisdictions the criminal conviction has been given collateral estoppel effect.

Acquittal in a criminal trial ordinarily does not entitle the beneficiary who has intentionally killed the insured to receive insurance proceeds. Moreover, in the absence of a statute requiring a contrary result, an acquittal in a prior criminal trial may be inadmissible in a subsequent civil suit by the beneficiary to recover insurance proceeds. Even under a statute permitting the claimant to admit into evidence the judicial record of a determination that the original beneficiary was a "slayer," an acquittal because of insanity has been held insufficient to entitle the beneficiary to the proceeds of the policy when his act came within statutory prohibitions of recovery.

(III) Liability of the insurer.—Most major insurance companies do not attempt to limit their liability by contract if the named beneficiary kills the insured, but express policy provisions to this effect have been upheld by the courts. If the insurer does not attempt to limit his liability by express provision, proceeds denied the killer-beneficiary become payable to an alternate beneficiary, if one is named in the policy, or to the estate of the insured. Most courts have given preference to the alternate beneficiary over the insured's estate.

Some states have codified the majority rule in allowing the alternate beneficiary or the estate of the insured, if no alternate beneficiary is

384. Vanderbilt Survey, supra note 316.
named in the policy, to receive the insurance proceeds. Other states have enacted statutes creating a conclusive presumption that the killer has predeceased the insured. Georgia requires heirs of the insured other than the killer to take by inheritance if there is no alternate beneficiary. Oklahoma and Wyoming require the proceeds to be distributed among the other heirs of the insured, presumably even if there is an alternate beneficiary. South Carolina’s statute provides that the proceeds shall pass directly to the insured’s estate. Iowa allows others entitled to take by will or inheritance to receive the proceeds. Persons other than the killer who are legally entitled to the money may take in a few states.

Despite the illogical result, in some states the killer who is denied insurance proceeds can obtain the same funds in another manner. A Texas statute provides that funds denied the killer-beneficiary shall pass to the nearest relative of the insured. In a Texas case decided prior to the enactment of this statute, a wife who murdered her husband was allowed to receive the proceeds indirectly since she was his nearest relative. Similar results are possible in those states having statutes that bar a murderer from taking any interest in his victim’s estate, but which have no similar statutory provision applicable to life insurance proceeds. In one of these states, a beneficiary convicted of voluntary manslaughter of the insured was entitled to receive insurance proceeds as his heir even though he would have been barred from receiving them as beneficiary by the common law rule. The court construed the statute barring a murderer from inheriting his victim’s estate as inapplicable to voluntary manslaughter. Model statutes, such as those proposed by

398. Strickland v. Wysowatcky, 128 Colo. 221, 250 P.2d 199 (1952); see Moore v. Prudential...
Dean John W. Wade and the Uniform Probate Code, prevent the acquisition of any benefit in insurance or the estate through intentional and illegal homicide.

There seems to be no limitation on who can take as an alternate beneficiary aside from a killer-beneficiary or one claiming through him. It has been held, for example, that the murderer's children by a previous marriage may take in this capacity rather than the administrator of the estate of his wife whom he had killed. Certain rights in the estate of the insured, however, may be cut off for the killer's children in at least two states.

In the absence of a specific statutory or contractual limitation, the only exception to the insurer's liability on a policy when the beneficiary is disqualified for killing the insured is based on the ground of fraud. If the beneficiary procured the policy, either personally or acting through the insured as an innocent instrumentality, after conceiving the idea of murdering the insured, the insurer may escape any liability under the insurance contract.

2. Automobile Insurance.—Despite the obvious need to have every driver insured, automobile insurance frequently is not available to convicted citizens. An insurance underwriter can deny applications for

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Ins. Co. of America, 342 Pa. 570, 21 A.2d 42 (1941). After the Moore decision the Pennsylvania legislature wisely adopted Dean John W. Wade's model statute (Wade, supra note 355), which would have precluded allowing the "slayer" to receive any benefit from his victim's estate. Other states mentioned in note 397 supra would do well to follow Pennsylvania's example.

399. Wade, supra note 355.

400. UNIFORM PROBATE CODE § 2-803.


402. LA. CIV. CODE ANN. art. 1691 (West 1952); MISS. CODE ANN. §§ 479, 672 (1956). The Louisiana statute revokes a legacy or disposition if the legatee unlawfully takes the life of the testator and deems such a legacy or disposition to be not written. The Mississippi statutes provide that property of the deceased shall descend as if the killer had "never been in being" and further provide that any devise to the killer shall be void and that any property so devised should be distributed as if the deceased had died intestate.


404. At least 3 states have recognized this need and require proof of insurance as a prerequisite to automobile registration. E.g., MASS. ANN. LAWS ch. 90, § 1A (1967); N.Y. VEH. & TRAFF. LAW §§ 310-21 (McKinney 1970); N.C. GEN. STAT. § 20-309 (1965). The remaining states have "financial responsibility" or "safety responsibility" laws requiring evidence of adequate security to satisfy a potential claim arising from an accident. R. HENSLEY, COMPETITION, REGULATION, AND THE PUBLIC INTEREST IN NONLIFE INSURANCE 120-32 (1962); Note, A Survey of Financial Responsibility Laws and Compensation of Traffic Victims: A Proposal for Reform, 21 VAND. L. REV. 1050, 1081-82 (1968). The statutes are patterned after the UNIFORM VEHICLE CODE §§ 7-101 to -505.
new or renewed coverage for any reason, no matter how arbitrary or capricious.405 Although an applicant’s criminal record does not always come to the attention of the underwriter,404 the discovery of this fact may result in a refusal of coverage.407 The insurance industry recognizes that claim frequency probably is not related to non-traffic convictions, but contends that the mere existence of a criminal record is so prejudicial that it adversely affects the insurer’s chance of successfully defending a claim against its insured. Insurers argue that an insured’s criminal record gets before the jury often enough to make the problem a serious one. Consequently, the insurance company may be compelled to pay on what would otherwise be an unmeritorious claim.409 Insurers have not, however, been able to supply the states with the underwriting statistics necessary to support an increased rate classification for ex-convicts.410

If the offender has automobile insurance at the time of his conviction or if he has been able to acquire coverage after release despite his conviction, there is a possibility that his policy may be cancelled. At least nine states permit an insurer to cancel the policy of an insured who has been convicted of any felony.410 Another jurisdiction authorizes cancellation “for any reason it [the insurer] may deem proper.”411 Only three states provide for appeal from an insurer’s decision to cancel.412 The insurance industry, however, rarely exercises its cancellation power to the legal limit. Since most insurance companies are national enterprises, efficiency is maximized through standardized business

406. Most applications contain no request for information on criminal convictions. Local retail credit bureaus, however, are frequently solicited for information about the applicant and if their report is unfavorable, a check of police records is made which will, of course, reveal the criminal record. Id.
407. Id. An agent indicated that practice is not invariable, however, and he knew of one ex-convict whom his company has insured in the last 20 years.
408. Id.
409. Id.
411. DEL. CODE ANN. tit. 21, § 2908 (1953).
practices, requiring that the insurer's cancellation policies conform to the least permissive state statutes. Thus, many companies subscribe to insurance rating bureaus that recommend business practices that will comply with the law in every state. One bureau, for example, suggests that a policy should be cancelled only for non-payment of premiums or revocation of the insured's drivers license. This voluntary imposition of a more lenient cancellation standard affords the ex-convict a better opportunity to retain existing insurance.

The ex-convict who is denied insurance by a standard company may have other means of obtaining coverage. He may obtain insurance, for example, from a company that is authorized to write insurance at higher rates. In addition to the disadvantage of higher premiums, however, there is a substantial danger that one insured through a "high-risk" insurance company may lose his coverage if the company fails. During the six-year period prior to 1967, some 73 "high-risk" companies went out of business, stranding thousands of policyholders with millions of dollars in unpaid claims. The ex-convict may be able to avoid "high-risk" companies by having himself placed in an assigned risk pool. Virtually every state provides for an assigned risk plan to afford coverage to individuals who are unable to obtain insurance because they are considered poor risks. Applicants are allocated on the basis of volume of business among all insurers doing business in the state. Since eligibility for participation in the assigned risk plan is conditioned upon inability to otherwise obtain insurance from a standard company, the permissible rates under the plan are much

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413. Note 405 supra. These bureaus serve as statistical clearing houses to compile information to supply to the state regulatory agencies for rate increases, standard form clauses, and general business practices.


415. Although the situation is thus improved, it must be remembered that not all companies subscribe to bureaus or are otherwise of such a national character as to make this situation desirable. Insurance Information Institute, The New Insurance Rating Board 7 (1967); see F. Crane, Automobile Insurance Rate Regulation 141-42 (1962).

416. A "standard" company, as compared with a substandard company, is an ordinary insurer not underwriting "high risk" groups. Note 405 supra.


419. Note 405 supra.

higher than ordinary. Furthermore, personal injury coverage is available in some states only in limited amounts, and claim treatment is often less than satisfactory. Moreover, even under some assigned risk plans, an ex-convict may be refused coverage if he has two or more convictions.

Although the ex-convict is not considered a good risk under the negligence insurance system, the Keeton-O'Connell plan, known officially as the Basic Protection Plan, and New York's recently developed Rockefeller-Stewart plan, may improve his status. These plans, if adopted, would require compulsory insurance for all motorists and impose no-fault liability on the insurer. The Basic Protection Plan necessitates a re-evaluation of the factors relevant in determining whether an applicant for insurance is a good or a bad risk. This re-evaluation may place the ex-convict in a better position to obtain coverage than he enjoys under the existing structure. Under the present negligence insurance system, the insurance underwriter is primarily interested in estimated "accident and claim frequency" as a basis for preferring one kind of policyholder over another. Under the Basic Protection Plan, however, the focus of the insurance company's concern will shift to the "average claim cost" since its liability will accrue automatically if the insured is involved in an accident. The company can be expected, therefore, to look to such factors as the insured's age, employment, income and fringe benefits, and the size of the insured's family and car. Since insurer liability will be predetermined for accidents involving the ex-convict, the contention that a criminal record might prejudice a jury's finding of fault will be irrelevant, and the factors examined to establish the risk classification into which the ex-convict will fall will be unrelated to his criminal record.

421. Although the rates are higher for assigned risk coverage, usually up to 50% above normal rates, 2 authorities contend that the insurance companies, nevertheless, are not fully compensated for the extra risk involved. R. KEETON & J. O'CONNELL, supra note 417, at 126-27. See also H.R. Rep. No. 815, 90th Cong., 1st Sess. 19 (1967).
424. Note 405 supra.
425. This plan is set out in R. KEETON & J. O'CONNELL, supra note 423.
428. Ghiardi & Kircher, supra note 426.
B. Loss of Pension Benefits

A criminal's conviction or even his criminal activity may disqualify him from pension benefits. If he is an employee at the time of his criminal conduct, a future application for participation in a pension plan may be denied; if he is retired and already on the pension roll, his conviction may result in discontinuance of payments. The amount of his loss might include not only superannuated payments, but also compulsory deductions taken from his salary and placed in the pension fund.

1. Nature of Pensions. — With the exception of corporate pension plans, the vast majority of pensions are legislative creations, established and administered for the benefit of public employees. Statutory pension plans are created not only by state and federal enactments, but also by either municipal ordinances or city charters. These acts generally provide for both disability and retirement pensions. Under the latter program employees attaining a specified age and number of years of service may retire with a monthly pension. The pension fund usually includes both state appropriations and contributions or deductions from employee salaries.

The administration of the funds is ordinarily delegated to a “board of trustees” or a group of “commissioners” who also serve in a “quasi-judicial” capacity. In cases involving disqualification of a criminal from pension benefits, it is usually this body that makes the necessary dispositions. The board or commission may be given a great deal of discretion in fulfilling this task. The legislature, for example, may give the board discretion to discontinue pension benefits because of an


434. See, e.g., State ex rel. Court v. Board of Trustees of Firemen's Relief & Pension Fund, 11 Wash. 2d 681, 120 P.2d 519 (1941).

employee's criminal conviction.  When the legislature has neither given the board this discretion nor expressly denied the convicted criminal the right to pension, it has been held that the board does not have the authority to adopt a rule of disqualification in derogation of that intent.  When discretionary power is granted to the board, however, the courts generally decline to substitute their judgment for that of the board in the absence of fraudulent, arbitrary, or capricious conduct.

Perhaps the most unsettled issue is whether pension funds are vested in the employee or whether they merely represent a "bounty" or gesture of appreciation awarded by the sovereign to its deserving servants. Those that favor the latter position contend that pension funds are "an inducement to conscientious, efficient, and honorable work," and are designed to secure good behavior and discipline during service. Thus, they reason that any pension funds awarded the criminal would impose an untenable burden on the taxpayer in providing for a person who has betrayed his trust.

On the other hand, many persons look upon pension funds as governed by contract law. The funds are viewed as contemplated payments set forth in the contract of employment as a form of deferred compensation for services rendered. As such, pension benefits are vested contractual rights accruing upon retirement, the employee's fulfillment of contingent requirements of age and years of service, or the first moment of employment. Although this position does not

436. State ex rel. Court v. Board of Trustees of Firemen's Relief & Pension Fund, 11 Wash. 2d 681, 120 P.2d 519 (1941).
437. Hinman v. Board of Trustees of Firemen's Relief & Pension Fund, 192 Wash. 562, 74 P.2d 475 (1937); see Freyermuth v. State ex rel. Pinter, 215 Ind. 693, 21 N.E.2d 707 (1939) (when board is given the power to terminate police pensions under certain circumstances, it does not have the power to do so in absence of those circumstances).
446. See, e.g., Pearson v. County of Los Angeles, 49 Cal. 2d 523, 319 P.2d 624 (1957); Tembruell v. City of Seattle, 64 Wash. 2d 503, 392 P.2d 453 (1964).
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exclude the possibility of disqualifying the criminal from pension benefits, it may determine the foundation from which a court will reason.447 Moreover, the courts are more inclined to give a strict construction to disqualification clauses if they believe that forfeiture will entail divestment of a contractual right rather than mere revocation of a gratuity.448 When the employee is said to have a vested right, for example, it has been held that he cannot be disqualified for a criminal conviction if the statutory disqualification was added after his right had accrued.449 Further significance of the conflict will become apparent in subsequent discussions of disqualification of the criminal and deductions from his salary.

2. Exclusion on Basis of Criminal Conviction.—A person who has fulfilled the statutory requirements of age and years of service still may be prevented from participating in a pension fund if he is convicted of a crime. Criminal convictions have served as a basis for both direct disqualification by express statutory provision and indirect disqualification because of dishonorable service or discharge for cause.

(a) Direct disqualification.—The federal government has directly disqualified Social Security recipients and members of its civil and uniformed services from annuity or retirement programs if they have been convicted of specific crimes.450 In addition, at least eighteen states have enacted statutes that directly disqualify convicted criminals from participation in pension funds.451 Under these statutes, the convicted

447. When a vested right in a pension is subject to disqualification, such contingency must be a term of the contractual agreement, and denial of pension benefits must be predicated on contractual as well as statutory interpretation. See Pearson v. County of Los Angeles, 49 Cal. 2d 523, 319 P.2d 624 (1957); Keogh v. Wagner, 20 App. Div. 2d 380, 247 N.Y.S.2d 269 (1964).


451. CAL. GOV'T CODE § 50883 (West 1966) (policemen & firemen); FLA. STAT. ANN. § 185.18(3)(b) (1966) (policemen); ILL. ANN. STAT. ch. 108 1/2, § 4-138 (Smith-Hurd 1964) (firemen); id. § 8-251 (municipal employees); id. § 9-235 (county employees); id. § 11-230 (laborers); id. § 12-191 (park employees); id. § 13-221 (sanitary district employees); id. § 15-187 (university employees); id. § 16-199 (teachers); id. § 18-163 (judges); id. § 19-103 (house of correction employees); id. § 19-203 (library employees); IND. ANN. STAT. § 28-4514 (1963) (teachers); id. § 48-6405 (policemen); id. § 48-6655 (sanitary officers); IOWA CODE ANN. § 410.8
citizen may be ineligible for annuities after having satisfied the standards of age and years of service but prior to having applied for pension benefits, or he may forfeit his benefits while receiving a pension as a retirant.

(i) *Ineligibility for pension.*—An employee who becomes eligible for retirement but chooses to remain in active service may be made ineligible for pension benefits in some states if he is convicted of a felony before he submits his application for participation in a pension plan. At least one state statute specifically disqualifies such an employee. In addition, the same result is reached in other states through statutes providing that no benefits shall be paid to a person convicted of a felony, or that such a person is not “entitled” to a pension; or that he has no “right” to a pension. Moreover, at least four states, while securing a vested right to pensions for all persons who become eligible to retire, expressly except the convicted felon.

In applying these statutes, it has been held that a pension was properly denied an employee who had become eligible for retirement but, prior to application, was convicted of a crime related to his employment. It also has been held that such an employee was not

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entitled to pension privileges even when his crime was totally divorced from his vocation.458 These holdings, however, have not been without opposition. A few states secure, without excepting the convicted criminal, a vested right to pensions for all employees at the time they first become eligible.459 Thus, it has been held that a police officer with twenty years of service could not be denied annuities because of a conviction for bribery committed after he had become eligible for retirement.460 The court reasoned that the right to a pension is contractual, granted by the city in consideration for services rendered. As such, any event subsequent to eligibility had no bearing on rights already vested.

(ii) **Forfeiture of benefits after retirement.**—Once an employee has retired and his application for pension benefits has been accepted, he still may have his payments discontinued if convicted of a crime. The federal retirement statute for civil and uniformed service employees states that no individual may be paid annuities or retirement allowance if convicted of specific crimes.461 Similarly, at least four states provide that payments to any retirant must cease if he is convicted of a felony.462 The Federal Social Security Act, however, places forfeiture of benefits in the discretion of the court.463 Likewise, a number of states vest discretion in the governing body of the fund to discontinue benefits in such situations.464 In addition, two states have statutes withholding annuities from any person incarcerated in a penitentiary.465 Forfeitures occurring within the purview of these statutes involve both crimes that arose out of activities during employment, though discovered after retirement, and crimes that were perpetrated after retirement, completely independent of employment.466

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461. 42 U.S.C. § 402(u)(1) (Supp. IV, 1969). The statutory use of "individual" rather than "employee" suggests that this statute may be applied both to render an applicant ineligible and to cause forfeiture of pension benefits after retirement.
466. Van Coppenolle v. City of Detroit, 313 Mich. 580, 21 N.W.2d 903 (1946) (pensioner's allowances discontinued upon conviction for criminal conduct during employment); *State ex rel.*
instance, forfeiture has been predicated on the theory that no person should be allowed to enjoy benefits simply because he has successfully concealed his crime until after retirement.\textsuperscript{467} In the latter instance, the courts have simply reaffirmed the legislative power to enact the conditions or terms it sees fit.\textsuperscript{468} Where further justification is offered, it has rested on the theory that a retired police officer remains a member of the police force since he is still subject to recall in certain emergency situations.\textsuperscript{469}

Many courts, on the other hand, have displayed a distaste for this particular application of the forfeiture statutes. Though few of these statutes have been successfully challenged on constitutional grounds, they have often been narrowly construed in order to prevent discontinuance of payments.\textsuperscript{470} In \textit{Landry v. Board of Trustees of Police Pension Fund},\textsuperscript{471} for example, the court held that the board of trustees had exceeded its power in terminating payments to a retired policeman who had been convicted of a felony and incarcerated in the state penitentiary. The court held that the statute providing that an officer who is convicted of a felony must forfeit all pension rights acquired under the act only applied to members of the police department on active duty and not to retired officers. The court also rejected the argument that a retirant remained a member of the force. A retired and pensioned officer, it reasoned, “is no longer entrusted with the obligations that usually devolve upon an officer of the law.”\textsuperscript{472}

The reluctance of these courts can be partially attributed to a belief that the retired pensioner has a vested right to payments.\textsuperscript{473} In \textit{Wallace v. City of Fresno},\textsuperscript{474} for example, the court carried this reasoning to an

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\textsuperscript{467} Van Coppenolle v. City of Detroit, 313 Mich. 580, 21 N.W.2d 903 (1946).


\textsuperscript{469} Rudolph v. United States ex rel. Rock, 6 F.2d 487 (D.C. Cir.), cert. denied, 269 U.S. 559 (1925). Rudolph was a retired policeman. His pension was discontinued 5 years after retirement when he was found guilty of violating the National Prohibition Law, Act of Oct. 28, 1919, ch. 85, 41 Stat. 305 (repealed 1934), and fined $200.

\textsuperscript{470} Rockenfield v. Kuhl, 242 Iowa 213, 46 N.W.2d 17 (1951) (unless the statute is unequivocal and affirmative in its terms, it should be strictly construed in favor of the pensioner); Williams v. City of Knoxville, 220 Tenn. 257, 416 S.W.2d 758 (1967).

\textsuperscript{471} 58 So. 2d 296 (La. Orleans Cir. Ct. App. 1952).

\textsuperscript{472} Id. at 298; accord, Wallace v. City of Fresno, 42 Cal. 2d 180, 265 P.2d 884 (1954).

\textsuperscript{473} Rockenfield v. Kuhl, 242 Iowa 213, 46 N.W.2d 17 (1951).

\textsuperscript{474} 42 Cal. 2d 180, 265 P.2d 884 (1954).
extreme in finding that an employee had a vested right at the moment of employment. Consequently, to avoid an unreasonable impairment of his contract rights, the court held that the employee was unaffected by a forfeiture provision enacted after he began work.

(iii) **Nature of crimes.**—The federal and state statutes that deny pension benefits on the basis of criminal conviction are not uniform in the nature of crimes required for disqualification. The federal statutes focus on conviction for specific crimes involving national security, irrespective of criminal degrees. On the other hand, the state requirements generally turn on the degree of the crime committed rather than the specific offense. The majority of states require a felony conviction. In a small minority of states, however, a conviction for a misdemeanor is sufficient. Anomalously, at least one state requires a felony conviction for one profession and a mere misdemeanor for another. The remaining states require conviction for either an "infamous crime," an offense relating to pension funds, or a crime involving "moral turpitude."

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475. 5 U.S.C. § 8312(b) (Supp. IV, 1969) (civil and uniformed services); 42 U.S.C. § 402(u) (Supp. IV, 1969) (social security). The crimes referred to in these statutes include sabotage, treason, unpermitted photographing of federal installations (a misdemeanor), and aiding the enemy.

476. CAL. GOV'T CODE § 50883 (West 1966); ILL. ANN. STAT. ch. 108 1/2, §§ 4-138, 8-251, 9-235, 11-230, 13-221, 15-187, 16-199, 18-163, 19-103, -230 (Smith-Hurd 1964); IND. ANN. STAT. § 48-6415 (1963) (policemen only); IOWA CODE ANN. § 410.8 (1949); LA. REV. STAT. ANN. § 40:1437 (1965); ME. REV. STAT. ANN. tit. 25, § 1593 (1964); MINN. STAT. ANN. § 423.809 (1958); N.D. CENT. CODE § 40-45-15 (1968); OKLA. STAT. ANN. tit. 11, §§ 370, 541p (1959); S.D. COMPIL. LAWS ANN. §§ 3-13-33 (1967); TEX. REV. CIV. STAT. ANN. arts. 6220, 6243e, § 17 (1962); WASH. REV. CODE ANN. §§ 41.18.130, .20.110 (1961). Of these, only Illinois requires that the felony relate to or arise out of the person's services as an employee.

For a discussion of what constitutes a felony see notes 108-20 on pages 956-57 supra and accompanying text. See also State ex rel. Beckman v. Bowman, 38 Ohio App. 237, 175 N.E. 891 (1930) (30-day sentence enough to satisfy felony requirement of forfeiture clause, even though same judgment could be reduced to a misdemeanor in the state). Contrary, Keogh v. Wagner, 20 App. Div. 2d 380, 247 N.Y.S.2d 269 (1964) (federal felony conviction insufficient when crime would be a misdemeanor under New York law). For a discussion of what constitutes a conviction see notes 82-103 on pages 952-55 supra and accompanying text. See also Keogh v. Wagner, supra. Tembruell v. City of Seattle, 64 Wash. 2d 503, 392 P.2d 453 (1964) (plea of guilty does not mature into a conviction until there has been adjudication and a sentence imposed as part of the judgment).

477. E.g., FLA. STAT. ANN. § 185.18(3) (1966) (disability pension denied when injury is result of participating in fights, riots, civil insurrections, or while committing a crime); IND. ANN. STAT. § 28-4514 (1948) (applies to teachers only and misdemeanor must result in imprisonment); PA. STAT. ANN. tit. 53, §§ 39323, 65599 (1957) (conviction of a crime or misdemeanor).

478. IND. ANN. STAT. § 28-4514 (1948) (teachers); id. § 48-6405 (1963) (policemen); id. § 48-6655 (sanitary workers). Teachers may lose all pension rights if imprisoned for a misdemeanor, but police and sanitary officers lose their rights only upon a felony conviction.


(b) **Indirect disqualification.**—In the absence of a direct disqualification, a criminal conviction still may deprive the offender of pension benefits. Either discharge from employment or a finding of dishonorable service may flow from his conviction and bar him from participating in the pension fund.

(i) **Honorable service.**—Some pension statutes provide that a person is eligible for pension benefits only after honorable or faithful service. Consequently, the convicted criminal may be denied pension benefits on the theory that his conviction is prima facie evidence of dishonorable service. Ironically, this method of disqualification may have a greater impact on the criminal than a direct disqualification, since its vagueness leaves more to the discretion of the pension board and may permit a denial on the basis of a misdemeanor. Moreover, it may give the board the discretionary power to deny a pension on the basis of criminal activity even in the absence of a conviction.

These statutes, like those requiring a criminal conviction, may breed denials of pension benefits for dishonorable service discovered before or after retirement. Moreover, some courts have held that a person must have faithfully served for the entire tenure of employment. Consequently, an employee who commits a crime after having satisfied the statutory prerequisites of age and years of service still may become ineligible. In *Plunkett v. Board of Pension Commissioners*, an employee who had already served twenty years of honorable service was disqualified because of embezzlements committed after he had reached the age of voluntary retirement.

When criminal conviction follows retirement, forfeitures because of dishonorable service must involve crimes that occurred during employment. Although this requirement restricts the scope of the "honorable service" statutes, it does not prevent harsh results. In *Fromm v. Board of Directors of Police and Firemen's Retirement*

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485. See notes 515-19 infra and accompanying text.
486. Kone v. Baltimore County, 231 Md. 466, 190 A.2d 800 (1963); State ex rel. Idlet v. Lockwood, 240 Mo. App. 1, 201 S.W.2d 514 (1947).
System, a police officer, who was granted a disability pension for injuries suffered while on duty, forfeited his payments when he subsequently was convicted of a misdemeanor that had been committed during his employment. As a result of this minor conviction, for which he was fined only 100 dollars, the board permanently discontinued his disability payments of over 346 dollars per month.

Even when the statute does not expressly require honorable service, some courts have reached the same result by making it an implied condition. When, for example, a state has several pension acts and only a few demand honorable service, it has been held that the requirement of honorable service is implicit in all pension acts by sui generis. Moreover, the requirement has even been implied when no pension acts of the state demand "honorable service." 492

(ii) Discharge and suspension.—Indirect disqualification of the convicted criminal also may be accomplished by his discharge or suspension from employment. Several states provide that when an employee is discharged for cause he may be denied pension benefits. Moreover, when participation in a retirement system is not expressly prevented by discharge, the same result has been reached by implication. In Ewing v. Dupee, for example, the court held that implicit in the pension ordinance at issue was the condition that an employee must "retire" to be within the provision in the first instance. The court reasoned that an employee who has been discharged for cause has no status from which to retire; therefore, he is ineligible even to apply for a retirement pension.

Other courts, however, have not cared to make so fine a distinction, especially when it is held that an employee has a vested right to a pension. It has been held, for example, that eligibility for retirement pay is complete as soon as an employee has reached the age of voluntary retirement. According to this view, the employee has a vested right that

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492. State ex rel. Fox v. Board of Trustees of Policemen's Pension or Relief Fund, 148 W. Va. 369, 135 S.E.2d 262 (1964).
494. 104 So. 2d 672 (Fla. App. 1958).
will permit him to retain his pension benefits if he chooses to remain in active service and is subsequently discharged.

In other cases where discharge is not mentioned in the statute, its effect has turned on the manner in which the provision has been written. If, for example, the statute provides that an employee who has met the statutory contingencies shall receive a pension when his services have "ceased," it has been held that his discharge has no effect on his pension benefits. If, on the other hand, the statute provides that upon application the "board shall retire" the employee, it has been held that the board may discharge an applicant and thereby prevent him from "retiring" on pension.

The effect of suspension, like that of discharge, has created much disagreement. If the statutory requirements have been met but the applicant is on suspension, it has been held that no successful application for pension benefits can be made. The majority of courts, however, insist that the suspended employee is still an employee until discharged and cannot be denied his pension.

(c) Effect of probation and pardon.—There are too few cases to formulate any general statement on the effect of probation on the exclusion of convicted criminals from pension funds. The Special Project has not found a single case in which probation, in and of itself, has restored a convicted employee's right to pension funds. The right to a pension, however, has been restored to an employee against whom charges were expunged upon a showing of compliance with the terms of probation.

The effect of a pardon has tended to turn on the method of disqualification involved. If, for example, direct disqualification, based on the conviction itself, has been employed, it has been held that a full pardon restores a convicted policeman to all his civil rights, including his

496. Stiles v. Board of Trustees of Police Pension Fund, 281 Ill. 636, 118 N.E. 202 (1917).
500. For a general discussion of restoration procedures see notes 570-659 infra and accompanying text.
right to pension. When an indirect disqualification is involved, however, pardon has had little effect on a convicted criminal's loss of pension benefits. In Hozer v. State Department of Treasury, Consolidated Police and Firemen's Pension Fund Commission, a policeman who had been convicted of nonfeasance in office was granted a "full and free" pardon. The court found that since dishonorable service, for which he had lost his pension rights, was distinct from criminal conviction, the pardon of one was not absolution from the other. The court reasoned that:

While a pardon may restore to a convicted felon his rights of citizenship and remove all penalties and legal disabilities, it cannot and does not substitute a good reputation for one that is bad; it does not obliterate the fact of the commission of the crime; it does not wash out the moral stain; it involves forgiveness and not forgetfulness and it does not 'wipe the slate clean.'

The punishment given the policeman had been a suspended jail sentence and a $1,000 dollar fine. In refusing to allow either the sentence or the full pardon to "wipe the slate clean," the court denied him pension payments for the remainder of his life.

3. Exclusion for Criminal Activity in the Absence of Criminal Conviction.—It is not always necessary that the criminal be convicted to be denied pension benefits. Many statutes provide for the exclusion not only on the basis of criminal conviction, but also for specified activities unattended by a conviction. Of these, most exclude the habitual drunkard. Other statutes deny pension benefits to employees for particular types of conduct, including "dishonesty, cowardice or intemperate habits," refusal to give testimony concerning one's employment, etc.

503. People ex rel. Stine v. City of Chicago, 222 Ill. App. 100 (1921) (certificate of restoration was given the same effect as full pardon).
506. Id. at 202, 230 A.2d at 512.
509. State ex rel. Foxall v. Cossairt, 146 Ohio St. 328, 65 N.E.2d 870 (1946) (habitual debts are evidence of dishonesty and therefore grounds for denial of pension); OHIO REV. CODE ANN. § 741.49(E) (Baldwin 1964) (police only).
510. 5 U.S.C. § 8314 (Supp. IV, 1969); D.C. CODE ANN. §§ 1-319(a)-(b) (1967). This provision has been held unconstitutional as creating arbitrary and unreasonable discrimination.
desertion, suicide, excessive use of drugs or narcotics, or willful and illegal participation in fights, riots, or civil insurrection.

In the absence of an express statutory exclusion, criminal activity still may disqualify the employee. As previously noted, both discharge for cause and the performance of dishonorable service may result in denial of pension benefits for criminal activity without a criminal conviction. There are, however, limits to the use of these vague standards. Mere accusations of unlawful conduct resulting in discharge, for example, have been held insufficient to deprive an employee of his pension benefits.

When there is an indictment for a crime but no conviction, federal employees may lose retirement pay if they willfully remain outside the country for over a year. Among the states, it is generally held that when an employee is indicted the board has the power to postpone action on his application for pension benefits until the outcome of the case. An indictment does not, however, warrant the board’s discontinuing a pensioner’s payments on the basis of “dishonorable service.”

4. Effect of Forfeiture.—The criminal who has lost the right to pension benefits is subject to varying amounts of forfeiture. He may, for example, lose only amounts in excess of the money he has placed into the pension fund, or he may forfeit the full amount previously due. Although he may himself be excluded from allowances, some states provide for the reallocation of forfeited benefits to other persons.

(a) Loss of contributions and deductions.—Assuming the criminal is excluded from pension benefits, he might lose not only superannuated allowances but also the amounts already deducted from his paycheck and placed in the pension fund. As justification for this position, many courts have held that contributions create no vested

against employees who have invoked their fifth amendment rights. Steinberg v. United States, 163 F. Supp. 590 (Ct. Cl. 1959), noted in 22 Ga. B.J. 114 (1959).

511. Ga. Code Ann. § 78-203 (1964); N.C. Gen. Stat. § 112-20 (1966). Though still unrepealed, both of these statutes are only of historical interest since they concern the Confederate veteran.


514. Id. § 185.18(3)(b).


rights in the criminal; therefore disqualification prevents recovery of the entire amount of anticipated allowance.\footnote{520} As to the significance of compulsory deductions, it has been held that the mere fact that the employee and his family "were entitled to various sums set forth should certain contingencies occur is sufficient and ample consideration for the payments made."\footnote{521} These cases make it clear that a claim for recovery of payments must be based on the statute governing the fund. Unless the right to a refund of contributions is expressly or impliedly granted by the statute, it rarely exists.\footnote{522}

To prevent the loss of money already paid into pension funds, the federal government,\footnote{523} as well as many states,\footnote{524} provides by statute that persons whose employment is terminated may obtain a refund of their contributions. These statutes, however, are neither uniform in their application nor always consistent in their effect on various vocations within a state. Some state statutes follow the federal example\footnote{525} and guarantee the employee both contributions and accrued interest.\footnote{526} Others refund only the amount of deductions without interest.\footnote{527} Kansas, while allowing police officers a refund of only one-half the total amount of deductions,\footnote{528} permits discharged teachers to be paid the full amount of their contributions.\footnote{529} Illinois simply states in its provisions excluding convicted criminals from pension benefits that the statutes do not


529. KAN. STAT. ANN. § 72-1730 (1964).}
“preclude” the right to refunds.530 Illinois judges, on the other hand, are expressly given a vested interest in refunds.531

In other states, statutes expressly deny the criminal the right to refunds. Massachusetts, for example, does not permit any employee convicted of an offense involving funds the right to his contributions until all monies are repaid.532 Washington, while securing the right to refund for employees if they cease work before eligibility, expressly excepts the convicted felon.533

In construing those statutes allowing refunds, it is consistently held that a person disqualified from receiving pension benefits has an inviolable right to recapture prior deductions from his salary.534 Such deductions have been considered a part of the employee’s salary held by the city or state as trustee.535 This view, however, has not left the employer without remedy. In *Francis v. Corleto*,536 for example, it was held that an employer who suffers financial loss due to an employee’s dishonorable service may make a set-off claim as a pro tanto defense to the employee’s claim for salary.

(b) Reallocation of benefits.—A few states provide for the reallocation of pension benefits upon forfeiture by the felon.537 Under these statutes, recipients of pension benefits may include the offender’s immediate dependents,538 his wife,539 or a legally appointed guardian.540 In most cases, however, these people are not given a vested right to the forfeited allowances and receive benefits only at the discretion of the board.541 The scope of the board’s discretion is broad and may include the power to discontinue payments already being paid to dependents of

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the convicted felon. On the other hand, if an employee had not been convicted of a crime prior to his death, but his widow, who is receiving his benefits, is convicted of a felony, it has been held that the board cannot discontinue payments.

C. Loss of Workmen's Compensation Benefits

In many states, a criminal conviction will adversely affect the convicts' rights to receive workmen's compensation benefits. Incarceration may result in forfeiture of benefits for injuries incurred prior to conviction. Moreover, a majority of states still deny all workmen's compensation for injuries incurred during imprisonment. Federal laws are more liberal than comparable state provisions and generally provide remedies for most injured inmates.

1. Federal Prisoners.—Federal prisoners who are injured while incarcerated may receive benefits from the Prison Industries Fund. This fund compensates prisoners for injuries "in any industry or in any work activity in connection with the maintenance or operation of the institution where confined." Under the fund, an inmate receives benefits only upon his release; all benefits are denied if the prisoner recovers or dies from his disability while incarcerated. The amount of compensation is determined by the Attorney General and is limited to amounts provided under the Federal Employee's Compensation Act. There is no compensation for pain and suffering. In addition, a subsequent criminal conviction discontinues all benefits for the convict.

For injuries caused by the negligence of a federal employee, a federal prisoner not covered by the Prison Industries Fund may seek relief under the Federal Torts Claims Act. Where both the Prison Industries Fund and the Federal Torts Claims Act are applicable, federal courts

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542. State ex rel. Court v. Board of Trustees of Firemen's Relief & Pension Fund, 11 Wash. 2d 681, 120 P.2d 519 (1941) (board discontinued payments to wife and daughter of deceased fireman who had been convicted of incest).


544. See generally 1 A. Larson, Workmen's Compensation 759-63 (1967).


546. Id.


548. 28 C.F.R. § 301.5 (1970).

have held that the injured prisoner must rely on the former. The critics of these decisions contend that more liberal compensation should be allowed than is provided under the Prison Industries Fund.

2. State Prisoners. (a) Preconviction injuries.—As a general rule, most states do not suspend workmen’s compensation benefits upon conviction of a crime. Courts in New York and Oregon, however, have held that if a person who is receiving workmen’s compensation benefits is convicted of a crime, the benefits are discontinued. Both states holding this view have civil death statutes that deprive the convict of his legal capacity to sue and prevent him from appealing the rulings of the workmen’s compensation board. The New York decisions imply that once the prisoner is paroled and his civil rights reinstated, he can again receive the benefits. In Oregon, however, the opposite conclusion has been reached. The Oregon court ruled that the statute of limitations for an appeal was not tolled by the imprisonment, because the inmate was not in prison when the benefits accrued. Thus, the prisoner also lost all his future benefits.

(b) Injuries sustained during confinement.—Although federal prisoners are compensated for their prison injuries, a majority of states do not provide for such compensation. At least five states specifically bar state prisoners from workmen’s compensation benefits by statute. In four of the five states, city and county prisoners are included in this exemption.

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552. Pallas v. Misericordia Hosp., 291 N.Y. 692, 52 N.E.2d 590 (1943); Boatwright v. State Indus. Accident Comm’n, 244 Ore. 140, 416 P.2d 328 (1966). But see Garner v. Shute Co., 23 App. Div. 2d 127, 259 N.Y.S.2d 161 (1965). An employee receiving workmen’s compensation benefits was convicted of a felony. The court viewed, for workmen’s compensation purposes, the prisoner’s civil death as equivalent to his physical death. Thus, his wife continued to receive benefits. In Testa v. Sorrente Restaurant, Inc., 10 App. Div. 2d 133, 197 N.Y.S.2d 560 (1960), workmen’s compensation benefits were continued to a foreign national in the United States illegally, due to a treaty provision. In Dutton v. Clancy Carting & Storage Co., 258 App. Div. 837, 15 N.Y.S.2d 630 (1939), workmen’s compensation benefits were continued to a claimant who had pleaded guilty to rape but was found legally insane and confined to mental institution before sentencing.
553. For a discussion of civil death statutes see notes 70-79 on pages 950-51 supra and accompanying text.
555. This case points out an anomaly in Oregon law. If a prisoner is injured while confined, he is awarded workmen’s compensation benefits by statute. See note 560 infra and accompanying text. If a person already receiving benefits is incarcerated, however, the benefits can be discontinued.
In the absence of a specific statute, the courts or attorney generals’ opinions of at least fourteen states have denied workmen’s compensation benefits to injured prisoners. These decisions generally turn on the definition of “employee” or “contract for hire” in the workmen’s compensation laws. The courts have reasoned that an inmate, who is required by law to perform labor while incarcerated, is incapable of entering into a “contract for hire.” Accordingly, he is not an employee of the state entitled to workmen’s compensation benefits, irrespective of any remuneration he receives from his work.

Other states, however, have followed the federal example and have permitted prisoners to recover under workmen’s compensation or by civil suit for prison injuries. At least five states specifically include prisoners under their workmen’s compensation laws. In four of these states, a prisoner receives no benefits until his release from confinement. In one state, all benefits are discontinued during any subsequent imprisonment, and there is no compensation for pain and suffering. Many other states have waived their tort immunity and permit injured prisoners to maintain civil suits against the state for negligence.

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559. Courts have adopted a number of rationales for the holding that the prisoner’s compensation does not create an employer-employee relationship. Watson v. Industrial Comm’n, 100 Ariz. 327, 414 P.2d 144 (1966) (compensation is an incentive to do a better job); Shain v. Idaho State Penitentiary, 77 Idaho 292, 291 P.2d 870 (1955) (compensation is a mere gratuity); Jones v. Houston Fire & Cas. Ins. Co., 134 So. 2d 377 (La. 3d Cir. Ct. App. 1961) (compensation is for rehabilitation).


In the absence of a specific statute including prisoners under workmen's compensation laws, at least three cases have allowed recovery of workmen's compensation benefits for prison-related injuries. A California case decided prior to the enactment of the statute denying compensation to injured prisoners allowed recovery by an inmate who was injured while working on a state road crew. The court held that the California legislature, in passing legislation authorizing the use of convict labor on road crews, had restored the prisoner's civil right to enter into a contract for hire with the state highway department. Consequently, it found that since the prisoner was injured in the course of his employment, he was entitled to workmen's compensation benefits. Other courts that have denied recovery have distinguished this case as resting on "special" legislation. The wording of the California statute, however, is similar to the wording of statutes authorizing similar activity in those states that have denied recovery.

In the two other cases permitting recovery, a convict was "loaned" to another governmental agency or private group. The work was entirely voluntary and the convicts received extra compensation, such as sundries, cigarettes, and a lessening of sentence. The convict's activity was not under the control of prison employees in either case. The opinions in these two cases emphasized these factors as well as the liberality in coverage allowed under workmen's compensation laws. These cases have been distinguished by other courts that have denied recovery for in-prison injuries.

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564. California Highway Comm'n v. Industrial Accident Comm'n, 200 Cal. 44, 251 P. 808 (1926); see Annot., 49 A.L.R. 1377 (1926).
567. "[S]tate highway commission may employ or cause to be employed, convicts confined to state prisons." California Highway Comm'n v. Industrial Accident Comm'n, 200 Cal. 44, 47, 251 P. 808, 809 (1926). The court noted "[t]he word 'employ' has a definite legal meaning, and legal terms when used in a statute are to be construed according to the context and the approved usage of language unless a different sense is obviously intended." Id. at 47, 251 P. at 810.
568. Johnson v. Industrial Comm'n, 88 Ariz. 354, 356 P.2d 1021 (1960); Pruitt v. Workmen's Compensation Appeals Bd., 261 Cal. App. 2d 546, 68 Cal. Rptr. 12 (Cl. App. 1968). Special note should be given the Pruitt decision. California Penal Code had specially excluded state prisoners from workmen's compensation benefits. Cal. Penal Code §§ 2700, 2766 (West 1956). This court, however, did not follow this statement of legislative policy for a county prisoner who applied for workmen's compensation. This recent decision is a step towards the liberalization of workmen's compensation laws to include prisoners.
569. See, e.g., Watson v. Industrial Comm'n, 100 Ariz. 327, 414 P.2d 144 (1966). This case points out the superficial distinctions employed in these decisions. Here the Arizona Supreme
the lack of control by prison authorities have been stressed as the distinguishing factors. Since prisoners receive some form of compensation for nearly all work activity, the nature and amount of compensation received in these cases was not deemed important.

XI. RESTORATION OF CIVIL RIGHTS AND PRIVILEGES

Relief from civil disabilities has traditionally been granted once the offender has been released from correctional supervision and has demonstrated that he can live a life that is consistent with the demands of society. Every state provides one or more procedures by which the offender may apply for a restoration of the civil rights that he forfeited upon conviction. Most procedures can be classified into three categories: pardon, automatic restoration, and expungement. In addition, several states have adopted procedures that cannot properly be classified in any of these groups. Several model restoration acts have also been formulated, but have received little support.

A. Pardon

The pardon was derived from the English practice by which the king granted clemency to those offenders who were worthy of release from the penal sanctions. Generally, the pardoning power was used to release the convict from imprisonment when he was proven innocent or when the strict application of the laws had produced a harsh and unjust result that was unacceptable to the general public. Although the pardon is still used in this manner, it is more frequently utilized to restore the offender's civil rights after release from a correctional institution.

Forty-nine states have a pardon procedure. Generally, the pardoning power is delegated to either the governor or a board of pardons. In 23 states, the governor has exclusive power to grant a

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pardon, while in eleven states the governor can grant a pardon only after a favorable recommendation from the board of pardons. In California, Colorado, and New Mexico, the governor’s pardoning power can be exercised only after an applicant has obtained a certificate of good conduct. In eleven states, on the other hand, a board of pardons has the exclusive pardoning power. In six of these eleven states, the governor is a member of the board. Ohio’s pardoning procedure is unique in that either the Governor or a board of pardons may award a pardon. In Rhode Island, the only state that does not have a pardoning procedure, the legislature may restore an offender’s right to vote and hold public office. The United States Constitution provides that the President has the power to grant pardons to offenders who have been convicted of federal crimes.

Several jurisdictions provide by statute that a pardon restores only the rights specifically enumerated in the pardon. In the other states, the judiciary must determine whether a pardon obliterates the conviction and guilt and establishes the offender as an innocent man without a criminal past. The United States Supreme Court has twice, in dicta, addressed itself to this problem, but the decisions have expressed opposite views. In Ex parte Garland, the Court stated:


582. 71 U.S. (4 Wall.) 333 (1866).
A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities and restores to him all his civil rights.

Nearly half a century later, however, the Court in *Burdick v. United States* noted that there is a "confession of guilt implied in the acceptance of a pardon." These conflicting opinions have created confusion among the lower courts. Although the *Garland* dictum has often been quoted and occasionally used as controlling authority, the majority of courts have held that a pardon neither obliterates the conviction nor re-establishes the offender's good character. Nevertheless, most civil rights that were forfeited on conviction are restored by a pardon. Therefore, the courts have generally held that a pardoned offender is entitled to vote, file suit, and serve as a juror or witness. Although most authorities and jurisdictions have found that the pardoned offender is eligible to hold public office, several recent decisions have held to the contrary. Regardless of its effect on eligibility for public office, it is well established that a pardon does not reinstate the offender to an office that had been forfeited because of his conviction.

Although a pardon usually restores most of the released offender's civil rights, it often does not affect several important disabilities. Most

583. *Id.* at 380.
584. 236 U.S. 79, 91 (1915).
585. See, e.g., *Marsh v. Garwood*, 65 So. 2d 15 (Fla. 1953); *State v. Childers*, 197 La. 715, 2 So. 2d 189 (1941).
588. See, e.g., *Hogan v. Hartwell*, 260 Ala. 646, 7 So. 2d 889 (1942); *In re Executive Communication*, 14 Fla. 318 (1872).
courts, following the principle that a pardon does not obliterate the conviction, hold that a pardoned offender is ineligible for an occupational or professional license that, by statute, can be issued only to persons without a criminal record. The disqualifications have been upheld on the rationale that the pardoned offender's scar of guilt prevents him from meeting the standard of good character that is a prerequisite for issuance of most licenses. Using this line of reasoning, the courts have consistently upheld the denial and revocation of licenses to practice medicine and law and to drive a taxi. If the issuance of a license depends in any way on a character qualification, the pardoned offender may be denied a license or reinstatement of a forfeited license. Similarly, most courts have held that a conviction, although pardoned, can be used to apply the harsher sanctions of an habitual criminal statute at a later trial for a subsequent offense. In addition, if the offender's spouse has grounds for divorce based on a criminal conviction, a pardon does not erase the conviction and destroy the action for divorce.

In addition to determining what rights are restored by a pardon, the judiciary must decide two additional questions that the pardoning provisions leave unanswered. First, the courts must determine whether a pardon granted by the pardoning authority of the jurisdiction where the offender was convicted is effective to restore the offender's civil rights in another jurisdiction. The courts generally hold that a pardon granted by the convicting jurisdiction will be honored in other jurisdictions.

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595. S. Rubin, supra note 572, at 608.
603. Hildreth v. Heath, 1 Ill. App. 82 (1878) (presidential pardon of a federal offender removes the civil disabilities imposed by state law); Cowan v. Prowse, 93 Ky. 156, 19 S.W. 407 (1892) (presidential pardon of a federal offender restores the offender's right to vote in state elections); Jones v. Board of Registrars, 56 Miss. 766 (1879) (presidential pardon of a federal offender restores the offender's right to vote in state elections); Wickizer v. Williams, 173 S.W. 288 (Tex. Civ. App. 1914) (pardon granted by Mississippi pardoning authority restores the offender's right to serve as a juror in Texas). See S. Rubin, supra note 572, at 610.
because a pardon restores all the civil rights of the offender, irrespective of whether the rights were lost by state or federal law. Secondly, the courts must decide whether the pardoning authority in one jurisdiction can pardon an offender who was convicted in another jurisdiction. It is generally held that the pardoning authority can restore the civil rights lost in that state because of a foreign conviction. The courts have reasoned that the restoration of the offender's civil rights, which were denied under the laws of the pardoning state, is within the scope of authority of the pardoning jurisdiction. The pardon issued by the pardoning jurisdiction, however, does not affect the penal sanction imposed by the convicting jurisdiction. The constitutional provision that authorizes the presidential pardon precludes the President from pardoning a state offender.

B. Automatic Restoration

Automatic restoration procedures were enacted to facilitate the restoration of the criminal's civil rights and to make the administration of restoration more efficient and economical. These automatic procedures restore the criminal's civil rights automatically upon fulfillment of conditions enumerated in the statutes.

Thirteen states have adopted automatic restoration procedures. Although basically similar, these laws differ significantly in the conditions that must be fulfilled before the offender's civil rights are restored. In three states, civil rights are restored automatically upon completion of the prison sentence, probation, or parole. Kansas and

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605. Hogan v. Hartwell, 242 Ala. 646, 7 So. 2d 889 (1942) (pardoning authority of Alabama can restore the civil rights of a federal offender); State ex rel. Dean v. Haubrich, 248 Iowa 978, 83 N.W.2d 451 (1957) (pardoning authority of Iowa can restore the civil rights of a federal offender); Arnett v. Stumbo, 287 Ky. 433, 153 S.W.2d 889 (1941) (pardoning authority of Kentucky can restore the civil rights of a federal offender).


607. Id. at 437, 153 S.W.2d at 891. S. Rubin, supra note 572, at 610.


609. See Note, Restoration of the Civil Rights of Convicted Criminals, 1951 Wis. L. Rev. 378 n.3.

Ohio require the offender to complete only his prison term or parole period in order to have his civil rights restored. In these states, the offender presumably may have his rights restored when he is still on probation. In three states, restoration is awarded upon completion of the prison term. Missouri and Washington condition the restoration on satisfactory completion of the parole period, and South Dakota allows automatic restoration only after the completion of a suspended sentence. The procedures of Nebraska and Wyoming differ from those of other states in that restoration is conditioned upon a post-imprisonment presentation of a certificate of good conduct, obtained from the prison warden.

There are few cases that have discussed the nature and effect of the restoration resulting from the automatic restoration statutes. From the cases reported, however, it is clear that the courts consider an automatic restoration equivalent to a pardon. Consequently, an automatic restoration grants the released offender his customary civil rights, but it does not restore his eligibility to receive an occupational or professional license. Under the prevalent interpretation, therefore, the only remaining difference between a restoration by pardon and one by automatic restoration is that the former is discretionary and limited in application while the latter becomes operative automatically and indiscriminately.

C. Expungement and Annulment

Expungement and annulment are the product of the recent emphasis in corrections on rehabilitation. Both kinds of statutes are designed to restore forfeited rights and uplift the offender's status by exonerating

him from the fact of conviction and concealing the conviction from the public view.620 These statutes are unique because their primary objective is the elimination of the penalties imposed by public opinion rather than those imposed by law.621

Nine states have enacted expungement procedures,622 three623 have annulment procedures. In all twelve states, the offender becomes eligible for expungement or annulment upon the fulfillment of specific conditions. In ten states624 expungement or annulment is conditioned upon the satisfactory completion of probation. The procedures adopted in Michigan and New Jersey, although not limited to probationers, are quite restrictive. In order to obtain relief in Michigan, an applicant must have been a first offender convicted before his twenty-first birthday, and his application cannot be submitted until at least five years after his conviction.625 The New Jersey statute imposes a ten-year waiting period after discharge from correctional authority before an application can be filed.626 It specifically denies restorative relief to offenders who have committed particular crimes. Only California has adopted a provision that requires the sealing of the criminal record of an applicant who is under 21 years old.627

The courts have generally held that expungement restores the offender's civil rights, such as the rights to vote628 and hold public office.629 Numerous exceptions, however, have made expungement somewhat ineffective in the area of licensing.630 While openly declaring

620. Gough, supra note 617, at 149.
627. Cal. Penal Code § 1203.45 (West Supp. 1968). "Sealing" procedures provide that all government records relating to an offender's criminal record are closed to public inspection.
630. Comment, supra note 621, at 125.
that expungement proceedings do not remove the stain of guilt from the criminal character, the courts have stated that these statutes release only criminal penalties and disabilities, not civil disabilities. Since the statutes providing for the revocation or denial of a professional or occupational license because of a criminal conviction have consistently been held to be civil in nature, they are outside the purview of the "penalties and disabilities" clause of the expungement statutes. Despite the evident trend toward a narrow and restrictive interpretation of the expungement statutes, several California courts have given these statutes a liberal construction. The effect of these California cases, however, has been negated by subsequent legislative amendments that create an extensive list of exceptions to the California expungement statute. When the prior case history and legislative exceptions are read in conjunction with the recent case of Copeland v. Department of Alcoholic Beverage Control, which is subject to the interpretation that the license revocation was upheld because the court felt assured of legislative approval, it is evident that the California expungement procedure provides little relief for those offenders who choose to apply for expungement. Since California is the only state that has experienced extensive litigation under its expungement statute, its approach might serve as a precedent for litigation arising in other states.

632. E.g., Kelly v. Municipal Court, 160 Cal. App. 2d 38, 46, 324 P.2d 990, 994 (1958) (criminal disabilities are defined as those sanctions whose purpose is punitive in nature, and civil disabilities as sanctions whose primary purpose is the protection of the public welfare).
636. E.g., CAL. BUS. & PROF. CODE § 1679 (West 1962) (dentists); id. § 2383 (physicians); id. § 2555.1 (dispensing opticians); id. § 2963 (psychologists); id. § 6102 (attorneys); id. § 10177(b) (real estate brokers); id. § 10562(b) (mineral-oil-gas brokers); CAL. EDUC. CODE § 12911 (West 1969) (school teachers).
638. Note, supra note 635, at 138.
D. Miscellaneous Procedures

Many states have adopted procedures providing restorative relief in addition to the traditional restoration procedures described above. Although these procedures have taken a variety of forms, they can be classified according to the authority by whom the relief is granted.

At least two states empower the governor to grant relief from civil disabilities. In Illinois, the offender may apply for restoration of lost rights at any time after conviction. Mississippi's procedure authorizes the governor, at his discretion, to grant a restoration of civil rights after the offender has successfully completed probation.

Three additional states provide that an administrative board has authority to restore civil rights. In Connecticut, a petition for the restoration of the right to vote may be filed with the commission on forfeited rights after six months from the date of conviction or discharge, whichever is later. New York has established two separate procedures. Under the first procedure, five years from the date of the applicant's discharge from correctional authority, the board of parole may issue a certificate of good conduct restoring only those rights that a statute specifically enumerates as subject to restoration. The second New York procedure, which applies only to first offenders, authorizes either the court or board of parole to issue a certificate of relief from disabilities. Neither procedure limits the discretion of licensing boards. In California, the board of parole has the authority to allow the parolee to exercise most of his civil rights during the parole period.

In four states, restoration powers are vested in the judiciary. The New Hampshire procedure authorizes the supreme court to restore the elective franchise upon request of the attorney general. In North Carolina two years after discharge from correctional authority the released offender may file with the court a petition for the restoration of his civil rights. Tennessee's procedure is similar to that of North Carolina, except that the petition date is conditioned upon two time limits, depending upon the crime committed. Persons convicted of

645. The rights to hold public office and serve as a trustee or an elector are excluded. Cal. Penal Code § 3054 (West Supp. 1968).
646. N.H. Const. pt. 1, art. 11.
murder in the second degree, voluntary manslaughter, malicious maiming or wounding, rescuing a person under lawful arrest, and offenses related to dueling, may apply for restoration six months after conviction. Persons convicted of all other crimes may apply for restoration three years after conviction. In California, the court may restore most civil rights for the interval between the imposition of sentence and imprisonment.

In three states, the legislature may restore some civil rights on an individual basis. In Rhode Island, for example, the right to vote and hold public office can be restored only by an act of the legislature. The legislatures of Mississippi and Virginia, by a two-thirds vote, can restore, respectively, the right to vote and the disability resulting from a conviction for dueling.

There have been few decisions that have addressed the effect of a restoration of rights under the miscellaneous procedures described above, and these primarily have involved certificates of restoration issued by a governor. If the rights restored are not limited by statute and the conviction is not federal, it has been held that a governor's certificate of restoration is synonymous with a pardon and restores the recipient to all his civil rights. A more difficult question, however, was raised in the recent case of People ex rel. Symonds v. Gualano, in which an Illinois court was asked to determine the effect that a state certificate of restoration has on a federal conviction for which a pardon can be granted only by the President. The court held that notwithstanding the lack of a presidential pardon, state restoration proceedings can still remove all the civil disabilities that flow from state law. Thus, in cases of federal convictions, restoration by a governor, although not as broad as a presidential pardon, can have a substantial impact on returning forfeited civil rights.

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649. The rights to serve as a trustee, hold public office, vote, and hold the general power of attorney are excluded. CAL. PENAL CODE § 2600 (West Supp. 1968).
651. MISS. CONST. art. 13, § 253.
652. VA. CONST. § 57.
653. People ex rel. Stine v. City of Chicago, 222 Ill. App. 100 (1921) (governor's certificate of restoration returned to the recipient all civil rights, including the right to a pension).
654. 260 N.E.2d 284 (Ill. App. 1970) (plaintiffs sought to prevent defendant, who had a prior federal conviction for mail fraud, from holding 3 public offices on the basis of an ineligibility clause in the Illinois Constitution, art. 1V, § 4); accord, Arnett v. Stumbo, 287 Ky. 433, 153 S.W.2d 889 (1941) (governor's certificate of restoration removed bar against ex-convict's running for public office).
Several model restoration acts have been proposed in order to stimulate reform and promote uniformity. The model acts on the whole reflect the drafters' belief that rehabilitation of the criminal is of primary importance to society.655

The Uniform Act on the Status of Convicted Persons,656 promulgated by the National Conference of Commissioners on Uniform State Laws, provides that a certificate of discharge is given to every person who has completed parole, probation, or a sentence in a correctional institution. This certificate states that the rights to vote and hold public office, which were forfeited by conviction, are restored and that the person is subject to no other disability, except as otherwise provided in the act. The restoration is automatic and the certificate is merely evidence of the restoration. The act does not affect the issuance of occupational and professional licenses, the acceptance of applications for public or private offices, or the qualification to serve as a juror or elector.

The Model Penal Code's proposal657 is more liberal than the Uniform Act but more conservative than several other model acts. This proposal combines several features of both the automatic and the annulment procedures presently used by some states. Under this Code, the release from all disqualifications and disabilities is available to all young adult offenders, to any offender who has completed his sentence and has not committed another crime for two years, and to probationers and parolees who successfully fulfill the conditions of their probation or parole. Annulment of a criminal conviction is provided for an offender who has satisfied his sentence and has not reverted to criminal behavior for five years. An order of restoration or annulment does not limit a licensing board from denying a license solely because of a prior criminal conviction, nor does it justify the offender in denying his prior conviction.

The model act proposed by the National Council on Crime and Delinquency658 is more far-reaching and contains fewer restrictions than either the Uniform Act or the Model Penal Code. Under this procedure, all persons discharged from probation, parole, or imprisonment have

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both their civil rights restored and their conviction annulled. The proposal also limits the discretion of licensing boards in denying licenses on the basis of criminal conviction. As a result of this so-called "limited inquiry" provision, the only question that can be asked of a license applicant is, "Have you ever been arrested for or convicted of a crime which has not been annulled by a court?" This limitation would effectively end the discrimination against convicted criminals in the field of licensing.

Under the model act submitted by the National Probation and Parole Association, full restoration of civil rights would be awarded automatically to the offender on discharge from prison. The relief also would be available to a discharged parolee one year after the termination of his parole if his parole board were convinced that his prognosis for rehabilitation was good. Under this act, probationers would not lose any civil rights as the result of their conviction.

The impact of the model acts has not been substantial. Although some form of their basic proposals has been enacted in 26 states, these provisions were passed before the model acts were promulgated.

Part Two: Evaluation

The foregoing survey makes it clear that a convicted criminal is potentially barred from exercising many of the rights and privileges of normal citizens. Not only do these civil disqualifications affect an offender during imprisonment, but in many instances they restrict the ex-convict’s liberty long after his return to society. Undoubtedly, some proscriptions are necessary. Many of these deprivations, however, are patently unreasonable. Moreover, both the scope and operation of a number of provisions raise serious questions concerning their constitutionality. More importantly, the entire scheme of civil disabilities appears to obstruct modern correctional goals. The following evaluation explores each of these objectionable aspects.

I. Necessity and Reasonableness of Civil Disabilities

A. General Criticisms

1. Overbreadth.—One of the most objectionable aspects of civil disability laws is their overbreadth. The laws of most jurisdictions provide for the blanket imposition of disabilities upon criminal conviction. The fault lies with the statutory terminology used to designate disabling crimes. Constitutional and statutory provisions, for example, frequently deny rights and privileges to individuals convicted of felonies, infamous crimes, and moral turpitude offenses. These categorizations undoubtedly represent an attempt by legislatures to limit disqualifications to the more serious crimes. Overbreadth results, however, because these definitional categories embrace many types of criminal conduct that are unrelated to the rights or privileges forfeited. The felony disqualifications, for example, impose a broad range of disabilities for conviction of an offense that is punishable by one year imprisonment in the penitentiary. In many states, involuntary manslaughter is a felony. In one state, defacing a gravestone is punishable by imprisonment for one year. A member of the Armed Forces can be sentenced to imprisonment for one year because of absence from his unit. Conviction of any of these dissimilar offenses would disqualified the offender under the felony provisions of typical disability statutes. Clearly, the forfeiture of rights and privileges, such as voting and holding employment, should have a more substantial basis

than merely the length of a prison term. Even more objectionable are the moral character standards that may bar ex-convicts from exercising certain rights and privileges, particularly in the area of employment.\textsuperscript{4} Moreover, many rights and privileges are forfeited automatically with no notice to the offender. Thus, in some instances, an ex-convict may not learn of a deprivation until he tries to exercise the right or privilege years after his conviction. These disabling provisions are most objectionable, however, for their failure to deal with the individual offender. Few statutes consider the convict’s past history, the nature and circumstances of his offenses, and his record of rehabilitation. As a result, the ex-convict may be barred from exercising the rights and privileges of other citizens because of a wholly unrelated offense. Furthermore, he may continue under this disability long after he has become fully rehabilitated.

2. \textit{Inconsistency}.—The survey disclosed striking inconsistencies in the civil disability laws of various jurisdictions. A comparison of different states’ statutory disqualifications, as well as the varying judicial treatment of these provisions, makes it clear that in a number of instances, the collateral consequences of a criminal conviction may be as much a function of geography as they are the nature of the criminal conduct. Even the definition of conviction, for example, is the subject of varying interpretations. In most states, conviction means a determination of guilt, followed by judgment and sentence.\textsuperscript{5} In a few states, however, the definition of conviction is limited to a determination of guilt by plea or verdict.\textsuperscript{6} Thus, under the former view, a convict serving a suspended sentence has not been convicted for purposes of the civil disability statutes. Under the minority definition, however, a suspended sentence will not prevent the imposition of civil disabilities. Another conflict centers around the effect that states give to foreign convictions. A clear majority of states impose disabilities upon residents who were convicted in another state,\textsuperscript{7} while a minority limits the imposition of civil disqualifications to individuals convicted in the forum state.\textsuperscript{8} Another variance is found in the manner in which states

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  \item \textsuperscript{4} E.g., ARIZ. REV. STAT. ANN. § 32-122(A) (Supp. 1969-70); MO. ANN. STAT. § 332.030(1) (1966).
  \item \textsuperscript{5} E.g., People v. Loomis, 231 Cal. App. 2d 594, 42 Cal. Rptr. 124 (1965); Summerour v. Cartrett, 220 Ga. 31, 136 S.E.2d 724 (1964).
  \item \textsuperscript{6} E.g., Tucker v. Tucker, 101 N.J. Eq. 72, 137 A. 404 (Ch. 1927).
  \item \textsuperscript{7} E.g., People ex rel. Keenan v. McGuane, 13 Ill. 2d 520, 150 N.E.2d 168 (1958) (conviction in federal court of crime involving moral turpitude is equivalent to conviction of infamous crime under state law); State ex rel. Arpagaus v. Todd, 215 Minn. 91, 29 N.W.2d 810 (1947) (felony conviction under federal law is a misdemeanor under state law).
  \item \textsuperscript{8} E.g., State v. Jones, 17 Utah 2d 190, 407 P.2d 571 (1965) (state law requiring removal
characterize foreign convictions. The majority of states imposing disabilities on residents who were convicted in foreign jurisdictions classify offenses according to the laws of the forum. Thus an offense that is a misdemeanor in a foreign jurisdiction could be regarded as a felony under the civil disability laws of a state where the offender later resides. The provisions for restoring forfeited rights and privileges also differ widely among jurisdictions. In several states, for example, a convict's rights and privileges are restored automatically upon his release into the community. In other states, however, a released offender often must wait years before the disabilities are removed.

Even more disparity is encountered among specific disabilities. In many states, for example, a conviction of a felony or a crime involving moral turpitude is a ground for divorce. In some states, however, the convicted spouse must serve a term of years in prison before the divorce action can be brought. Disqualifications from licensed occupations based on criminal conduct also differ widely among jurisdictions. Varying judicial interpretations of disability statutes reinforce these inherent inconsistencies. Courts have experienced considerable difficulty, for example, in applying disqualifying provisions based on “infamous” and “immoral” crimes. Not infrequently, an offense that is held to involve moral turpitude in one state will not be similarly construed in another state.

Civil disability statutes not only vary considerably among jurisdictions, but a notable lack of consistency is found within individual states. In several states, for example, conviction of crime disqualifies members of certain occupational groups from receiving pension benefits,

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9. See, e.g., Du Vall v. Board of Medical Examiners, 49 Ariz. 329, 340, 66 P.2d 1026, 1031 (1937); In re Weathers, 159 Fla. 390, 393, 31 So. 2d 543, 544 (1947).
13. See, e.g., HAWAII REV. LAWS § 580-41 (1968) (7 years); MASS. ANN. LAWS ch. 208, § 2 (1969) (5 years).
15. In re Bartos, 13 F.2d 138, 139 (D. Neb. 1926); In re Hatch, 10 Cal. 2d 147, 151, 73 P.2d 885, 887 (1937); see Huff v. Anderson, 212 Ga. 32, 90 S.E.2d 329 (1955) (presenting false claims to government for wages is a crime involving moral turpitude).
while other occupational groups are unaffected. Similarly, a criminal conviction may bar the offender from some licensed occupations and not from other related occupations. From these examples it is clear that convicted criminals are subjected to inconsistent treatment under disability statutes. These illogical and inexplicable inconsistencies have no place in a body of law that restricts the rights and privileges of citizens. If the extent of an ex-convict's civil disqualification is reasonably related to a legitimate purpose, he should be treated uniformly by all jurisdictions.

3. Interminability.—Most jurisdictions provide for the eventual restoration of convicted criminals' rights and privileges. These procedures, however, are of limited effectiveness and, as a result, many ex-convicts suffer disabilities long after deprivation is justifiable. Of the procedures currently in use, the automatic restoration provisions come closest to achieving a desirable result. Unfortunately, in most states that have these procedures, relief is not available to all offenders. In some states, for example, the remedy is only available to parolees, while in others it is limited to released prisoners. In only three states are rights and privileges automatically restored upon discharge from either probation, prison, or parole. Moreover, not all rights and privileges are restored under these provisions. Another shortcoming is the failure to provide notice to the offender. Without this knowledge, some ex-convicts may fail to exercise rights or privileges that have been restored.

The executive pardon available in most states is used infrequently as a restoration device since the burden of seeking relief is placed on the offender. Many ex-convicts probably lack the persistence or resources necessary to pursue this remedy. Other ex-convicts may not seek pardons because of the detailed investigation and attendant publicity...


17. In Arizona, for example, although a felony conviction is not a ground for refusing a barber's license, Ariz. Rev. Stat. § 32-353 (Supp. 1969), felons are excluded from the practice of cosmetology, id. § 32-552.


19. See, e.g., Colo. Const. art. 7, § 10.


21. See Papatheodore v. State Dep't of Liquor Control, 69 Ohio L. Abs. 556, 118 N.E.2d 713 (Franklin County Ct. C.P. 1954) (another statute denying liquor permits to convicts held controlling).

involved. Another inherent weakness of the pardon procedure is that the decision rests with the executive rather than the judiciary, which is the appropriate forum for determining the propriety of restoring deprived rights and privileges. Moreover, a pardon does not normally remove all disabilities. It is generally held, for example, that a pardon does not preclude exclusion from licensed occupations based on criminal conviction.24

The expungement procedures provided by some states are similarly ineffective as restoration measures. In most of these states, the remedy is available to successful probationers but not to convicts paroled or released from prison.25 Moreover, unfavorable public reaction to concealment of criminals' records has forced the judiciary and legislatures to limit the application of these procedures.26 In California, for example, the expungement device has no effect on prohibitions against licensing or employing convicted criminals.27 Although there is much to commend a policy that permits a reformed offender to erase all records of his criminal past, the public will often have a justifiable need for this information. Much preferable to a system of concealment is one that enables the ex-convict to demonstrate to the community that he has been fully rehabilitated.

The procedures just discussed, as well as similar devices employed in other jurisdictions,28 are clearly inadequate. Undoubtedly, their ineffectiveness is partially attributable to the large number of civil disqualifications that accompany a criminal conviction. In any event, functional methods for timely restoration of all deprived rights and privileges to reformed offenders are essential if ex-convicts are to make satisfactory readjustment in the community.

B. Evaluation of Specific Disabilities

1. Loss of Employment Opportunity.—Under the laws of the federal government and every state, a convicted criminal is potentially

23. Id.
27. E.g., CAL. BUS. & PROF. CODE § 1679 (West 1962) (dentists); id. § 2383 (physicians).
barred from a broad range of private and government regulated employment. Since exclusion is generally discretionary with employers and licensing authorities, there is usually no fixed relationship between criminal conviction and employment future. The reported cases primarily concern licensing of professionals, such as physicians and lawyers, probably because members of this group are better able to bear the expense of litigation. Moreover, these men possess superior knowledge of the available legal remedies; hence they are more likely to use them. Most convicted criminals, however, are faced with exclusion from semi-skilled and unskilled employment.29

The convict who is refused private employment has no legal remedy. In all probability, he also lacks the resources or persistence to contest arbitrary government action denying him public or licensed employment. In the rare cases in which judicial relief is sought, the extent of disqualification from even the most routine occupations becomes quite apparent. A young man with an arrest record for participating in college demonstrations, for example, has been denied a license to drive a taxicab.30 A federal court recently has upheld a city’s refusal to employ an ex-convict as a tree-trimmer because of his criminal record.31 At the same time, the list of occupations from which convicted criminals are excluded continues to grow.32 The relationship between the ex-convict’s ability to earn a decent living upon his release from prison and his rehabilitation is unmistakably clear.33 Yet in all too many cases the law either discourages or prevents the former offender from securing a job. The alarming recidivism rates make it apparent that the many social and legal obstacles to former criminals’ employment must be lowered.

(a) Private employment.—Under existing laws, discrimination against convicted criminals by private employers is perfectly legal. A federal law prohibiting private employers from denying jobs to individuals with criminal records has been suggested.34 It is believed, however, that such a law would encounter substantial resistance and

33. One study concluded that recidivism of adult male offenders varies inversely with their post release employment. See D. GLASER, supra note 29 at 359. See also TASK FORCE REPORT, supra note 22, at 31.
probably do more harm than good. A better approach would be to encourage private employers to hire ex-convicts. Federal legislation, for example, authorizing tax credits to private employers who hire and retain ex-convicts would likely create more job opportunities for former offenders. Detailed analysis of this proposal is beyond the scope of the present inquiry. It is sufficient to note that similar incentives have been proposed to induce in private employers a responsiveness to the needs of the economically underprivileged.36

Another method of increasing the ex-convict's employment opportunities in the private sector is fidelity bonding. Presently, former offenders are frequently disqualified from both public and private positions due to their inability to be bonded.36 A government-sponsored program designed to provide fidelity bonding for released convicts could create many job opportunities for the ex-convict.37 Moreover, such a program would do much to dispel the private businessman's understandable reluctance to hire applicants with criminal records. Several experimental attempts at providing fidelity bonding for ex-convicts have already proved highly successful.38 It is believed that a federal program of bonding released offenders would contribute significantly to the elimination of existing barriers to private employment of convicted criminals.

Clearly, the most convincing inducement for private employers to hire applicants with criminal records would be demonstrative evidence of the released offender's rehabilitation. It is here that work-release programs offer great promise. These programs permit trustworthy prisoners to work at full-time jobs in the community, requiring confinement only at nights and on weekends. Available information indicates that the work-release programs now conducted by the federal government39 and half the states40 have realized substantial success with

36. See note 470 on page 1002 supra and accompanying text.
37. It should be noted that the Manpower Development and Training Act authorizes direct governmental payments or contracts to indemnify employers who hire persons that have participated in federal counseling or training programs against infidelity, dishonesty or default on the part of such employees. 42 U.S.C. § 2572e (Supp. IV, 1969). This program, however, is limited to a miniscule maximum expenditure of $300,000 annually, and this amount must suffice to bond all federally assisted applicants.
private employers. The training programs for released offenders recently established by several unions and employers also may prove useful in preparing convicts for regular employment. Undoubtedly, future employment opportunities for many prisoners are greatly improved through participation in these activities. Beyond this, liberal government licensing and employment policies would reinforce private employer decisions to give convicted criminals a second chance. It is at least anomalous that governments should encourage private employment of released prisoners, while restricting the licensed and public employment opportunities of the same convicts.

(b) Licensed and public employment.—Under the most recent Supreme Court pronouncements, exclusion of convicted criminals from licensed or public employment appears constitutionally permissible when three conditions exist. First, government regulation of the occupation must be a legitimate and necessary exercise of police power. Secondly, exclusion from the regulated occupation on the basis of prior criminal conduct must be reasonable. Thirdly, the procedures whereby employment or licensing is denied must comport with due process. As already observed, however, only patently unreasonable regulations are struck by the courts. Moreover, only clear abuses of discretion by employment and licensing agencies are overruled. As a result, senseless, oppressive, and totally unrealistic restrictions of the ex-convict's right to work have been upheld. In addition, innumerable restrictions, the legality of which remains untested, confront the offender whose occupational pursuit may in some way affect the public interest. It is essential, therefore, to examine more closely the standards of necessity and reasonableness that have heretofore provided the legal basis for denying the convicted criminal the right to work in licensed or public employment. Of equal concern, moreover, are the procedures by which these standards are applied.

(i) The necessity for regulation.—Provisions restricting the convicted criminal's right to work are usually encountered as a part of the broad scheme of regulations considered necessary to protect the

42. See TASK FORCE REPORT, supra note 22, at 33.
43. For extended discussion of the Constitutional questions surrounding government restrictions on the convicted criminal's employment opportunity see notes 206-83 infra and accompanying text.
public health, safety, and morals. As a general rule, if an occupation is licensed or classified as public employment, past criminality may denote unfitness. It is clear that the public interest requires regulation of a wide variety of occupations and activities. No one disputes the right of governments to subject their own employees to reasonable regulations. Similarly, many professional callings are proper subjects for licensing, including imposition of reasonable entrance requirements and standards of performance for practitioners. When regulatory provisions extend to semi-skilled and unskilled pursuits, however, the necessity for regulation becomes questionable. Obviously, a government must regulate the hiring and performance of even its most routine employees. Occupational licenses, however, are now so extensive as to invite serious questions regarding their necessity and purpose.

No attempt is made to explore fully the prostitution of occupational licensing that has occurred in recent years. Others have documented the process in graphic detail. It suffices to point out that licensing regulations now embrace nearly every conceivable occupation and trade, and the process appears never-ending. It is not difficult to understand this phenomenon since most licensing legislation is induced by occupational groups rather than initiated by legislators. Motivated by a desire for professional status or perhaps competitive advantage, occupational associations have frequently convinced legislatures to accord them licensed status and confer upon members of the occupation broad authority in the issuance and revocation of licenses.

The public often places heavy reliance on the ability and fidelity of individuals in unlicensed occupations. Salesmen, service station attendants, and lifeguards, for example, are not required to be licensed. General law, however, protects the public against incompetence and immorality in these areas. It would be equally effective in the case of many licensed occupations. Nevertheless, the procession to licensed status continues at a steady pace and it is likely that most of the legislation will be upheld as a legitimate exercise of police power.

Aside from objections of being monopolistic and in restraint of trade, the over-extension of licensing is particularly ominous for a person with a criminal record. Almost invariably, the convicted criminal


47. Sources cited note 45 supra.
is slated for exclusion from the newly licensed group. Thus as each new
occupation achieves licensed status, another employment barrier is
erected for the convicted criminal. It is believed that a comprehensive
and realistic review of existing licensing laws would reveal that many
licensed occupations are subjected to unnecessary regulation.
Elimination of these unnecessary restrictions would undoubtedly
enhance the employment opportunities for a number of former
offenders.

(ii) The reasonableness of regulation.—Although regulation of
many public and licensed occupations is necessary, it remains to inquire
whether exclusion of individuals based upon criminal conduct is always
justified. Clearly, a criminal conviction may be a proper ground for
excluding the offender from certain types of employment. In some
cases, licenses should be revoked and public employment terminated
when an individual is convicted. Moreover, a criminal record will often
be strong evidence that an offender is unsuitable for a particular
occupation. Since, however, restriction of an ex-convict’s right to work
punishes him indirectly long after imprisonment and also impedes his
rehabilitation, courts have consistently stated that the restrictions must
be reasonable. Generally, reasonableness is measured in terms of the
necessity for protecting the public. The standard has not been applied
uniformly, however, and judicial approaches to the question vary
considerably. Irrespective of judicial guidelines, any realistic view of
society’s need to achieve rapid and complete rehabilitation of offenders
clearly precludes unreasonable and unnecessary obstacles to an ex-
convict’s employment.

Under what circumstances, therefore, is exclusion of convicted
criminals from public and licensed employment reasonable? Understandably, the extent of regulation necessary for public protection
varies considerably among the many occupations and classifications of
public employees. Thus, while a criminal conviction may be convincing
evidence of unfitness for a particular profession, it may only be of
questionable relevance to fitness for an unskilled occupation. In any
event, exclusion is justifiable only if the convicted criminal’s pursuit of

48. E.g., Yeoman v. Department of Motor Vehicles, 78 Cal. Rptr. 251 (Ct. App. 1969)
(upholding revocation of school bus driver’s license for conviction of driving under influence of
intoxicating liquor).


50. Compare Kaufman v. Taxicab Bureau, 236 Md. 476, 204 A.2d 521 (1964), cert. denied,
382 U.S. 849 (1965) (refusing taxicab license to applicant with arrest record), with Pond v.
demonstrate that applicant for barber’s license lacked requisite moral character to engage in
barbering).
the occupation would represent a danger to the public. The question to be asked in every case, therefore, is whether the crime of which the individual was convicted demonstrates unfitness for the regulated occupation. In the absence of demonstrative unfitness, exclusion is unreasonable.

Unfortunately, most legislatures have failed to limit exclusion of convicted criminals to instances of demonstrative unfitness. Criminal conduct itself is generally an express ground for disqualification, and employment and licensing authorities do not hesitate to bar individuals with criminal records. As a result, many convicted criminals have been and continue to be barred from regulated employment without regard to the relationship of past criminal conduct to job qualifications. Many statutes authorize exclusion on the basis of a felony conviction. Although it is true that felonies are usually crimes punished by imprisonment in a penitentiary for at least a year, this classification is hardly a basis for determining the relationship of the crime to the occupational pursuit. Clearly, in establishing a test for determining the conduct that makes a person ineligible to pursue a particular occupation, the emphasis should be on the nature of the conduct rather than simply on the duration of imprisonment. A few statutory provisions achieve this result by authorizing disqualification only for certain enumerated crimes related to the occupation. Occasionally a statute may limit revocation to crimes committed while using a license. For the most part, however, statutes are unrealistically broad. Perhaps a

51. This approach is recommended by the President's Commission on Law Enforcement and Administration of Justice. See Task Force Report, supra note 22, at 91.

52. The likelihood of unreasonable exclusion based on past criminal conduct is illustrated by a recent New York case. The petitioner was denied a liquor license renewal based on his conviction of aggravated assault by an army court-martial 23 years earlier, even though shortly after conviction he was restored to duty and later received an honorable discharge. This action was taken despite the fact that the petitioner had held a similar license in good standing for a period of 15 years prior to the instant application. Not surprisingly, the New York Supreme Court found the agency determination patently unreasonable, and reversed. The Appellate Division, however, would not go that far. It remanded with directions that the petitioner first make application for a certificate of good conduct and, if successful, then apply for a license. Dicarlo v. State Liquor Authority, 54 Misc. 2d 482, 282 N.Y.S.2d 834 (Sup. Ct. 1967), modified, 29 App. Div. 2d 757, 287 N.Y.S.2d 960 (1968).

53. See, e.g., In re Morris, 74 N.M. 697, 397 P.2d 475 (1964) (attorney disbarred for involuntary manslaughter conviction).

54. This argument was advanced in Reddy v. United States, 403 F.2d 26 (1st Cir. 1968), cert. denied, 393 U.S. 1085 (1969), discussed at note 238 infra.


standard based on conviction of a crime involving moral turpitude is more indicative of unfitness, but so much difficulty has been experienced in defining moral turpitude that its effectiveness is limited.

Moral character standards are particularly susceptible to unreasonable exclusion of convicted criminals. Putting aside the argument that all character standards are unconstitutionally vague, it is clear that their imposition as entrance requirements for many regulated occupations borders on the ridiculous. Yet, in many instances a criminal conviction has been held conclusive evidence of unsatisfactory character. Criminal or immoral conduct in the absence of conviction is often given the same effect. In one recent case, for example, a licensing authority refused to issue a taxicab operator's permit to a middle-aged married man, based partly upon the fact that as a young man he had been discovered about to engage in sexual intercourse in his car. If licensing authorities continue to be this concerned about the morals of the occupational group, it is clear that many convicted criminals will be barred.

Even a determination that a conviction demonstrates unfitness for a particular occupation should not complete the inquiry. It remains to ask how long the presumption of unfitness raised by past criminality is unrebuttable. At some point, evidence of general rehabilitation and satisfactory employment in unregulated occupations, parole and probation records, certificates of good conduct, expungement, and pardon, all become relevant to the question of fitness. This is the view adopted by the draftsmen of the Study Draft of the New Federal Criminal Code. Under the proposed provision governing disqualification from federal office or employment because of criminal conviction, the matter is left entirely to the sentencing court's discretion. Moreover, the Draft provides for automatic removal of the disqualification five years after the defendant has completed his sentence. Implicit in this approach is the recognition that failure to give consideration to a convicted criminal's record of rehabilitation is both arbitrary and unreasonable. Unfortunately, most licensing and

57. Notes 274-78 infra and accompanying text.
58. See, e.g., OKLA. STAT. ANN. tit. 59, § 1107 (Supp. 1970) (water and sewage works operators required to be of good moral character).
61. Id. § 3501.
62. Id. § 3503.
employment authorities are not required to take note of post-conviction records and only a few courts have commanded it.\footnote{63}

It is submitted that laws regulating licensed occupations and public employment should be revised to insure that individuals are not unduly prejudiced by reason of past criminal conduct. Unreasonable and undesirable results can be avoided only by expressly limiting exclusion from occupations to criminal conduct indicative of unfitness for the particular occupation. Moreover, licensing and employment agencies should be required to give full consideration to all the circumstances surrounding an individual's criminal record with particular emphasis on his rehabilitation.

(iii) \textit{The fairness of procedures}.—Quite apart from the problem of overly broad disqualifications based on criminal conduct, unwarranted exclusion of ex-convicts may result because of the typically broad discretion accorded most licensing and employment authorities. The possibility for abuses in the field of occupational licensing is all too clear. It has been suggested that only by removing regulatory power from occupational groups can fair and impartial adjudications be obtained.\footnote{64} This is the usual situation with drivers' licenses. Not only are driver disqualifications limited to crimes in connection with the use of a license or vehicle,\footnote{65} but discretion to refuse or revoke licenses is vested in officials employed by the state. The likelihood of detached impartiality seems far greater than what might be expected of a board of examiners composed primarily of competitive tradesmen. Inclusion of non-associational members on licensing boards would appear to be a partial solution. More important, however, is the need to limit employment and licensing agency consideration to the sole question of an ex-convict's overall fitness for the occupation sought. Explicit, definitive, and

\footnote{63. See, e.g., Tanner v. DeSapio, 2 Misc. 2d 130, 150 N.Y.S.2d 640 (Sup. Ct. 1956). Although the court reversed on due process grounds the refusal to license a former convict to operate a beauty parlor, it emphasized the importance of criminal rehabilitation: "The State Prison for women . . . is maintained both for the security and reformation of women prisoners . . . . Among the vocational training programs offered to inmates . . . is a complete course in hairdressing and cosmetology. It would seem most inconsistent and improper to have one governmental department stress a vocational training in a correctional institution . . . and have another governmental department deny the right to a reformed convict . . . to enter upon such a vocation . . . ." Id. at 134-35, 150 N.Y.S.2d at 644-45.}

\footnote{64. See, e.g., Barron, \textit{Business and Professional Licensing—California, A Representative Example}, 18 \textit{Stan. L. Rev.} 640, 665 (1966); Reich, \textit{The New Property}, 73 \textit{Yale L.J.} 733, 783 (1964).}

realistic guidelines are needed. One of the most enlightened legislative enactments in this field is the recent California statute requiring licensing authority recognition of occupational training received in prison. Hopefully, other states will follow this example.

Of equal importance is the necessity that licensing and employment agency determinations be subject to full judicial review. Exclusion from either a licensed occupation or public position undoubtedly impairs an individual's economic and social opportunities. For an ex-convict the deprivation may be especially severe. It is essential, therefore, that all decisions excluding ex-convicts from government regulated employment be reviewed by independent, prestigious tribunals in a trial de novo. A full measure of judicial scrutiny will be an added safeguard against unnecessary and unreasonable restrictions of the convicted criminal's right to work.

2. *Loss of Domestic Rights.*—No civil deprivation is likely to affect the convict more adversely than the loss of domestic rights. One recent study of post-release failures among federal prison releasees found that released convicts who resumed residence with their wives experienced the lowest recidivism rate. Ex-convicts who lived alone, however, were determined to be the most likely to return to crime. These findings dramatically illustrate the interest that society has in preserving the family ties of imprisoned convicts. Unfortunately, present laws largely ignore this interest.

(a) *Restrictions on the right to marry and have children.*—The statutes restricting the convicted criminal's right to acquire a family are exceedingly limited in scope. The prohibitions against marriage and procreation are almost exclusively directed at habitual criminals. Nevertheless, to the extent that these laws fail to take account of the nature and circumstances of the offender's crimes, as well as his subsequent rehabilitation, it is arguable that they exceed the scope of constitutionally permissible regulation of human affairs. The myriad arguments for and against eugenic sterilization lie beyond the scope of the present inquiry and are detailed elsewhere. It suffices merely to point out that the divergence of scientific and medical opinion about the origin, nature, and inheritability of mental disorders and criminal traits

67. See D. GLASER, supra note 29, at 379. The author concludes that those marriages that survive the husband's imprisonment are a major asset to rehabilitation.
raises serious constitutional questions concerning sterilization laws. It is anticipated that a future Supreme Court ruling will conclude the practice to be unconstitutional. The express prohibitions against marriages by habitual criminals are even more objectionable from both a constitutional and a social viewpoint. If procreation is the evil sought to be avoided, even sterilization of the convict is preferable to an absolute bar to marriage. Moreover, if a prospective spouse is aware of the convict's criminal past and still desires to marry, the law should not prohibit consummation of the marriage. Doubtlessly, these statutes will also be stricken.

(b) Loss of marital rights.—Undoubtedly, the welfare of the spouse and children of a convicted criminal will often be best served by permitting the spouse to obtain a divorce. Although the state has a legitimate interest in the preservation of marriages, little is gained from requiring innocent spouses to remain tied to imprisoned convicts against their wishes for a period of years. Both the spouse and children may suffer emotional and psychological harm in this situation. Moreover, the loss of the husband's support while he is imprisoned may force his family to turn to public welfare for assistance, thereby making them an additional burden on the state. Divorce also may be justified when the convicted offender does not go to prison. The mere gravity of the offense itself, for example, may so seriously disturb the innocent spouse or cause such embarrassment to the offender's family that the marriage should be dissolved.

The wide diversity in statutory treatment of conviction and imprisonment as grounds for divorce illustrates the futility of attempting to define the type of criminal conduct that will in every case justify dissolution of a marriage. There is no reason why, for example, in one

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69. The Supreme Court's most recent consideration of the constitutionality of involuntary sterilization laws was Skinner v. Oklahoma, 316 U.S. 535 (1942). The challenged statute provided for sterilization of criminals thrice convicted of felonies involving moral turpitude. The Court found Oklahoma's classifications of crimes on the basis of moral turpitude unreasonable and held that the sterilization statute deprived defendants of equal protection of the law. The 2 concurring opinions, however, expressed the belief that involuntary sterilization laws were also objectionable on due process grounds. Id. at 543-47.

70. The authority of states to regulate marriage has long been recognized as a constitutionally permissible exercise of police power. E.g., Maynard v. Hill, 125 U.S. 190 (1888) (upholding legislative divorce); Reynolds v. United States, 98 U.S. 145 (1878) (upholding state prohibition against polygamy). In a recent case, however, the Supreme Court has described marriage as a basic civil right. Loving v. Virginia, 388 U.S. 1 (1967) (declaring antimiscegenation statutes unconstitutional). It is arguable, therefore, that the right to marry is entitled to constitutional protection. See Foster, Marriage: A "Basic Civil Right of Man", 37 FORDHAM L. REV. 51 (1968-69).
jurisdiction a criminal conviction should be an immediate ground for divorce, while in another jurisdiction the innocent spouse must wait several years before bringing suit. Clearly, the availability of divorce should not depend solely on the type of crime committed or the length of a prison term. It is submitted that the spouse of a convicted criminal should be able to obtain a divorce in every case in which either the nature of the crime or sentence imposed engenders a reasonable desire in the spouse to terminate the marriage. All jurisdictions should provide for this result either expressly or under grounds such as incompatibility or irreconcilable differences. The terminology is not important. What is important is that a marriage that has broken down will not be prolonged needlessly. It is not suggested that a convict’s spouse should be encouraged to seek a divorce. On the contrary, every effort should be made to preserve the marriage. When, however, the spouse earnestly desires freedom, the law should not stand in the way.

Although it is recognized that many unsuccessful marriages should be terminated, the role of divorce in perpetuating criminal behavior cannot be ignored. It is clear that a convict’s rehabilitation is adversely affected by the dissolution of his marriage. The hope of eventual reunion with his wife and family may be the mainspring of whatever incentive he has to reform. Once forsaken by his wife, he may lose the motivation necessary to break the cycle of recidivism that follows many criminal convictions. Domestic relations law is incapable of resolving the conflicting goals of terminating unsuccessful marriages and preserving the convicted criminal’s ties with his family. Divorce statutes, for example, that grant divorce only when the convicted spouse has been sentenced to an extended prison term satisfy neither goal. The spouse who is denied a divorce under this type of statute will only be more resentful and further disillusioned with the marriage. Her loyalty and affection for the imprisoned spouse cannot be preserved by this artificial approach. Only by broad penal reforms can the marriages of many imprisoned convicts be saved. Reforms are needed that will both ease the family’s economic burden during the breadwinner’s absence and permit a husband and wife to enjoy the minimum consortium necessary to keep alive their affection for each other during their separation. Work-release programs, conjugal visits, good behavior furloughs, and marriage counseling are measures frequently discussed in connection with penal

71. E.g., ALASKA STAT. § 09.55.110 (1962); N.M. STAT. ANN. § 22-7-1 (1953); OKLA. STAT. ANN. tit. 12, § 1271 (1961).
72. E.g., CAL. CIV. CODE § 4506 (West 1970).
reform. Full-scale institution of these programs is thought by many scholars to be essential if correctional systems are to make any progress in rehabilitating offenders. Another equally important result of these reforms could be the salvation of many convicts' marriages.

(c) **Loss of parental rights.**—Both adoption laws and dependency and neglect statutes have the common purpose of providing for the welfare of children whose parents are either unable or unwilling to do so. In many cases, the children of convicted criminals need this protection, and the parental rights of some convicted or imprisoned parents should be terminated. Similarly, there will be situations in which adoption of a convict's children without his consent is warranted. It is clear, however, that these measures are not justified in every case.

Unfortunately, most provisions regarding conviction and imprisonment are overly broad. One adoption statute, for example, dispenses with the requirement of consent of a parent imprisoned for a felony. In several states a sentence of three years' imprisonment may obviate the consent requirement. Clearly, not all felons are unfit to continue as parents. Nor should a sentence of three years' imprisonment be conclusive on the question of fitness. The inquiry in every case should embrace the total parent-child relationship and not merely focus on what may have been isolated misconduct on the part of a devoted parent. It is of equal importance to consider the nature of the crime, the circumstances surrounding its commission, possible arrangements for the child's care during the parent's imprisonment, the parent's rehabilitative potential, and, when possible, the child's wishes. To the extent that the statutes just mentioned prevent this comprehensive inquiry, they are objectionable. Equally objectionable are those adoption statutes that do not require the consent of a parent who has been deprived of the custody of his children. Surely, the custody award of children to the innocent spouse in a divorce based on the other spouse's imprisonment should not foreclose the issue of the convicted parent's parental rights. Nevertheless, this result appears likely under a number of these statutes.

To be considered also is the effect on the convict of the involuntary termination of his parental rights. As already observed, the dissolution of family ties adversely affects an offender's rehabilitation. Undoubtedly, the adoption of an imprisoned convict's children without his consent could have a devastating effect. Although it was earlier urged

73. *See* notes 321-35 *infra* and accompanying text.
that a convict's spouse who earnestly desires a divorce should be permitted to terminate the marriage contract, it does not follow that the convict's parental rights should be as easily forfeited. While in many cases the emotional and physical welfare of the spouse may justify a divorce and the best interests of the children may necessitate deprivation of their parent's custody, only the most extreme circumstances should justify a complete termination of the convict's parental rights.

3. *Loss of Political Rights and Privileges.*—Many civil disability laws severely restrict the convicted criminal's participation in the political process. In most jurisdictions, individuals convicted of certain crimes are denied the right to vote and are prohibited from holding public office. Although there are instances when the imposition of civil disabilities is necessary to protect the public interest, the present scope and operation of these disabilities raises serious questions regarding their necessity and reasonableness.

(a) *Voting.*—The right of suffrage has long been recognized as one of the most fundamental rights of American citizens. In recent years, both Congress and the courts have taken steps to expand and protect voting rights. Only a few challenges, however, have been directed at state constitutional and statutory provisions that deny the franchise to convicted criminals. In general, the courts have indicated no desire or intention to declare these laws unconstitutional. Nor have the legislatures shown any interest in eliminating these proscriptions. Only one state, for example, has adopted the Uniform Act on the Status of Convicted Persons, which limits the voting disqualification to the period of a convict's imprisonment. Moreover, since voter qualifications in most states can be changed only by constitutional amendment, it is doubtful that either the Uniform Act or the similar Model Penal Code disfranchisement provision will be enacted into law by many states.

Legislative and judicial acquiescence in the proscription of voting rights stems from a concern that the elective process should not be influenced by criminal elements. It is not disputed that some restrictions

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80. UNIFORM ACT ON THE STATUS OF CONVICTED PERSONS §§ 1-8.
are necessary to achieve this purpose. When it is recalled, however, that
the right to vote is one of the most important symbols of the democratic
process, it is clear that it should be denied only for the most compelling
reasons. It is submitted that the traditional justifications for
disfranchising convicts fail to demonstrate this compelling necessity. It
has been suggested, for example, that individuals who have been
convicted of crimes may be more susceptible to corruption and
fraudulent practices at the polls. Although this suspicion may be
justified in individual cases, such as convictions of treason, bribery, or
election violations, it is hardly a basis for the broad disqualifications
found in most jurisdictions. In many states, for example, the franchise is
regularly denied to felons and persons convicted of infamous crimes.
Clearly, not all offenses encompassed by those provisions demonstrate
unfitness to participate in the elective process. Only one state supreme
court, however, has recognized that these proscriptions far exceed the
scope of regulation necessary to protect the ballot box. In holding that a
state cannot constitutionally disfranchise a convict without a
determination that his offense denotes unfitness to vote, the California
court pointed out that:

[S]ince conspiracy to commit a misdemeanor is itself a felony ... dis
franchisement would automatically follow from conviction of conspiracy to
operate a motor vehicle without a muffler ... or to violate any other of the myriads
of lesser misdemeanor statutes on the books. No reasonable relation is apparent
between this result and the purpose of protecting the integrity of the elective
process.

A statute that disqualifies felons from voting is not only objectionable
for its overbreadth, but also for its failure to disfranchise certain
criminals who probably should not vote. There are misdemeanors, for
example, that are more serious from a moral standpoint than some
c felonies. It is readily apparent that meaningful standards for
determining an individual's fitness to vote are necessary if unreasonable
discrimination is to be avoided.

Courts in upholding provisions that disqualify convicted citizens
from voting have reasoned that since the state is simply establishing
voter qualifications, the deprivation is non-penal in nature. Although
this reasoning may reflect the true intent of the statutes, it nevertheless


83. Id. at 605, 414 P.2d at 418, 51 Cal. Rptr. at 290.

84. In Arizona, for example, the offense of willfully setting fire to a forest is a misdemeanor.

ignores the penal effect that these deprivations have on ex-convicts. In many states, the convicted criminal is not only denied the right to vote during incarceration, but his disqualification may continue for years after his release from prison. Prohibiting the released offender from participating in the political processes that affect his life may further alienate him from society and its institutions. Moreover, the loss of voting rights could be an additional source of embarrassment for the ex-convict, particularly in a small town where voting disqualifications often become matters of common knowledge.\footnote{86}

In addition to other constitutional objections,\footnote{87} disfranchisement of criminal offenders also can be challenged on a separate constitutional ground. The fifteenth amendment prohibits a state from denying or abridging the right to vote on account of race, color, or previous condition of servitude.\footnote{88} If confinement in a penitentiary can be categorized as a previous condition of servitude, the fifteenth amendment would invalidate any law impairing the released offender's right to vote merely because of his previous conviction. An in pari materia construction of the thirteenth and fifteenth amendments supports the contention that "previous condition of servitude" includes penal confinement. The thirteenth amendment contains the following disclaimer: "Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."\footnote{89} The omission of this disclaimer in the fifteenth amendment seems to permit inclusion of the term "punishment for crime" into the phrase "previous condition of servitude." This interpretation implies that the right to vote should not be denied to an individual previously convicted of a crime. This novel argument was flatly rejected by the court in \textit{People v. DeStefano},\footnote{90} which affirmed the conviction of an ex-offender who had illegally voted in a municipal election. The court stated that the fourteenth and fifteenth amendments exclusively applied to the Negro, adverting to a 1947 federal circuit court decision declaring that both amendments were designed to insure to the

\begin{flushright}
87. Notes 137-315 infra and accompanying text.
88. U.S. Const. amend. XV, § 1.
89. Id. amend. XIII, § 1.
\end{flushright}
Negro the right to full participation in the process of government.\footnote{Rice v. Elmore, 165 F.2d 387, 392 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948).} The *DeStefano* court's outdated limitation of the fourteenth amendment to rights of the Negro casts doubt on its restrictive reading of the fifteenth amendment. This conclusion gains support from the expansion of the fourteenth amendment in voting cases as well as from the fundamental relationship between the two amendments. Construing the fifteenth amendment to forbid disfranchisement on account of penal confinement, therefore, would be consonant with the contemporary realization that the right to vote "is the sacred and most important instrument of democracy."\footnote{Fortson v. Morris, 385 U.S. 231, 250 (1966) (Fortas, J., dissenting).}

Voting disqualifications for imprisoned convicts also are difficult to justify. This deprivation is most often explained in terms of the administrative difficulty in extending the franchise to incarcerated offenders. In addition, the idea has been opposed on the ground of possible bloc voting in the prison community.\footnote{F. COHEN, THE LEGAL CHALLENGE TO CORRECTIONS 85 (1969).} It is believed, however, that the positive benefits from extending the franchise to prisoners would clearly outweigh the tenuous arguments opposing it. There would appear to be no great administrative burdens involved in providing absentee ballots or polling booths at prisons. Surely, custodial personnel could provide adequate supervision. On the positive side, the participation in current political developments would mitigate the isolation and alienation from the community engendered by confinement. Moreover, the retention of the right to vote would serve as a reminder that society recognizes the prisoner's existence—a missing ingredient in the correctional atmosphere of today.

(b) *Holding public office.*—Laws excluding criminal offenders from public office serve primarily to protect the public rather than to punish the criminal. Although the public undoubtedly may often need this protection, it remains to inquire whether the disqualifications now effective in most states are necessary to accomplish this result. It is suggested that the state's compelling interest in excluding corrupt and dishonest persons from positions of public power does not require that all felons, for example, should be barred from holding office. It would seem that the public interest could be adequately safeguarded by making a convicted person ineligible for a public office only when the offense he committed is directly related to the duties of the office he is seeking. A convicted embezzler, for example, should be ineligible to hold an office in which he would be responsible for public funds, but eligible...
to serve on the local school board. Even if this position is adopted, the offender should not be disqualified permanently from holding any office. Rather, he should be ineligible only for a limited number of years. Adoption of this test for eligibility would enable members of the public to retain confidence in their public officials without unduly restricting the number of persons qualified for public office.

Constitutional objections to civil disability laws in general are detailed elsewhere. In addition to these challenges, it is arguable that laws prohibiting offenders from holding public office restrict the freedom of association protected by the first amendment. It has been suggested, for example, that the right of political association embraces a right of candidacy. In his concurring opinion in *Williams v. Rhodes,* Mr. Justice Harlan contended: "The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association." The right to promote a political philosophy means little if the spokesman for a political faction can be kept off the election ballots and thus denied an equal opportunity to be heard. To be considered also is the extent that provisions making convicted persons ineligible for office unreasonably restrict the general public's right to elect candidates of its choice. It is not uncommon for one candidate to represent the views of a segment of the electorate. It has been argued, and reasonably so, that if this candidate is prevented from running, then those voters who support him have lost an opportunity to cast their votes effectively. The Supreme Court essentially adopted this position in *Williams v. Rhodes,* which concerned the right of the American Independent Party to have a place on the ballot in Ohio for the 1968 presidential election. Although the case concerned a political party rather than an individual, it would seem that the same reasoning could be applied, especially since the party involved was formed primarily to further the candidacy of a single political spokesman.

94. See notes 137-315 infra and accompanying text.
95. 393 U.S. 23 (1968).
96. Id. at 41.
97. See id. at 31.
100. Comment, supra note 98, at 140.
whatever part of the spectrum it reflects." Applying this reasoning, it is submitted that if a convicted citizen has become a public figure and has achieved considerable political support, disqualifying him from public office would deny political expression to his supporters.

On balance, there appears to be considerable justification for the argument that convicted citizens should be permitted to seek public office. The Swedes support the former convict's right to hold public office, reasoning that if an ex-convict becomes a candidate, his former conviction probably will become an issue during the campaign. If the voters are informed about the candidate and nevertheless choose to elect him, the Swedes believe that the legislature should not interfere with their choice. Adopting the same rationale, a report of the President's Commission on Law Enforcement and Administration of Justice suggested that the states should rely on the judgment of the voters for elective officials and on the appraisal of the persons with appointive power for appointive positions. It is difficult to find fault with this conclusion. The public can be adequately protected by narrow provisions temporarily disqualifying a convicted citizen if the offense he committed is directly related to the duties of the office he is seeking. This approach was adopted by the draftsmen of the New Federal Criminal Code, which proposes that disqualification of convicted citizens from federal office be discretionary with the sentencing court. Under the proposed Code, in no case would the period of ineligibility extend longer than five years following completion of sentence.

4. Loss of Judicial Rights.—For many convicts the only exposure to the judicial system is as a criminal defendant. Under statutes in a number of states, convicted criminals lack the capacity to sue, to execute judicially enforceable instruments, and to serve as witnesses or jurors. Not only do many offenders fail to develop an appreciation for the judicial process, but in some instances they may be denied judicial relief without justification. Moreover, the denial of a convict's legal capacity may work hardships on innocent citizens. For these reasons, it is essential that these restrictions be narrowly drawn.

(a) Capacity to sue.—It is well recognized that the administrative

\begin{enumerate}
\item 393 U.S. at 39.
\item Damaska, supra note 86, at 338.
\item TASK FORCE REPORT, supra note 22, at 90.
\item THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 3501 (1970).
\item In some states, a conviction of perjury or subornation of perjury will completely exclude a person from testifying. See notes 772-82 on pages 1038-39 supra and accompanying text.
\end{enumerate}
problems inherent in the penal system necessitate the withdrawal of some rights and privileges from criminal offenders.\textsuperscript{106} It has been suggested that the prisoners only have the right to those liberties that are indispensable to fair and decent treatment, to the avoidance of cruel and unusual punishment, and to the preclusion of invidious discrimination.\textsuperscript{107} Although the rights of prisoners have been expanded throughout the years,\textsuperscript{108} prison inmates in a number of states still lack the capacity to institute civil actions. In analyzing this procedural incapacity, it is necessary to balance the importance of the right to sue against the administrative problems involved in permitting prisoners to initiate civil suits.

A number of reasons have given support to the theory that prisoners should not be permitted to sue. First, it has been suggested that prisoners are likely to file many suits based on illegitimate claims, creating an enormous amount of litigation for the already overcrowded courts.\textsuperscript{109} This rationale seems questionable since the courts in those states permitting prisoners to sue apparently have not been overburdened with litigation instituted by inmates. Secondly, the argument has been made that prisoners may instigate suits in order to be temporarily absent from prison.\textsuperscript{110} There is no basis for this argument since most courts that accept civil suits by prisoners do not allow the prisoner-plaintiffs to appear personally in court. Thirdly, there has been some concern that prisoners might harass public officials with countless lawsuits.\textsuperscript{111} Although this may be a possibility, most prisoners who are treated fairly probably will not bring spurious suits against public officials. When they are treated unfairly, they should have the opportunity to obtain the appropriate judicial relief. In addition, laws prohibiting prisoners from suing make it possible for dishonest public officials and citizens to take advantage of inmates without fear of facing civil liability. Prisoners are less likely to receive unfair treatment if they have the capacity to maintain civil actions.

\textsuperscript{107} Nolan v. Scafati, 306 F. Supp. 1, 3 (D. Mass. 1969) (prisoner does not have right to be represented by counsel or to cross-examine witnesses at prison hearing that might result in solitary confinement or in postponement of his release date).
\textsuperscript{111} Id.
The strongest indication of the unreasonableness of the rule prohibiting prisoners from suing is that the majority of states now permit inmates to institute suits. All states have been slow to abolish the numerous common law disabilities imposed on criminal offenders. Consequently, it is significant that at least three-fourths of the states apparently have recognized that prisoners should retain the right to sue. In addition, most foreign countries have abolished this "anachronistic procedural incapacity." It seems clear that any conceivable benefits that society receives by denying prisoners the capacity to sue are outweighed by the excessive personal hardships caused by this disability. In fact, society will be better served if prisoners are permitted to seek judicial relief for wrongs committed against them. One of the major obstacles facing rehabilitative efforts today is that many prisoners think society is unwilling to give them a second chance. An inmate who is denied access to the courts when he has a legitimate cause of action might reasonably think he is receiving unnecessary punishment for the offense he committed. His natural reaction will be one of hostility toward society, making it less likely that he will be willing to comply with society's demands. If the prisoner is permitted to sue, however, his hostility may be reduced and he will have the opportunity to start putting his affairs in order before his release from prison. This, in turn, will make his adjustment period after release less difficult.

(b) Capacity to execute judicially enforceable instruments.—Fortunately, in most states the capacity to execute judicially enforceable instruments is not affected by a criminal conviction. Statutes and decisions limiting the convict's contractual and testamentary capacity are primarily confined to civil death jurisdictions. It suffices merely to observe that these disabilities are clearly detrimental to the convict, his dependents, and society. Restrictions on the convict's power to contract are contrary to the general public policy supporting free economic intercourse. Moreover, a convict under this disability may be unable to procure the ordinary necessities of life. So too, denying a convicted criminal's testamentary capacity clearly contravenes the accepted policy favoring testate

113. See 34 Va. L. Rev. 959, 960 (1948).
114. See note 355 infra and accompanying text.
116. Rhode Island is the one non-civil death jurisdiction that limits the convict's power to contract and make a will during incarceration by requiring court approval prior to the execution of a valid instrument. R.I. GEN. LAWS ANN. § 13-6-3 (1969).
distribution of decedents' property. It may be argued that imprisoned convicts may be subjected to unlawful pressure in reaching contractual and testamentary decisions and are therefore protected by the disabilities. It is readily apparent, however, that appropriate remedy for this supposed evil is elimination of the oppressive influences, rather than deprivation of these basic rights. In any event, no conceivable purpose is served by denying the released convict's rights to manage his affairs and control the disposition of his property.

(c) Capacity to serve as a witness.—The rules of evidence dealing with the testimony of citizens who have been convicted of certain crimes are badly in need of reform in almost all states. The offender who seeks to testify in a judicial proceeding can be affected by his prior criminal conviction in two ways: First, a citizen who has been convicted of perjury or subornation of perjury, will be completely excluded from testifying in some states;117 secondly, in all states, the criminal record of a witness who has been convicted of certain crimes will be introduced to discredit his testimony.118

It is difficult to justify statutes forbidding citizens who have been convicted of perjury or subornation of perjury from testifying. There is no valid reason why a person with material knowledge of facts in a case should not be permitted to tell them, regardless of his character or previous criminal acts. If the witness has been convicted of perjury within recent years, the jury should be informed of his conviction and allowed to weigh his testimony accordingly. Although the convicted perjuror's testimony will not be considered reliable in most cases, he should at least be permitted to take the stand and testify. Laws completely excluding an individual from testifying because of his prior criminal record not only are detrimental to the convicted citizen's rights, but also can adversely affect the rights of innocent third parties who may need to rely on his testimony.

It is equally difficult to justify statutes that permit witnesses to be impeached by a showing that they have been convicted of criminal offenses having no relation to veracity. Under a number of statutes, many offenses that are admissible for impeachment purposes do not necessarily reflect on the credibility of the witness. As one progressive court has observed: "Acts of violence . . . which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity."119 The

117. See notes 772-82 on pages 1038-39 supra and accompanying text.
118. See notes 783-838 on pages 1039-45 supra and accompanying text.
existing impeachment rules can produce anomalous results. A given individual, for example, might prize his reputation of veracity to such an extent that he would be provoked to violence if another person called him a liar. The individual might be convicted for his violent acts and later called to testify in a judicial proceeding. His conviction, ironically, would be introduced to imply that he is a liar.120

The use of a conviction for impeachment purposes should be limited to crimes that indicate a lack of veracity. The laws of evidence generally do not permit the introduction of irrelevant facts as evidence.121 There is no reason, then, why irrelevant facts should be admitted for impeachment purposes. The existing impeachment statutes not only are too broad to accomplish their legitimate purpose, but they also have a highly prejudicial effect. If the witness is the defendant in a criminal action, the jury will tend to infer that he is guilty of the crime charged because of his prior record.122 If the defendant does not have a criminal record, but his chief witness does, then the defendant may be condemned through guilt by association.123 The prejudicial effect also extends to civil cases. If an innocent party has only one witness and this person has a criminal record, the jury is likely to disregard the witness' testimony, even though he was convicted of a crime having no relation to his honesty and integrity. The fact that the courts instruct juries that prior convictions are introduced for limited purposes does not eliminate the resulting prejudice.124 As Mr. Justice Jackson observed: "The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction."125

The practice of admitting prior convictions to impeach the credibility of witnesses always will have a prejudicial impact, but unnecessary prejudice can be minimized if evidence of prior convictions is limited to crimes relating to veracity.

In addition to the adverse affect that the broad impeachment statutes have on the administration of justice, the statutes also are detrimental to the convicted citizen whose credibility is attacked. If a criminal offender has paid his debt to society and has been rehabilitated,
it seems unfair to introduce his prior conviction to imply that he is a liar. Ex-convicts should be encouraged to assume the role of responsible citizens. The impeachment rules, however, are based on the theory that a person with a criminal record cannot be trusted, even after his rehabilitation. This inconsistency undoubtedly makes it more difficult for the convicted citizen to be accepted among his peers as a responsible member of the community.

(d) Capacity to serve as a juror.—Laws disqualifying convicted citizens from jury service apparently are based on the theory that a citizen with a criminal record may discharge his duties as a juror in a dishonest and disinterested way. Some persons believe, for example, that a criminal offender may be more susceptible than the average citizen to threats or bribes. The United States Supreme Court has upheld the validity of statutes confining the selection of jurors to citizens of good moral character and approved integrity. It does not follow, however, that disqualification of persons with criminal records is necessary to achieve this result. Not all persons with criminal backgrounds are dishonest or lacking in moral character. Theoretically, a citizen convicted and sentenced for a crime has been rehabilitated by the time he is released into the community. Moreover, a criminal conviction does not and should not indicate that the offender has a weakness of moral character incapable of correction.

The Supreme Court also has held that jury competence should be an individual rather than a group or class matter. Most, if not all, state statutes violate this principle by automatically excluding a convicted citizen without reference to his character or integrity. Since many states already have statutes providing that only persons of good character can serve as jurors, the provisions disqualifying convicted citizens are altogether unnecessary. Statutes that make character a factor in jury selection may be valid, but states should adopt specific guidelines so that jury commissions will not assume that a criminal conviction is conclusive evidence of bad character.

The statutes automatically disqualifying convicted persons from jury service are also detrimental to the convicted citizen who is excluded

from jury service. It is unfair to prevent rehabilitated citizens from participating in the administration of justice. Moreover, it is conceivable that allowing persons with criminal records to serve as jurors would have beneficial effects. Many convicted persons, for example, think that they were not treated fairly by the courts. An effective way to help restore their confidence in the judicial system would be to permit them to serve as jurors after their rehabilitation.

5. Loss of Property Rights and Other Vested Interests.—Although forfeiture of property has been abolished in the United States, vestiges of this ancient criminal sanction linger in the laws of three states.131 While these obscure statutes apparently are no longer enforced, the fact that convicted criminals in those states remain subject to the forfeiture provisions indicates that the statutes should be repealed.

Although the convicted criminal does not forfeit his property, he may, nevertheless, experience considerable difficulty managing it during the period of imprisonment. Only a few states make provisions for the imprisoned convict to manage and maintain his property.132 Even in states that authorize appointment of a guardian or representative for convexts, the purpose of the appointment may be for the protection of third parties rather than the prisoner.133 Clearly, a desirable solution to this problem would be the appointment of a trustee to manage the property. This approach is recommended by the Uniform Probate Code.134

Although forfeiture of real or personal property is unlikely, the convicted criminal may be deprived of certain vested property interests. The most serious loss that may result from conviction and imprisonment is the forfeiture of pension benefits. Under both federal and state statutes, accrued retirement and disability pensions may be withheld from retirants who are convicted of certain crimes. Many of the disqualifying provisions appear wholly unjustified. As already observed, legislation regarding pensions varies considerably among the states and

132. See notes 263-68 on page 1102 supra and accompanying text.
133. See notes 279-86 on pages 1104-05 supra and accompanying text.
134. The Uniform Probate Code provides an integrated statutory approach to assisting those persons who are unable to manage their own property, including those under "confinement." The powers of the appointing court are quite flexible, permitting protective arrangements most suitable to the needs and desires of the convicted prisoner. Uniform Probate Code §§ 5-401, -407, -408, -524 to -531. The powers and duties of the court and the appointed representative also are clearly delineated, a notable improvement over most current statutes in which these duties are impossible to ascertain. Fratcher, Powers and Duties of Guardians of Property, 45 Iowa L. Rev. 264, 291-92 (1960).
even among separate occupations within a state. Rarely do disqualifications based on criminal conviction apply uniformly to all occupational groups. In a number of states, for example, policemen are regularly disqualified, but pensions of judges, teachers, and firemen may not be subject to forfeiture. It is difficult to rationalize these inconsistencies. If conviction of a crime justifies the forfeiture of pension rights it would seem that disqualifications should apply to all employees. The broad discretion vested in pension boards contributes further to the disparity of treatment received by employees and pensioners who have been convicted. The function of these administrative bodies should be restricted to the management of pension funds. In the absence of special circumstances, the decision to punish employees and pensioners convicted of crime seems to be an appropriate subject for criminal courts.

It is not suggested that criminal conviction should never disqualify an employee from receiving a pension but only that the disability should be limited to crimes committed before the employee has become eligible for his benefits. Moreover, only crimes that bear a direct relationship to the individual's employment should work a forfeiture. Whether payments to pensioners are viewed as a gratuity or performance of a contractual duty, they are in consideration of past services. Under no circumstances should a retired or disabled pensioner's vested rights be proscribed because of his subsequent conduct. To be considered also is the potentially detrimental effect of this deprivation on a retired pensioner. The convicted pensioner may in some cases be released from prison as an aged indigent with no source of income and no possibility of employment. Clearly, the forfeiture of a pension could have devastating impact on the offender's chances of rehabilitation.

II. CONSTITUTIONALITY OF CIVIL DISABILITIES

The collateral consequences of a criminal conviction generally have not been affected by the extension of constitutional guarantees to other stages in the criminal process. The low visibility level of these restraints may account for their virtually unchallenged tenure. Moreover, the few


direct constitutional challenges to civil disability laws have been rejected by the courts on the basis of archaic case law and unsupported reasoning.\textsuperscript{138}

A recent federal case illustrates the difficulties involved in challenging disability laws. In \textit{Morrison v. California},\textsuperscript{139} a paroled felon sought a permanent injunction prohibiting the state from enforcing constitutional and statutory provisions depriving criminal offenders of various civil rights. The plaintiff asserted that the California Penal Code sections violate due process, inflict punishment by legal fiat, are retroactive laws, abridge the privileges and immunities of United States citizenship, are Bills of Attainder and are ex post facto laws, and that the said California constitutional provisions are likewise unconstitutional and violate Article I, Section 10, Clause 1, of the 13th Amendment and the 14th Amendment of the United States Constitution.\textsuperscript{140}

Additionally, the plaintiff sought a declaratory judgment for breach of contract, alleging that the state breached the implied "social compact" by which government secures and protects individuals in the enjoyment of vested rights of citizenship.\textsuperscript{141} The court held that the complaint was without merit, citing four Supreme Court cases as controlling the constitutional issues.

The court’s treatment of the constitutional challenges typifies the existing judicial reluctance to re-examine the dubious precedents used to uphold civil disability statutes. Furthermore, the breach of contract allegation demonstrates the disillusionment and frustration fostered by these laws. This section will evaluate various constitutional avenues that may be used to challenge civil disability laws.

\textbf{A. Related Judicial Developments}

Although the Supreme Court has recognized the adverse consequences of criminal convictions,\textsuperscript{142} it refused to overturn a civil

\textsuperscript{138} A recent order, sustaining an agency ruling denying an applicant with a criminal record employment as a tree trimmer, typifies the conclusions given by some courts when confronted with claims by former criminals: "The Court . . . determines that the denial of employment to an applicant because of his criminal record is not an invasion of the applicant's Federal Constitutional rights." Antencio v. Rossmiller, Civil No. C-1493 (D. Colo., order rendered Jan. 13, 1970).

\textsuperscript{139} 238 F. Supp. 22 (S.D. Cal. 1964).

\textsuperscript{140} \textit{Id.} at 23.

\textsuperscript{141} But see Green v. Board of Elections, 380 F.2d 445, 451 (2d Cir. 1967). In \textit{Green} the court reasoned that "[a] man who breaks the laws he has authorized his agent [the legislature] to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the [social] compact."

disability law as recently as 1960.\textsuperscript{143} Political and judicial developments since then, however, indicate that civil disability laws may come under close scrutiny by the courts in the future. The increasing number of criminal convictions among the nation's youth, for example, has produced a class of offenders highly cognizant of their political, economic, and social rights.\textsuperscript{144} These offenders can be expected to initiate numerous challenges to the disabilities that will adversely affect their lives.\textsuperscript{145} Moreover, active judicial protection of fundamental rights under the due process and equal protection clauses casts doubt on the validity of the constitutional methodology used by the courts in past attempts to invalidate civil disability statutes.\textsuperscript{146} In addition, judicial intervention in the correctional process and expansion of post-conviction relief have illuminated the severity of the deprivations imposed upon prisoners.

1. Judicial Intervention in the Correctional Process.—One development that foreshadows a more active judicial involvement in civil disability laws is the growing body of literature and case law dealing with prisoners' rights.\textsuperscript{147} Judicial incursions on the formerly unchecked discretionary authority of correctional administrators have forged a new balance between the interests of the prisoner and the prison.\textsuperscript{148} The courts, previously disposed to noninterference in prison affairs, have now recognized that prisoners retain fundamental constitutional


143. De Veau v. Braisted, 363 U.S. 144 (1960). Since De Veau, the Court has not reviewed a civil disability resulting from a criminal conviction.

144. Violations of the selective service and marijuana laws are the most common offenses. See J. Kaplan, Marijuana—The New Prohibition 29 (1970) (approximately one-fourth of all felony complaints in California during 1968 were for violation of the marijuana laws); Note, Prosecutions for Selective Service Offenses: A Field Study, 22 Stan. L. Rev. 356 (1970).


This trend could signify an increased judicial scrutiny of the effects that civil disabilities have on the rights of offenders during and after incarceration.

The decision in *Mempa v. Rhay*, extending the right to counsel to probation revocation hearings, may also have a significant impact on disability laws. This case has been liberally interpreted as the springboard for increased judicial activity in the discretionary peno-correctional stage of the criminal process. According to this theory, the convict's disadvantaged position may impel the court to view itself as the only institution capable of representing an unpopular cause on behalf of an unpopular group. One result of this increased court activity may be the requirement of fair hearings before the various agencies that regulate the offender's activities. Inevitably, as the sentence-to-final-discharge area of the penal law is more clearly defined, the courts will begin to review those disability laws tainted with irrationality and unstructured discretion.

Finally, recent constitutional developments in juvenile corrections imply that the lack of procedural safeguards in the imposition of disability laws may not comply with due process requirements. In extending due process standards to juvenile hearings, *In re Gault* implicitly recognized the need for fairness in all proceedings that deny basic constitutional rights. Furthermore, *Gault* emphasized the rehabilitative harm in not according due process to offenders: "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."

Consistent with these principles, civil disabilities laws are vulnerable to potential challenge to determine whether additional due process protections are necessary to comport with the requirement of procedural fairness.

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149. See, e.g., Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (a right not specifically lost by operation of law is retained); cf. Johnson v. Avery, 393 U.S. 483 (1969).


152. Id. at 5. Paralleling an increased concern for the rights of prisoners is an effort to define the rights of the mentally ill, a group that has been as nonvisible as the prisoner population. Civil liberties organizations are advocating the abolition of certain disabilities which the mentally ill share with the prisoner, including disenfranchisement and certain occupational disabilities. N.Y. Times, Jan. 12, 1970, at 24, col. 4 (city ed.). See generally Morris, "Criminality" and the Right to Treatment, 36 U. Chi. L. Rev. 784 (1969).


154. Id. at 26.
2. Expansion of Post-Conviction Relief—Several recent developments have emphasized an increased judicial awareness of the post-release consequences of existing civil disabilities and a determination to alleviate some of these restrictions. In *Carafas v. LaVallee*, for example, the Supreme Court rejected New York's claim that a petition for habeas corpus was moot, recognizing that the petitioner, although released from physical custody while his petition was pending, was still subject to an impaired status resulting from civil and occupational disabilities. This decision indicates that the Court has fully recognized the excessive burdens that civil disabilities impose on the liberty of the ex-convict, but leaves open the question whether an unconstitutionally released prisoner may collaterally challenge his conviction by habeas corpus. If read narrowly, *Carafas* may be viewed as a decision reached only by a strained interpretation of the language of the federal habeas corpus statute. As a result, the Court "was consciously eschewing its opportunity to extend the custody concept to include petitioner's disabilities." This narrow interpretation may result in an untenable distinction: habeas corpus relief is not available to those who apply for the writ after their release, even though they may be subject to the same disabilities that were sufficient to warrant a remedy where application was made prior to release. The Court's explicit recognition of the restraints imposed by civil disabilities, however, supports a

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157. Expansive definitions of the custody language of the federal habeas corpus statute have been developed by the courts. See *Fay v. Noia*, 372 U.S. 391 (1963) (restraint upon personal liberty fulfills "custody"); *Jonas v. Cunningham*, 371 U.S. 236 (1963) (parole restrictions fulfill "custody"); *Benson v. California*, 328 F.2d 159 (9th Cir. 1964), cert. denied, 380 U.S. 951 (1965) (probation restrictions fulfill "custody"). Even before *Carafas*, one commentator, basing his argument on these definitions and the dissent in *Parker v. Ellis*, 362 U.S. 574 (1960), concluded: "If the imposition of civil disabilities will support retention of a case after release, it is difficult to see why the same sort of restraint on personal liberty should not support initiation of the action in the first place. . . . It does not appear why the difference between parole or probation on the one hand and civil disabilities on the other . . . is sufficient to justify a refusal to grant relief in the latter instance." Note, *Habeas Corpus, Custody and Declaratory Judgment*, 53 VA. L. REV. 673, 680 & n.37 (1967); see Note, *Postrelease Remedies for Wrongful Conviction*, 74 HARV. L. REV. 1615, 1616 n.9 (1961).
broader view. Accordingly, a federal district court recently extended the writ to an unconditionally released offender by equating civil disabilities with the burdens on liberty required by the habeas corpus custody requirement.

In addition to the developments precipitated by Carafas, several state statutes have abolished the custody requirement for a post-conviction challenge to a completed sentence. Moreover, at least one state court, recognizing the stigmas and disabilities attending a criminal conviction, has broadened the scope of review for post-conviction applicants in a manner similar to that in Carafas. The custody requirement also is not a prerequisite for the common law remedy of coram nobis, a limited federal procedure that has been used successfully to attack a satisfied conviction that might result in the future loss of civil rights. In United States v. Cariola, for example, a voting disability resulting from a 24-year-old conviction fulfilled the jurisdictional requirement in a coram nobis proceeding to vacate the conviction. Other avenues for avoiding the custody requirement include a declaratory judgment and relief under the Civil Rights Act.

158. The unequivocal language of Carafas states: "Because of these 'disabilities or burdens [that] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him' . . . On account of these 'collateral consequences,' the case is not moot." 391 U.S. at 237-38. Opponents of this position argue that it will foster innumerable habeas corpus petitions that will overburden the courts. This argument, however, has been rejected in similar contexts. See Fay v. Noia, 372 U.S. 391 (1963). Contracting the number of disabilities by re-examining the relationship between the specific disability and the crime would measurably reduce the number of petitions. See Smith, Federal Habeas Corpus: State Prisoners and the Concept of Custody, 4 U. Richmond L. Rev. 1, 39 n.188 (1969).


160. See Ore. Rev. Stat. § 138.510 (1969); Advisory Committee on Sentencing and Review, A BA Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies §§ 2.3-.4 (Tent. Draft 1967) (recommends elimination of custody as a jurisdictional prerequisite to post-conviction relief when the petitioner is burdened by a civil disability that prevents him from engaging in a desired and otherwise feasible action or activity).


163. 323 F.2d 180 (3d Cir. 1963).

164. See Note, supra note 162 at 687-98.

B. Civil Disability Laws as Bills of Attainder

Civil disability laws have frequently been challenged as violating the bill of attainder clause of the federal constitution. The argument used is that legislatures, by precluding convicted citizens from exercising certain rights or participating in certain functions, have punished them without judicial trial. "In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether three definitional elements—specificity in identification, punishment, and lack of a judicial trial—are contained in the statute."146

1. Specificity in Identification.—A legislative act, in order to constitute a bill of attainder, must first involve named individuals or members of a readily ascertainable group. In Hawker v. New York, the Supreme Court confirmed that criminal offenders compose an easily ascertainable group, but held that a statute barring all felons from medical practice was not a bill of attainder since the disqualification was based on “the well recognized fact of human experience” that criminal offenders can be conclusively presumed to lack good moral character. The legislation challenged in Hawker was both overinclusive and underinclusive:

Felons were not the only persons who might possess character defects making them unsuitable practitioners of medicine; and, as the Court expressly noted, not all felons would lack good moral character. Nevertheless, the legislature was permitted to disqualify all members of the class, rather than being required to delegate to the courts the responsibility of determining the character of each individual based on all relevant factors, including prior conviction.167


170. 170 U.S. 189 (1898).
Despite this imprecise definition, the Hawker holding controls and satisfies the definitional element of specificity in identification.

2. Punishment or Regulation.—To satisfy the second definitional prerequisite for a bill of attainder, the court must determine whether the statute is penal or regulatory.¹⁷² Two variant tests have been applied to determine penal or regulatory character, and the “problem has been extremely difficult and elusive of solution.”¹⁷³

An application of the first test can be found in Trop v. Dulles,¹⁷⁴ in which the Court based its determination upon the evident purpose of the legislature, recognizing “that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect.”¹⁷⁵ As an illustration, the Court discussed the case of the ordinary felon who loses both his right to liberty and his right to vote. It concluded that the former sanction is penal, imposed for the purpose of punishing bank robbers, whereas the voting disability purports merely to designate a reasonable ground of eligibility for voting, a nonpenal exercise of the state’s power to regulate the franchise.

In applying the Trop test, the first step should be to determine the evident purpose of the legislative body in enacting the disability statutes.¹⁷⁶ This analysis should be made despite statements by the majority of courts that disabilities prescribe tenable regulatory grounds for depriving former criminals of certain rights and privileges. Although there are nonpenal reasons for disabilities, their original legislative purpose may have been to impose additional punishment. Legislative

¹⁷². This requirement, as enunciated in United States v. O'Brien, 391 U.S. 367, 383 n.30 (1968), applies in cases where statutes are challenged as bills of attainder (e.g., United States v. Lovett, 328 U.S. 303 (1946)) and where punishments are challenged as unconstitutionally cruel and unusual (e.g., Trop v. Dulles, 356 U.S. 86 (1958)). The requirement of inquiry into legislative purpose to determine if the necessary element of punishment exists in these 2 classes of cases has been criticized since the cases “appear to require no such inquiry at all” because of the Court’s past preference for deciding whether a sanction is punitive by considering the operation of the sanction rather than the intention of the imposing body. Note, Legislative Purpose and Federal Constitutional Adjudication, 83 Harv. L. Rev. 1887, 1889 (1970). The present discussion is directly applicable to determine whether civil disability statutes are punitive in nature for purposes of the eighth amendment. See notes 191-205 infra and accompanying text.


¹⁷⁵. Id. at 96. If the effect of a disability is to punish, it may be inferred that the statute was passed with a hidden intent. See Note, Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez, and Speiser Cases, 34 Ind. L.J. 231 (1959).

¹⁷⁶. “To determine purpose, the court may consider both the language of the statute and general public knowledge about the evil which the legislature sought to remedy; prior law; accompanying legislation; enacted statements of purpose; formal public pronouncements; and internal legislative history.” Note, supra note 172, at 1887 n.1.
history, however, is not available in most states. Consequently, other historical documentation must be relied upon to rebut Trop's classification of disability laws as a nonpenal exercise of state power. The history of disability statutes demonstrates that these laws were imposed in England as punitive measures and were perpetuated by American legislatures without consideration of their rationale or effect. The prevailing European view that disabilities form an additional punishment is also convincing evidence of their punitive purpose. The large majority of disability statutes, therefore, should be classified as penal under the evident purpose test notwithstanding the conclusions in Trop.

The second traditional test, enunciated in Kennedy v. Mendoza-Martinez, concentrates on the operation or effect of the sanction rather than the intention of the imposing body. The Court listed seven factors relevant to the inquiry of punitiveness, noting that they often point in different directions. An analysis of disability statutes using these seven factors likewise points to the penal nature of these laws. The statutes squarely meet four of the seven criteria: (1) they involve an affirmative disability or restraint; (2) they have historically been regarded as punishment; (3) they promote the retributive aim of punishment and implicitly purport to further the goal of deterrence; and (4) they appear excessive in relation to the alternative purposes assigned for their imposition. Disability statutes, however, do not fall within the remaining three criteria: (1) they do not come into play only upon a finding of scienter; (2) they do not attempt to regulate criminal conduct; and (3) they may rationally be attributed to an alternative nonpenal purpose. Absent conclusive evidence of contrary legislative intent, the application of the Kennedy criteria, on balance, should demonstrate that most disability statutes have the requisite element of punishment necessary to be classified as bills of attainder.

Other cases also support the conclusion that civil disability statutes may be considered punishment for purposes of the bill of attainder clause. In Cummings v. Missouri, a test oath requiring applicants for

177. See notes 1-69 on pages 941-50 supra and accompanying text.
182. 71 U.S. (4 Wall.) 277 (1866); accord, Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866) (oath required as condition of practicing law).
various professions to disavow Confederate participation was invalidated as a bill of attainder since the disclaimers in the oath were not relevant to the activities in question. The Supreme Court, stressing that the occupational disabilities were punitively imposed by legislative act without judicial trial, offered a categorical and egalitarian explanation of the importance of occupational rights:

The theory upon which institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can in no otherwise be defined.183

The Court in United States v. Brown184 expansively interpreted the concept of punishment by equating it with the mere deprivation of a right or privilege. The Court rejected the argument that only a retributive legislative measure can be characterized as punishment:

It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less the punishment.

. . . Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution.185

By implicitly holding that legislative purpose may be omitted in an analysis of a statute’s punitive nature, Brown supports the proposition that civil disability laws impose additional punishment under the Kennedy operation or effect test. Thus, the requirement that a law be punitive in nature to constitute a bill of attainder seems to be satisfied.

3. Lack of a Judicial Trial.—The lack of a judicial trial in the imposition of punishment is the final definitional component necessary

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184. 381 U.S. 437 (1965). The Court ruled that § 504 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 504 (1964), was an unconstitutional bill of attainder. The statute provides: “No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury . . . or conspiracy to commit any such crimes shall serve [in certain official capacities of any labor organization] . . . ” The exclusionary provisions for felons were not in issue in Brown, but were sustained in De Veau v. Braisted, 363 U.S. 144 (1960) and Postma v. Teamster Local 249, 337 F.2d 609 (2d Cir. 1964). Both cases refused to classify the occupational disability penal in nature, a dubious conclusion in view of Brown.

185. 381 U.S. at 458.
to invalidate statutes as bills of attainder. The dissent in Brown supports the proposition that civil disability statutes impose punishment without a judicial trial. In his dissent, Justice White viewed the disqualification of Communists from positions in labor unions as indistinguishable from the civil disability statute upheld in Hawker. He maintained that there was a legislative finding in both cases that the average propensities of a given class presumptively preclude its members from engaging in particular conduct. Reasoning from this dissent, it would be possible to infer that Brown impliedly overruled Hawker and established that any statute excluding persons from certain activities on the basis of character or past conduct, without an independent judicial determination, is invalid as a bill of attainder. The Brown majority, however, did not equate the two statutes, finding instead that the legislature had specified the class that should be penalized under the statute in question without providing for a judicial determination of the individuals capable of serving in those positions. Although there was a legislative classification involved in Hawker, the element of judicial determination that was independent of legislative control prevented the statute from being classified as a bill of attainder. Thus, the Brown decision does not provide a constitutional precedent for invalidating civil disability laws on bill of attainder grounds. In Hawker, the impersonal judicial determination was outside the control of the legislature, thereby distinguishing it from Brown and Cummings.

Furthermore, the statute in Hawker relied exclusively on a judicial conviction rather than mere past conduct. It could be argued that the trial, the only conceivable judicial determination involved in the imposition of civil disabilities, adjudicates the issue of guilt or innocence for the specific crime and not the moral character or fitness underlying the exercise of rights and privileges lost by civil disabilities. This approach, however, does not comport with the classical definition of a bill of attainder, which does not forbid a legislative classification so long as there is some independent

186. Id. at 469.
188. In Hawker, the Court also viewed the statute as prescribing a reasonable qualification under the due process clause, removing it from the bill of attainder proscription. See Linehan v. Waterfront Comm'n, 347 U.S. 439 (1954); Dent v. West Virginia, 129 U.S. 114 (1889).
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determination of the individuals affected by the statute in question. Thus, until this third definitional element is further explicated, prior interpretation appears to prevent classifying civil disability statutes as bills of attainder.190

C. Civil Disabilities as Cruel and Unusual Punishment

The inflexible and mandatory burdens imposed by civil disabilities may be recognized as punishment that contravenes the eighth amendment.191 This conclusion is supported by the implicit degradative effect of disability laws despite nonpenal justifications for their existence.192 The contention that civil disabilities constitute cruel and unusual punishment, however, has been dismissed in recent decisions.193 Nevertheless, it can be plausibly argued that since disability laws impose degrading and excessive punishment and perpetually restrict individuals because of former criminal status, they conflict with the basic concept underlying the eighth amendment. This concept embodies "nothing less than the dignity of man . . . . Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."194

1. Degrading and Excessive Punishment.—As early as 1888, the Michigan Supreme Court held that occupational disabilities imposed on a druggist, convicted of failing to keep records of liquor sales, violated

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193. Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967). But cf. Otsuka v. Hite, 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966). Green reasoned that disfranchisement was no punishment, and if it were punishment, the framers of the eight amendment would not have regarded it as cruel and unusual. Moreover, the court relied heavily on the large number of states with disfranchisement provisions.

the constitutional prohibition against cruel and unusual punishment.\textsuperscript{195} In reaching its decision, the court found that the defendant's preclusion from selling liquor for five years was a penalty involving practical ruin to him. The excessiveness of the disabilities prompted the following statement, reflecting the historical perspective overlooked by modern disability cases:

These punishments have always been regarded as incompatible with our constitutions, and there can be no doubt that the cruel and unusual punishments forbidden by the United States Constitution had special reference to the old law of felony . . . . It is safe to say that throughout the United States . . . any punishment is unusual which forfeits civil rights . . . . Disabilities to transact business are almost or quite unheard of in this country.\textsuperscript{196}

The Michigan court's opinion found support from the United States Supreme Court in a 1910 decision noted for its progressive construction of the cruel and unusual punishment clause. In \textit{Weems v. United States},\textsuperscript{197} a disbursing officer in the Philippines, convicted of falsifying a government payroll, was fined and sentenced to fifteen years imprisonment at hard labor and was subjected to specific political and civil disabilities. The punishment was held to be cruel and unusual since it was not graduated and proportioned to the offense. The Court's landmark interpretation was strongly influenced by the imposition of accessory civil and political disabilities.\textsuperscript{198} The holding stressed that the offender, when released, would be subjected to degrading perpetual limitations on his liberty flowing directly from the sentence.\textsuperscript{199}

The \textit{Weems} doctrine is particularly relevant in light of the broad interpretation given the term "felony" in applying civil disability laws. The practice of arbitrarily attaching the disabilities to felons and not to misdemeanants emphasizes the labels given to the particular offense rather than the substantive relationship between the offense and the

\textsuperscript{195} People ex rel. Robinson v. Haug, 68 Mich. 549, 37 N.W. 21 (1888). See also Hoboken v. Baur, 137 N.J.L. 329, 59 A.2d 809 (1948) (ordinance providing for licensing of vendors of vending appliances and subjecting violators to fines and jail sentences is unconstitutional as cruel and unusual punishment for failure to establish standards for all applicants).


\textsuperscript{198} Weems v. United States, 217 U.S. 349, 412 (1910) (White, J., dissenting); see Schofield, \textit{supra} note 178, at 326.

\textsuperscript{199} Weems v. United States, 217 U.S. 349, 366 (1910). The disabilities included deprivation of the rights of parental authority, marital authority, and the administration of property, registration and work requirements, and absolute disqualification from public office, voting, and retirement pay. \textit{Id.} at 364.
interest protected by the disability. As a result, persons convicted of relatively minor felonies are subjected to disability laws while serious misdemeanants escape all disabilities. This imposition may violate the eighth amendment as interpreted in Weems, since the disabilities imposed are not proportioned to the crime. Weems implicitly recognized that unrelated disabilities imposed for relatively less severe crimes are punitive and serve no nonpenal legislative interest.

Further support for this position is found in Trop v. Dulles, in which the Supreme Court held that deprivation of United States citizenship for military desertion in time of war constitutes cruel and unusual punishment. Trop's description of the punishment entailed by denationalization is analogous to the effect that civil and political disabilities have on offenders:

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It [denationalization] is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.

The striking similarity between the effects of denationalization and civil disabilities indicates that these disabilities should be within the eighth amendment prohibition enunciated in Trop. Certainly it can be argued that civil disabilities destroy an individual's political existence. The Supreme Court, for example, has characterized the right to vote as being preservative of all rights, implying that its deprivation would abolish the political rights to which all citizens are entitled. By equating the deprivation of civil rights with denationalization, the Trop reasoning may be applicable to the disabilities that accompany all criminal convictions.

2. Punishment for Status.—Statutory penalties that punish an individual because of his particular status also may violate the eighth

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200. In Otsuka v. Hite, 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966), the California Supreme Court found a voting disability not to be violative of the eighth amendment. The court reached this decision only by limiting the definition of "infamous crimes," the criterion for imposing the disability, to persons who had been convicted of crimes that evidenced a threat to the electoral process. The opinion noted that the term "felony" was overinclusive and thus deprived offenders who did not endanger the public interest of the fundamental right to vote. In declaring a state statute requiring vasectomies for twice convicted felons violative of the eighth amendment, the court in Davis v. Berry, 216 F. 413, 417 (S.D. Iowa 1914), also emphasized the anomaly in using the blanket term "felony".

202. Id. at 101.
amendment. This issue was faced by the Supreme Court in *Robinson v. California*, when a California statute imposing a criminal penalty for narcotics addiction was constitutionally challenged. Reasoning that addiction is a disease like mental illness, the Court held that a law making the "status" of a narcotic addict a criminal offense violates the eighth amendment. While the status of an addict, like that of an ex-felon, entails no overt antisocial or irregular behavior, it clearly allows a person to be contiously guilty of the prescribed offense. Civil disabilities punish the offender because of his status as a former criminal, even though he may not have exhibited criminal behavior for many years. These disabilities, when imposed on the rehabilitated offender, seem to fulfill the conditions that resulted in the invalidation of the statute in *Robinson*.

D. Civil Disabilities and Due Process

The due process clause provides a flexible method to suppress unreasonable or arbitrary state action. Even if the state action is taken to protect a legitimate public interest, a due process objection will be sustained if the law is unreasonable and will have an adverse effect on basic liberties. Accordingly, the methods by which civil disabilities are imposed may be susceptible to several due process objections. First, at the trial level, the relationship between the nature and circumstances of the crime and the various rights that are automatically forfeited upon conviction is never considered. The conviction raises a conclusive presumption of permanent unfitness to exercise certain rights and privileges without a substantive evaluation of the connection between the disabilities and the crime. Secondly, various regulatory bodies are guided either by mandatory disability provisions or admission standards that lack the objective criteria necessary to establish the offender's capacity to perform the regulated functions. The best example

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204. 370 U.S. 660 (1962).


206. In 1928, Professor Ernst Freund, commenting on license revocation, expressed a view that appears to command a consensus among commentators: "It is a very questionable policy to make revocation either mandatory upon conviction or an automatic consequence of conviction. The commission of a crime, even if it is a felony, is no evidence of lack of qualification; and it may not even be evidence of lack of character . . .. If conviction perpetually disqualifies, the handicap under which a discharged offender inevitably suffers will be greatly increased." E. Freund, *Administrative Powers Over Persons and Property* 125 n.25 (1928); see W. Gellhorn, *Individual Freedom and Governmental Restraints* 128 (1956); Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533 (1962).
of the vague standards is the generic "good moral character" test used as a formula for admission to many occupations, for selections of jurors, and for qualifying for other positions of public and private trust. Even more objectionable are blanket exclusions that fail to provide for even the most rudimentary procedural safeguards.207

Since occupational and professional rights have the most practical value to individuals, the case law applying due process to civil disabilities has concentrated on occupational disqualifications. The right to earn a living and to pursue freely all occupations is recognized as a fundamental interest that society seeks to protect.208 The loss or refusal of an occupational license constitutes a penalty that impairs personal rights of liberty and property.209 These rights are defeasible, however, if they are not arbitrarily or unreasonably revoked or denied.210 Although the focus of this section will be on occupational disabilities, the methodology applies to the imposition of any disability that lacks a direct relationship to the nature of the crime.

1. Conclusive Presumption of Unfitness.—Most civil disabilities have the effect of creating a conclusive presumption that the offender is unfit to perform various functions.211 This presumption generally has not been questioned by the courts. The United States Supreme Court in **Hawker v. New York**,212 for example, sustained a statute excluding offenders from the medical profession, reasoning that it is common

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207. See Otsuka v. Hite, 64 Cal. 2d 596, 606, 414 P.2d 412, 422, 51 Cal. Rptr. 284, 294 (1966) (voting). No attempt is made in this section to distinguish between initial denial and revocation, although the latter may require more stringent due process standards because the particular right already has been vested. See Note, Due Process and the "Right" to a Job, 46 Va. L. Rev. 323 (1960).


211. The presumption is best stated in Washington v. State, 75 Ala. 582 (1884): "The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship." Id. at 585.

212. 170 U.S. 189, 196 (1889).
knowledge that ex-convicts lack the character required to practice medicine.\textsuperscript{213} In \textit{Heiner v. Donnan},\textsuperscript{214} however, the Supreme Court held that failure to give a party an opportunity to prove the irrationality of a statutory presumption violates the due process clause, since changing circumstances may invalidate assumptions that were once reasonable. Since civil disability statutes frequently cannot be justified in the context of modern correctional theory, the same due process requirements found in \textit{Heiner} should apply to any proceeding involving the imposition of disability statutes.

In rebutting the factual foundation for these presumptions, the offender should be permitted to cast the burden of proving their validity on the body imposing the disability. In \textit{Leary v. United States},\textsuperscript{215} the Supreme Court required the prosecution to prove the rationality of a presumption that mere possession of marijuana is proof of illegal importation.\textsuperscript{216} In its decision the Court emphasized the need for empirical evidence to prove the validity of the presumption.

2. \textit{Direct and Rational Connection}.—Serious constitutional objections to both automatic and discretionary imposition of civil disabilities have been raised in recent cases restricting state power to use a criminal arrest or conviction as a disqualifying standard. In \textit{Schware v. Board of Bar Examiners},\textsuperscript{217} for example, the Supreme Court narrowly defined the scope of a state's authority to exclude from certain professions persons with arrest records. The Court held that occupational disqualifications must bear a rational connection to the applicant's fitness to perform the particular function involved.\textsuperscript{218} The

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\textsuperscript{213} The Hawker court also based its justification for the absolute test on a rule of evidence that has doubtful validity: "At common law one convicted of crime was incompetent as a witness, and this rule was in no manner affected by the lapse of time since the commission of the offense and could not be set aside by proof of a complete reformation." 170 U.S. at 197. Some recent courts have held that remote convictions may be excluded by the trial judge in determining competency to testify, thus eliminating the harshness of the common law rule. See, e.g., \textit{Brown v. United States}, 370 F.2d 242 (D.C. Cir. 1966); \textit{Glubauer v. Smith}, 10 Ariz. App. 328, 458 P.2d 532 (1969); \textit{Dillard v. State}, 153 Tex. Crim. 134, 218 S.W.2d 476 (1949). \textit{Contra}, \textit{People v. Smith}, 90 Ill. App. 2d 310, 234 N.E.2d 31 (1967); \textit{State v. Hawthorne}, 49 N.J. 130, 228 A.2d 682 (1967). \textit{See also MASS. ANN. LAWS ch. 233, § 21} (1956) (specifying inadmissibility of felony conviction 10 years from the date of expiration of the minimum term of imprisonment).

\textsuperscript{214} 285 U.S. 312 (1932); \textit{cf. Manley v. Georgia}, 279 U.S. 1, 6 (1929).


\textsuperscript{216} \textit{See Tot v. United States}, 319 U.S. 463 (1943) (invalidating the statutory presumption that possession of firearms by a convicted person is conclusive evidence of interstate transportation of these firearms); \textit{cf. Turner v. Fouche}, 396 U.S. 346, 364 n.29 (1970).

\textsuperscript{217} 353 U.S. 232 (1957). The Court reversed New Mexico's denial of admission to the bar to an applicant who had been arrested 3 times, heavily weighing the mass of affirmative character evidence adduced by the applicant against the culpability of his past actions. \textit{See also Konigsberg v. State Bar}, 353 U.S. 252 (1957); \textit{Green v. Silver}, 207 F. Supp. 133 (D.D.C. 1962).

\textsuperscript{218} 353 U.S. at 238-39.
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decision implied that the automatic exclusion of a convicted citizen from a regulated employment opportunity without a consideration of the nature of his offense could violate the due process clause. This holding appears to compel inquiry by the state into the relationship between the right or privilege that the offender is seeking to exercise and the crime that he committed.

The necessity for determining whether a conviction is relevant to the offender's capacity to perform the duties of a particular occupation also was emphasized in *Hallinan v. Committee of Bar Examiners*, in which the California Supreme Court held that several convictions arising from civil rights demonstrations were not determinative of unfitness for admission to the bar. The court noted that the convictions did not constitute a threat to the interests protected by the character requirement—namely the prevention of harm to clients and to the judicial process. After a thorough analysis of the facts and circumstances attending the convictions, the court promulgated a direct and reasonable relationship test:

The nature of these acts, moreover, does not bear a direct relationship to petitioner's fitness to practice law. Virtually all of the admission and disciplinary cases in which we have upheld decisions of the State Bar to refuse to admit applicants or to disbar, suspend or otherwise censure members of the bar have involved acts which bear upon the individual's manifest dishonesty and thereby provide a reasonable basis for the conclusion that the applicant or attorney cannot be relied upon to fulfill the moral obligations incumbent upon members of the legal profession.

Thus, according to the California court, it is impermissible to presume that a past conviction is sufficient proof that an individual is predisposed to further criminality. In a different context, the United States Supreme Court also has rejected the presumption of present criminality based on past criminal acts.

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219. Id. at 243.


222. 65 Cal. 2d at 471, 421 P.2d at 93, 55 Cal. Rptr. at 245 (emphasis added).

223. In Sherman v. United States, 356 U.S. 369 (1958), a 9 year-old narcotics sales conviction and a 5 year-old possession conviction were held insufficient to prove a present readiness to sell narcotics, particularly in light of the petitioner's evidence that he was attempting to overcome the narcotics habit at the time. See F. COHEN, THE LEGAL CHALLENGE TO CORRECTIONS 83 n.86 (1969). In addition to this criminal decision, the principles derived from subversive activity cases are analogously useful in refuting the inference of present lack of moral character based on prior behavior. The subversive activity cases are concerned only with current membership in subversive organizations and contemporaneous unlawful activities. Past activities might be relevant to establish a chain from which present bad moral character may be presumed, but past actions alone do not justify an inference of bad moral character. See De Gregory v. Attorney Gen., 383 U.S. 825.
The process used by the courts to determine if a direct and rational connection exists in a particular case focuses on the relevant circumstances surrounding the commission of the crime and the interests sought to be protected by the disability. Numerous cases arising under the Nationality Act of 1940 illustrate the intensive scrutiny courts have given to the facts of individual cases in determining if the present status and behavior of an individual comports with the interests that the disability seeks to safeguard. Under this Act, a resident alien could obtain United States citizenship only if he could demonstrate his “good moral character” in the five years preceding his application. Although the opportunity to become a citizen was considered a bare privilege, the courts used an “elastic test of good moral character,” extending due process protections to applicants by requiring a review of each case on its particular facts. This careful examination resulted in granting citizenship to aliens either convicted or technically guilty of first degree murder, voluntary manslaughter, negligent homicide, assault with intent to commit murder, attempted automobile larceny, adultery, and incest. In these cases, the courts considered affirmative evidence of good character, mitigating circumstances surrounding the commission of the crime, and evidence of the criminal’s reformation. Realizing that one of the primary functions of governmental agencies was to assist the rehabilitation of convicted persons, the courts consistently recognized the potential for responsibility that each applicant had demonstrated, regardless of the seriousness of his crime. In conjunction with Schware and Hallinan,


228. Repouille v. United States, 165 F.2d 152 (2d Cir. 1947); In re Bespatow, 100 F. Supp. 44 (W.D. Pa. 1951).


232. Petition of Rudder, 159 F.2d 695 (2d Cir. 1947).

233. United States v. Francoso, 164 F.2d 163 (2d Cir. 1947).


235. E.g., Daddona v. United States, 170 F.2d 964, 965-66 (2d Cir. 1948), cert. denied, 336 U.S. 961 (1949); see Petition of Sperduti, 81 F. Supp. 833, 835 (M.D. Pa. 1949) ("A person so
the nationality cases should compel the courts to give exacting review to each offender who is denied an opportunity under the "good moral character" test or under other discretionary standards.

Despite the emergence of the foregoing standards, courts have almost unanimously upheld civil disability statutes as reasonable regulations to protect the public interest. After Hawker v. New York,235 each successive case has relied on the often antiquated doctrine of the immediately preceding decision, resulting in a narrow body of case law that has never fully incorporated the more individual-oriented principles of due process.

In Hawker, the Court articulated a broad standard permitting states to prescribe qualifications for professions that affect the public interest:

[The state] 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 practice 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.236

Both the decision and the statute it interpreted can be criticized. Since the offender's post-conviction character was not considered relevant to his fitness, the statute disqualified individuals without regard for their present fitness for the practice of medicine. The broad scope of legislative discretion approved by the Court, however, may be vitiated by mitigating language in the opinion recognizing the potential arbitrariness of an inflexible exclusionary law applied to offenders who have reformed.237 Furthermore, the particular crime involved in Hawker was criminal abortion, which seems directly related to a physician's fitness to practice medicine.

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235. 170 U.S. at 191.
236. 170 U.S. 189 (1898). In Watson v. Commissioner, 223 A.2d 834 (Me. 1966), appeal dismissed, 389 U.S. 9 (1967), the court relied on Hawker to sustain a state statute that mandatorily excluded any person convicted of certain criminal offenses from receiving a license to operate a collection agency. As in Hawker, the plaintiff's embezzlement conviction can be considered as directly related to the protected function.
237. 170 U.S. at 191. An unrelated qualification imposed by a state on an applicant for admission to a profession deprives that person of his fourteenth amendment right to pursue a lawful vocation. See Dent v. West Virginia, 129 U.S. 114 (1889); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).
238. 170 U.S. at 197; see Cohen, supra note 223, at 85. Civil disability cases challenging the Federal Firearms Act, 15 U.S.C. §§ 901-09 (1964), demonstrate the judicial reluctance to overrule the result-oriented precedent of Hawker.
The *Hawker* reasoning emerged again in 1954 in another case involving the medical profession. In *Barsky v. Board of Regents*, the Supreme Court upheld the six-month suspension of a doctor's license based on his contempt conviction for failure to produce subpoenaed papers before the House Un-American Activities Committee. Although the charges did not relate to the physician's professional capacity, the Court found that the strict suspension statute was reasonable and did not violate due process. The Court made no effort to show how the suspension promoted high professional standards.

"[T]he [Barsky] Court gave great weight to the fairness and flexibility of the New York procedure for administering discipline and little weight to the substantive rationality of the statute."[241]

Unfortunately, most constitutional challenges to disability statutes have involved professionals, as in *Barsky* and *Hawker*. These cases have had a substantial impact on laws regulating nonprofessional positions less infused with public accountability. As a result, many nonprofessional occupations, often sought by ex-convicts,[242] are subject to the same strict standards applied to professions.[243] In *De Veau v. Braisted*, for example, the Supreme Court sustained a New York
statute\textsuperscript{246} that automatically excluded the offender from a job as secretary-treasurer of a waterfront labor organization on the basis of his 40-year-old grand larceny conviction. Since this position seemingly does not require the irreproachable conduct expected by the state of doctors and lawyers, the Court's holding, on the surface, may be questionable. The statute in \textit{De Veau}, however, was enacted after a comprehensive investigation confirming that corruption on the waterfront stemmed from "corrupt hiring practices and the fact that persons conducting such hiring are frequently criminals and persons notoriously lacking in moral character \ldots ."\textsuperscript{244} The \textit{De Veau} Court supported the legislative judgment behind the statute because of overwhelming evidence establishing a causative connection between ex-felons holding union office and corruption on the waterfront.\textsuperscript{247} In its decision, the Court indicated that it will sustain a disability law, mandatorily excluding all persons with a record of criminality, only when a substantial legislative finding links past criminal acts with present corruptness in a specified area.\textsuperscript{248} Thus, \textit{De Veau} should not be an obstacle to a due process challenge of a disability statute that is unsupported by specific causative evidence. Even if a comprehensive legislative finding supports a statute on its face,\textsuperscript{249} the application of the statute to an individual who poses no threat to the particular function may lack the minimum rationality required by the due process clause.\textsuperscript{250} The remoteness of the defendant's

\textsuperscript{245} The exclusionary provision was part of New York's Waterfront Commission Act, ch. 882, § 8, [1953] \textsc{N.Y. Laws, as amended. N.Y. Unconsol. Laws} § 9933 (McKinney Supp. 1969).

\textsuperscript{246} 363 U.S. at 148.

\textsuperscript{247} \textit{Id}. at 159-60; Note, \textit{supra} note 167, at 417. The Court stressed its commitment to rehabilitation: "Duly mindful as we are of the promising record of rehabilitation by ex-felons, and of the emphasis on rehabilitation by modern penological efforts, it is not for this Court to substitute its judgment for that of Congress and the Legislatures of New York and New Jersey regarding the social surgery required by a situation as gangrenous as exposure of the New York waterfront has revealed." 363 U.S. at 158.

\textsuperscript{248} \textit{But cf.} Postma v. Teamsters Local 294, 337 F.2d 699 (2d Cir. 1964) (per curiam); Watson v. Commissioner, 223 A.2d 834 (Me. 1966), \textit{appeal dismissed}, 389 U.S. 9 (1967).

\textsuperscript{249} In \textit{Thorn} v. \textit{New York Stock Exchange}, 306 F. Supp. 1002 (S.D.N.Y. 1969), \textit{aff'd sub nom.} \textit{Miller} v. \textit{New York Stock Exchange}, 425 F.2d 1074 (2d Cir.), \textit{cert. denied}, 398 U.S. 905 (1970), a New York law requiring all employees of member firms of national security exchanges to be fingerprinted as a condition of employment was upheld as a reasonable exercise of the state's power to deal with the serious problems of theft in the securities business. The lower court thoroughly documented the evils that gave rise to the statute, noting that it was reasonably calculated to meet the evils toward which it was directed without any undue burden upon individuals. This holding squares with the \textit{De Veau} requirement of legislative exigency and may also be distinguished from civil disability cases since fingerprinting is a lesser intrusion on individual liberty than outright denial of a right or privilege.

conviction in *De Veau*, for example, coupled with the absence of evidence demonstrating his repeated criminality, raises the issue of whether his exclusion resulted from an illogical and unreasonable application of a statute valid on its face.

Judicial reluctance to interfere with administrative decisions further impedes the application of due process standards to the imposition of civil disabilities. A recent case using due process reasoning clearly illustrates the strength of judicial precedent in this area and the tendency to magnify the state’s subjective determination of public interest in derogation of individual freedom. In *Muhammad Ali v. Division of State Athletic Commission*, a federal court refused to review the New York State Athletic Commission decision denying a license to a former heavyweight champion on the basis of his conviction for draft evasion, a decision that was still pending appeal. Although the case was reversed on rehearing on equal protection grounds, the court did not reconsider its due process reasoning. In its first decision the court failed to scrutinize the nature of the crime as required by *Schware*. Furthermore, reference to the historical sensitivity of the boxing profession failed to include a showing of immediate legislative exigency as was present in *De Veau*. Although an alternative ground for the holding may be attributed to the court, the broad scope of discretion accorded the Commission “sanction[s] a State’s deprivation or partial destruction of a man’s professional life on grounds having no possible relation to

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252. The Commission’s reason for refusing the license epitomizes the unconfined discretion vested in licensing bodies: “By refusing to serve his country, Muhammad Ali is guilty of an act detrimental to the best interests of boxing generally or to the public interest, convenience or necessity, and therefore not entitled to the privilege of a boxing license which is within the power of this Commission to grant.” Exhibit D, Plaintiff’s Brief on Rehearing.

253. See notes 305-07 infra and accompanying text.

254. The court relied heavily on *Hawker* and economic regulation cases that grant the states sweeping powers to control regulated employment opportunities. See *Goesaert v. Cleary*, 335 U.S. 464 (1948) (statute denying bartending licenses to all women except wives or daughters of male bar owners valid under equal protection clause); *Kotch v. Board of River Port Pilots Comm’rs*, 330 U.S. 552 (1947) (statute permitting state-licensed river pilots to be selected on the basis of lineage valid under equal protection clause).

255. Although no present corruption was documented, the particular sensitivity of the boxing profession to corrupt influences was recognized: “Even judges have some awareness of the brutal, corrupt and dirty chapters in the history of this subject.” 308 F. Supp. at 16. This peculiar feature of the boxing profession may bring the result of this case within the *De Veau* exception for purposes of the due process clause.

256. The court emphasized that the prospect of a 5 year sentence supplied a rational ground for disqualification since the plaintiff would be physically precluded from boxing. 308 F. Supp. at 17.
fitness . . . to pursue his profession." The decision amply illustrates the danger of automatically according public policy greater weight than individual rights. The concept of rational connection should require a more balanced approach when the permanent harm to the individual is considered.

3. **Overbreadth of Legislative Infringement.**—Many civil disability statutes may violate the due process clause because they contain language that is overly broad in light of the interests sought to be protected. In enacting civil disability laws, states have attempted to protect the public from corruption in certain areas. In defining the limits of a state’s police power, however, courts have explicitly recognized the prominence of private interests:

To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

In cases involving first amendment protections, the Supreme Court has required states to promulgate the narrowest workable means to accomplish legitimate legislative ends. Statutes that broadly stifle fundamental liberties are invalid when the end can be achieved by narrower means. Similarly, the Supreme Court has applied this restrictive standard to cases involving the due process clause when first amendment rights have not been involved.

In *Aptheker v. Secretary of State*, the Supreme Court applied a strict standard of review to section 6 of the Subversive Activities Control Act of 1950. The Court reasoned that section 6, which made it a crime for members of Communist organizations to apply for

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258. Reich, *supra* note 240, at 769.
262. The first amendment aspects of political disabilities subject these to substantial overbreadth objections. Voting and holding public office have been recognized as forms of political expression and association deserving stringent protection. E.g., Williams v. Rhodes, 393 U.S. 23 (1968) (public office); United States v. Texas, 252 F. Supp. 234, 249-50 (W.D. Tex.), aff’d, 384 U.S. 155 (1966) (voting).
or use a passport, was overly broad and violated due process because it indiscriminately treated all party members alike regardless of their threat to the protected interest. As a result, party members were compelled to choose between their right to unrestricted travel and their lawful association with the Communist Party. At issue in *United States v. Robel*, was a similar provision of the Subversive Activities Control Act that forced an individual to choose between his party membership and a job. Strong precedent existed for the proposition that the right to hold specific private employment free from unreasonable governmental interference was a fundamental right within the "liberty" and "property" concepts of the due process clause. The Court declined, however, to follow the *Aptheker* rationale, choosing to base its decision of unconstitutionality on the first amendment. Although this approach implies that the *Aptheker* reasoning may not apply to legislative restrictions on public or private employment, this reasoning may have been reserved by the *Robel* court for a more appropriate factual situation. The *Aptheker* approach should invalidate a statute that indiscriminately restricts fundamental rights or employment opportunities if a more narrow means of protecting the particular interest exists. Despite the administrative inconvenience, the duty of determining whether an ex-convict poses a present threat to the function regulated could be delegated to the courts. Such a method would protect the rights of individual ex-convicts while preserving the state's interest in safeguarding the particular right or privilege.

4. **Procedural Inadequacies.**—In many instances, criminal offenders are denied rights and privileges without even minimum procedural safeguards. This lack of protection should be examined in light of recent cases extending due process rights to both applicants for and members of various professions. Perhaps the most significant development has been the abrogation of the "right-privilege" distinction, which was utilized to deny procedural safeguards on the ground that mere privileges, as opposed to rights, were not constitutionally protected. One of the few aberrations in the steady

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266. See cases cited note 208 supra.
268. Should the disability be accepted as penal, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), requires full due process limitations before the sanction is imposed.
progress toward the demise of this distinction is found in Barsky v. Board of Regents,270 in which the Supreme Court, in upholding a six-month suspension from medical practice, referred to the practice of medicine as a "privilege granted by the State." Today, such a characterization would be an anachronism in light of the exacting standards of due process required of state administrative bodies. The Court recently explained the necessity of stringent procedural due process safeguards:

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'

Certainly, the loss of livelihood by the ex-convict is a sufficiently compelling private interest to require full procedural protection. This protection should include confrontation, cross-examination, and a formal hearing to rebut allegations of bad moral character.272 Before an applicant is rejected, the reviewing body should be required to demonstrate a direct, adverse connection between the applicant's past criminality and the interest the state seeks to protect.273 By scrupulous adherence to such procedures an ex-convict will be afforded an opportunity to prove his present fitness before administrative bodies.

5. Vagueness.—Another due process objection to civil disabilities may arise from the vagueness of the standards used to determine whether to impose a particular disability. Both the generic "good moral character" standard and the term "crimes involving moral turpitude" have been sufficiently interpreted to have an established meaning.274

272. See Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (lawyer);
274. The Supreme Court, however, has noted the vagueness of the term "good moral character": "[T]he term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." Konigsberg v. State Bar, 353 U.S. 252, 263 (1957) (footnotes omitted); see LSCRRC v. Wadmond, 299 F. Supp. 117, 144 (S.D.N.Y. 1969) (Motley, J., dissenting), prob.
Nevertheless, it can be argued that the severity of the disability statutes requires more exact standards to enable the offender to determine whether he is legally qualified to perform particular functions.

Penal" and regulatory statutes have been invalidated when they have been so vague and indefinite that they constituted no standard at all. In Giaccio v. Pennsylvania,275 for example, the Supreme Court invalidated a state statute allowing jurors to assess costs against acquitted defendants on the basis of "loose and unlimiting terms" such as "reprehensible," "improper," and "outrageous to morality or justice." Although these standards had been judicially interpreted, their use in this context lacked the requisite certainty demanded by the due process clause. This reasoning could be applied to those disability statutes that are characterized by similarly vague standards. The broad language of the opinion suggests this result, implying that any statute providing for the deprivation of liberty or property must contain definite standards, susceptible to objective measurement.276

6. Sciencer: The Enforcement of Civil Disability Laws.—Most criminal offenders probably are not fully aware of the specific restrictions civil disability laws place on their freedom. As a result, they may resume their normal activities and unknowingly violate specific statutory prohibitions.279 In People v. DeStefano,280 for example, the Illinois Supreme Court upheld the conviction of an ex-convict for

juris. noted, 39 U.S.L.W. 3006 (July 14, 1970). A recent decision reflecting the judicial trend toward confining the discretion of administrative agencies held that an ordinance that allows a discretionary judgment of the "good character" of the applicant as a condition precedent to granting a permit to distribute newspapers was overly vague and unconstitutional on its face. Strasser v. Doorley, 309 F. Supp. 716 (D.R.I. 1970).


276. See Jordan v. DeGeorge, 341 U.S. 223 (1951) (deportation); Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940) (commitment to mental hospital); Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962), vacated and remanded on other grounds, 374 U.S. 449 (1963) (deportation).


278. 1966 Duke L.J. 792, 795. It has been suggested that "[d]enial of admission to the bar [or any profession or occupation] entails a loss which is far greater than the sum Giaccio paid ($230.95) and carries with it at least as great a stigma as that left on Giaccio's character. It is therefore also a 'forfeiture' and must be carefully scrutinized for vagueness." Note, supra note 221, at 1360. One writer notes that the broad discretionary powers vested in jury commissioners by virtue of a "good character" standard may contravene due process by being unduly vague. Note, The Congress, the Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966, 52 Va. L. Rev. 1069, 1140-51 (1966); cf. Louisiana v. United States, 380 U.S. 145 (1965) (voting).


illegally attempting to vote, even though he had no knowledge of his voting disability. The defendant relied on \textit{Lambert v. California},\textsuperscript{281} which held that a statute requiring all convicted felons to register with the police permitted conviction of those who had no knowledge or reason to know of its provisions, thus violating fundamental principles of due process; but the \textit{DeStefano} court distinguished \textit{Lambert} by categorizing nonregistration as passive conduct and illegally attempting to vote as positive conduct.\textsuperscript{282} Such a distinction, however, ignores the scienter element basic to the \textit{Lambert} rationale. A recent decision recognized the problem in attempting to distinguish between passive (nonfeasance) and active (misfeasance) conduct when the actor has no knowledge of the controlling statute:

When there is no knowledge of the law's provisions, and no reasonable probability that knowledge might be obtained, no useful end is served by prosecuting "violators." Since they could not know better, we can hardly expect that they should have been deterred. Similarly, it is difficult to justify punishment on other traditional grounds such as retribution, rehabilitation or disablement. Without knowledge, the moral force of retribution is entirely spent; we do not rehabilitate conduct which is by hypothesis not faulty; and there is little to recommend incarcerating those who would obey the law if only they knew of its existence.\textsuperscript{282}

Until more effective methods are devised to inform offenders of the rights and privileges lost through civil disability laws, penalties for the unknowing violation of these statutes seem constitutionally suspect on due process grounds.


\textsuperscript{282} The court also relied on an 1888 Texas decision, Thompson v. State, 26 Tex. App. 94, 9 S.W. 486 (1888), proposing that knowledge of conviction was equivalent to knowledge of disfranchisement. The \textit{DeStefano} court admitted, however, that actual knowledge of the voting disability existed in \textit{Thompson}, a factor significantly absent in the Illinois decision. 64 Ill. App. 2d at 394, 212 N.E.2d at 360. The maxim "ignorance of the law is no excuse" was utilized to impute to the defendant knowledge of all the legal consequences flowing from his conviction. \textit{Id.} at 399, 212 N.E.2d at 363.

\textsuperscript{283} United States v. Mancuso, 420 F.2d 556, 559 (2d Cir. 1970). The defendant, convicted of violating the federal narcotics laws in 1950, failed to register with customs officials on leaving and entering the country as required by statute. The court overturned his conviction on the specific finding that he had no knowledge of the statute. The court expressed hope that the decision would prompt improved enforcement of the act by stimulating efforts to inform those likely to be affected by the statute. Additionally, the maxim "ignorance of the law is no excuse" was undercut, the court noting its inapplicability in cases where there is "ignorance of a \textit{malum prohibitum} and little known statutory command that can be found only by going to the statute books . . . ." 420 F.2d at 559 n.5. \textit{Lambert}, as interpreted by \textit{Mancuso}, provides cogent reasoning for overruling \textit{DeStefano} and invalidating all convictions under disability statutes that do not adequately provide notice to criminals upon their release from prison.
E. Equal Protection and Civil Disabilities

Civil disabilities restrict numerous rights and privileges by means of broad classifications that include all offenders convicted of certain crimes. These imprecise classifications generally deprive felony offenders of numerous rights but do not affect misdemeanants, whose offenses may directly relate to the interests the disability statutes are designed to protect.

I. Standards of Review.—The traditional equal protection test is concerned with the rational connection between the particular legislative classification and the interest the state seeks to protect. This test has been supplanted by a more exacting standard if the classification affects a "fundamental right." Under the more stringent standard, the state interest in perpetuating the classification must be "compelling" in order to be sustained. A three-step analysis has evolved under the strict review standard: (1) whether the interests the classifications purport to protect are legitimate state interests; (2) whether the statute is drawn narrowly enough to meet the test of necessity; and (3) whether the interest of the state is sufficiently compelling to warrant the resulting infringement of fundamental liberties.

The personal rights that have been singled out as fundamental and thereby accorded this special treatment "include voting, procreation, rights with respect to criminal procedure, and, to a lesser degree, education." The identification of fundamental interests proceeds on an

287. See, e.g., McGowan v. Maryland, 366 U.S. 420, 425 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (classification must be "without any reasonable basis" to be invalidated by the equal protection clause).
290. See Kramer v. Union Free School Dist., 395 U.S. 621 (1969). A recent case applied the strict equal protection test to a state statute providing longer incarceration for women than for men convicted of similar offenses. After the court explored the state's reasons justifying the classification, the statute was found to be invidious and violative of equal protection. United States ex rel. Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); see United States ex rel. Sumrell v. York, 288 F. Supp. 955 (D. Conn. 1968). Similar scrutiny of civil disability statutes, probing the long accepted justifications for their existence, is likewise a prerequisite for their invalidation.
291. See Developments, supra note 285, at 1127-28. The right to travel has also been termed
ad hoc basis with the severity of the detriment serving as the controlling factor.292 It is not unreasonable, therefore, to assume that the Court will recognize that the rights affected by disabilities are "fundamental" in light of the severe penalties that result from these statutes. Taken in totality, the disablement scheme deprives an ex-convict of most opportunities to participate in the political, economic, and social processes of society. These broad deprivations should be scrutinized under the strict test to determine if they meet equal protection standards.

Application of the strict standard of review should demonstrate the inequities inherent in these laws. First, as under the traditional standard, the legitimate state interests must be carefully examined. Secondly, the necessity for the laws must be measured against their overbreadth and their arbitrary definition of classes. Denying all felons the franchise, for example, clearly contravenes the test of necessity since this regulation restricts the right of those ex-convicts who pose no threat to the protected interest.

If the traditional test is utilized,293 state justifications for disability laws should not be accepted without an investigation of their factual foundations. The view that ex-convicts endanger the protected interest of the state should no longer be a viable justification without empirical support. It is believed that definitive examinations will reveal that these laws do not reasonably implement either the retributive or nonretributive purposes upon which the states have based their continuation. It is plausible to conclude, therefore, that even under the traditional test, these statutes will be found utterly lacking in reasonableness.

2. Application of the Standards.—Two recent cases challenging provisions that disfranchise criminal offenders have taken different approaches in discussing equal protection requirements. In Green v. Board of Elections,294 the Second Circuit sustained a New York statute disqualifying all felons from voting. The court relied heavily on Supreme Court dicta approving disfranchisement of convicted citizens,295 but this

footnotes:
292. Developments, supra note 285, at 1130.
authority now seems doubtful in light of more recent decisions invalidating various state voting qualifications.\textsuperscript{296} The \textit{Green} court also relied on a 1935 equal protection case\textsuperscript{297} utilizing the traditional standard of review, but failed to consider recent decisions requiring a strict standard of review in equal protection adjudications involving voting.\textsuperscript{298}

Although the \textit{Green} decision can be criticized for the foregoing reasons, there may be justification for the ultimate result. The offender in \textit{Green} had been convicted of “flouting a constitutional statute designed to prevent violent overthrow of the government.”\textsuperscript{299} It may be inferred that the court considered this serious offense to be directly related to the exercise of the franchise. The decision contained mitigating language:

There may, of course, be crimes that would not come within the definition of a particular state law on exclusion from the franchise . . . or which are of such minor significance that exclusion for their commission might raise not only a question of wisdom . . . but even a substantial constitutional question at least if we looked at § 1 of the Fourteenth Amendment alone.\textsuperscript{300}

The \textit{Green} decision was preceded by \textit{Otsuka v. Hite},\textsuperscript{301} in which the California Supreme Court interpreted Supreme Court precedent to require a narrow definition of the term “infamous crime” as a standard for disfranchisement. In \textit{Otsuka}, conscientious objectors who pled guilty to Selective Service violations during World War II were excluded from voting under a state constitutional provision that disfranchised all persons convicted of “infamous crimes.” The court, on federal constitutional grounds,\textsuperscript{302} deemed the interpretation of “infamous crimes” as felonies to be an unreasonable classification in violation of the equal protection clause. The court found that there was no “reasonable relation” between certain felonies, such as wife beating or conspiracy to operate a motor vehicle without a muffler, and the purpose of protecting the integrity of the elective process. After narrowing the meaning of the term “infamous crimes,” the court was able to find that


\textsuperscript{298} \textit{E.g.}, \textit{Kramer v. Union Free School Dist.}, 395 U.S. 23 (1969).


\textsuperscript{300} 380 F.2d at 452; \textit{see note 404 infra}.

\textsuperscript{301} 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966).

\textsuperscript{302} The propriety of such a decision has been criticized. \textit{66 Colum. L. Rev.} 1357, 1363 (1966).
the restriction was sufficiently specific to meet the test of necessity under the strict standard of review. The court determined that the term "infamous crime" could be defined consistently with fourteenth amendment standards if narrowly restricted to focus on the nature of the crime. The Otsuka opinion, by recognizing the broadness of the felony classification and utilizing the strict standard of review, comports closely with Supreme Court decisions invalidating statutes that arbitrarily deny fundamental rights.303

3. Unequal Treatment of Offenders.—Some licensing boards, exercising their broad discretionary authority, often refuse to renew or issue a license solely on the basis of an applicant's criminal conviction. Recent developments, however, indicate that the board's action may be challenged on equal protection grounds if similar licenses have been granted to other applicants who also possess criminal records. The equal protection clause guarantees impartiality in the administration of the law. The Supreme Court has found that "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it has selected a particular race or nationality for oppressive treatment."304 This reasoning was recently applied in Muhammad Ali v. Division of State Athletic Commission,305 in which a federal district court enjoined the New York State Athletic Commission from denying a former heavyweight champion renewal of a license to box because of his prior conviction for draft evasion. The Commission had denied the license on the basis of the broad "character and general fitness" standards employed by most licensing bodies.306 An investigation, however, revealed that the Commission had customarily granted licenses to hundreds of other applicants convicted of numerous crimes involving moral turpitude, leading the court to conclude that the Commission's

303. Cf., Carrington v. Rash, 380 U.S. 89, 94 (1965) ("[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible").
306. N.Y. UNCONSOL. LAWS § 8912 (McKinney 1961) provides in part: "If in the judgment of the commission the financial responsibility, experience, character and general fitness of an applicant . . . are such that the participation of such applicant will be consistent . . . with the best interests of boxing or wrestling generally . . . the commission may grant a license." Additionally, the commission is expressly empowered to refuse to renew a license, if it finds that the applicant has been convicted of a crime or is associating or consorting with persons who have been convicted of crime. Id. § 8917.
action was an "intentional, arbitrary, and unreasonable discrimination" against the plaintiff. The court stated:

It is not suggested that any rational basis exists for singling out the offense of draft evasion for labelling as 'conduct detrimental to the interests of boxing' while holding that all other criminal activities such as murder, rape, arson, burglary, robbery and possession of narcotics are not so classified. All other things being equal, the convicted murderer, burglar, rapist, or robber would seem to present a greater risk of corruptibility as a licensed boxer, and a greater likelihood of bringing boxing into disrepute than would a person who openly refused to serve in the Armed Forces.

The implications of this decision are twofold. First, licensing bodies vested with broad discretionary authority apparently can reject all applicants convicted of crimes without violating the equal protection clause. This result, however, would deprive many qualified applicants of the opportunity to earn a living and excel in a chosen profession. Secondly, the decision provides a constitutional approach by which convicted persons can challenge the determination of any licensing body that rejects them solely because of their criminal record. For this challenge to be successful, however, an investigation of the past practices of the determining body would have to reveal that applicants with criminal records had previously been accepted.

The Ali decision, moreover, should compel licensing bodies to define their rejection standards more precisely. If evidence of unequal treatment or inconsistent practices is uncovered, the licensing body should be required to demonstrate explicitly the particular characteristics of unfitness that distinguish the individual applicant from previously accepted offenders who had committed crimes of similar degree. This standard should prevent the rejection of offenders who have not committed crimes that are directly related to the interests sought to be protected unless other factors are present in individual cases.

4. Equal Access to Restoration Procedures.—The equal protection clause also has been applied to regulate the various state procedures that provide for the restoration of civil rights lost as the result of a criminal conviction. A recent decision held that requiring a fee as a prerequisite for access to the restoration machinery denies equal

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307. Civil No. 69-4867, at 11. The court rebutted certain of the Commission's justifications such as the recentness of the conviction by citing previous instances in which a person similarly situated, had been granted a license. Furthermore, the court emphasized that granting plaintiff a license would advance the accepted penological view that rehabilitation should be commenced as soon after the conviction as possible. Id. at 15.

308. In the course of plaintiff's investigation, for example, it was recorded that Sonny Liston, former heavyweight boxing champion, was licensed although he had been convicted of armed robbery and assault with intent to kill. Id. at 5.
protection to indigents. This decision also could be applied to the pardoning power, frequently used to restore civil rights. If it can be shown that the pardoning power is used arbitrarily to deny some prisoners their civil rights, an equal protection challenge might lie, even though a pardon is considered a discretionary privilege. Acceptance of such a contention is unlikely, however, until the executive pardon power is subject to judicial review, a development thus far rejected by all courts that have considered the issue.

F. Miscellaneous Constitutional Considerations

Other constitutional limitations might be utilized to minimize the effects of a prior criminal conviction. Since, for example, a convicted felon cannot be refused permission to speak on a college campus, it can be argued that a prior conviction, if irrelevant to the exercise of a first amendment right, should likewise be discounted in determining whether an offender can exercise other equally fundamental rights. A second contention may arise in the case of a military conviction. Under the principle of O'Callahan v. Parker, it may be argued that a court-martial conviction cannot disqualify the offender from exercising his civil rights because full due process requirements were not accorded in the trial. Finally, the nascent right of privacy may be invoked to nullify the legal consequences of a criminal conviction. A recent California case concluded that indiscriminate financial disclosure required of candidates for public office violated the right of privacy. It is not implausible to extend this protection to former criminals who are required to disclose their past record in practically every pursuit they

310. E.g., Murray v. Louisiana, 347 F.2d 825, 827 (5th Cir. 1965) (equal protection not violated where Louisiana refused to accord Missouri pardon the same effect as its own pardon); Davis v. North Carolina, 339 F.2d 770, 779 (4th Cir. 1964), rev'd on other grounds, 384 U.S. 737 (1966); United States v. Patti, 291 F.2d 745 (3d Cir. 1961).
312. 395 U.S. 258 (1969) (a serviceman accused of a nonservice-connected crime is entitled to civilian trial with full procedural safeguards).
314. The entrenched traditional view is exemplified in the reasoning of one court, rejecting a former prisoner's attempt to expunge his prison records: "[T]he relation to the public of one who has been convicted of crime is such as to forfeit whatever right of privacy he may be said to have ever possessed. This is true at least to the extent that the protection of society requires such forfeiture." Hodgeman v. Olsen, 86 Wash. 615, 150 P. 1122 (1915).
undertake. Reasoning from this recent case, it should not be difficult for
the judiciary to develop a principle allowing offenders freedom from the
consequences of their former convictions.

III. VALIDITY OF CIVIL DISABILITIES WITHIN THE CONTEXT OF
MODERN CORRECTIONS

The development of correctional science has been characterized by
isolation, inertia, and ill-defined goals. As a result, the critical
importance of corrections in the administration of criminal justice was
not recognized until recent years. One difficulty that has traditionally
confronted correctional programs has been the inability to achieve a
satisfactory balance between two major objectives—protection of
society and rehabilitation of offenders. The dilemma posed by these
conflicting goals is clearly reflected in existing civil disability laws. In the
apparent interest of societal protection, legislatures have seen fit to place
numerous restrictions on activities of convicted criminals, both while
incarcerated and after release from prison. Although these laws were
enacted in piecemeal fashion over a period spanning two centuries and
in many instances were founded upon penal concepts that have long since
been discredited, they continue to deprive former convicts of many rights
and privileges exercised by normal citizens. Modern correctional theory,
however, now recognizes that rehabilitation of former offenders can only
be achieved by their complete and rapid reintegration into society.
Fostering community acceptance of ex-convicts is at best a difficult
proposition. Moreover, existing disability laws probably reinforce
community hostility and general distrust of former offenders. It is
necessary, therefore, to re-examine both the scope and purpose of these

316. See Joint Commission on Correctional Manpower and Training, A Time To Act
2 (1969) [hereinafter cited as A Time To Act]. Observing the incongruity among correctional goals,
one author has noted: “Ironically, there seems to be a general unawareness that much of the
confusion and inconsistency in correctional objectives and the vacillation in implementing these
objectives is directly attributable to society’s indecision regarding the criminal and its failure to
provide the means to utilize existing knowledge or to acquire further knowledge of the variables of
crime to permit optimal treatment.” Schnur, Some Reflections on the Role of Correctional

317. See, e.g., Williams v. New York, 337 U.S. 241, 248 (1949); Abbot v. Los Angeles,
53 Cal. 2d 674, 687, 349 P.2d 974, 982-83, 3 Cal. Rptr. 127, 135 (1960); Federal Offender’s
Rehabilitation Act, 18 U.S.C. §§ 4082, 4284 (Supp. IV, 1969); Correctional Rehabilitation

to Isolating the Condemnation Sanction, 68 Yale L.J. 869, 896-97 (1959); Patterson, Civil and
Social Barriers to Treatment, 4 Nat’l Parole & Probation Ass’n J. 268, 270 (1958); accord,
Joint Commission on Correctional Manpower and Training, The Public Looks at Crime
and Corrections (1968).
civil disqualifications to determine the extent they obstruct accomplishment of modern correctional goals. Likewise, these restrictions must be viewed in light of the urgency of the crime problem as a whole. The alarming recidivism rates make it clear that rehabilitation of criminals is one of the most crucial tasks facing our society. It is not suggested that protection of legitimate public interests should not remain a primary concern. To the extent civil disability laws serve this purpose, they are justified. The public, however, has a compelling interest in enhancing the opportunity for post-release success for the thousands of convicted criminals who return to the community each year. It is likely that many of the civil deprivations currently experienced by ex-convicts only frustrate their chances for rehabilitation.

A. Rehabilitation—The Focus of Modern Correctional Theory

Rehabilitation, the foremost concept of modern correctional theory, utilizes the various disciplines of law, sociology, psychology, and psychiatry to achieve the social and economic restoration of the offender. To realize the goal of rehabilitation, therapeutic and reformative concepts are employed to treat the offender's needs and problems and assist his adjustment to the environment he will encounter upon release from custody. This treatment is designed to equip the offender with the social and economic skills that will promote his human dignity while affording society the protection it desires. Judicial acknowledgement of the effectiveness of rehabilitative programs is


320. A sociologist writes: "According to current theory, deviant behavior is most likely to occur when the sanctions governing conduct in any given social setting seem contradictory . . . ." Erikson, Notes on the Sociology of Deviance, in The Other Side 9 (H. Becker ed. 1964).


323. See id. at 27; H. Packer, The Limits of the Criminal Sanction 54 (1968).

324. Several scholars, however, have criticized modern correctional theory and its goal of rehabilitation. They have submitted that rehabilitation is an unrealistic goal. This objection is based on the proposition that society does not yet know how to rehabilitate offenders. H. Packer, supra note 323, at 55. But cf. N. Morris & G. Hawkins, The Honest Politician's Guide to Crime...
now leading to a recognition that the offender has a right to rehabilitative treatment. 325

Ideally, the process of rehabilitation should attempt to overcome the bitter feelings that the offender may have developed for society and the criminal process. In seeking to achieve this goal, correctional programs include positive measures326, that are designed to re-establish the offender's dignity, enabling him to achieve a new social identity327 and re-enter society with confidence and a sense of personal responsibility.328 Rehabilitation also strives to provide the criminal with an easy transition from the rigidity of custody to the relative freedom of the community. Progressive correctional programs are based on a recognition that assimilation into society is necessary to successful rehabilitation.329 These programs are designed to involve the community in the rehabilitation and reintegration of the law violator through the use of prerelease centers,330 half-way houses,331 job-skill training,332


326. See The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 51-55 (1967) [hereinafter cited as Task Force Report]. The Commission's recommendation suggests providing the inmate with educational, vocational, and clinical services as the first stage of rehabilitative treatment. Next, the prisoner will be provided with an opportunity to reduce the isolation inherent in his institutional setting by allowing exposure to the community. Programs such as work-release and study-release will be utilized. Outright discharge is the final stage of this rehabilitative scheme.


330. Inmates are assigned to prerelease centers for a period of time before release from prison. Ideally, such centers are centrally located in the community and allow inmates to work in the community and return to the center at night for consultation and guidance. Task Force Report, supra note 326, at 68.


community correctional volunteers,\footnote{A community correctional volunteer is a member of the community who personally assists the offender in his re-establishment in society. See Parole, 1967 Survey, 13 Crime & Delinquency 209, 261 (1967).} prisoner aid societies,\footnote{The Fortune Society, for example, is a lobby dedicated to arousing greater public awareness of prison conditions and the problems of rehabilitation confronting former prisoners. See Rothenberg, The Fortune Society, 27 Legal Aid Briefcase 80 (1968); Samuels, A New Lobby—Ex-Cons, N.Y. Times, Oct. 19, 1969, § 6 (Magazine), at 36.} and work-release programs.\footnote{A work-release program allows prisoners to be employed in the community during the day and return to the prison in the evening. This concept is designed to ease the inmate’s eventual return to society. See, e.g., Grupp, Work Release and the Misdemeanant, 29 Fed. Probation 6 (June 1965); Note, Prison Work Release Programs—A Rehabilitative Approach to Sentencing, 1 Colum. Sch. Pub. Law & Pub. Pol’y 99 (1968); N.Y. Times, Oct. 10, 1969, at 45, col. 6 (city ed.).}

\section*{B. Traditional Rationales for Civil Disabilities}

The civil disability laws of most states were enacted in the nineteenth and early twentieth centuries. Many of the penal and non-penal rationales that prompted disability statutes have long since been discredited. An examination of these traditional rationales graphically illustrates the inconsistencies between civil disabilities and modern correctional goals.

1. \textit{Nonpenal Rationales for Civil Disabilities}.—Protection of society from corruption in specified vital areas has been the primary nonpenal justification for civil disabilities.\footnote{See, e.g., De Veau v. Braisted, 363 U.S. 144, 159-60 (1960) (protection against corruption in occupations). The concept of administrative convenience also has been a nonpenal justification for civil disabilities. This concept places highest priority on internal prison functioning often in derogation of inmate rights. The doctrine, however, has come under close scrutiny by the courts because of its potential for misuse. Administrative convenience, expanded to its logical extreme, could be used to justify numerous restrictive disabilities that are legally and penologically unacceptable. Thus, when the rationale of administrative convenience is invoked, careful inquiry is required to determine whether the particular administrative benefit intended by the disability is greater than its adverse effect on the offender. The judicially formulated “hands off” doctrine that allowed correctional administrators maximum discretion in controlling the lives of prisoners is slowly ebbing, and unnecessary deprivations are viewed by the courts as inconsistent with proper rehabilitation. See, e.g., Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. Pa. L. Rev. 985 (1962); Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review Complaints of Convicts, 72 Yale L.J. 506 (1963).} Supporters of this theory contend that a criminal conviction indicates that the offender is incompetent to perform the function regulated by the disability. Although some disabilities are still necessary to protect society, most existing disability statutes are questionable because of their anachronistic features and pervasive application.

Statutes that deprive criminal offenders of many rights and
privileges are outmoded when compared with the theories and practices of modern criminal law administration. Legislatures, laboring under outdated theories of criminal behavior, did not consider the importance of rehabilitating offenders when they enacted most disability statutes. In addition, these laws were enacted before the indeterminate sentence, probation and parole, and other rehabilitative techniques became part of the American criminal system. As a result, deprivations that are appropriate only for prisoners are hindering offenders serving their sentence in the community. Furthermore, the severe hardships caused by some disability statutes outweigh their limited value in protecting society.

The goal of societal protection is not advanced by most disability laws. The overbreadth of these laws creates confusion among judges, parole and probation officers, prison personnel, and the officials responsible for administering the regulated functions. Since these officials are often unaware of the extent and duration of the forfeitures, the inclusive effect that is designed to protect society is lost.

2. Penal Rationales for Civil Disabilities.—Several justifications for punishing criminal offenders have been used to support statutes that deprive offenders of many rights and privileges. Traditionally, criminal punishment has been justified on four bases: retribution; deterrence; incapacitation; and rehabilitation. Two of these rationales—retribution and incapacitation—have been used to justify the imposition of civil disabilities. In addition, deterrence is an implicit rationale for all statutes imposing sanctions.

(a) Retribution.—Historically, public retribution has been accepted as a primary justification for the imposition of penal sanctions. In Europe, political and civil disabilities were considered additional punishments essentially retributive in nature. This view had a significant influence on early American legislatures, and it has been suggested that civil death statutes are statutory manifestations of the


338. See notes 1-4 on pages 1155-56 supra and accompanying text.


retributive function of criminal law.\textsuperscript{342} Since revenge is not designed to strengthen the offender's desire to obey the law\textsuperscript{343} or to reintegrate him into society, this rationale seems to conflict with modern correctional theory.

(b) \textit{Incapacitation}.—The incapacitation theory advocates the incarceration of criminal offenders to keep them from committing further crimes.\textsuperscript{344} Civil disabilities are consistent with this theory because they diminish the offender's capacity to commit crimes, even though he still has the opportunity to participate in functions or secure positions that may stimulate his criminogenic impulses and result in repeated offenses.

The incapacitation theory assumes that only those offenders who are likely to commit other crimes will be incarcerated.\textsuperscript{345} Civil disabilities can be distinguished from incapacitation, therefore, because of the dissimilarity between the imposition of the primary sentence and the imposition of the disabilities. While the primary sentence is imposed with the idea of incapacitating the offender for the term deemed necessary to prevent him from committing additional crimes, civil disabilities lack this selective and variable quality because they are automatically imposed upon all offenders for an indefinite period. Since the disabilities are imposed without regard to the nature of the offense, they have a more attenuated relationship to the offense than does the prediction upon which the primary sentence is based.

(c) \textit{Deterrence}.—According to the deterrence theory, criminal action is inhibited by the use of threatened punitive and monetary sanctions for specified crimes. For several reasons, civil disabilities were not intended to and do not serve a deterrent function. First, the economic origin of many statutes indicates they were not originally intended to repress crime.\textsuperscript{346} Secondly, one prominent school of thought concludes that since criminals do not refrain from criminal conduct because of the possibility of even harsh primary punishment, the secondary punishment imposed by civil disability laws serves no deterrent function.\textsuperscript{347} Lastly,

\begin{itemize}
  \item \textsuperscript{342} Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 \textit{Yale L.J.} 506, 516 n.57 (1963).
  \item \textsuperscript{343} See J. WAITE, THE PREVENTION OF REPEATED CRIMES 27 (1943).
  \item \textsuperscript{344} See H. PACKER, supra note 323, at 48-50.
  \item \textsuperscript{345} It is fundamental to note, however, that this prediction cannot be made accurately or consistently.
  \item \textsuperscript{346} See notes 30-47 on pages 945-48 \textit{supra} and accompanying text.
  \item \textsuperscript{347} See H. PACKER, supra note 323, at 40. A recent study by the California Legislature concluded that there is no evidence to prove that more severe penalties deter crime more effectively than less severe penalties. \textit{Assembly Committee on Criminal Procedure, Deterrent Effects of Criminal Sanctions} (1968).
\end{itemize}
the difficulty of determining the disabilities imposed in any state, coupled with widespread public ignorance of criminal penalties, makes the deterrent function of civil disability laws highly questionable. In addition to these observations, there is no evidence that states with few disability statutes have a higher incidence of crime than those with a myriad of such statutes.

C. The Impact of Civil Disabilities on Rehabilitation

Civil disability statutes have a significant impact on the lives, attitudes, and rehabilitation of most criminal offenders. These laws directly affect the convict by restricting his activities both while he is in prison and after he has been released into the community. At the same time, civil disabilities indirectly affect rehabilitative efforts by implicitly sanctioning community attitudes of mistrust toward all offenders. Under the guise of societal protection, these laws often encourage behavior that works to the disadvantage of both the community and the offender.

1. Direct Effect of Disabilities on the Offender. (a) In-prison rehabilitation.—Criticism of the present prison system inevitably centers on the debilitating effects of prison life on the inmate. By limiting the offender’s contact with the groups and institutions on which he previously relied for identification, the prison environment fosters a stigmatized status that replaces his former familial, occupational, and educational ties. Civil disabilities contribute to this process by severing meaningful contacts, restricting many channels of communication with the outside world, and extinguishing interest in events occurring outside the prison environment. Statutes that facilitate the dissolution of an offender’s marriage and permit the forfeiture of parental rights without his consent, for example, have the effect of closing meaningful lines of communication. Loss of the right to vote, moreover, may diminish the inmate’s desire to keep abreast of current political affairs since his ability to influence such events is impaired. The psychological impact of losing these common civil liberties “contributes to... the

348. The California survey found that the general public displayed a profound lack of information about criminal penalties while those persons who had engaged in crime had a more extensive knowledge of penalties. ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, DETERRENT EFFECTS OF CRIMINAL SANCTIONS (1968).
mortification and stripping processes common to total institutions."

Standing physically and psychologically stripped of the means of identification with the outside world, the inmate is compelled to rely totally on the prison environment for his identity and to look within the prison for valuable personal relationships. As the offender's re-identification progresses, the tension between the institutional world and the outside world is heightened, creating an atmosphere that allows full management of the inmate's conduct by the prison environment. Once the reidentification is complete, the offender frequently develops a hostile and suspicious attitude toward society that makes him unamenable to rehabilitative programs.

Civil disability laws may influence the prisoner's response to rehabilitative programs, even though not directly affecting him during incarceration. Inmates, for example, frequently become aware of the detrimental effect that employment and licensing disabilities will have on their post-institutional life.

Since the inmate is understandably reluctant to train for employment when his prospects for legitimate work are limited, the knowledge of employment disabilities may hinder his adaptation to correctional programs. In addition, these disabilities may prompt a prisoner to become pessimistic about his chances of leading a law-abiding life upon return to society. These attitudes may breed recurring deviancy and recidivism.

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353. See note 355 infra. Most convicts are not accurately informed of the civil disabilities at the time of their conviction. Although they become aware of these disabilities during incarceration, they may often continue to hold common misconceptions concerning the legal and civil status of prisoners. A typical erroneous impression held by the general public is that a person automatically loses his citizenship upon criminal conviction. Gathings, Loss of Citizenship and Civil Rights for Conviction of Crime, 43 AM. POL. SCI. REV. 1228 (1949); see People v. Russell, 245 Ill. 268, 272, 91 N.E. 1075, 1076 (1910) ("[a felon] has become an alien in his own country").
354. Cf. Wheeler, Socialization in Correctional Communities, 26 AM. SOC. REV. 697, 699-700 (1961). The author observes that an inmate who accepts an easy prison job rather than a more difficult one that might be useful on release is not adhering to expectations of rehabilitation.
355. The Vanderbilt Law Review administered an informal, open-ended questionnaire to a sampling of prisoners at the Tennessee State Penitentiary in Nashville, Tennessee. Information obtained from the questionnaire is cited to the Vanderbilt Law Review Prisoner Survey, on file with the Vanderbilt Law Review. The Vanderbilt Law Review Prisoner Survey found that inmates were overwhelmingly alert to the effect their conviction will have on future job opportunities. These observations were offered:

"The law states and society agrees that ex-convicts should not hold certain jobs no matter how much one adjusts or readjusts to society's environment";
"This is my second offense, and when I was released the first time it was hard for me to get a job anywhere. I tried but it didn't do much good";
"I have heard that an ex-convict will have little chance of getting a civil job or banking or any of the executive fields";
"Ex-convicts have difficulty in securing employment—its [sic] the nature of things."
Furthermore, the complexity and haphazard application of civil disability statutes gives the prisoner a feeling of uncertainty about the status of his civil problems and their eventual outcome. Parole boards will be reluctant to grant a parole request when the inmate himself is uncertain about his marital statutes or financial condition.\textsuperscript{356}

(b) \textit{Post-release rehabilitation}.—Once the offender is released from custody, civil disabilities discourage him from participating in normal community life by preventing him from engaging in activities that other members of the community routinely perform. These disabilities pervade his post-release life, inhibiting his conduct and according him special treatment in each area regulated. As a consequence, the offender is segregated from society and cannot pursue an ordinary life. The offender's life style, for example, is radically changed by the many occupational and professional disabilities that frequently prevent him from practicing his former profession and force him to accept demeaning employment. Moreover, typical requirements that ex-convicts must register with local authorities\textsuperscript{357} may impede some individuals from travel, even to a nearby town. The prohibition against


\textsuperscript{357} Criminal registration statutes require that persons convicted of enumerated crimes register with the local police officials after entering the jurisdiction governed by the statute. Most statutes prescribe that the registration take place within a specified time after arrival. The time period for registration varies from a few hours to 30 days. The registrant must furnish a detailed explanation of his past criminal record and his current activities, and often must submit to fingerprinting and photographing. Note, \textit{Criminal Registration Ordinances: Police Control Over Potential Recidivists}, 103 U. Pa. L. Rev. 60, 75-76 (1954).

The purpose of criminal registration statutes is to aid the police in preventing criminal activity. The statutes are based on the premise that recidivism is a reality. Therefore, the information provided by the criminal upon registration will be a valuable aid to law enforcement agencies in locating probable perpetrators of crime. State v. Ulesky, 54 N.J. 26, 27, 252 A.2d 720, 721 (1969).

Although the alleged purpose of the statutes appears permissible under the states' police power, the application of the statutes deserves sharp criticism. The registration statutes are frequently used by the police to harass persons who have a criminal record rather than to aid the police in the prevention of crime. For a detailed discussion of the harassment tactics employed by the police see Note, supra at 102-05. Obviously the requirement of registration and the subsequent police harassment severely burden the released offender's rehabilitative efforts. See Comment, \textit{Criminal Registration Ordinances and The Consequences of Judicial Consideration}, 19 Ohio St. L.J. 324, 333 (1958).

released convicts' owning firearms\textsuperscript{358} may prevent them from participating in hunting and related sports that serve significant social functions in many rural areas. In at least one state,\textsuperscript{359} the offender, deprived of full contract rights, may be unable to obtain such mundane necessities as an automobile, home furnishings, or basic self-improvement tools, such as a correspondence course to further his education. A felon, in addition, may be unable to obtain or continue his education because he is automatically excluded from some state universities.\textsuperscript{360}

These examples illustrate that civil disabilities require ex-convicts to make drastic readjustments upon their return to the community. The rare offender who is successfully rehabilitated while incarcerated may find himself unable to cope with the multiplicity of rules and restrictions registration ordinances. An extensive survey of municipal ordinances in 1954 revealed that 49 of the municipalities that responded to the survey had enacted criminal registration laws. Note, supra at 108. Today, however, the results of this survey appear to be a conservative estimate because other municipalities have enacted similar statutes since 1954. E.g., \textit{Nashville, Tenn., Code} § 34-2-6 (1967).

The constitutionality of both the state and municipal criminal registration statutes has generally been upheld despite numerous constitutional challenges. Although the United States Supreme Court held that the application of criminal registration statutes was an unconstitutional denial of due process in the absence of actual knowledge by the offender of his duty to register, the Court's decision did not declare criminal registration statutes unconstitutional per se as long as the offender has knowledge of the duty imposed by the statutes. \textit{Lambert v. California}, 355 U.S. 225 (1957). It was initially believed that the limitation imposed by \textit{Lambert} would effectively limit the use of criminal registration statutes; the \textit{Lambert} decision, however, has not curtailed the operation of the statutes. Comment, supra at 325-26. Recently, the Nevada Supreme Court upheld the constitutionality of that state's criminal registration statute. \textit{Atteberry v. State}, 438 P.2d 789 (Nev. 1968). The constitutional challenges which have been rejected by the courts include: (1) the denial of due process, \textit{Atteberry v. State}, 438 P.2d 789 (Nev. 1968); (2) the denial of the right to free travel under the privileges and immunities clause, \textit{State v. Ulesky}, 100 N.J. Super. 287, 241 A.2d 671 (Monmouth County Ct. 1968), rev'd on other grounds, 54 N.J. 26, 252 A.2d 720 (1969); (3) unconstitutional as a bill of attainder and \textit{ex post facto} law, \textit{id.}; (4) the denial of equal protection of the law. Note, supra at 105; and (5) unconstitutional as an arbitrary and unreasonable application of a state's police power, \textit{id.} at 98-102.

Two municipal criminal registration ordinances, however, have been declared unconstitutional on the grounds that the area of criminal registration was pre-empted by state legislation. In \textit{State v. Ulesky}, 54 N.J. 26, 252 A.2d 720 (1969), rev'd 100 N.J. Super. 287, 241 A.2d 671 (Monmouth County Ct. 1968), the New Jersey Supreme Court ruled that the state's laws on probation, parole, and criminal registration of narcotic offenders manifest a complete legislative scheme in the area of supervision of criminals that precluded local ordinances in this area. In \textit{Abbott v. City of Los Angeles}, 53 Cal. 2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960), the California Supreme Court used similar reasoning to reach the same result.


\textsuperscript{359} See notes 744-50 on pages 1033-34 supra and accompanying text.

\textsuperscript{360} North Texas State University, for example, will not admit persons convicted of a felony who are not free of the sanctions of the court. Houston Chronicle, Aug. 22, 1970, at 8, col. 7.
imposed upon release. Additionally, since civil disabilities only directly affect a small segment of the community, the inmate who becomes fully institutionalized while imprisoned may recidivate so that he can return to a social structure where all persons are treated equally. The goal of allowing the released offender to develop a normal life will be impossible to achieve as long as he must remain an unequal member of society, forced to follow a restrictive pattern of conduct.

Civil disabilities also have a significant effect on the attitudes of released convicts. By denying offenders access to the norms of community living, civil disabilities deter their full socialization in society. As a result, the offender loses any self-respect he may have retained during incarceration. In addition, when an ex-convict is unsuccessful in seeking legitimate employment, he may develop feelings of frustration and rejection that can find expression in antisocial behavior. Similarly, the offender’s inability to vote, serve as a juror, or hold public office prevents him from appreciating the society to which he returns. Psychologists have recognized that “no more fiendish punishment could be devised . . . but if every person we met ‘cut us dead,’ and acted as if we were nonexisting things . . . .” This feeling of rejection both reinforces the pessimistic view of societal authority that convicts often form in prison and heightens their lack of faith in society. This sense of rejection may produce a feeling of estrangement from the institutions that foster the development of law-abiding conduct.

2. Indirect Effect of Disabilities on the Offender. (a) The public’s

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363. See Reinhardt, supra note 361.


365. A study based on the operations of the only employment agency in Britain for former prisoners concluded that the inability to obtain employment is directly related to repeated crime. The results demonstrated the necessity of utilizing the ex-prisoner’s capabilities in jobs that would provide sufficient remuneration to allow an adequate start for rehabilitation. The employment agency, for example, had placed a former embezzler as an accountant, with satisfactory results. N.Y. Times, Nov. 30, 1969, at 72, col. 1 (city ed.).


367. Id. at 460.

368. See Schrag, supra note 324, at 11, 18.

ambivalent reaction to corrections.—The offender who is released from a correctional institution will face a public with ambivalent views on crime and corrections. The general public agrees with rehabilitative methods of treating criminals, yet its emotional fear of released offenders colors its overall response. A 1967 survey concluded that 72 percent of the adult population supported rehabilitation as the primary goal of correctional agencies.\textsuperscript{370} Sixty percent of the public consider finding employment as the ex-offender’s most serious difficulty, while 42 percent think that being accepted and trusted in the community is a major obstacle to reintegration.\textsuperscript{371} Despite these expressions indicating a philosophical commitment to rehabilitation and a knowledge of the problems faced by ex-convicts,\textsuperscript{372} this survey also found adverse attitudes controlling the public’s actual response to released offenders. In response to a questionnaire, most businessmen stated that they would hesitate to hire a person who had a criminal record. For example, 43 percent of those surveyed admitted they would hesitate to hire as a janitor an offender who had shot someone in an armed robbery; 54

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|}
\hline
Disability & Businessmen & Ex-Offenders \\
\hline
Loss of voting rights & 74\% & 88\% \\
Difficulty in getting driver’s license & 78\% & 92\% \\
Difficulty getting other occupational license (barber, plumber, bartender) & 78\% & 93\% \\
Difficulty getting professional license (doctor, accountant) & 55\% & 63\% \\
Difficulty getting civil service jobs & 64\% & 69\% \\
Difficulty getting bond & 63\% & 85\% \\
Loss of civil rights (jury service, etc.) & 56\% & 74\% \\
Use of criminal record in court testimony & 61\% & 94\% \\
\hline
\end{tabular}
\caption{Survey Results on Perceived Barriers to Reintegration}
\end{table}

There is no reasonable basis to conclude that these figures are not as valid in 1970 as they were in 1949.

\textsuperscript{370} JOINT COMMISSION ON CORRECTIONAL MANPOWER AND TRAINING, \textit{The Public Looks at Crime and Corrections} 7 (1968). The survey, conducted by Louis Harris and Associates, utilized a national sample of adults and teenagers.

\textsuperscript{371} Id. at 13.

\textsuperscript{372} A 1949 survey concluded that most offenders felt that specific disabilities made it more difficult for a man with a criminal record to be a good citizen and earn a decent living. Tappan, \textit{Loss and Restoration of Civil Rights of Offenders}, in \textit{Yearbook of the National Probation and Parole Association, Crime Prevention Through Treatment} 86, 89 (1952), \textit{citing} Wallerstein, \textit{Testing Opinion of Causes of Crime}, 28 Focus 103 (July 1949). The results of the Wallerstein questionnaire are reprinted below. The answers represent responses by 223 business and professional men and 258 men with criminal records who were living in New York. The results indicate the percentages of businessmen and ex-offenders who believe that the particular disability listed will hinder the offender in becoming a "good citizen" and securing a "decent living."
percent would hesitate hiring him as a salesman; 63 percent, as a supervisor; and 71 percent, as a clerk handling money.\(^{373}\)

Civil disability laws may negatively influence the public's ambivalent response to the ex-convict by sanctioning overt discrimination in areas vital to his reintegration into society.\(^{374}\) By focusing on all ex-convicts as a class, disability laws may justify and reinforce the public's reluctance to aid ex-convicts and accept its responsibility in the "collaborative regime"\(^{375}\) of corrections. Society's response to corrections must be transformed by a broad program of community education and orientation on progressive penal policy. Yet the perpetuation of civil disabilities will continue to create a preoccupation with the worst traits of the ex-convict, who might not have evinced antisocial behavior for many years.\(^{376}\)

(b) Stigmatization and social degradation.—The ex-prisoner re-enters a world vastly different from the one he experienced in prison. Although correctional personnel have attempted to prepare the inmate for his release, the community has not been so educated. The community initially reacts to the releasee with distrust, suspicion, and hostility.\(^{377}\) Civil disabilities play a significant role in fostering these attitudes by affixing an additional stigma on the offender's already inferior status.\(^{378}\) These disabilities trigger a societal response that groups all offenders together and ostracizes them, despite personal differences and all attempts to reintegrate them into the community.\(^{379}\) The United States

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374. One writer has recognized the persistence of discrimination against ex-convicts: "For the most part groups that are discriminated against are able to organize legitimately for counter action. Not so the former inmates. Counter action gets them arrested. The discrimination against such people may be very subtle." Reinhardt, supra note 361, at 47; see Note, Employment of Former Criminals, 55 CORNELL L. REV. 306, 317 (1970).

375. The collaborative regime is a new concept that entails increased communication in the correctional institution among custodial staff and inmates. TASK FORCE REPORT, supra note 326, at 11. As corrections moves into the community, the lay public ideally will cooperate with correctional workers and offenders, thus adding a new dimension to the collaborative regime.

376. E.g., De Veau v. Braisted, 363 U.S. 144 (1960) (the Court affirmed the statutory exclusion of the plaintiff from union office on the basis of a 40-year-old grand larceny conviction resulting in a suspended sentence).


CIVIL DISABILITIES

Supreme Court recently recognized that the inferior status of the convicted person and the diminution of his legal personality is directly promoted by civil disabilities.\textsuperscript{380} Correctional officials also have observed the stigma to which the offender is subjected by his forfeiture of civil and economic rights.\textsuperscript{381} In recognition of the stigma attached to civil disabilities, the judiciary characterizes them by such expressions as “the badge of ‘convict,’”\textsuperscript{382} “the brand of iniquity,”\textsuperscript{383} “indelible disgrace,”\textsuperscript{384} and “stain on his reputation.”\textsuperscript{385}

Civil disabilities also renew or perpetuate the status degradation of the trial by legitimating continued state interference in the ex-convict’s life long after his release from imprisonment. Status degradation in the criminal process is officially entrusted to the courts,\textsuperscript{386} where the trial and conviction focus public denunciation upon the offender. Unfortunately, this status degradation outlasts his discharge from the criminal process. The lack of a status elevation ceremony, a terminal procedure that cuts off stigma, has been recognized as a significant flaw in the criminal system.\textsuperscript{387} The rarely used and inadequate restoration procedures do not provide the symbolic ceremony necessary to confer public respect on the rehabilitated offender. Instead, civil disabilities allow the public to equate the primary criminal sanction, which should terminate at discharge from correctional custody, with the post-prison status of the offender. This further facilitates the characteristics of the status degradation ceremony.\textsuperscript{388}

Civil disabilities operate as a causative factor in social degradation by promoting what one writer has termed the “management of status” in the community.\textsuperscript{389} According to this theory, community attitudes
prevent offenders from attaining a higher station in life than those without a criminal background. Civil disabilities visibly mark the offender as automatically unworthy and unfit for the performance of certain functions. This badge helps to shape society’s concept of the lawbreaker and demonstrates to the offender that he is not free to pursue an ordinary life. Licensing and public office disabilities, for example, appear to implement and preserve this social phenomenon. Because the ex-convict is often limited in his occupational choice to jobs that society views as menial, he is accompanied by a life-long inferior status. The public then views all ex-convicts as holding menial jobs and immediately characterizes the entire class as members of the lower strata of society. Until the machinery of status management is dismantled by enlightened public opinion, the imposition of civil disabilities will remain an arbitrary societal control over the status of convicted persons.

It is not suggested that the removal of civil disabilities will prevent all societal disapproval. Careful reconsideration of their relevance in the rehabilitative process can, however, lead to the elimination of many disabilities that adversely shape attitudes toward prisoners. The disabilities now imposed allow the community to concentrate its punitive predilections on the class of people who can least afford to be treated in any way less than normal. Although the tremendous force of public opinion and established custom will no doubt remain as a sanction against the hard-core offender, the present civil disability statutes solidify public sentiment against the criminal, causing all law violators to suffer. This result is not desirable since it creates a permanent class of outcasts who can never be assimilated into the main stream of community life. Strict application of disabilities in accordance with a direct relationship test may allow public opinion to distinguish between

390. An empirical study established that the social stigma of a prison record would severely prejudice the employment opportunities of unskilled workers upon release from prison. Swartz & Skolnick, Two Studies of Legal Stigma, in THE OTHER SIDE 107 (H. Becker ed. 1964).

391. See H. BECKER, OUTSIDERS 31-35 (1963). A recognized theory of antisocial behavior suggests that deviance is not inherent but is conferred by the audiences that react to perceptions of the person’s conduct. See E. JOHNSON, supra note 327, at 617. Thus, civil disabilities, by reflecting society’s response to the criminal, may cause the former prisoner to think that he is expected to commit criminal acts.

392. The need for community education regarding corrections is necessary so that public opinion will not be formed in the existing informational vacuum. A TIME TO ACT, supra note 316, at 67.

393. The isolating effect of civil disabilities finds its origin in early attempts to banish the offender from the community. In isolating the offender from the citizenry, civil disabilities relegate the suffering of the offender to a position secondary in importance to the public’s interest in protecting its political and social institutions. It is axiomatic that assimilation is not promoted by this device (civil disability laws) for maintaining social distance. See E. SUTHERLAND
IV. RECOMMENDATIONS

The foregoing discussion points out the need for major alterations in the present system of regulating the civil rights and privileges of convicted criminals. Although some disabilities adversely affect the convict while he is in prison, the disabilities that are most objectionable prevent the offender from becoming a normal citizen in the community upon his release from prison. In addition to the need for uniformity among jurisdictions, remedial action of a threefold nature is required. First, the entire scheme of civil disabilities must be re-examined and restrictions that are not necessary to protect the public must be eliminated. Secondly, existing provisions that call for the blanket application of disabilities must be replaced by procedures whereby a convicted criminal will lose only those rights and privileges that are directly related to the nature and severity of his criminal offenses. Thirdly, imaginative measures are needed to ensure that the disabilities imposed are removed as soon as the convict's rehabilitative progress indicates this action is warranted.

A. Elimination of Unnecessary Restrictions

The threshold problem of determining which civil disabilities are necessary must be approached with the recognition that disabilities can only be justified when they are needed to protect the public. When measured against this standard, it is clear that many existing restrictions of convicts' rights and privileges are without foundation. This holds true whether the convict is incarcerated or has been released from prison. Statutes that deny convicts the capacity to contract, for example, serve no public purpose. General contract law is adequate to prevent corruption in this area. Equally objectionable are those provisions that deprive an individual of property rights upon criminal conviction. With the exception of those few situations in which an offender's wrongdoing clearly warrants forfeiture of a particular property interest, such as denying a killer's right to inherit from his victim, divesting a convict of

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384. See page 1235 infra.
his property, whether it be personalty or a vested pension, can serve no
legitimate purpose. Nor is the public interest served by prohibiting the
convict from suing in court. Likewise, the practice of barring certain
convicts from testifying in court cannot be justified in the public interest.
Standard cross-examination and impeachment techniques are adequate
safeguards. Moreover, as the Uniform Rules of Evidence recognize, a
witness’s prior criminal record should not be admissible for
impeachment purposes unless his past offenses connote a lack of
veracity. To deny absolutely the legal effect of a convict’s word can
work hardship on innocent parties, the vindication of whose rights
depend on the convict’s testimony.

The conclusion that the disabilities just discussed can no longer be
justified on any rational basis gains support from the fact that a number
of states have deleted them from their statutes. Six states, for example,
have repealed civil death statutes since 1959. There remain, however, a
number of civil disabilities that are unmistakably related to the public
interest. Undoubtedly, there are instances when convicted criminals
should be barred from voting, jury service, holding offices of public and
private trust, and engaging in public and licensed employment. Similarly,
conviction of certain crimes will justify forfeiture of domestic
rights. Clearly, these restrictions must be available to protect the public
in appropriate situations. The problem is to determine when the
imposition of disabilities is justified in individual cases.

B. Reasonable Application of Necessary Restrictions

As already observed, most civil disability laws are unnecessarily
broad. Many of these provisions automatically deprive the convicted
criminal of rights and privileges with no consideration of his past
history, the nature and circumstances surrounding his offenses, and his
record of rehabilitation. What is needed is a rational and equitable
procedure for imposing civil disabilities that will prevent injustice to
convicted criminals but provide adequate protection for the interests of
society that may be endangered by the criminal behavior of convicts.
This will require development of more realistic standards for

determining when restrictions are justified and efficient procedures for applying these standards to individual convicts.

1. The Direct Relationship Test.—Since the only justification for imposing disabilities is the need to protect the public, the sole question for determination should be whether an individual’s criminal past clearly demonstrates his unfitness to exercise the rights and privileges of normal citizens. A disability, therefore, should be imposed only when a convict’s offenses bear a direct relationship to the functions and responsibilities of the right or privilege. For reasons already discussed, the direct relationship test is not recommended for divorce, adoption, and dependency statutes. The test should be incorporated, however, in all other constitutional and statutory provisions that call for the denial or suspension of rights or privileges upon conviction of a crime. This can be accomplished either by expressly limiting disqualification to specific, directly related crimes or simply establishing the direct relationship requirement in general terms. Either approach avoids the overly broad classifications that are currently found in most disability provisions. Under the direct relationship standard, a person convicted of voting fraud, for example, would be denied the right to vote because his crime is directly related to this function. Similarly, a physician convicted of illegally performing an abortion would be prohibited from practicing medicine. The person convicted of involuntary manslaughter, however, would not be deprived of the right to vote as the result of this conviction, since his crime does not demonstrate unfitness to perform the function of voting. Moreover, an implication of general untrustworthiness, which may arise because of a criminal conviction, should not normally satisfy the direct relationship standard.

2. Applying the Direct Relationship Test.—Under existing procedures, many civil disabilities are automatically imposed upon conviction without notice to the offender. Thus, a convict may not learn of a deprivation until he tries to exercise the right or privilege, which may be many years following his conviction. More importantly, this arbitrary imposition of disabilities precludes consideration of convicted criminals on an individual basis. For these reasons, it is essential that states establish procedures requiring application of the direct relationship test to individual offenders before rights or privileges are denied. The propriety of imposing most disabilities is an appropriate subject for judicial determination. When the determination is more properly the function of an administrative agency, such as the refusal or revocation of occupational licenses, the direct relationship standard can
be incorporated in the agency's regulations. Moreover, agency adherence to the direct relationship test can be ensured by an expanded scope of judicial review.

(a) **Judicial determination.**—The appropriate forum for determining whether a convicted criminal should forfeit rights and privileges is the sentencing court. With the exception of exclusion from licensed occupations, all disabilities essential to public protection can be properly considered and decided as a matter of law by the sentencing judge. The appropriateness of determining these matters at the sentencing stage was recognized by the draftsmen of the proposed New Federal Criminal Code in their recommendation that disqualification from federal office or employment upon conviction of a crime be discretionary with the sentencing judge.\(^{397}\) Similarly, the American Bar Association Advisory Committee on Sentencing and Review recently recommended that the sentencing court be empowered to determine the collateral disabilities imposed upon probated offenders both during and after the term of probation.\(^{398}\) By a determination at the sentencing stage of which civil rights and privileges are lost, the rehabilitation of the offender will be aided because he will become aware of his legal status and can more intelligently and accurately plan for his future. In addition, the sentencing judge can most efficiently apply the direct relationship test because he will be familiar both with the offender and the circumstances of his crime.

The court should follow a two-step procedure in determining whether the imposition of disabilities is justified. First, the court should decide which civil rights and privileges are directly related to the offender's crime. Secondly, the court, after considering the offender's history and any other relevant information, should use its discretion to decide whether the public interest requires the suspension of these directly related rights or privileges. Under this procedure, no person convicted of a crime in the state will lose any civil rights or privileges unless there is a direct relationship between his crime and the particular right or privilege. Moreover, it is not mandatory that the sentencing court deprive an offender of directly related civil rights or privileges. The facts and circumstances of the case may indicate that societal protection does not require the imposition of disabilities even though the sentencing court finds that several civil rights and privileges


are directly related to the offender’s crime. A deprivation of rights or privileges should terminate if the offender’s conviction is reversed on rehearing or appeal. Moreover, a sentencing court’s imposition of disabilities should be appealable independently of the conviction.

The discussion thus far has concerned in-state convictions. Also to be considered is the state’s policy toward residents who have been convicted in other jurisdictions. Under current practices, a person convicted in the courts of other states, the federal system, or a foreign country may be deprived automatically of certain rights and privileges in a state where he later establishes residence. In all probability the foreign offender will be unaware of this deprivation until he attempts to exercise a right or privilege in the state of new residence. Additional measures are required, therefore, to provide a judicial determination of rights and privileges for the individual convicted in a foreign jurisdiction prior to becoming a resident of the disability-imposing state. Such a procedure need not be complicated. The judicial determination could follow the filing of a petition for the declaration of civil rights and privileges in a court of general criminal jurisdiction. The petition could be filed by either the foreign offender, upon establishing residency in the state, or a government agency that intends to prohibit him from exercising a right or privilege. A simple form capable of completion by an average citizen without assistance of an attorney would be sufficient. The hearing could be a nonadversary proceeding in chambers, unless a party or witness requests representation by counsel. Unless and until the court imposes a disability, a foreign offender should not normally be barred from exercising rights or privileges. Should there appear to be substantial likelihood of public harm if the offender exercises a directly related right or privilege, however, the court could issue a temporary restraining order during the pendency of the petition. In hearing a petition, the court should follow the procedures suggested for determinations by sentencing courts of disabilities imposed for convictions within the state. Special emphasis should be placed on the foreign offender’s prison and post-release records. The court’s ruling on the petition also should be subject to appeal.

Both the sentencing court in cases of state convictions and the court hearing a petition for a declaration of rights and privileges of a foreign offender should transmit to the offender an official certificate stating which, if any, civil rights and privileges are lost, the duration of the deprivation, and the reasons for the court’s determination. The offender

399. See notes 142-61 on pages 960-64 supra and accompanying text.
also should be informed of procedures for restoration of deprived rights and privileges as well as his right to appeal the court's determination. The issuance of this certificate will serve the additional purpose of informing the public of the extent of the offender's civil disabilities. If an offender is questioned later about the exercise of a civil right or privilege, he may offer the certificate to show that he was not deprived of that particular right or privilege. The written statement of the court's reasons also will provide the offender with information helpful in deciding if the court's determination should be appealed. Moreover, the appellate court can use this statement in deciding the legality of the lower court's decision.

(b) Administrative determination.—Although a sentencing court or a court hearing a petition for declaration of rights and privileges can readily determine whether exclusion from public employment is justified, the denial of occupational licenses and other types of permits is an appropriate subject for administrative determination. The numerous abuses inherent in current licensing practice, as well as suggested measures for general reform, are detailed elsewhere.\(^{400}\) It suffices here to point out that the incorporation of the direct relationship test in licensing legislation would place a reasonable limitation on the agency's discretion that has often been misused to the detriment of convicted criminals. It is recognized that licensing agencies have certain interests that they should protect, such as the integrity of the profession and the competence of its members. These interests, however, can be adequately protected without unreasonable discrimination against convicted criminals whose crimes are not directly related to the regulated activity.

Under the direct relationship test, the licensing agency would be required first to determine whether an individual's criminal offense demonstrates unfitness to participate in the licensed occupation or activity. Secondly, the agency would determine whether substantial risk of harm to the community will result unless the license is denied, suspended, or revoked. In reaching its decision the licensing authority should be required to consider such additional factors as the individual's preconviction record, the nature and circumstances of his crime, his in-prison vocational training and conduct, and his post-release record. The agency should be required to provide the convict with a detailed explanation of the reasons for its decision. This requirement will both force the licensing agency to give careful attention to the criteria mentioned above and provide the applicant with information to judge

\(^{400}\) See notes 43-66 on pages 1162-68 \(\text{supra}\) and accompanying text.
the advisability of an appeal. The licensing agency also should furnish the convict with a description of the appropriate appellate and restoration procedures.

A trial de novo should be available to an individual suffering an adverse decision from a licensing agency. This new trial will permit an objective determination by a person not bound by the inbred, discriminatory biases of many licensing agencies that are too profession-oriented to give a fair and impartial hearing. Moreover, an expanded scope of judicial review will likely prompt licensing agencies to apply the direct relationship test justly so that convicted criminal will be denied occupational licenses only in those few cases where protection of the public clearly requires it.

C. Restoration of Rights and Privileges

As already observed, one of the most objectionable aspects of present civil disability laws is their failure to provide for restoration of deprived rights and privileges. Only a few states have established effective restoration procedures. Under the disability laws of some jurisdictions, the convicted criminal is faced with lifetime deprivations of many rights and privileges. Although conviction of certain crimes may require imposition of directly related disabilities, it is clear that at some point the offender's subsequent rehabilitation may justify restoration of these rights and privileges. When it is recognized that many disabilities actually impede the convict's rehabilitation, it is readily apparent that deprived rights and privileges must be restored at the earliest practical time. It is recommended, therefore, that constitutional and statutory provisions be amended to provide for the automatic restoration of all rights and privileges five years after the convict's release into the community. This recommendation presumes that a convicted criminal is sufficiently rehabilitated and thereby entitled to be a normal citizen, free of all civil disabilities, if he has lived a crime-free life in the community for five years. By automatically restoring the


402. A legislatively fixed time maximum of 5 years is recommended by the ABA Advisory Committee on Sentencing and Review for the supervision and revocation of convicted felons released on probation. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROBATION 21 (Tent. Draft, Feb. 1970). The proposed revisions to the Federal Criminal Code also include the automatic termination of collateral disqualifications or disabilities 5 years after the offender has completed his sentence. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE §§ 3501-04 (1970). Although arbitrary, the 5 year period seems to be a logical time beyond which the suspension of rights and privileges does not benefit society.
forfeited rights and privileges at the conclusion of this five-year period, all statutory consequences of a criminal conviction are terminated. Although licenses refused or revoked because of a criminal conviction would not be issued automatically at the end of five years, the ex-convict would no longer be ineligible for licensing solely because of his criminal record. The five-year period should begin to run as soon as the person is released into the community, irrespective of whether the release is by unconditional discharge from prison, parole, or by court-ordered probation.

It is not suggested that an ex-convict should always have to await the passage of five years before resuming the role of an ordinary citizen. Automatic restoration at this time is proposed merely to set a maximum limit on the period in which rights and privileges may be deprived. Under the recommended procedures for imposing disabilities, however, courts would have wide discretion in determining the duration of disabilities. Considering the crucial role of immediate post-release experiences in the ex-convict’s rehabilitation, it is believed that courts will seldom conclude it necessary to impose the maximum term for disabilities. Similarly, a realistic view of released convicts' economic needs should persuade reviewing courts to limit exclusion from licensed occupations to situations where it is absolutely necessary to protect the public.

Recognizing that some convicted criminals may be sufficiently rehabilitated before the expiration of disabilities imposed by the sentencing, it is recommended that convicts under disabilities be permitted to petition the court periodically for restoration of deprived rights and privileges. Just prior to release from prison, for example, a convict should be authorized to petition the court to consider whether any of the disabilities imposed at the sentencing stage could be removed on the basis of his in-prison record of rehabilitation. At regular intervals thereafter, the convict should be allowed to petition for restoration of deprived rights and privileges based upon evidence of rehabilitation in the community. Similarly, licensing agencies should be required to review periodically license denials and revocations based upon criminal convictions in order that the convict who has been denied a license can be afforded an early opportunity to demonstrate his rehabilitation. Licensing authorities must be required to recognize an ex-convict's rehabilitation, both while in prison and after his release. There is much to commend the practice followed in one state where an occupational license may not be denied on the basis of past criminality if the applicant has satisfactorily completed prison vocational training for the
occupation. No matter what procedures are employed, however, it is imperative that the ex-convict's progress toward complete rehabilitation not be retarded by restrictions on his rights and privileges that have long since served their purpose. The availability of progressive and efficient restoration procedures will contribute significantly to this end.

D. Conclusion

The foregoing recommendations do not purport to be the only or necessarily the preferable solutions to the civil problems facing convicted criminals. Undoubtedly, a more concrete and detailed analysis of various alternatives will be required. Nor is it suggested that the premises underlying these proposals are free from doubt. The obvious benefits of empirical research are notably absent from both the survey and the evaluation. It is believed, however, that the recommendations realistically reflect both the urgency of the problem and the scope of remedial action required. Beyond this, the recommendations mark certain guideposts for further consideration of this critical subject by scholars, jurists, and legislators. The need for immediate and thoughtful action is abundantly clear. Until the harsh injustices presently embodied in civil disability laws are eliminated, ex-convicts will continue to pass through the gates of freedom only to find the doors of opportunity hopelessly closed.

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404. As this issue was going to press, the New Jersey statute disfranchising citizens convicted of specified offenses was declared unconstitutional by a 3-judge federal court. The court, applying a strict equal protection standard of review, based its decision on the "remarkable contrasts in treatment" produced by the statute. The court noted, for example, that embezzlers were eligible to vote under the statute, but those convicted of larceny were ineligible. The court found no explanation as to "[h]ow the purity of the electoral process is enhanced by the totally irrational and inconsistent classifications." Recent voting rights cases, the court found, have emasculated early cases ostensibly approving disfranchisement for conviction. The court was not persuaded by the state's argument that § 2 of the fourteenth amendment grants states the power to disfranchise convicted citizens. The court held that § 2 does not constitute a restriction on the equal protection clause in § 1 of the fourteenth amendment. Stephens v. Yeomans, Civ. No. 1005-70 (D.N.J. Oct. 30, 1970).